CORPORATE FINANCE/M&A - SWITZERLAND

Settlement of target equity award programmes in view of best-price rule

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Introduction
Takeover Board

AUTHORS

Alexander Vogel

Samuel Ljubicic

Introduction

As a general rule, the price paid by the offeror for shares outside a public tender offer may not exceed the offer consideration. If the bidder violates this rule, it must increase the offer consideration accordingly. In principle, the best-price rule applies between the announcement of the offer and the date that is six months from the expiration of the public offer's acceptance period. According to the Takeover Board's established practice, an offeror may reserve the right to adjust the price initially offered if the target distributes a dividend subsequently to the offer being launched. An offeror is not considered to violate the best-price rule if it acquires shares outside the offer at the initial offer price and, subsequently to the distribution of a dividend by the target, decreases its offer consideration accordingly.

In view of the contemplated tender offer for all publicly held shares of Syngenta AG, on February 2 2016 China National Agrochemical Corporation and its (indirect) subsidiary CNAC Saturn (NL) BV on the one hand, and Syngenta AG on the other hand, entered into a transaction agreement. According to the transaction agreement, the offeror consented to a special dividend of Sfr5 per Syngenta share to be distributed by Syngenta, conditional to the success of the offer and payable immediately before the first settlement date of the offer (special dividend).

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In this case, the offeror explicitly abstained from reserving the right to reduce its offer as a consequence of the special dividend. Instead, the offeror filed a request with the Takeover Board for approval that it (or any person acting in consent with the offeror) should – before the distribution of the special dividend – have the right to acquire shares outside the offer at a price per share for a consideration of up to Sfr5 above the offer consideration, without triggering the best-price rule by doing so. In its February 2 2016 decision, the Takeover Board stressed the importance of the offer price as a reference for the best-price rule and held that any acquisition of shares for a consideration above the offer price would violate the best-price rule.

In view of the contemplated offer, Syngenta's board resolved (subject to the Takeover Board not ruling that these amendments infringe or trigger the best-price rule or other provisions of Swiss takeover law) that in case of the offer being successful:

- all equity awards will vest immediately and any blocking or holding periods will be waived; and
- all equity awards will be settled by cash settlement on the second settlement date of the offer, such cash settlement being based on the offer price increased by an amount equal to the special dividend.

The Takeover Board held that Syngenta was acting in concert with the offeror and that the best-price rule would also apply in respect of Syngenta's resolution in view of the contemplated offer pertaining to the cash settlement of the equity award plans. Thus, Syngenta acquiring Syngenta shares (or settling its equity awards in view of the offer) above the offer consideration would, in principle, trigger the best-price rule.

However, in respect of Syngenta's equity award plans, the Takeover Board granted an exemption to the best-price rule, as Syngenta was contractually obliged to the plan participants and, by amending the plans by providing for a (mandatory) cash settlement at a premium of Sfr5, merely achieved that the participants were economically treated equally to any of Syngenta's shareholders tendering their shares in the offer.

For further information on this topic please contact Alexander Vogel or Samuel Ljubicic at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91) or email (alexander.vogel@mll-legal.com or samuel.ljubicic@mll-legal.com). The Meyerlustenberger Lachenal website can be accessed at www.mll-legal.com.
