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New takeover legislation

Alexander Vogel, Christoph Heiz, Daniel Schoch and Andrea Sieber of Meyer Lustenberger discuss the Swiss legislative reform that has changed the way M&A is done

The Swiss Code of Obligations governs private M&A transactions, and, if the acquisition structure includes a merger, demerger or asset deal, the Swiss Merger Act applies, which provides detailed rules for each of these procedures. The Swiss Act on Stock Exchanges and Securities Trading (Sesta) further governs the acquisitions of interests in listed companies. Sesta contains the applicable rules for both friendly and hostile public offers. In addition, the Swiss Antitrust Statute needs to be taken into consideration once the turnover of each of the parties involved in the transaction reaches a certain threshold. The latter act provides for a preventive merger-control procedure led by the Swiss Merger Control Commission if a transaction exceeds certain minimal thresholds.

If an acquisition is either financed by the issuance of new, listed securities, or the transaction structure provides for new securities to be issued by an issuer listed on a stock exchange, the listing rules of such stock exchange will apply.

M&A transactions

While the year 2008 started with a promising first quarter, the remaining quarters of 2008 were influenced by the global financial downturn. Both the volume and number of M&A transactions decreased in 2008 compared to 2007. The number of (reported) M&A transactions in Switzerland decreased by approximately 10%. To explain this decline market analysts point to the persisting insecurity about the development of the relevant industries, and to the difficulty of raising debt financing for potential acquisitions. Also, financial investors such as private equity funds find it difficult to identify target companies that offer attractive returns based on reasonable expectations.

With regard to cross-border takeovers by Swiss companies, among the major deals in the year 2008 was the acquisition of a

majority interest in Genentech by Roche for approximately \$46.8 billion, the acquisition of Ventana Medical Systems by Roche for €2.35 billion (\$3.17 billion), the acquisition of a 26.5% stake of the German financial services provider MLP by Swisslife, and Zurich Financial Services Group's acquisitions of a 50% stake in Spain's Caixa d'Estalvis de Sabadell's life and general insurance companies and shortly after of two Brazil insurance companies from Banco Mercantil do Brasil.

High-profile transactions by foreign acquirers that involved Swiss companies as the target include the public offer of Dutch global beer company Heineken on Eichhof's beverage division, the only (so far remaining) independent major brewery group in Switzerland, the acquisition of the traditional Swiss specialty chemical maker Ciba Holding by German chemical firm BASF for approximately €3.8 billion, the public offer on sia Abrasives Holding by the German Bosch group, and the merger of Irish IAWS Group and Hiestand, a Swiss based international bakery and convenience food group to form ARYZTA.

While the Ciba and sia Abrasives transactions were straightforward cash offers (the latter as a competing offer to an earlier

pre-announced, but not yet launched mandatory offer), the Eichhof transaction was technically structured as a demerger under the Swiss Merger Act, followed by a cash offer on the newly created spin-off entity Eichhof Getraenke Holding. The latter was created through a (symmetrical) demerger, giving each Eichhof Holding investor unlisted shares in the beverage unit in addition to its existing shares in the listed holding company. Even though the shares of the spin-off company were not listed, since the shares were in close connection to a listed issuer, the offer had to be made in compliance with the provisions of the Sesta.

The Hiestand transaction was structured as a merger by absorption of Hiestand pursuant to the Swiss Merger Act and the contribution of the shares of IAWS to ARYZTA by means of a scheme of arrangement under the Irish Companies Act. While, as a consequence of a prior acquisition of a stake in Hiestand, IAWS was technically obliged under the Sesta to make a public offer to acquire all of the outstanding Hiestand shares, such obligation to make the exchange offer lapsed (or was de facto replaced) upon the completion of the merger by absorption of Hiestand by ARYZTA. In order to comply with the applicable rules, IAWS and ARYZTA announced their intention to submit a public exchange offer on the same terms as the merger by publishing a pre-announcement.

Another big transaction involving listed companies was the sale of a 25% stake in the world's biggest eye-care company, Alcon Pharmaceutical, by Nestlé to Novartis for \$11 billion, combined with an option to acquire Nestlé's remaining 52% stake for approximately \$28 billion, bringing the total cost of the deal to \$39 billion. There were also the mergers of energy suppliers ATEL and EOS to ALPIQ and of the software producers Esmertec and Purple Labs to Myriad Group, building Europe's largest mobile phone software company. Among the transactions involving unlisted companies were the sale of Esec by Oerlikon Group to BF Semiconductors Industries, and the acquisition of Eichhof Immobilien by the pension fund of the Canton of Zurich.

“Eichhof was technically structured as a demerger, followed by a cash offer on the newly created spin-off entity”

Author biographies



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Christoph Heiz is head of the capital markets team at Meyer Lustenberger. He joined the firm in 1989 and has been a partner since 1994. Heiz attended law school at the University of Zurich and took postgraduate studies at the University of Pennsylvania. He was admitted to the Switzerland bar in 1984.

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Public takeover regulations

Public tender offers on issuers listed on an exchange in Switzerland are also governed by Sesta. In certain instances, mainly in the case of a listed issuer's spin-off of a non-listed company, an offer on the latter's shares is, even though not listed, still subject to the provisions of the Sesta. Conversely, pure merger transactions are not subject to the provisions of the Sesta, but to those of the Swiss Merger Act referred to above. An exception applies if one of the merging companies acquires a controlling stake of the other merging company before the effective date of the merger, thereby triggering the obligation to submit a public offer according to the Sesta.

In that case the Takeover Board, while requesting compliance of the merger

documentation and the terms of the merger with the requirements provided for in the Sesta and the ordinance on public takeovers, allows the acquirer to postpone the offer and instead complete the merger with the consequence that the obligation to submit a public offer lapses due to the absorption of (usually) the target company. But if the merger fails, the acquirer will be obliged by the Takeover Board to follow through with its public offer.

Sesta defines when a purchaser is required to make a mandatory offer for all outstanding equity securities of a target. This occurs if an acquirer directly or indirectly controls more than 33.3% of the company's voting rights. Exceptions apply if the target had increased this threshold in its articles of incorporation to up to 49% (opting up) or if the latter

contains an opting out-clause. Furthermore, once a public offer has been pre-announced, the board of the target is no longer permitted to take any defensive measures that could have the effect of significantly altering the assets or liabilities of the target but has to submit such measures to the shareholders' meeting for approval.

Compliance with the rules provided for in the Sesta is supervised by the Takeover Board which issues binding administrative orders in the form of binding decrees. Any decision of the Takeover Board can be brought to the Financial Market Supervisory Authority (Finma) for review. Any (admitted) party can make an appeal against decisions of the Financial Market Supervisory Authority to the Federal Administrative Court whose decisions are, as of this year, final.

Recent legislative changes

The Swiss legislator recently enacted the new Financial Market Supervision Act (Finmasa) providing for a new regulatory framework that entered into force from January 1 2009. The regulatory framework is supervised by the newly created integrated Finma, the product of a merger of three formerly independent supervisory authorities, the biggest of which was the former Federal Banking Commission (FBC). Several changes to the Sesta relating to public offers and the applicable procedural rules were enacted and took effect from January 1 2009. In view of these changes in the legislation, the Finma and the Takeover Board undertook a general overhaul of the stock exchange ordinance of Finma (Sesto-Finma, formerly Sesto-FBC) and the ordinance on public takeovers (TOO). These two new ordinances became effective on January 1 2009.

The amendments to the Sesta, the Sesta-Finma and the TOO introduced some important changes to the rules for public takeovers, and codified the Takeover Board's decision practice since the enactment of the Sesta in 1997.

The new rules provide a stronger position for the Takeover Board. Up to now the Takeover Board could only issue recommendations, which could be accepted or rejected by the parties involved, but as of this year its decisions will be handed down in the form of a decree. Further, the procedure in front of the Takeover Board is from this year on with a few exceptions governed by the applicable procedural rules for administrative procedures.

The exceptions take into account that a takeover procedure needs to be speedy and thus provide, amongst other things, for shorter deadlines, the possibility to submit filings or comments to the Takeover Board by fax and limit the dilatory effect of an appeal. The amendments to the Sesta also introduced the possibility for shareholders that hold 2% or more of the voting rights of the target company, whether exercisable or not, to

“In addition to introducing new shareholders’ rights, the new rules also provide changes regarding competing offers”

request the status of a party in the proceedings before the Takeover Board.

In the past only the offerer and the target company were allowed to act as formal parties and to reject a recommendation of the Takeover Board or file an appeal against a decision by the Finma. This innovation changes the practical steps, particularly also in a friendly transaction, considerably.

In the past, the offerer and the target company could agree on the terms and conditions of a public offer and have those terms and all relevant documents relating to the offer approved by the Takeover Board prior to the publication of the pre-announcement of the offer. The Takeover Board then issued its recommendation prior to the publication, which could not be appealed by the shareholders. Since the shareholders could not participate in this procedure, the offerer was able to launch the public offer without having to wait for the cooling-off period to end, and without having to fear any appeal against the approval granted by the Takeover Board. The only potential threat to the success of a friendly offer was a competing offer by a third party. In such a case, the original offerer had the option either to fight and increase its original offer or to withdraw its offer and leave the scene.

Under the new rules, shareholders can also request to participate 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. This right of participation is given to shareholders (and possibly also shareholders acting in concert or organized groups of shareholders) holding on aggregate 2% or more of the voting rights of the target (so called qualified shareholders). In order to qualify for admission to the proceedings, such qualified shareholders must hold their qualifying stake at the time of publication of the pre-announcement (if any) or the offer itself and keep holding at least 2% of the voting securities throughout the offer procedure in order not to lose their standing.

In view of these new rights granted to

qualified shareholders, the offerer has to comply with a mandatory cooling-off period of usually ten stock exchange days. Further, due to the possibility of an appeal, the terms of the offer and the offer documents will be – even though reviewed by the Takeover Board – published with only a preliminary approval of the Takeover Board. This is because the qualified shareholders may file an objection with the Takeover Board, which might cause the Takeover Board to reconsider its approval, or an appeal against the decision of the Takeover Board might be filed with the Finma.

By making use of their procedural rights, qualifying shareholders can considerably delay a friendly takeover. In case of an objection or appeal filed by a qualified shareholder, the cooling off period will in most cases be extended – and thus the offer period will not start – until the Takeover Board or Finma has issued its decision. Such delays may considerably increase the transaction risks for both the offerer and the target company. The offerer risks being bound to its offer, and so exposed to market risks, for a much longer period than anticipated. This increases the offerer’s costs and the difficulties to obtain financing. The threat of significant delays caused by extended litigation with one of more qualified shareholders may force the offerer to negotiation and offer better terms, however to all shareholders in exchange for a withdrawal of the legal challenges.

On the other hand, such delays may also have considerable disadvantages for the target company, since itself, its management, its workforce, customers and suppliers do not know for an extended period whether the intended transaction will be completed as planned or if an uninvited third party will enter the scene and launch a competing (hostile) offer, trying to profit from the fact that the target has put itself in play.

Put up or shut up rule

The new rules can prevent a potential offerer publicly communicating that it is considering launching a public offer on a

specific target company without publishing a pre-announcement in compliance with the Sesta. The Takeover Board can force the potential offerer to either submit a public offer within a certain deadline or publicly declare that it will not launch any offer in the following six months, provided that in the case of a third party offer any temporary ban can be lifted by the Takeover Board. In the past, the Takeover Board had no clear basis to force a potential acquirer to publish an offer, even though this measure was considered in certain cases (for example in the unsuccessful attempt of an unfriendly offer on Forbo).

Changes regarding competing offers

In addition to introducing new shareholders’ rights, the new rules also provide changes regarding competing offers. A competing bid can now be launched until the last day of the preceding initial offer (which is three days more than under the former rules) by publishing an offer prospectus or at least a pre-announcement. In the latter case, ie, if only a pre-announcement is published, the offer prospectus must be published within five exchange business days. In addition, due to the now mandatory cooling-off period, a potential competing offerer will in most cases have at least ten more exchange business days available to prepare a competing offer.

The new rules have also considerably changed the effects of a competing offer on the previously published (initial) offer: the offer period of the initial offer is extended so that its offer period expires at the same date as the competing offer. Further, contrary to the former rules, the offerer of the initial offer is not able to withdraw its offer anymore in case a competing offer is launched. The initial offerer can, however, amend its offer up to the fifth exchange business day before the expiration of the adjusted offer period.

Changes relating to defensive measures

As indicated above, once a public offer has been pre-announced (or announced), the board of the target company may no longer take defensive measures that have a significant impact on the target company, provided however, that it can submit such measures to the shareholders for approval.

The revised TOO provides a detailed black list on disallowed defensive measures. Before, the board was not allowed to issue shares based on authorised share capital without granting subscription rights to the existing shareholders except in very limited cases. It was also not allowed to enter into an acquisition or sale of parts of its existing operations or assets representing 10% or more of its consolidated assets, or to launch incentive plans, or enter into severance or similar arrangements with members of the board or senior management with unusually

“The Takeover Board stated in its Communication 4 that the value of the offered securities and the value of the cash consideration need not be equal”

high compensation. The new rules are more detailed and provide, amongst other things, that assets generating more than 10% of the target company's consolidated earning power may not be sold or acquired and that the target company cannot purchase or sell its own shares, shares offered in exchange or related financial instruments. It also cannot write or grant any rights to acquire its equity securities, in particular conversion or option rights.

Changes to the offered consideration

Pursuant to the rules of the Sesta-Finma regarding the consideration offered, the offer price in the case of a mandatory offer may be paid in the form of a cash consideration or by offering securities in exchange. However, according to the newly implemented amendment to the Sesta-Finma, in case of a mandatory offer, the offerer is required to offer a cash consideration as an alternative in addition to the shares offered in exchange to the remaining shareholders of the target.

Until the Takeover Board published its Communication 4, the consequences of this new provisions were unclear and heavily criticised. The criticism focused on the fact that the obligation to offer a cash consideration as a mandatory alternative, if necessary at all, was not limited to an offer of illiquid equity securities (ie, securities that have not been traded on at least 30 of a period of 60 exchange business days prior to publication of the offer or pre-announcement). If the offered equity securities are illiquid, the cash alternative to be provided enables the remaining shareholders of a target to exit the target at a fair price.

Conversely, a mere offer of equity securities that are illiquid would leave the shareholders with the option either to: (i) remain a shareholder of the target with a minority stake and therefore enjoy limited shareholders' rights, or (ii) become the owner of equity securities that are not liquid and therefore not easily marketable.

However, from a potential offerer's perspective, the new rule has a significant

financial impact, since the offerer is obliged to provide evidence of its ability to finance the public tender offer. Before the new regulations, in case of an exchange offer, the offerer had to prove the availability of the securities to be exchanged at the time the offer was scheduled to settle. As a consequence of the new rule, the potential offerer now must not only prove the latter, but also make arrangements for the cash consideration to be offered alternatively to the remaining shareholders. The offerer must also prove the availability of such funds.

In its Communication 4, the Takeover Board stated that the obligation to offer a cash consideration as a mandatory alternative to an exchange offer does not apply to voluntary tender offers. This is despite the general rule that the minimum price rules for mandatory offers are also applicable for voluntary offers aiming for more than 33.3% (or such applicable higher threshold in case of a opting-up) of the shares of a target. However, according to the amended language of the Sesta-Finma, the rule applies to mandatory offers, regardless of whether the offered equity securities are liquid or not.

So the offerer whose holding in the target exceeds the relevant threshold of voting rights and thus triggers the duty to submit a mandatory offer will not have a choice as to how to fulfil this obligation and is not only bound by the minimum price-rule and best-price rule. To the contrary, even if the offerer wishes to offer securities that are liquid, and therefore can easily be sold by the offeree, it will be obliged to offer a cash consideration as an alternative and must prove the availability of such (additional) financing.

However, the Takeover Board stated in its Communication 4 that the value of the offered securities and the value of the cash consideration need not be equal. Therefore, the offerer may offer a premium on the offered security consideration compared to the cash consideration and, therefore, the offerer is allowed to provide an incentive to accept the exchange offer. However, both the value of the offered securities and the cash consideration must fulfil and comply with the minimum price rule.

Voluntary offers

As mentioned above, in its Communication 4 the Takeover Board further confirmed its interpretation that the obligation to offer a cash consideration as a mandatory alternative to an exchange offer does not apply to voluntary tender offers. This applies particularly to voluntary tender offers made for a number of equity securities, the acquisition of which would reach the applicable threshold triggering a mandatory offer. Furthermore, the Takeover Board confirmed that a successful offerer (where the offerer holds a majority stake in the target exceeding the triggering threshold after the public tender offer is completed) has no obligation to submit an additional public tender offer (against cash consideration) to the remaining shareholders.

Nevertheless, the exemption for voluntary offers does not apply if the offerer acquires equity securities of the target against a cash consideration after the exchange offer is launched. Under such circumstances, the Takeover Board requires that the terms and conditions of the exchange offer be modified to ensure equal treatment of all shareholders of the target. In particular, the recipients of the offer must have the choice whether to accept the initially offered securities or a cash consideration, as paid after the exchange offer was launched. Furthermore, shareholders that have already tendered their shares can change their election and request to receive the cash consideration rather than the previously accepted securities. However, a shareholder is not entitled to withdraw its tender (ie decide to accept neither the offered securities nor the cash consideration) if it has already accepted the (initial) exchange offer.

But the duty of equal treatment does not prevent the offerer from acquiring the securities of the target against cash consideration, where the purchase has been effected prior to the pre-announcement or publication of the offer. However, such consideration needs to be taken into account when determining the minimum price of the offer.

In the case of a voluntary tender offer, the offerer is free to offer equity securities for which no liquid market exists or which are not listed. In such case the offerer will be required to provide a valuation by an accredited audit firm or investment bank. The Takeover Board argued that in such case, the shareholders of the target may, simply by refusing the tender offer, avoid the negative consequences of having to choose between becoming a minority stakeholder (thus limiting the shareholder's rights), and becoming the owner of equity securities that are not liquid and consequently not easily marketable. This is because, unlike in the case of a mandatory offer, the recipients receiving a voluntary offer have the option to reject the offer and thus prevent the offerer from acquiring a controlling stake.