CORPORATE FINANCE/M&A - SWITZERLAND

Restructuring exemption in Swiss takeover law

01 April 2020 | Contributed by Meyerlustenberger Lachenal

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Introduction

Under Swiss takeover law, the duty to launch a takeover offer is triggered when an acquirer of shares, whether acting directly, indirectly or in concert with third parties, acquires equity securities and thereby, in addition to the equity securities already owned, exceeds the threshold of 33.3% of the voting rights of a listed company.

However, Article 136 of the Financial Market Infrastructure Act provides for certain exemptions from this duty in justified cases. Among other things, the Takeover Board may grant such an exemption when a company is in a critical financial situation and the securities have been acquired for restructuring purposes (the so-called 'restructuring exemption'). As a general rule, this exemption is granted only as an *ultima ratio* (ie, only in cases where a restructuring would hardly be possible if the acquisition of shares would lead to a duty to make an offer). The rationale for this exemption is that in difficult financial situations, the interest of shareholders (and other stakeholders) in the continued existence of a company is to be weighted higher than the interest of the shareholders in being able to sell their shares following a change of control in a mandatory offer. This is especially true if the company needs additional liquidity that is available only through the injection of new equity (ie, by way of a capital increase).

In a recent case concerning Schmolz+Bickenbach AG, a traditional and longstanding company active in the steel industry, two principal shareholders applied to the Takeover Board for an exemption from the obligation to submit a mandatory offer, which would allow them to provide the company with the necessary financial means through a capital increase. However, the Takeover Board rejected both applications (Decision 750/01 of 22 November 2019). Subsequently, the company and the principal shareholders filed an appeal against this decision with the Financial Market Supervisory Authority (FINMA). In its decision of 6 December 2019, FINMA ruled against the Takeover Board and granted the restructuring exemption subject to certain conditions.

Against this background, this article:

- provides a summary of the facts underlying the Schmolz+Bickenbach case;
- outlines the main considerations and conclusions of FINMA and the Takeover Board; and
- summarises the requirements for a restructuring exemption.

Facts

Since the third quarter of 2018, the financial situation of Schmolz+Bickenbach AG has deteriorated continuously and significantly as a result of a general crisis in the steel industry.

In this context, Schmolz+Bickenbach planned a financial restructuring at the end of 2019 that included a capital reduction (nominal value reduction) with a simultaneous ordinary capital increase. At this time, the main shareholders of the company were:

- Liwet Holding AG with 26.91%;
- Martin Haefner with 17.50%; and
- Schmolz+Bickenbach Beteiligungs GmbH Germany with 10.09%.

Martin Haefner committed to subscribe, via his investment company BigPoint Holding AG, for newly issued shares resulting in a post transaction shareholding of up to 37.5% of the share capital of the company, under the condition that an exemption from the obligation to make an offer would be granted. Since according to this plan, his post transaction equity stake would exceed 33.3% of the total restructured equity of the company, Martin Haefner/BigPoint Holding AG filed an application with the Takeover Board requesting an exemption from the offer obligation. Liwet Holding AG also requested an exemption should it exceed the threshold triggering the offer obligation within the capital increase (however, this request was later withdrawn in the proceedings). As mentioned, the Takeover Board rejected such applications. The Takeover Board argued that the proposed restructuring measure did not meet the subsidiarity requirement since it was not excluded that a capital increase without a change of control might also be sufficient for a restructuring.

The company and the applying shareholders appealed the Takeover Board's decision.

FINMA's main considerations

FINMA decided otherwise and granted the exemption from the offer obligation, subject to certain conditions. In its considerations, FINMA clarified several aspects of the requirements for a restructuring exemption, which may be summarised as follows.

Need for restructuring
If a restructuring exemption is applied for, it must first be examined whether there is a need to restructure the company. Under the applicable takeover law, the term 'restructuring' is to be understood in a broader sense than in other legal fields and covers all measures serving to remedy the weaknesses inherent to an economically distressed company and helping to restore its profitability. In order to meet this requirement in a takeover law context, there is no need to wait until the balance sheet of a company is understated or over-indebted, or the company becomes formally insolvent. In the Schmolz+Bickenbach case the Takeover Board and FINMA both affirmed the company's need for restructuring, mainly due to the already high debt burden.

Suitability for restructuring
The selected measures must be suitable for a successful restructuring. Usually the Takeover Board is reluctant to review the suitability requirement. In essence, any measure is considered suitable if it seems appropriate to ensure the company's continued existence. Therefore, measures taken by a general meeting to improve the financial situation by way of a capital increase are generally accepted. In the Schmolz+Bickenbach case, FINMA considered the capital increase of Sfr350 million to be suitable for a restructuring of the company, whereas the Takeover Board remained silent on this requirement.

Subsidiarity of the measure
Pursuant to the Takeover Board's established practice, a restructuring exemption may only be granted in a situation in which an investor would hardly be found without such an exemption. In the Schmolz+Bickenbach case, the Takeover Board concluded that the subsidiarity requirement had not been fulfilled because it appeared possible to carry out a restructuring without a change of control. FINMA disagreed with the Takeover Board's considerations and held that the arguments of the applying shareholders were essentially convincing, whereas the Takeover Board's arguments were mainly based on vaguely substantiated assumptions. Further, FINMA cited the established practice that in case of doubt, exemptions from the obligation to make an offer must be granted. FINMA concluded that the interests of the minority shareholders were likely to be best protected by the proposed restructuring measure.

According to Article 41(3) of the Financial Market Infrastructure Ordinance, exemptions may be subjected to conditions and future obligations of the acquiring party or limited in time. Based on this provision, FINMA granted the exemption in the Schmolz+Bickenbach case, subject to the condition that the exempted shareholder (ie, Martin Haefner/BigPoint Holding AG) will be obliged to launch a mandatory takeover offer if its shareholding in the company still exceeds the threshold of 33.3% of the voting rights on 31 December 2024.

Comment

The Takeover Board's decision to reject the application for a restructuring exemption in the Schmolz+Bickenbach case surprised most financial and legal experts who were familiar with similar cases and the circumstances of Schmolz+Bickenbach. The financial situation of the traditional Swiss company was precarious, numerous jobs were at stake and the steel industry as a whole is going through difficult times. Moreover, it is well-established practice to grant an exemption in cases of doubt.

On the other hand, this case is noteworthy because FINMA rarely overturns decisions of the Takeover Board. FINMA's ruling re-emphasises that takeover law and practice is in motion and that the requirements for exemptions from the offer obligation must be assessed carefully on a case-by-case basis. Therefore, it is highly recommended to seek advice in sufficient time before planning and implementing restructuring measures for listed companies which could lead to an offer obligation or for which an exemption of such obligation must be applied for.

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