

Delivering expert knowledge to global counsel



Corporate Finance/M&A - Switzerland

Swiss Takeover Regulations Revised

Contributed by **Meyer Lustenberger**

April 08 2009

Legal Framework

Mandatory Offer and Determination of Offer Price

Exchange Offers: Additional Cash Consideration

Comment

The Federal Act on Stock Exchanges and Securities Trading and its associated ordinances have been revised. The new takeover regulations not only reflect the existing practice of the Takeover Board, but also include several amendments to the rules governing public tender offers. This update summarizes the general rules to be considered by a bidder when determining an offer price and the new rules on exchange offers.

Legal Framework

Public tenders offers for holdings in Swiss companies whose securities are, in whole or in part, listed on a stock exchange in Switzerland are governed by the Federal Act on Stock Exchanges and Securities Trading, the Financial Market Supervisory Authority (FINMA) Ordinance on the Stock Exchange and the Takeover Board Ordinance on Public Takeover Offers.

Mandatory Offer and Determination of Offer Price

Obligation to submit a mandatory offer

According to Article 32 of the act, any buyer of equity securities which directly, indirectly or acting in concert with third parties, acquires equity securities which, added to those already held, exceed the threshold of 33.33% of the voting rights of a target must submit a mandatory tender offer to the remaining shareholders of the target to acquire all its listed equity securities.

However, a company may raise this threshold in its articles of association to 49% of the voting rights (Article 32(1)) or may state in its articles of association that bidders are not bound by the obligation to make a public tender offer pursuant to Article 32 of the act.

Minimum price rule

The price of such a mandatory offer pursuant to Article 32 must equal or exceed the stock market value of the target – that is, the volume-weighted average share price of exchange-based transactions over the last 60 trading days prior to the pre-announcement or publication of the offer (Article 40 of the FINMA ordinance). Further, the offer price may not differ by more than 25% from the highest price paid by the bidder for equity securities in the target during the 12 months preceding the pre-announcement or publication of the offer (Article 32(4)).

Where a voluntary tender offer is launched, – that is, where the bidder launches a tender offer before the relevant threshold triggering a mandatory offer has been reached or exceeded – the minimum price rule stated above must nevertheless be complied with, to the extent that the offer is made for a number of equity securities the acquisition of which would reach the applicable threshold triggering a mandatory offer (Article 9(6) of the Takeover Board ordinance). However, if a voluntary offer is made for a number of equity securities the acquisition of which would not reach the applicable threshold triggering a mandatory offer, the bidder may freely determine the price offered (Article 9(5) of the Takeover Board ordinance).

Best price rule

According to Article 24(2) of the act, as a general rule, a bidder must treat all shareholders of the same

class equally. One aspect of this duty of equal treatment is the so-called 'best price' rule.

The rule states that, if after publication or pre-announcement of an offer and within a six-month period of the expiration of the additional acceptance period, the bidder (including any of its affiliates and other parties acting in concert) acquires additional equity securities of the target for an amount or consideration higher than the offer price, the bidder is obliged to offer this higher price or consideration to all recipients of the offer (Article 10 of the Takeover Board ordinance). According to the practice of the Takeover Board and its supervisory authority, FINMA, all shareholders of the target are considered recipients of the offer, not just those shareholders that have accepted the tender offer.

On the other hand, if the bidder acquires equity securities of the target before or after the mentioned period, the best price rule does not apply. According to the practice of the Takeover Board, where the acquisition is not contingent on the success of the offer, an acquisition of equity securities of the target is deemed to have been effected before the mentioned period. Therefore, if there is no condition linking the agreement to the success of the offer, the best price rule does not apply where the bidder enters into a purchase agreement before the pre-announcement or publication of the offer which entitles it to acquire equity securities of the target, despite the fact that the execution or consummation of such purchase agreement takes place after publication of the offer. Conversely, the best price rule is applicable if the acquisition of the equity securities of the target is contingent on the outcome of the public offer.

Exchange Offers: Additional Cash Consideration

Mandatory offers

Pursuant to Article 43(1) of the FINMA ordinance, the offer price may be paid as cash consideration or through an exchange of securities. However, according to the newly implemented Article 43(2) of the same ordinance, in an exchange offer the bidder is required to offer a cash consideration as an alternative to the remaining shareholders of the target.

Until the Takeover Board published its Communication 4, the consequences of this article were unclear and heavily criticized. 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, to securities that have not been traded on at least 30 of a period of 60 trading 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 effectively to exit the target at a fair price. On the other hand, 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 bidder's perspective, the new Article 43(2) has a significant financial impact. A bidder 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 bidder 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 Article 43(2), the potential bidder now must not only prove the latter, but also make arrangements for the cash consideration to be offered alternatively to the remaining shareholders. The bidder 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. However, according to the language of Article 43(2), the rule in any case applies to mandatory offers, regardless of whether the offered equity securities are liquid. In other words, a bidder that exceeds the relevant threshold of voting rights and thus triggers the duty to submit a mandatory offer will not have a free choice as to how to fulfil such obligation and is not only bound by the minimum price rule and best price rule. To the contrary, even if the bidder wishes to offer securities that are liquid – and therefore can easily be sold – 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, a bidder may offer a premium on the offered security consideration compared to the cash consideration and, therefore, the bidder 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 (Article 9(6) of the Takeover Board ordinance). Furthermore, the Takeover Board confirmed that a successful bidder (ie, where the bidder 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 bidder 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 choice and accept 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.

On the other hand, the duty of equal treatment does not prevent a bidder from acquiring 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.

Furthermore, in the case of a voluntary tender offer, the bidder is free to offer equity securities for which no liquid market exists or which are not listed. In such case the bidder will be required to provide a valuation by an accredited audit firm or investment bank in accordance with Article 24(6) of the Takeover Board Ordinance and Article 44 of the FINMA ordinance. 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 a bidder from acquiring a controlling stake.

Comment

Previously, bidders that wished to acquire control over a target listed on a stock exchange in Switzerland often chose a two-step approach to increase transaction certainty. First, the bidder entered into a purchase agreement with one or more shareholders to acquire a major or even majority stake in the target, and submitted a public tender offer regarding the remaining equity securities (ie, those equity securities not already acquired by the bidder based on the purchase agreements). To incentivize the existing (majority) shareholders to sell their stakes, the bidder often paid a premium compared to the price offered under the terms of the tender offer. The two-step approach had only to comply with the minimum price rule (which allows the payment of a premium of up to 25% in the 12 months preceding the pre-announcement or publication of the offer), and had no impact on the type of consideration offered.

Under the new rules, where a bidder is unwilling or unable to submit a cash offer to the remaining shareholders, such an approach remains possible only if the bidder does not exceed the threshold triggering the obligation to submit a mandatory offer in the first step, since Article 43(2) of the FINMA ordinance applies where this threshold is exceeded, thus requiring a cash consideration to be offered as an alternative to any consideration in kind. Since this threshold can be exceeded in situations where the bidder, certain existing shareholders and/or the target are acting in concert, careful planning of the deal structure becomes even more crucial under the newly implemented takeover regulations.

On the other hand, in times of falling stock prices and decreased availability of credit, the newly implemented Article 43(2) of the FINMA ordinance and the minimum price rule may have an unexpected defensive effect. A bidder that has acquired equity securities in the target during the preceding 12-month period may not simply launch a tender offer by determining the offer price based on currently low stock market prices, since the minimum price cannot be less than 75% of the highest price paid by the bidder (including any of its affiliates and other parties acting in concert, including the target, if considering acting in concert) in the preceding 12-month period. If a bidder is planning to submit an exchange offer – which would be an interesting option where the market price of its securities decreased significantly less than the stock prices of the target – and is unwilling or unable to offer an alternative cash consideration, the bidder must avoid triggering the obligation to submit a mandatory offer, thus limiting it to a prior acquisition of less than one-third. As a result, interested parties may be obliged to take into account decreased transaction certainty.

For further information on this topic please contact [Alexander Vogel](#) or [Andrea Sieber](#) at Meyer Lustenberger by telephone (+41 44 396 91 91) or by fax (+41 44 396 91 92) or by email (alexander.vogel@ml-law.ch or andrea.sieber@ml-law.ch).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

Authors

Alexander Vogel



Andrea Sieber



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2009 Globe Business Publishing Ltd