

Corporate Finance/M&A - Switzerland

Takeover Board becomes more lenient regarding opting-out clause

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February 15 2012

[Introduction](#)

[Facts](#)

[Decision](#)

[Comment](#)

Introduction

The Securities and Stock Exchange Act provides for a mandatory offer obligation in the event that 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. All EU member states have also introduced such an obligation based on the EU Takeovers Directive (2004/25/EC) (which also provides for a mandatory bid threshold of 33.3%), although many of them provide for a mandatory bid threshold of 30%. However, Switzerland is the only country which provides for an opting-out mechanism (ie, the shareholders of a listed company can choose to opt out from the mandatory offer obligation). This is possible, among other things, when an opting-out clause has been included in the articles of association.

Article 22 of the Securities and Stock Exchange Act differentiates between the introduction of an opting-out clause before and after the listing of shares on the stock exchange. A company may at any time – even after listing – adopt such a provision in its articles of association, provided that this does not prejudice the interests of the shareholders within the meaning of Article 706 of the Swiss Code of Obligations. Once such a clause has been validly introduced, any acquirer is generally exempt from the mandatory offer obligation for an unlimited period – irrespective of the reasons for exceeding the threshold.

The Takeover Board's latest decision on this matter, which is discussed in this update, highlights the board's recent interpretation of the rules when such an opting-out provision is introduced after the company has already been listed on the stock exchange. This expands even further the practice of the board, which had already been relaxed in two 2010 cases.⁽¹⁾

Facts⁽²⁾

In January 2010 Mr Weber, shareholder of LEM Holding SA, announced his intentions to increase his participation in the company together with another shareholder, Mr Wampfler, who was simultaneously a member of the board of directors. After this intended further increase in their participation, they were likely to exceed the 33.3% threshold. Therefore, Weber announced his intention to request the introduction of an opting-out clause into the articles of association.

On June 25 2010 the LEM shareholders' meeting approved the introduction of the opting-out clause by 71% of the voting rights represented (Weber held 39.84% of the votes represented). The board of directors recommended that the motion be rejected as it was not in the shareholders' interests, and thus informed the shareholders of the implications and consequences of introducing such an opting-out clause.

A year later, in June 2011, Weber and Wampfler announced that together they would form a shareholders' group (ie, they would be the significant shareholders), and would hold 32.3% of the voting rights in the company. On August 31 2011 the significant shareholders filed a request to confirm the validity of the introduced opting-out clause with the Takeover Board, as they wanted to be exempt from the mandatory offer obligation when increasing their participation in LEM above the 33.3% threshold.

Decision

The Takeover Board confirmed its practice which it had expanded in 2010. It confirmed

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that the introduction of an opting-out clause is valid as long as it does not prejudice the interests of the shareholders within the meaning of Article 706 of the code. Such a clause is, in particular, considered to be invalid if it is either selective in a formal sense (ie, the person that is to benefit from the opting-out clause is specifically mentioned in the clause) or in a material sense (ie, the opting-out clause has been introduced in view of an upcoming transaction or for the benefit of a specific person and is thus, in its consequence, selective). However, if an opting-out clause is introduced five years ahead of a transaction that will benefit from the opting-out clause, it is assumed that the introduction of the opting-out clause is not selective in a material sense. Additionally, an opting-out clause which is selective in a formal or material sense is not invalid if the opting-out does not prejudice the shareholders' interests according to Article 706 of the code.

In the case at hand, the opting-out clause was selective in a material sense as it was clearly introduced for the benefit of the significant shareholders. In addition, less than five years had passed since its introduction. The significant shareholders were about to exceed the threshold that triggers the mandatory offer obligation due to the planned increase of their participation in the company, and thus benefited from the opting-out clause as they would be exempt from the mandatory offer obligation. However, when the Takeover Board analysed the validity of the introduction of the opting-out clause, it did not rely on Article 706 as a basis for its analysis, and thus did not review whether the introduction of the opting-out clause prejudiced the interests of the other shareholders. Instead, the Takeover Board came to the following conclusions:

- The shareholders were fully aware of the consequences of the introduction of such an opting-out clause, as they were fully informed by the members of the board of directors that they should reject its introduction. Nonetheless, a majority of the shareholders approved the introduction of the opting-out clause.
- The minority shareholders had the opportunity to contest the decision of the majority shareholders before the civil courts within two months of passing the resolution. However, no shareholder contested the resolution.

The Takeover Board concluded that the shareholders had approved the introduction of the opting-out clause, even though they were fully aware of its implications and consequences. Therefore, the resolution was validly passed and the opting-out clause had been validly introduced in the articles of association.

The Takeover Board ordered the board of directors to issue a statement on its assessment on the introduction of the opting-out clause. Although the board of directors had initially recommended that the shareholders reject the introduction of the opting-out clause, it reversed its position after the shareholders' vote. Thereafter, it was of the opinion that the introduction of the opting-out clause was valid, since the shareholders had been sufficiently informed of the implications and consequences of the clause. Further, a majority of the shareholders approved its introduction and LEM had benefitted from a stable shareholder base in the previous years, which led to the successful development of the company. Therefore, the opting-out clause was validly introduced and the significant shareholders were not subject to the mandatory offer obligation.

Comment

In future, it appears that the Takeover Board will no longer review opting-out clauses (even if these are selective) in light of Article 706 of the Swiss Code of Obligations in instances where the shareholders have been fully informed and made aware of the consequences and implications of the introduction of such clauses. Once such a clause has been approved by the majority, the only way for minority shareholders to contest the decision is by contesting the resolution passed based on the provision of the code – and not the Securities and Stock Exchange Act – before a civil court within two months of the shareholders' meeting. However, it is questionable whether minority shareholders would be willing to risk having to advance the court fees and in addition bear costs should the case be dismissed in court. Nonetheless, minority shareholders will, in future, be dependent on the rulings of the civil courts, since the Takeover Board (which is based on the Securities and Stock Exchange Act, which is supposed to protect minority shareholders without reservation) will refrain from protecting them in similar cases.

As discussed above, the provision regarding the introduction of an opting-out clause is relatively unique in Europe. Although Swiss law also provides for other unique provisions (eg, a control premium of 25%), the trend could arguably follow a direction of a narrow interpretation of such provisions. Additionally, there is even talk of the removal of the control premium, among other things. Thus, it is surprising that suddenly the Takeover Board has become quite lenient in its assessment of the introduction of an opting-out clause, which is clearly selective in a material sense, particularly since this is entirely at the cost of the minority shareholders. On the other hand, the Takeover Board has been following a self-imposed trend whereby it abstains from issuing rulings concerning the interpretation of corporate law issues.⁽³⁾ In the case at hand, the

Takeover Board did exactly that: it abstained from making a decision concerning corporate law and left the decision to the civil courts instead. This was despite the fact that civil courts are now unable to form an opinion on the clause at issue, since the two-month period following the shareholders' meeting – during which a challenge of the clause would have been possible – lapsed a long time ago. Thus, the clause is effectively beyond judgment. This is a rather astonishing result, especially when considering that in the last reform of the Securities and Stock Exchange Act the legislature intended to substantially strengthen the position of minority shareholders, and had allowed any shareholder holding at least 2% of the voting rights in the target (ie, a qualified shareholder) to:

- request admission as a party in the takeover proceedings;
- have access to non-public documents that the offeror or the target submitted to the Takeover Board; and
- submit objections to the orders of the Takeover Board.

The question remains: had the minority shareholders contested the resolution passed in this case, would the civil courts have considered the introduction of the opting-out clause to be invalid based on Article 706 of the code? Time will tell whether such clauses will be considered valid. What is certain is that the Takeover Board will be confronted with selective opting-out clauses in the future: it will be interesting to see whether it upholds the (minority shareholder-unfriendly) interpretation laid down in the present case.

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Endnotes

(1) Takeover Board Decision 437/01 of March 4 2010 regarding Ci Com SA and Takeover Board Decision 440/01 of June 4 2010 regarding COS Computer Systems AG.

(2) Takeover Board Decision 490/01 of September 22 2011.

(3) Takeover Board Decision 435/02 of February 24 2010 regarding Transocean Ltd and Circular 1 of February 26 2010 on share buy-backs.

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