

International Briefings

March 2004

Switzerland

Takeover regulation

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The Takeover Board is a federal commission established under the Swiss Federal Act on Stock Exchange and Securities Trading (SESTA). It has jurisdiction to issue general rules and ensure compliance of public offers with the provisions of SESTA. In particular, potential offerors and their legal advisors should be aware of the following recommendations issued by the Takeover Board.

Obligation to make an offer by members of an organized group: In the *Recommendation in re Quadrant AG* dated July 23 2002 the Takeover Board surprised many with a broad definition of organized groups. It held that organized groups may be formed based on social relationships (business connections) even if there is no contractual relationship between the parties. This case is now pending in the Federal Court.

Fairness opinion: As a result of the *Recommendation in re EIC Electricity AG* dated August 21 2003, fairness opinions now have to be much more detailed than in the past. They now have to disclose the detailed basis and the parameters (such as discount rates and historical share prices) of the valuation.

Principle of equal treatment: If there is a parallel foreign offer (for example, if securities are listed on the Swiss Stock Exchange and American Depositary Receipts are listed on the New York Stock Exchange) and the foreign takeover law grants more favourable rights to the offerees, equal rights have to be granted to the offerees in the Swiss offer (*Recommendation in re Centerpulse AG* dated April 16 2003).

Right to revoke the acceptance in case of a competing offer: The Takeover Board held that it is unlawful for a shareholder to enter into an agreement with the initial offeror and waive its right to revoke acceptance in case of a competing offer (*Recommendation in re InCentive Capital AG* dated June 11 2003).

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International Briefings

February 2004

Switzerland

Money Laundering Act

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In December 2003 the Swiss Money Laundering Control Authority (Control Authority) published a revised code of practice for investment companies. According to the new code of practice, all investment companies are considered to be financial intermediaries and thus subject to the provisions of the Swiss Money Laundering Act (MLA, in force since April 1 1998).

The Control Authority argues that the main purpose of investment companies is not the financing of other companies but capital investment. For the definition of investment companies the Control Authority now refers to the rules issued by the SWX Swiss Exchange, which define investment companies as "capital investment bodies organized according to company law, which have the purpose, either exclusively or mainly, of generating yields and/or capital gains and which do not pursue active entrepreneurial activities in the original sense of the term". This rule distinguishes between investment companies and holding companies, which are not subject to the Money Laundering Act.

As a consequence of the new code of practice, numerous investment companies, including about 40 investment companies now listed on the SWX Swiss Exchange, will have to comply with the obligations of financial intermediaries under the MLA. Thus, investment companies must identify shareholders and the beneficial owners of shares, draw up and retain detailed identification documentation and report cases of suspicious funds.

Further guidance and clarification by the Control Authority on how to fulfil the obligations is required, especially for public investment companies, whose shareholders may sell or purchase shares on a daily basis over the stock exchange.

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International Briefings

January 2004

Switzerland

M&A statute

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The Swiss legislature recently completed work on a new statute governing mergers, demergers, conversions of companies, and the transfer of assets with or without related liabilities. Most of these topics were not addressed in the Swiss Code of Obligations and thus many of the existing rules relating to mergers and demergers are based on case law or on legal principles developed over time by practitioners. Most of the code law provisions that did exist will now be replaced in their entirety.

The main purpose of the new statute is to enable the adaptation of existing business structures to meet the changing needs of the owners and the requirements of the market, while at the same time protecting the legitimate interests of other interested groups such as creditors, employees and minority shareholders. The new legislation also modifies some of the tax rules applicable to reorganizations to make sure the use of the new provisions will not have negative tax consequences. The new legislation includes a number of features that are new to Swiss company law. One of the most striking is the ability to provide consideration other than the shares of the surviving company to the shareholders of the merging company. This new possibility combined with other rules will allow new types of transactions such as triangular mergers, for example, or the squeeze out of minority shareholders in the course of a merger provided at least 90% of all shareholders approve the consideration offered by the surviving company. Under the existing law, only listed companies could squeeze out minority shareholders following a public takeover, provided the offeror held at least 98% of the voting stock of the target after the offer. The new legislation, expected to enter into force in mid 2004, will now allow also small and medium-sized companies to use a squeeze out instrument.

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International Briefings

December 2003

Switzerland

Sanctions on cartels

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The Swiss parliament enacted an amendment to the Federal Act on Cartels on June 20 2003. The deadline has passed for a referendum against the amendment so it will most likely enter into force on April 1 2004.

Undertakings in Switzerland should review their agreements and practices to prepare for the new law. Severe direct sanctions can be imposed for the following violations, which are considered to be particularly serious:

- I participation in horizontal cartels (that is, cartels between competitors): price fixing, restrictions on the quantities of goods or services produced, bought or supplied or market sharing;
- I participation in vertical cartels (that is, cartels between undertakings of different market levels): price fixing and market sharing; and
- I abuse of a dominant position.

Sanctions can be up to 10% of the turnover achieved in Switzerland in the previous three financial years. They may be imposed for up to five years after the unlawful practice has stopped. But sanctions will not be imposed if the Swiss Federal Competition Commission (FCC) is notified or the unlawful practices stop in the year after the amendment enters into force. Furthermore, it is possible to notify the FCC of a potentially unlawful agreement or practice before it has been put into practice. If the FCC says that the proposed agreement or practice is lawful, or if it fails to respond within five months of the notification, direct sanctions will be avoided.

The FCC may start an investigation within five months of being notified and then decide that the agreement or practice is unlawful. In that situation the undertaking may avoid sanctions by not carrying out the proposed agreement or practice that might later on be considered unlawful or by giving up the agreement or practice once the FCC has started an investigation.

The amendment also proposes a bonus programme. This is drafted along the lines of the leniency programme in EU cartel law. Under this programme the FCC may reduce sanctions or refrain from imposing them altogether if the undertaking participating in the cartel actively helps the FCC to discover the cartel or cooperates with the FCC in its investigations.

Details about the bonus programme, the rules for the determination of sanctions and the above-mentioned notification procedure can be found in the draft for a new ordinance, which was recently published together with an explanatory commentary.

The amendment to the Cartel Act also provides clearer rules for the conduct of investigations. Pursuant to an order of a member of the FCC's presiding body, the competition authorities will be entitled to order searches and seize documents. It can be expected that the FCC will conduct dawn raids in cases of suspected unlawful restraints of competition. Media attention is guaranteed for the first dawn raid and for the first imposition of the new direct sanctions.

International Briefings

October 2003

Switzerland

Public solicitation of investment funds

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Under Swiss law, the distribution of an investment fund requires authorization as soon as the fund is publicly offered to investors in Switzerland through public solicitation. The term *public solicitation* has been the subject of wide interpretation. Consequently, the Federal Banking Commission (FBC) has stated in a circular in effect since July 1 2003 that solicitation is considered to be public if addressed to more than 20 individuals within a business year.

Two important exemptions apply: (1) Foreign investment funds are exempt if those funds are offered only to institutional investors with professional financial management. (2) Banks, security dealers or professional portfolio managers are exempt if, based upon a written portfolio management agreement (which meets the standards of the Swiss Banking Association), they underwrite shares in investment funds only for the accounts of their clients.

The FBC specifies that the information published on any website is considered public solicitation if it directly or indirectly offers an investment fund in Switzerland. It is thus not just a matter of whether the investment fund shares can be purchased online. However, it will not be considered public solicitation if a disclaimer in the website expressly excludes any offering in Switzerland, provided the website's visitor cannot evade reading the disclaimer. This can be ensured by the disclaimer appearing automatically and the visitors having to confirm that they have taken note of it.

These clarifications on public solicitation and disclaimers in websites are relevant under Swiss investment fund regulations and also guide the interpretation of similar terms under Swiss banking and capital markets laws.

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