CORPORATE FINANCE/M&A - SWITZERLAND

Selective opting-up clauses under takeover law: recent Takeover Board and FINMA rulings

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Introduction

Under Swiss takeover law, a shareholder or group of shareholders which acquires more than 33.1/3% of the voting rights in a listed company must submit a takeover bid for all of the company's outstanding listed shares. However, the law provides for the possibility to raise the threshold for the triggering of this obligation to up to 49% (opting up) or to completely waive the offer obligation (opting out) in the company's articles of association.

In a recent decision in the matter of MCH Group AG, the Takeover Board had to assess the validity of a selective opting-up clause. Unlike a general opting-up clause, a selective one applies only to a certain pre-defined transaction or to certain beneficiaries.

Against this background, this article:

- outlines the conditions for the valid introduction of a selective opting-up clause; and
- summarises two key considerations of the Takeover Board's Ruling 765/02 of 20 August 2020 and the Financial Market Supervisory Authority's (FINMA's) decision in the matter of MCH.

Introduction of opting-up clauses in takeover law

Under Article 125(3) of the Financial Market Infrastructure Act (FinMIA), the introduction of an opting-up clause prior to a listing requires only an absolute majority of the votes represented in the general meeting, subject only to a higher quorum defined in the articles of association.

According to Article 125(4) of the FinMIA, opting-up clauses can also be adopted when the shares are already listed, provided that this does not unduly disadvantage certain shareholders. According to the Takeover Board's practice, selective opting-up clauses can thus be validly implemented if the following prerequisites are met:

- transparency – the shareholders must be transparently informed of the introduction of the opting up, its consequences and the intentions of both the shareholders which suggest its introduction and the controlling shareholders (if any);
- shareholder approval – the opting-up clause must be approved by a majority of the votes represented; and
- approval of the 'majority of the minority' – the opting-up clause must also be approved by a majority of the represented votes of the minority shareholders. In this context, any shareholder which, alone or in conjunction with third parties, owns a participation of less than 33.1/3% and has not requested the opting-up clause to be introduced qualifies as a minority shareholder.

In addition, if higher quorums for the amendment of the articles are defined in the articles, such higher quorums must also be complied with.

If these prerequisites are met, the Takeover Board will generally assume that the opting-up clause is valid without further examination. However, it may also assess the material content of the clause in limited circumstances.

For instance, if the opting-up clause seems necessary to protect predominant corporate interests, the Takeover

Board may consider it valid even if it has not obtained the required approval of the minority shareholders. However, the presumption that an opting-out clause unduly disadvantages certain shareholders if the majority of the minority does not approve can be overturned only in exceptional circumstances.

For example, in the Takeover Board's Advanced Digital Broadcast decision, a shareholder holding 41.27% in a listed company wanted to rely on an opting-out clause which had not been approved by the majority of the minority to increase its stake above 49%, without having to submit a mandatory offer.(1) The shareholder argued that its planned investment would lead to a stabilised shareholder structure, and that the liquidity of its shares would improve. However, the Takeover Board held that as the shareholder held more than 41%, the shareholder structure was already stable and the free float would increase only for a short period, if at all. The Takeover Board thus concluded that the arguments brought forward by the shareholder were of a general nature, since all listed companies could produce such arguments, and that these facts thus did not qualify as particular and exceptional circumstances which would justify overturning the presumption.

Conversely, the Takeover Board may also assess if an opting-out clause unduly disadvantages certain shareholders and thus consider it void, even if it has been approved by the aforementioned double majority

In its ruling of 16 October 2020, FINMA confirmed that the aforesaid principles also apply to selective opting outs and opting ups, provided that the unequal treatment of shareholders inherent to the selectivity is justified by the corporate interest. However, FINMA did not specify whether this prerequisite is (as per the Takeover Board's practice) always assumed to be fulfilled if the respective shareholders' decision has received the aforementioned approvals.

Facts of MCH case

MCH is the holding company of the MCH group. The MCH group organises various fairs and congresses, among them the well-known Art Basel. Its shares are listed on the SIX Swiss Exchange. The MCH group faces a challenging business and financial situation, due in particular to the COVID-19 crisis.

As a result, MCH intended to carry out a transaction containing restructuring and other measures.

The cornerstone of the transaction was an equity investment of up to Sfr75 million by Lupa Systems LLC, an investment company founded in 2019 by James Murdoch. Depending on how many shareholders exercised their preferential subscription rights, Lupa would acquire a participation of 29% to 45% in MCH. Either a general or selective opting-up clause was thus planned to be included in MCH's articles, in order to allow Lupa to proceed with the contemplated investment without having to submit a mandatory offer.

MCH and Lupa jointly filed a request with the Takeover Board to, among other things, confirm the validity of the contemplated opting-up clauses. In Ruling 765/01 of 13 July 2020, the Takeover Board confirmed the validity of both clauses, subject to the fulfilment of the abovementioned conditions (ie, transparency and legal quorums). LLB Swiss Investment AG lodged an objection against this decision challenging, in particular, the validity of the selective opting-up clause.

On 3 August 2020 MCH held an extraordinary general meeting. Among other resolutions, the shareholders took the (conditional) decisions to proceed with the contemplated capital increase and introduce the selective opting-up clause.

In its ruling issued after the shareholders' meeting, the Takeover Board declared the selective opting-up clause void because it considered that the required quorum of the minority shareholders' consent had not been met (Ruling 765/02 of 20 August 2020).

MCH appealed this decision; however, it was eventually confirmed by FINMA.

Takeover Board's main considerations

Quorum for majority of minority

A key point of the Takeover Board's decision was the method for calculating the quorum required for the approval of the minority shareholders.

According to the minutes of the extraordinary general meeting, the selective opting-up clause was approved by:

- an overall majority of 71.5% of the represented votes; and
- 50.3% of the represented votes of the minority shareholders.

A total of 18,685 abstentions were counted. These abstentions were not taken into consideration for calculation of the quorum of the minority shareholders. In other words, the abstentions were not counted as 'no votes'. If the abstentions had been counted as 'no votes', only 49.9% of the votes attributed to minority shareholders had

approved the opting-up clause. The opting-up clause had thus been rejected.

LLB claimed that the 18,685 abstentions should have been counted as 'no votes' and that the opting-up clause should thus have been rejected. In particular, LLB raised the following arguments:

- First, LLB claimed that Article 14(4) of MCH's articles applied in the present case. This article states that any changes to the articles require an approval of two-thirds of the votes represented, thus implicitly ruling that abstentions will be counted as 'no votes'.
- Second, LLB claimed that according to the Takeover Board's practice, abstentions had to be counted as 'no votes' anyway.

MCH and Lupa in turn based their position, in particular, on Article 14(1) of MCH's articles. This article states that abstentions will not be considered for shareholder meeting decisions if the law or the articles contain no provisions to the contrary. MCH and Lupa considered that the quorum for the approval of the minority shareholders should be calculated according to this provision (and not Article 14(4) of the articles). Lupa highlighted that in its view, the Takeover Board could not overrule the quorums defined by corporate law (ie, the articles).

The Takeover Board followed LLB's argument. Without much explanation, it referred to its past practice according to which abstentions are counted as 'no votes' in the context of the introduction of opting-up clauses. It also held that Article 14(4) of MCH's articles applied in the present case and that, thus, the articles also required the abstentions to be counted as 'no votes'. As a result, the Takeover Board held that the opting-up clause had been rejected by a thin majority of 50.1% of the minority shareholders.

FINMA confirmed the Takeover Board's rationale. In essence, it held that it is a principle of Swiss takeover law that the majority of the minority required for the approval of a selective opting up must always be calculated based on the total number of votes present. This means that, as a matter of fact, abstentions are counted as 'no votes'.

No predominant corporate interest

MCH argued that even if the opting-up clause was deemed to have been rejected by the minority shareholders, it would be justified by an overwhelming corporate interest. The selective opting up was part of a comprehensive restructuring package. If the clause could not be introduced, the entire restructuring package would be dropped and MCH's restructuring would fail.

The Takeover Board rejected this argument. It held that a selective opting-up clause meant to facilitate a restructuring constitutes a means of last resort. It further held that in its view, other means would have been available to MCH to achieve the contemplated restructuring – for example, the so-called 'restructuring exemption'. The relevant Article 136(1)(e) of the FinMIA allows parties to require the Takeover Board to grant an exemption from the offer obligation on a case-by-case basis if the securities are acquired for restructuring purposes (for further details please see "Restructuring exemption in Swiss takeover law"). The Takeover Board thus considered a selective opting up to be subsidiary to the restructuring exemption and implied that MCH and Lupa should thus have relied on Article 136(1)(e) of the FinMIA rather than on a selective opting up.

FINMA also upheld the Takeover Board's ruling on this point. It confirmed that in the event of a restructuring, parties which want to avoid a mandatory offer must rely on the specific restructuring exemption. However, companies should not invoke the more general principle of an overwhelming corporate interest to justify a selective opting up if they want to avoid a mandatory offer for restructuring purposes.

Comment

The rulings of the Takeover Board and FINMA point to the complex interplay between corporate and takeover law when it comes to the determination of the quorums for the introduction of selective opting-up clauses. They provide welcome clarification regarding the calculation of the majority of the minority by clarifying that this majority is always to be calculated based on the votes present and not the votes cast – meaning that abstentions do, eventually, qualify as 'no votes'.

The rulings also show that, depending in particular on the expected majorities in the shareholders' meeting, it can be vital for companies in financial distress to assess whether they should rely on a selective opting-up clause or the restructuring exemption in order to avoid a bid obligation, which can impede a contemplated restructuring.

Finally, it remains highly advisable to seek an advance ruling from the Takeover Board to confirm the permissibility of a selective opting-out clause before entering into a transaction that could trigger an offer obligation.

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Endnotes

(1) Further information is available here.
