

Corporate Finance/M&A - Switzerland

Implementation of Federal Administrative Court decision on Quadrant

Contributed by [Meyerlustenberger Lachenal](#)

July 03 2013

Introduction

Transaction and proceeding

Decision

Comment

Introduction

On November 30 2010 the Federal Administrative Court handed down its first decision as the court of final instance in a public takeover matter as the result of an amendment to the regulatory framework governing public takeovers in Switzerland.⁽¹⁾ In its decision the court addressed, among other things, several questions relating to procedure, including the scope of review and the effect of *res judicata* (for further details please see "[Federal Administrative Court rules on Quadrant public takeover](#)"). It rejected part of the Financial Markets Supervisory Authority (FINMA) and Takeover Board's previous decisions. As a result, the Takeover Board had to reassess numerous issues, such as the evaluation of share price, which had been rejected by the court.

Transaction and proceeding

In May 2009 SIX Swiss Exchange-listed Quadrant AG became the target of a friendly public takeover offer launched by Aquamit BV, an Amsterdam investment vehicle established and held by four board members and shareholders of Quadrant (ie, 'Quadrant Management') and Mitsubishi Plastics Inc, Tokyo. When preparing the public offer, Quadrant Management and Mitsubishi Plastics had entered into a framework agreement and a joint venture agreement. Under the terms of these agreements, Mitsubishi Plastics agreed to provide financing to Aquamit and to grant founders' rights and management options to Quadrant Management. Mitsubishi Plastics and Quadrant Management each held 50% of Aquamit. In order to implement the offer, the latter entered into a transaction agreement with Quadrant.

After Aquamit announced its public takeover offer for the shares of Quadrant at a price of Sfr86 per share, Sarasin Investmentfonds AG, a minority shareholder of Quadrant, challenged the decision of the Takeover Board regarding the approval of the offer and requested, primarily, an increase in the actual offer price based on the allegation that the price offered to the public was more than 25% below the consideration received by Quadrant Management from Mitsubishi Plastics for its shares under the framework agreement and the transaction agreement. Eventually, the Federal Administrative Court had to decide on the matter, whereby, in particular, the decision regarding the evaluation of the share price was remitted to the Takeover Board. However, before the board could decide on the remitted matters, decisions had to be handed down with regard to, among other things, the suitability of the review body, which had been contested repeatedly by Sarasin.⁽²⁾ On December 13 2012 the board finally handed down its decision on the matters regarding the adequacy of the share price offered to the public shareholders.⁽³⁾

Decision

Contents of review report and discretionary powers of review body

After confirming that the appointed audit firm was independent and suitable to act as a review body, the Takeover Board analysed the contents of the review report. It stated that in a first step, the offeror must evaluate the material benefits granted by Mitsubishi Plastics to Quadrant Management under the framework agreement and transaction agreement. Aquamit fulfilled this requirement. In a second step, the review body must analyse the adequacy of the evaluation, whereby each performance must be evaluated separately. The review body has a margin of appreciation and discretion in this regard. The margin of appreciation is greater when the valuation factors are uncertain. The conclusions of the review report must be comprehensible and plausible. Thereafter, the

Authors

[Alexander Vogel](#)



[Debora Durrer-Kern](#)



review body must determine whether the performance and consideration balance each other out, and whether the minimum price has been adhered to.

The board further stated that the review body has special expert knowledge. The board may rely on the report and therefore the review body is an extended arm of the board. The board must ascertain that the review body has made its investigations comprehensively and that the explanations of the review body are transparent, plausible and comprehensible.

After the general remarks, the Takeover Board analysed the evaluation of each material benefit granted by Mitsubishi Plastics to Quadrant Management. The board reviewed each time whether the evaluation of the respective material benefit was transparent, plausible and comprehensible.

Minimum price rule

The review report concluded that Mitsubishi Plastics had a valuation advantage compared to the management. Therefore, the management did not receive hidden premiums. As a result, the offer price was not too low and was in line with minimum price rules. The offer price thus did not have to be increased. The Takeover Board concluded that the review body had adhered to the prerequisites set out by the Federal Administrative Court and the board, and therefore the review report could be approved.

The board did not answer the question of who would profit from the increase in offer price if it were to be increased - whether only Sarasin, the complainant, or also the other shareholders which were not party to the appeal procedure (mostly because their shareholding was not sufficiently large in order to meet the minimum threshold of 2% at the time (now 3%) required to appeal a Takeover Board decision). Nonetheless, the board did refer to the decision of the Federal Administrative Court which stated in an *obiter dictum* that only the complainant (ie, Sarasin) would benefit from the increase in the offer price. However, the board pointed out – also in the form of an *obiter dictum* – that the view taken by the court was incompatible with the principles of the law on stock exchange, since shareholders with a participation of less than 2% do not have the possibility to be a party and would be without any protection (ie, would never have the possibility to benefit from the decision of the first instance court). The investors on the stock exchange would thus not be treated equally. As a result, the efficient operation of the securities market was not ensured. The board stated that these aims can be achieved only when decisions of the board, FINMA and the court regarding decisions of public takeovers have a reflex effect on all market participants.

Comment

Even though the duration of this case was extraordinary, due to, among other things, the offeror's difficulties in finding a review body that fulfilled the statutory criteria and was willing to accept the appointment in view of the challenging task of dissecting the multifarious arrangements between Mitsubishi Plastics and Quadrant Management, it is an example of how long a procedure can take until a final judgment is delivered if an offeror opts for a complex transaction structure rather than a straightforward approach offering fewer angles of attack. The decision shows how the board applies the exact method of evaluation as prescribed by the Federal Administrative Court. As a result, the requirements for the contents of the review report have become more stringent and the review body is required to make an in-depth analysis of all evaluations covering all benefits granted to a major shareholder which has entered separate – and special – arrangements with the offeror, as in this case. The requirements of such scrutiny are likely to increase in view of the legislature's abolishment of the previously allowed "control premium" (for further details please see "[Control premium](#)"), thereby removing a big part of the leeway available when structuring public transactions with significant shareholders in the past. However, the review body has – and will have in future – significant discretion in its analysis. In its analysis and appreciation, the board relies widely on the appreciation and the report of the review body. Nonetheless, the board analysed the evaluation of each material benefit granted to Quadrant Management and concluded that the offer price of Sfr86 per Quadrant-share corresponded to the provisions of the Federal Act on Stock Exchanges and Securities Trading.

Of particular interest is the split in views with regard to the reflex effect in decisions of the Takeover Board, FINMA and the court, which the board mentioned in its *obiter dictum*. The interpretation by the board corresponds to the aims of the legislation on stock exchanges and listed securities, as it considers, among other things, the principle of equal treatment of all investors. Further, this may increase the incentive of an offeror to find an extra-procedural settlement with the appealing shareholder by offering better terms – thereby respecting the best price rule – to all shareholders in exchange for withdrawing their legal challenges. Since the board made its statement on the reflex effect only in the form of an *obiter dictum*, it is not certain that it will follow this line of argument in a future case and more importantly there are considerable doubts that FINMA and the court would be of the same opinion if the reflex effect were ever to be contested.

Offerors would be well advised to use less complex transaction structures in future

public takeover matters if an in-depth and complicated evaluation of the transaction is to be avoided.

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) Federal Administrative Court Decision B-5272/2009, November 30 2010.
- (2) Takeover Board Decision 410/3, July 5 2011; FINMA decision of August 11 2011; Takeover Board Decision 410/4, November 14 2011; Federal Administrative Court Decision B-253_2012, March 8 2012.
- (3) Takeover Board Decision 410/5, December 12 2012.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2013 Globe Business Publishing Ltd