

# Permitted conditions for public offers in Switzerland

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## Introduction

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### Demerger condition

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Together with the offer price, the offer conditions constitute the main terms in public takeover offers. The conditions of an offer describe the circumstances in which the offeror shall be bound to its offer or may step back from the transaction in case such conditions are not met. With the inclusion of conditions in an offer, the risk of the occurrence or non-occurrence of certain events is shifted from the offeror to the offerees. For this reason, Swiss takeover law and Takeover Board case law permit conditions in public takeover offers only under restrictive circumstances, terms and timelines.

In a recent case (the takeover of Actelion by Johnson & Johnson, Transaction 0652), the Takeover Board expanded its case law on the permissibility of conditions in public takeover offers. In this case, the Takeover Board had to assess whether the implementation of a demerger of a business division from the target constituted a permissible condition within a public offer. This update sets forth the general requirements for permissibility of offer conditions, briefly outlines the main types of condition and summarises the background and considerations of the Takeover Board on the demerger condition in the *Actelion* case.

## Permissibility of offer conditions

Voluntary takeover offers can be made subject to whether:

- the offeror has a justified interest;
- the condition is outside the offeror's control to satisfy; and
- the condition has clear terms.

If the cooperation of the offeror is required to satisfy the conditions, the offeror must take all reasonable steps to ensure that they will be fulfilled. At the end of the regular offer period, the offeror must clearly state whether the conditions have been satisfied. The offeror can reserve in the offer the right to waive certain conditions. The most common conditions in voluntary takeover offers may be categorised as follows:

- Conditions on obtaining control of the target – for example:
  - the offer reaches a minimum success percentage;
  - the target's shareholders' meeting approves a deletion of restrictions on transferability of shares; or
  - the offeror is registered in the target's share register.
- Conditions on implementing the offer – for example:
  - all necessary regulatory approvals are obtained; or
  - no decision by any authority is issued that forbids or declares inadmissible the offer or its implementation.
- Conditions for the benefit of the offeror – for example:
  - no material adverse changes have arisen; or
  - no defence measures have been decided by the target's shareholders' meeting.

## AUTHORS

[Alexander Vogel](#)



[Camillo Devecchi](#)



Mandatory takeover offers may be made subject only to conditions relating to important reasons. This is deemed to be the case if:

- the acquisition requires regulatory approval;
- the shares to be acquired include no voting entitlement; or
- the offeror wants the specific economic substance of the target to remain unchanged.

### **Demerger condition**

The takeover of Actelion by Johnson & Johnson (launched in February 2017 and completed in June 2017) consisted not only of a public takeover offer regarding Actelion shares, but also of a demerger of Actelion's research and development (R&D) business to be accomplished by way of:

- a transfer of the assets and liabilities of the R&D business into new entities to be wholly owned by a newly formed holding company;
- the listing of the shares of the newly formed holding company; and
- the approval by Actelion shareholders regarding the distribution among them of the new holding company's shares.

In order to combine the public takeover offer with the demerger transaction, the offer was made subject to the condition that the steps required to execute the contemplated demerger transaction will be implemented successfully, including:

- listing the shares of the newly formed holding company; and
- approval by Actelion shareholders regarding the distribution among them of the new holding company's shares.

In Decision 0652/01 on the validity of Johnson & Johnson's public takeover offer, the Takeover Board considered whether such conditions complied with the requirements for voluntary offers. With regard to the requirement of a justified interest of the offeror, the Takeover Board held that the offeror had an indirect rather than a direct interest, as the demerger transaction was a prerequisite for Actelion to agree to the offer. However, the Takeover Board stated that these conditions were obviously linked to the offer, as the demerger transaction was part of a global transaction structure (together with the offer), and concluded that the requirement of a justified interest was met. In this context, the Takeover Board explicitly pointed out that these conditions were not only in the interest of the offeror, but were also or even predominantly in the interest of the target company and its shareholders, which had the opportunity to continue participating in Actelion's R&D business and to sell their participation in the marketed business. The interest of the target and its shareholders in these conditions was substantiated by the fact that the conditions were designed in such a manner that the offeror could waive such conditions only if the target took certain steps (eg, if the target withdrew its recommendation to accept the offer or strove for a competing offer). In this regard, the Takeover Board held that the conditions were not at all problematic, but rather caused such conditions to appear unproblematic or even desirable. The further requirements for permissibility of offer conditions were also deemed to be met. Based on these considerations, the Takeover Board concluded that such a demerger condition was permissible.

*For further information on this topic please contact [Alexander Vogel](#) or [Camillo Devecchi](#) at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91) or email ([alexander.vogel@mll-legal.com](mailto:alexander.vogel@mll-legal.com) or [camillo.devecchi@mll-legal.com](mailto:camillo.devecchi@mll-legal.com)). The Meyerlustenberger Lachenal website can be accessed at [www.mll-legal.com](http://www.mll-legal.com).*

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