

Alexander Vogel**Camillo Devecchi**

Fulfilment of Swiss takeover offer obligation by completing a merger

20 May 2020 | Contributed by **Meyerlustenberger Lachenal**

Introduction

Facts

Decision

Comment

Introduction

A public takeover offer may be defined as the public offer to shareholders of a listed company to sell their shares at a price determined in the offer. 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 33.3% threshold of voting rights in a listed company. Further, public takeover offers may be launched voluntarily.

A key element of any public takeover offer is the freedom of shareholders to decide whether they wish to:

- tender their shares at the offered price; or
- continue to hold them.

In order to ensure that shareholders can make a sufficiently informed decision, the law stipulates that the offeror must publish an offer prospectus and other offer documents.

In a recent case, the Takeover Board had to assess whether a mandatory offer could also be fulfilled by completion of a merger where, by definition, the aforementioned freedom of each individual shareholder is replaced by a collective decision of all participating shareholders – in most cases with a qualified majority of such participating shareholders – as to whether they approve the merger (Decision 672/08 in the matter of SHL Telemedicine Ltd, rendered on 11 July 2019). Contrary to a public takeover offer, non-approving minority shareholders and non-participating shareholders must accept the decision of the majority vote and do not have the option to continue to hold their shares. Rather, they are forced to – depending on the transaction structure – accept shares of the entity surviving in the merger or cash in case of a cash-out merger.

Against this background, this article:

- provides a summary of the facts underlying this recent case; and
- outlines the Takeover Board's main considerations and conclusions in Decision 672/08.

Facts

In January 2018 the Takeover Board held that a group of shareholders in SHL Telemedicine Ltd was acting in concert and, as such group collectively held more than 33.3% of the voting rights in the company, the group was obliged to make a public offer to the other shareholders (Decision 672/01 in the matter of SHL Telemedicine Ltd, rendered on 26 January 2018).

The Takeover Board set a two-month period to launch the offer. At the request of the group of shareholders obliged to make the offer, this period was extended twice by approximately three and two months, respectively (Decisions 672/02 and 672/03 in the matter of SHL Telemedicine Ltd, rendered on 21 March 2018 and 27 June 2018, respectively).

The group of shareholders mainly contested the difficulty of finding suitable financing in order for the offer to be submitted. The group requested a third extension, which the Takeover Board rejected. Rather, the Takeover Board held that the offer had not been submitted on time and accordingly suspended the voting rights of the group of shareholders (Decision 672/04 in the matter of SHL

Telemedicine Ltd, rendered on 1 September 2018). This decision was appealed by the applicants, but such appeal was rejected by the higher authorities.

On 13 March 2019 the main shareholder of the group filed an application with the Takeover Board and requested, among other things, advanced confirmation that the completion of a triangular cash-out merger under Israeli law would qualify as proper fulfilment of the obligation to make a mandatory offer as stated in Decision 672/01.

The merger was intended to be structured as follows:

- SHL Telemedicine Ltd was intended to be the surviving entity and a newly established Israeli company held by the applicant; and
- another shareholder of SHL Telemedicine Ltd was intended to serve as non-surviving entity which would be dissolved.

By completing the merger, the shareholders of the non-surviving entity were to become the only remaining shareholders of SHL Telemedicine Ltd, while all other shareholders were to be paid the price per share as determined to be paid in the offer.

Decision

In its Decision 672/08 the Takeover Board first referred to a previous case in which it had assessed whether an absorption merger under Swiss law could lead to a fulfilment of the duty to make an offer (Decision 372/01 in the matter of Hiestand Holding AG, rendered on 6 June 2008). In this previous case, the Takeover Board stated that the obligation to make an offer could be fulfilled by completing a merger if such merger was designed in such a way that it is functionally equal to a typical takeover offer.

In order to assess such functional equality, the Takeover Board held that there is basically a contradiction between the obligation to exchange shares in a merger and the shareholders' freedom to tender the shares in an offer. Nevertheless, the Takeover Board concluded that the elimination of the shareholders' freedom to offer their shares did not preclude the fulfilment of the offer obligation by completing a merger, with the justification that it is possible to carry out a merger following a public takeover offer. Further, the Takeover Board held that the basic principles of takeover law (in particular the provisions on minimum pricing) were complied with, and that the obligation to make an offer remains in place if the merger transaction fails (ie, is not successfully completed). Finally, the Takeover Board decided that despite fulfilling the offer obligation by way of a merger, the usual offer documents (in particular the offer prospectus) must nevertheless be published by the quasi offeror (ie, the surviving entity).

With reference to previous case law, in Decision 672/08 the Takeover Board examined whether the cash-out merger under Israeli law was functionally equal or equivalent to a public takeover offer to the shareholders of SHL Telemedicine Ltd. First, the Takeover Board stated that the decision on whether a merger will be carried out will be dependent on a collective decision of the general shareholders meeting which can be seen as a restriction of the shareholders' freedom to tender their shares in an offer. However, this restriction was held to be justified by the Takeover Board for the following reasons:

- it had already decided in previous case law (see above) that the shareholders' freedom to tender their shares may be precluded in the event that a merger is being carried out instead of a mandatory takeover offer;
- the intended cash-out merger complied with the basic principles of takeover law, in particular with the provisions on transparency and the minimum price rules;
- a cash-out merger under Israeli law could be carried out at any time, and thus also without a public takeover offer having been conducted as a first step;
- the group of shareholders obliged to present the offer would, for reasons of Israeli law, be unable to buy out the remaining shareholders if a public takeover offer under Swiss law would result in the group holding less than 95% of the shares and votes; and
- it was questionable for reasons of international law whether the provisions of Swiss takeover law regarding a squeeze-out would be applicable in the case at hand.

Based on these reasons, and with reference to the fact that the consideration for the shareholders within the framework of the merger is economically equivalent to the consideration within the framework at the offer, the Takeover Board decided that the intended cash-out merger under Israeli law was to be permitted as a substitute for the fulfilment of the offer obligation. The Takeover Board further decided that the usual offer documents for a public takeover offer needed to be published and that the offer obligation will not expire in case the merger transaction would not be completed successfully.

Comment

In its decision regarding SHL Telemedicine Ltd, the Takeover Board confirmed its case law on whether the obligation to make a public takeover offer may be fulfilled by completing a merger. However, the Takeover Board's arguments were based heavily on the specifics of the case at hand. It seems possible, if not likely, that the Takeover Board would have come to a different conclusion had the merger been structured differently. Thus, there is still considerable legal uncertainty in this area and the permissibility of the fulfilment of an offer obligation by way of a merger must be assessed on a case-by-case basis, in particular whether the merger is functionally equivalent to a takeover offer and whether the preclusion of the shareholders' freedom to tender their shares is justifiable in the concrete case. Therefore, it is highly recommended to seek advice and an advanced ruling of the Takeover Board before considering and structuring a merger as a substitute for the fulfilment of an offer obligation.

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

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