

Corporate Finance/M&A - Switzerland

Continuation of past practice regarding introduction of opting out clauses

Contributed by [Meyerlustenberger Lachenal](#)

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Introduction

The Securities and Stock Exchange Act provides for a mandatory offer obligation when a shareholder, or a group of shareholders acting in concert, exceeds a threshold of 33.3% of the voting rights in a company listed on the stock exchange (or 49% when a company has introduced an opting up clause). The shareholders of a listed company can choose to opt out of the mandatory offer obligation according to Article 22 of the act, by including an opting out clause in the articles of association. Such an opting out clause can be included before or after the listing of the shares on the stock exchange. The introduction of an opting out clause is, in principle, invalid when it is selective either in a formal sense (ie, the name of the beneficiary of such clause is explicitly stated in the articles of association) or in a material sense (ie, such a clause was introduced in view of a specific beneficiary or a particular transaction, without stating explicitly such beneficiary or transaction in the articles of association).

The Takeover Board's practice regarding the evaluation of the validity of an opting out clause has recently undergone several changes. In particular, in the *Advanced* decision issued on October 11 2012⁽¹⁾ the board deviated from its previous practice (for further details see "[Takeover Board confirms opting out practice](#)"). The cases discussed in this update indicate that the Takeover Board will maintain its practice established in *Advanced*, even when an opting out clause has been introduced before the current practice came into place.

Perfect Holding SA

Facts

Perfect Holding SA is listed on the SIX Swiss Exchange. On April 27 2007 the shareholders' meeting resolved on the introduction of an opting out clause. The shareholders' group – Stephen Grey, Nicholas Grey, Grover Ventures Inc and Haute Vision SA – had a direct interest in the introduction of the opting out clause and thus refrained from taking part in the vote. The proposed opting out clause in the articles of association was adopted by 98.59% of the remaining shareholders which attended the shareholders' meeting. At the meeting, 50.03% of Perfect's shares were represented (ie, the shareholders' group held 58.3% and the remaining shareholders held 41.7% of the shares represented in the meeting).

Shortly after the introduction of the opting out clause, some members of shareholders' group submitted a request to the Takeover Board for exemption from the mandatory offer obligation. The board decided that the opting out clause was selective in a material sense and was therefore not applicable to the shareholders' group. Since the board's practice has changed since 2007, the shareholders' group requested that the board determine and confirm the validity of the opting out clause in the articles of association, as the group wanted legal certainty in the future when implementing expansion plans.⁽²⁾ For example, an increase of Perfect's share capital would likely lead to an aggregate shareholding of the shareholders' group of more than 33.3%, which would – without a valid opting out clause – trigger the obligation of the shareholders' group to launch a (mandatory) public offer to Perfect's other shareholders.

Decision

In a first step the Takeover Board summarised its past and current practice regarding the assessment of opting out clauses and confirmed that even though the opting out clause was introduced before the change in its practice, the new practice was

Authors

Alexander Vogel



Debora Durrer-Kern



applicable when evaluating the validity of the opting out clause.

The board stated that, first, the reason for the introduction of the opting out clause must be made fully transparent to the shareholders before the latter take a decision regarding the adoption (or confirmation) of such a clause. The shareholders must be placed in a situation where they can make a deliberate and conscious decision. The intentions of the applicant which wants to introduce an opting out clause, as well as the intentions of the controlling shareholder, must be disclosed, whereby the envisaged transaction and the (potential) change of control of the affected company must be revealed. Such information must be provided in both the invitation to the shareholders' meeting and the shareholders' meeting itself. Further, the general consequences and concrete effects of such an opting out clause must be specified. If the required transparency is not observed, the opting out clause is invalid. In this case, there was a lack of transparency, as information was provided mainly with regard to the effects of a possible capital increase by the Grey family (members of the shareholders' group) as part of restructuring measures. The shareholders were not made sufficiently aware of the fact that neither present nor future shareholders would be obliged to make an offer when exceeding the 33.3% threshold.

Second, the Takeover Board analysed whether the adoption of the opting out clause would not lead to discrimination of the minority shareholders. From a takeover law viewpoint, the introduction of an opting out clause is valid only when both the majority of all voting rights represented at the shareholders' meeting and the majority of the voting rights of the minority shareholders represented at the shareholders' meeting approve the introduction of the opting out clause.

Should the majority of the voting rights of the minority shareholder represented at the meeting not approve the introduction of the opting out clause, it is assumed that the opting out clause would put the minority shareholders at a disadvantage, in accordance with Article 706 of the Code of Obligations. A minority shareholder neither directly or indirectly (or in concert with third parties) holds more than 33.3% of the voting rights of the target nor has requested the introduction of the opting out clause.

Since neither the invitation to the shareholders' meeting nor the information provided to the shareholders at the meeting itself met the transparency criteria, the opting out clause was considered invalidly introduced. As a result, the shareholders' group requested that the shareholders' meeting confirm the opting out clause in the articles of association at the ordinary shareholders' meeting on May 24 2013. In the invitation to the shareholders' meeting, Perfect took the transparency criteria stated by the Takeover Board into account and implemented them by explaining, among other things, the intentions, applicability and consequences of such an opting out clause once validly adopted (or confirmed).

Logan Capital AG

Facts

Logan Capital AG is listed on the Berne eXchange. At the time of its listing, the articles of association provided for an opting up clause. The majority shareholder consisted of Mountain Partners AG and its wholly owned subsidiary Mountain Capital Management AG (together known as Mountain Group), and held 48.73% of Logan's voting rights. Due to the opting up clause, Mountain Group was not subject to the mandatory offer obligation when exceeding the 33.3% threshold and could hold up to 49% of Logan's voting rights (ie, a mandatory offer obligation would have to be launched if the threshold of 49% were exceeded).

The invitation to the shareholders' meeting on January 10 2013 contained, among other things, the agenda item "opt out – amendment of articles of association". The invitation stated that both the approval of the majority of the votes of both the majority and minority shareholders was necessary in order to pass a valid resolution. Further, the invitation contained information on the future strategy of Logan and the effects that such an opting out clause would have on its entrepreneurial scope with regard to investors. In addition, the invitation stated that the opting out clause would increase the chance of an internal equity financing, and that it would lead to a stabilised stock exchange value. At the shareholders' meeting, the board of directors repeated these points and also indicated which board members had a conflict of interest – 59.9% of the voting rights were represented, of which 48.73% were held by Mountain Group (ie, Mountain Group held 81.34% of the voting rights represented at the shareholders' meeting). The resolution on the introduction of the opting out clause was approved unanimously. Therefore, the board of directors cancelled the second vote and thus deviated from the intended two-tier voting procedure.

Mountain Group filed a request with the Takeover Board⁽³⁾ to determine that Mountain Partners and Mountain Capital Management together or individually were not subject to a mandatory offer obligation in accordance with Articles 32 and 52 of the Securities and Stock Exchange Act.

Decision

The board summarised the current practice regarding the introduction of opting out clauses. Opting out clauses are valid only when:

- the shareholders have been informed of the introduction of the opting out clause and its consequences; and
- the majority of all voting right represented and the majority of the shares held by minority shareholders represented at the shareholders' meeting approve the opting out.

If both requirements are fulfilled, it is assumed that the opting out does not disadvantage the minority shareholders. Even when both requirements are fulfilled, the Takeover Board may still review whether the minority shareholders are disadvantaged in accordance with Article 706 of the Code of Obligation. However, for the permissibility of such a review of the adopted opting out clause, special circumstances must exist. The board may interfere only with restraint in the decision-making process of the company.

The board stated that the explanations provided by the board of directors in the invitation and at the shareholders' meeting met the requirements of transparent information. As a result, all shareholders could make a free and well-informed decision. Since the decision to introduce an opting out clause was approved unanimously, both the majority of the voting rights represented and the majority of the shares held by minority shareholders represented at the meeting approved the introduction of the opting out clause. Therefore, it was assumed that the minority shareholders were not at a disadvantage. Further, there were no special circumstances visible which would justify overruling the decision of the shareholders. In conclusion, all requirements for the valid introduction of an opting out clause were met and the opting out clause had been validly introduced.

Comment

Both *Perfect* and *Logan* show how the Takeover Board confirms, applies and implements the new practice introduced in *Advanced* in 2012. The transparency requirements must be met not only at the shareholders' meeting itself, but also with regard to the information provided in the invitation to the meeting, so that the shareholders can understand the reason for, and the effects of, the opting out clause.

According to the former practice of the Takeover Board, an opting out clause was not deemed to be selective in a material sense if the clause had been introduced five years before the respective transaction. However, this assumption was reputable. Based on *Perfect*, it seems that the board will no longer apply this assumption – although the opting out clause was introduced six years ago, the board did not address a five-year assumption. Therefore, companies which introduced an opting out clause five years before a transaction cannot rely on the assumption that the board will continue to consider such a clause as not being selective in a material sense. Further, should any uncertainties with regard to an introduced opting out clause remain, it may make sense to follow the procedure which *Perfect* implemented (ie, to have the existing opting out clause confirmed at the shareholders' meeting and adhere to the prerequisites described by the Takeover Board). However, this is no guarantee that the board will accept the introduced opting out clause as being validly introduced.

The practice of the Takeover Board regarding its interference in decisions of shareholders' meetings should become more defined in the future, due to possible discrimination of the minority shareholders. From these two cases, it is unclear what the board considers as "extraordinary and special circumstances". As the introduction of opting out clauses remains a hot topic, it should not take too long before there is further clarification.

For further information on this topic please contact [Alexander Vogel](#) or [Debora Durrer-Kern](#) at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91), fax (+41 44 396 91 92) or email (alexander.vogel@mll-legal.com or debora.durrer@mll-legal.com).

Endnotes

(1) Takeover Board 518/01, October 11 2012, regarding Advanced Digital Broadcast Holdings AG.

(2) Takeover Board 531/01, April 26 2013, regarding Perfect Holding SA.

(3) Takeover Board 539/01, June 24 2013, regarding Logan Capital AG.

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