CORPORATE FINANCE/M&A - SWITZERLAND

Hostile tender offers under public takeover law

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As of January 1 2016 Swiss M&A transactions involving public companies are mainly governed by the Financial Market Infrastructure Act, which replaced the former Federal Act on Stock Exchanges and Securities Trading (including its implementing ordinances). This regulates both friendly and hostile public takeovers for Swiss resident companies with at least one class of equity securities listed on a Swiss exchange, and for foreign resident companies whose shares are mainly listed on a Swiss exchange. The bidder is not required to notify the target board or the Takeover Board of an offer before announcing it publicly. In most cases, a public offer starts with a preliminary announcement.

Within six weeks of publication of the pre-announcement, the offeror must publish the offer prospectus. Once a public offer has been pre-announced, the target's board is no longer permitted to take any defensive measures without submitting them to the shareholders' meeting for approval.(1) If the offeror elects not to publish a pre-announcement, this effect is triggered on publication of the offer prospectus.

Examples of frustrating actions which may no longer be taken upon (pre-)announcement of an offer include:

- actions taken with regard to the 'crown jewels' of the target (eg, a sale or pledge of any part of the business or intangible assets that form part of the main subject matter of the offer);
- 'scorched earth' tactics (eg, sale of assets which represent more than 10% of the latest annual balance sheet or which contribute by more than 10% to the company's profitability(2));
- contracts providing for 'golden parachutes' for the benefit of members of the target board or management (ie, which provide for unusually high severance payments(3)); and
- certain actions pertaining to the target's securities (eg, repurchase of own shares or the issuance of new equity securities, with the exclusion of the pre-emptive rights of the existing shareholders).

Even though defensive measures may be submitted by the target board to its shareholders in view of a specific takeover threat, no target board has yet proposed such measures to its shareholders in such context.

However, outside the context of a specific takeover, some companies have implemented certain general defensive measures, including:

- voting shares (ie, shares with increased voting power up to a ratio of 1:10, as opposed to ordinary shares);
- shares with restricted transferability(4);
- limitation of exercisable voting rights per shareholder; or
- authorised or conditional share capital where the board of directors can exclude pre-emptive rights in the event of a public offer.

Despite being prevented from implementing frustrating measures, the target board still plays an important role. It must publish a detailed report summarising the advantages and disadvantages of the offer, in which it may recommend not to accept the offer.(5) Further, the target may actively search for, and negotiate with, potential 'white knights'. However, before granting a white knight access to due diligence information, the target board should consider that this will inevitably lead to an obligation to grant access to the same information to the hostile bidder.

In particular, in cases where a potential target has one or several shareholders that hold a significant stake in the target, an offeror considering launching a hostile bid should be aware that any shareholder holding 3% or more of the voting rights of the target may request the status of a party in the proceedings before the Takeover Board and submit objections or requests to the latter or appeal against a decree issued by the Takeover Board. By exercising their procedural rights, qualifying shareholders may considerably delay a takeover.

According to a study, only 10% to 15% of all offers launched in the past were hostile takeovers. Even though many hostile takeover bids resulted in a change of control in recent years, the bids often went to white knights launching competing offers.

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Endnotes

(1) See, for example, Takeover Board decision 0343/03, Implenia AG, dated December 20 2007.

(2) Takeover Board decision 0293/01, Saurer AG, dated October 31 2006.

(3) Takeover Board decision 0249/05, Saia-Burgess Electronics Holding AG, dated August 23 2005.

(4) See, for example, Takeover Board decision 0343/03, Implenia AG, dated December 20 2007.

(5) See, for example, Takeover Board decision 0403/03, Harwanne Compagnie de participations industrielles et financières SA, dated March 30 2009.