The University of Tokyo Business Law Working Paper Series
No. 2020-E-01

Some Peculiarities of Swiss Takeover Law

Rolf Sethe
University of Zurich

July 2020

The University of Tokyo
Graduate Schools for Law and Politics

World-leading Innovative Graduate Study: Advanced Business Law Program
Institute of Business Law and Comparative Law & Politics

Some Peculiarities of Swiss Takeover Law

Prof. Dr. Rolf Sethe, LL.M., University of Zurich[*]

Summary

The paper deals with the Swiss takeover law, which is based in the European capital market law tradition, but shows some distinct features. After an overview of the possible forms of M&A transactions and the Swiss share market, it describes the general legal framework for public tender offers, the purpose of the rules governing those offers and their scope of application. This is followed by a detailed description of mandatory public tender offers and the determination of the bid price. It concludes with a brief outlook on the possible sanctions in the event of violations of the obligation to make a public tender offer.

---

* This essay is an extended version of a lecture at the Faculty of Law, University of Tokyo. I want to thank Prof. Kansaku and Prof. Iida for their kind invitation and their hospitality. Furthermore I thank Ms. Nozomi Oda (Latham & Watkins LLP, Tokyo), Mr. Daniel Lütolf (University of Zurich) and Dr. Inke Nyborg (University of Zurich) for their valuable comments to the essay.

I. Introduction

This paper intends to give a short insight into Swiss takeover law. However, it is quite difficult to give a *short* overview of such a wide and complex topic such as takeover law. The standard Swiss textbook on the topic has more than 430 pages.[1] Therefore, I can only highlight some of the major peculiarities of Swiss takeover law and address only those issues where Swiss law differs substantially from that of Japan.[2]

Switzerland is a small country in the middle of Europe, landlocked, with only 8.5 million people. Nonetheless it has a very strong economy and is famous not only for chocolate, mountains and watches but also for its financial and chemical industry and is home to a large number of highly specialised companies.

In a first step, I will give a short introduction into the various legal forms for and the importance of mergers and acquisitions in Swiss law (II.). We then will have a brief look at the takeover law in general (III.) before turning to the mandatory offer (IV.), the bid price assessment and the abolition of the control premium (V.).

II. Legal and Economic Overview

1. Forms of Mergers and Acquisitions

Mergers and Acquisitions (M&A) of business enterprises involve a range of different legal topics depending on the way a transaction is executed.

- Acquisitions of private (= non-listed) companies can either be carried out by the purchase of shares (*share deal*) or by the purchase of the assets and liabilities (*asset deal*). The acquisition

[1] Tschäni/Diem/Gaberthüel, Öffentliche Kaufangebote, 4th ed., Zurich 2020.

[2] The Japanese takeover law is described by Shirai, The takeover bid system and the system of disclosure of the status of large-volume holdings, in: Kansaku et al. (ed.), Japanese Financial Instruments and Exchange Act, Tokyo 2018, p. 512 et seq.

is governed by sales law[3] or by the Mergers Act[4] which covers the transfer of assets and liabilities of registered companies.

- A merger of two companies can be performed either by an absorption of one company by another one (*Absorptionsfusion*) or by the combination of two companies to a new one (*Kombinationsfusion*). In both cases the assets and liabilities of the dissolved company are transferred by law to the surviving resp. the new company. In return for losing their memberships in the dissolved company, its shareholders receive shares of the new company as a consideration. If 90 % of the shareholders consent, the consideration can be in cash. In that case the membership of the minority shareholders ends and we talk about a "squeeze-out" (art. 8 (2), 18 (5) Mergers Act).
- In comparison, rather rare is the formation of a joint venture company and a transfer of assets/know-how onto that company in exchange for shares. A joint venture is established according to the rules of company law.[5]
- With regard to companies listed on the stock exchange[6], all of the above-mentioned ways of M&A are also available, but the share deal is substituted by the public tender offer (*öffentliches Kaufangebot*). Such a tender offer is the most common way of acquiring the control of that company. Between the coming into force of the new law in 1997 and the time of writing, the Swiss Takeover Board has considered 764 transactions.[7] The voluntary tender offer may be structured as an offer for cash or as an exchange offer for securities, or as a combination of both. If the offer is mandatory and structured as an offer in exchange for securities, the offeror must always offer a consideration in cash as an option. If the offeror holds more than 98 % of the voting rights of the target company on expiry of the offer period, he or she may, within three months, petition the court to cancel the outstanding equity securities. The remaining shareholders are compensated either by payment of the offer price or by fulfilment of the exchange offer (art. 137 FMIA). This method of excluding remaining shareholders is easier than a squeeze-out according to the Merger Act (see above) but has higher prerequisites.

2. *Share Market in Switzerland*

The Swiss capital market is – compared to the size of the country and its population – relatively large. In 2017 there were 215194 public limited companies (stock company), of which 270 were listed at the two Swiss Stock exchanges. On first sight this does not seem impressive but those 270 companies contributed 18 % to the gross domestic product, employed 350000 people and paid around 40 % of all taxes for business enterprises.[8] However, the Swiss government is concerned about the fact that from an international perspective, the relative importance of the Swiss capital market has declined since the financial crisis in 2008.[9] Therefore, its government is looking at ways of improving the current situation.

---

3 Art. 184 et seq. of the Code of Obligations (CO) of 30 March 1911 (status as of 1 April 2020), SR 220 (SR = Systematic Compilation of Federal Laws).

4 Federal Act on Mergers, Demerger, Conversion and Transfer of Assets and Liabilities, 3 October 2003 (status as of 1 January 2014), SR 221.301.

5 The company law is regulated in art. 530 et seq. CO.

6 Switzerland has two stock exchanges: BX Swiss AG, Berne, and Six Swiss Exchange, Zurich.

7 See the website of the Swiss Takeover Board, www.takeover.ch.

8 Beier/Hauser/Hauser, Die Bedeutung börsenkotierter Aktiengesellschaften für die Schweizer Volkswirtschaft, HTW Chur, February 2013.

9 Beirat Zukunft Finanzplatz, Erhebliches Entwicklungspotential für den Schweizer Kapitalmarkt, April 2018, https://www.efd.admin.ch/dam/efd/fr/dokumente/home/dokumentation/berichte/papier-schweizer-kapitalmarkt%20.pdf.download.pdf/VR-PK-d.pdf.

If one analyses the nationality of the shareholders in Swiss companies, the Swiss capital market is rather international (see table 1).

Table 1

Nationality of shareholders/shareholding companies[10]	
USA	43,04 %
Switzerland	17,70 %
Luxemburg	8,50 %
United Kingdom	6,48 %
Norway	5,96 %
Other countries	18,32 %

The Swiss law is – in line with its general approach to regulation – very liberal (except when it comes to buying and selling real estate or financial intermediaries) and does not provide for any restrictions against foreign takeovers. In essence, Swiss capital market law is designed to attract foreign investments and any restrictions for foreigners would disturb the investor-friendly environment.

In 2017, there were 722 mergers and acquisitions (including takeovers) with a volume of CHF 68.45 billion (see table 2).[11] It is not surprising that Switzerland has many takeovers, a lot of them in public focus. In February 2017, US-based Johnson & Johnson announced a takeover offer for the Swiss biotech company Actelion. The deal was valued at approximately US$30 billion. In May 2017, Clariant and Huntsman announced their intention to merge. They planned a cross-border all-stock merger structured as a reverse triangular merger with a value of approximately US$20 billion at announcement. After the intervention of a major shareholder however, the deal was stopped in the same year. Another significant deal in 2017/18 was the acquisition of Breitling, one of the last independent Swiss luxury watch manufacturers, by CVC Capital Partners. This deal is remarkable because it reflects the dominance of private equity players in the Swiss M&A market.[12]

10 Rasch, Wem gehört der Schweizer Aktienmarkt?, NZZ online of 21 August 2015, https://www.nzz.ch/finanzen/aktien/wem-gehoert-der-schweizer-aktienmarkt-ld.1519.

11 https://www.handelszeitung.ch/invest/bilanz-fur-2017-ma-boom-der-schweiz.

12 https://www.baerkarrer.ch/publications/Switzerland2018.pdf.

Table 2

Volume of takeovers in 2017[13]		USD billion
outbound (target outside Switzerland)	listed target	3.757
	private target	11.313
inbound (target within Switzerland)	listed target	49.665
	private target	2.510

However, since there is no reciprocity with China, a discussion started in summer 2018 whether the liberal Swiss regime should be restricted. Among others, the 2016 deal ChemChina/Syngenta (a deal worth US$43 billion) in particular was seen as an example of a general tendency. Chinese investors were able to buy companies in Switzerland but China on the other hand was not willing to open its own market for foreign takeovers. Therefore, some scholars proposed to empower the Swiss government with means to stop foreign takeovers if the target company is of vital interest to Switzerland.[14] The discussion is still ongoing.[15]

When talking about takeovers, the first idea that comes to people's mind is the 1987 film "Wall Street" by Oliver Stone. The protagonist Gordon Gekko, played by Michael Douglas, is a ruthless capitalist who smashes companies without any consideration to employees or family traditions. This image might have been true at the beginning of the 1980's. Reality is far more differentiated. Economic studies have shown empirical evidence suggesting that takeovers overall do create value in practice if one aggregates the returns of target and bidder shareholders. However, unfortunately I do not have the time to elaborate all details about the protection of stakeholders in takeover situations that have been extended since the times of Gordon Gekko. Nor do I have the time and expertise to scrutinize the economic findings of these studies.

---

13 http://www.iflr.com/Article/3673259/2017-Mergers-and-Acquisitions-Report-Switzerland.html.

14 Binder, Weshalb sehen wir tatenlos zu, wie pflichtenlose Investoren unsere Wirtschaft attackieren?, GesKR 2017, 263 et seq.; Daeniker, Good Governance bei M&A-Transaktionen – Rückblick auf 20 Jahre, in: Tschäni (ed.), Mergers & Acquisitions XX, Zurich 2018, p 104 et seq.; Valda, Politiker wollen Firmenkäufe der Chinesen bremsen, Tagesanzeiger online of 11 August 2018, https://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/schweizer-politiker-fordern-schutzwall-gegen-china/story/17307623.

15 This discussion has become more topical in spring 2020: In March, the Swiss parliament instructed the Federal Council to draft a corresponding law on the control of foreign takeovers (a "Lex China") (see the decision of the Council of States of 17 June 2019 and the decision of the National Council of March 3 and the "Motion Rieder 18.3021"). Therefore, in future, an authority for investment control might examine foreign investments. However, it is expected that the legislative process will take time and has to overcome many hurdles. See also Böni/Wassmer, Weiterentwicklung der Zusammenschlusskontrolle zur Vermeidung unerwünschter Firmenübernahmen durch chinesische Investoren, RIW 2019, 707 ff.

III. Some Basics on Swiss Takeover Law

1. Legal Framework for Public Tender Offers

Public tender offers[16] are regulated in art. 125 – 141 FMIA[17]. Implementation rules can be found in art. 116 – 121 FMIO-FINMA[18] and art. 30 – 47 FMIO-FINMA[19] and the TOO[20]. The organisation of the Swiss Takeover Board is provided for by the R-TOB[21].

2. Purpose of the Rules on Public Tender Offers

The rules and regulations on public tender offers serve several different purposes which are interlinked with the functions of public tender offers as such:

- The legal regime shall guarantee a level playing field through means of the duties of disclosure, fairness and equal treatment (cf. art. 1 (2), art. 131 (c) FMIA, art. 1 TOO).
- The law aims at ensuring that shareholders of a target company can decide about the offer without any time pressure and on the basis of comprehensive information (*freedom of choice*). Therefore, the boards of the bidder company and the target company are obliged to disclose all relevant facts.
- The takeover law serves the purpose of investor protection on the one hand and the protection of the market for corporate control on the other hand. Investments shall be allocated to the company which has the most effective management. As a result of a successful tender offer, an ineffective management risks losing its job. Thus, the threat of a public tender offer has a disciplining effect on the management and – in theory – reduces the costs shareholders have to bear in order to control the management.
- Because the members of the target company's board might be biased in fear of losing their jobs, they are subject to a duty of neutrality. However, in Switzerland this rule is applied less

---

16 There is a vast amount of publications on the topic. A description of the Swiss takeover law provision by provision can be found in the commentaries of: Watter/Bahar (eds.), Basler Kommentar Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz (BSK FINMAG/FinfraG), 3rd ed., Basle 2019; Sethe et al. (eds.), Kommentar zum Finanzmarktinfrastrukturgesetz (SK FinfraG), Zurich 2017; Weber, Kommentar Börsenrecht, 2nd ed., Zurich 2013; Gericke/Wiedmer, Kommentar Übernahmeverordnung, 2nd ed., Zurich 2020. For a continuous text description see: Fahrländer, Das Schweizer Börsenrecht, in: Bovet (ed.), Finanzmarktaufsicht, Basle 2016, p. 431 et seq.; Glatthaar/Bernet/Luginbühl, Swiss Takeover Law, Zurich 2013; Höhn/Lang/Roelli, Öffentliche Übernahmen, Basle 2011; Nobel, Schweizerisches Finanzmarktrecht, 4th ed., Berne 2019, § 8 Note 1087 et seq.; Nobel, in: Berner Kommentar – Das Aktienrecht, Berne 2017, § 4 Note 126 et seq.; Schenker, Schweizerisches Übernahmerecht, Berne 2009; Schweizerische Übernahmekommission (ed.), Schweizerisches Übernahmerecht in der Praxis, Zurich 2005; Tschäni/ Diem/Gaberthüel (footnote 1).

17 Financial Market Infrastructure Act (FMIA) of 19 June 2015 (status as of 1 January 2020), SR 958.1.

18 Financial Market Infrastructure Ordinance (FMIO) of 25 November 2015 (status as of 1 January 2020), SR 958.11.

19 FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA) of 3 December 2015 (status as of 1 September 2018), SR 958.111.

20 Ordinance of the Takeover Board on Public Takeover Offers (TOO) of 21 August 2008 (status as of 1 January 2016), SR 954.195.1.

21 Regulations of the Takeover Board (R-TOB) of 21 August 2008 (status as of 1 January 2016), SR 954.195.2.

strictly than in other countries because e.g. the board might recommend one of several offers if it is convinced to act in the best interest of the company.[22]

- Derived from a duty of equal treatment of all bidders, the target company is obliged to consider competing offers.
- Mandatory public tender offers enable shareholders to exit from the company in case of a change of control.
- Finally, the rules on public tender offers shall ensure that the target company is not unduly hindered to carry out its ordinary business. In other words, the takeover rules shall prevent a long-lasting period of uncertainty for the board and the shareholders of the target company.

3. *Scope of Application*

a. *Offer*

Takeover law applies to public tender offers that relate to the equity securities of companies. A public tender offer is defined in art. 2 (i) FMIA as being an offer to purchase or exchange equity securities. In the article, the term “offer” is interpreted broadly and includes any solicitation to shareholders to sell or exchange their equity securities. As such, it is irrelevant whether the offer is friendly or hostile, whether it is an offer to buy all shares or only a certain amount, whether it is mandatory or voluntary or whether it is conditional or unconditional.

b. *Public*

There is neither a legal definition of the term “public” nor a consensus on a fixed minimum number of persons that have to be addressed. The Swiss Takeover Board ruled that an offer is public if it is addressed to a number of persons that is too numerous to allow for individual contractual negotiations with each shareholder.[23] An example would be an offer that is directed at or that is published in a way as to reach a large number of persons (e.g. through newspapers, TV or the internet). It does not matter how many people effectively read or respond to the offer.[24]

The definition of “public” excludes a “creeping tender offer” whereby the buyer purchases shares on an individual basis over a longer period of time. Although the “creeping tender offer” is not subject to the definition of a “*public*” offer, it might nevertheless infringe on other legal obligations such as the duty to disclose the amount of shareholdings (art. 120 FMIA) or the obligation to publish a mandatory tender offer after having gained more than 33.3 % of all shares (art. 135 FMIA, see below).

c. *With Regard to Equity Securities*

As the definition in art. 2 (i) FMIA points out, the offer must relate to equity securities. This term encompasses shares, participation certificates, profit-sharing certificates or other participation rights. Thus, debt instruments such as bonds are not covered by the scope of the takeover rules.

d. *Listing of the Securities*

Swiss takeover law applies only if all or parts of a company’s equity securities are listed at a Swiss stock exchange. If the company has more than one category of shares, the offer has to cover all categories of listed shares (art. 9 (2) TOO). Because a partial listing is sufficient, the duty of equal treatment of all shareholders also applies to non-listed securities if the offer refers to listed and non-listed equity securities (art. 9 (2) TOO).

---

[22] Tschäni/Diem/Gaberthüel (footnote 1) Note 774.

[23] Case 260/03 in the matter of Berna Biotech of 10 February 2006, 2.4.

[24] Swiss Banking Commission (EBK), Ruling in the matter of SGS Société Général de Surveillance Holding SA of 5 October 1998, Bull. EBK 39/2000, p. 15, 21 et seq.

e. Territorial Scope

The rules on tender offers apply to all target companies registered in Switzerland whose equity securities are at least partly listed on a Swiss stock exchange (art. 125 (1) (a) FMIA). They also apply to companies with their registered office abroad whose equity securities are "at least in part mainly listed in Switzerland" (art. 125 (1) (b) FMIA).[25] If a Swiss domiciled company is only listed abroad, Swiss takeover law does not apply.

Art. 125 (2) FMIA provides for a rule with regard to companies with a dual listing. If both Swiss and foreign law are applicable simultaneously to a public takeover offer, the provisions of Swiss law may be relinquished if the application of Swiss law would lead to a conflict with the foreign law, and the investor protection provided by the foreign law is equivalent to that provided by Swiss law.

The registered office or domicile of the bidder does not matter. Thus, the bidder can be a Swiss or foreign national or company.

f. Circumventions

The Takeover Board takes cases of (even attempted) circumventions seriously. Thus, it applies the law to cases where the company is delisted with the intention to avoid a public tender offer, or where the public tender offer is delayed until after the delisting,[26] or where the company is delisted during the ongoing tender period.[27] The same is true for a public tender offer with regard to a non-listed company that evolved from the demerger of a listed company.[28]

g. Exemptions

Provided it is justified by overriding interests, the Takeover Board may *ex officio* or in response to a request waive compliance with the individual provisions of the TOO (art. 4 TOO). In particular, the Takeover Board may exempt the offeror in cases of the repurchase of its own equity securities, if equal treatment, transparency, fairness, and good faith are guaranteed and there are no indications of any circumvention of the requirements of the FMIA or other provisions.[29]

IV. The Mandatory Public Tender Offer

1. Overview

Swiss law distinguishes between voluntary and mandatory offers, and it provides for a different set of rules for these two scenarios. A voluntary offer means that a bidder publicly announces that he or she wants to acquire a certain amount of shares. As soon as a person has exceeded the threshold of one third of the voting rights, he or she must publish a mandatory offer to purchase all remaining shares.

---

25 Currently 13 companies; the stock exchange must publish a list of those foreign companies (art. 116, 115 (2) FMIO), https://www.six-exchange-regulation.com/de/home/issuer/obligations/disclosure-of-shareholdings/capital-foreign-companies.html.

26 Case 0141/02 in the matter of Schweizerische Lebensversicherungs- und Rentenanstalt of 2 December 2003, 1.3.4.

27 Case 0550/01 in the matter of Victoria-Jungfrau Collection AG of 7 November 2013, 1.

28 Case 0556/02 in the matter of Walter Meier AG/WM Technologie AG, 1.

29 Takeover Board Circular No. 1: Buyback programmes of 27 June 2013 (status as of 1 January 2016).

In what is rather complicated wording, art. 135 FMIA stipulates the prerequisites of a mandatory offer: Anyone who directly, indirectly or acting in concert with third parties, acquires equity securities which, when added to the equity securities already owned, exceed the threshold of 33.3 % of the voting rights of a target company, whether exercisable or not, must make an offer to acquire all listed equity securities of the company. The offer has to be made within two months after exceeding the threshold of one third of the voting rights.

A mandatory offer is an exception to the principle of freedom of contract. The rationale behind it is the notion of minority protection. In cases where a person holds more than one third of a company's shares, he or she *de facto* controls the shareholder meeting because on average only 60 % of all shareholders attend those meetings. If a person newly acquires shares and as a result exceeds one third of the voting rights, a shift of control takes place. In this situation the other shareholders shall have the possibility to leave the company by selling their shares to the new dominating shareholder (*possibility of exit*). One could argue that a mandatory offer is a disproportionate burden on the offeror. However, past experience has shown that in practice selling those minority shares on the market is often impossible or leads to low prices that do not reflect the intrinsic value of the company. This is especially true in cases where the business plan of the new dominating shareholder is considered to be controversial. On top, it is the new dominating shareholder who is in the *de facto* position to dictate the price especially in cases where the sales volume of the shares is low (*narrow market syndrome*). An additional argument in favour of the mandatory offer is the *equal treatment of shareholders* in the market. The dominating shareholder is willing to pay a high price in order to acquire the controlling position and, once completed, ends up paying much less for the "leftovers". In that situation, shareholders have a strong incentive to sell as soon as possible and do not have enough time to evaluate the situation (so called "danger of a greyhound racing"). If the shareholders know that they can sell their shares at a fair price even if the bidder acquires a dominating position, there is no time pressure anymore.

The disadvantage of mandatory offers for the offeror/dominating shareholder is that the acquisition of control over the company might become more expensive. However, this disadvantage is not critical if one considers that the offeror holds in fact a strong influence over the reaction of the minority shareholders. If he or she is able to convince the minority shareholders that the new business plan for the enterprise will be an improvement, the shareholders will not use the exit offer. In that case, the offer will not turn out to be more expensive. The burden on the dominating shareholder is not disproportionate because – at the end of the day – it is in his hands how expensive the offer will be. Therefore, the reoccurring argument that mandatory offers hamper the market for corporate control[30] can be refuted.

2. *Opting-out or Opting-up*

Prior to the equity securities being listed on a Swiss stock exchange, the articles of association of a company may stipulate an opting-out. In that case, an offeror shall not be bound by the obligation to make a mandatory public tender offer (art. 125 (3) FMIA). Such a clause can also be introduced after listing, provided that this does not prejudice the interests of shareholders (art. 125 (4) FMIA). The stock exchange publishes a list of the companies that have exercised this option[31] (currently 58 out of 248 listed companies).

The company may by stipulation in its articles of association raise the threshold for a mandatory bid up to 49 % (art. 135 (1) FMIA) (currently 12 out of 248 listed companies).

Both options are result of a compromise in Swiss Parliament achieved between the proponents and opponents of the mandatory bid rule.

---

[30] For the discussion see Fahrländer (footnote 16) Note 584.

[31] https://www.six-exchange-regulation.com/de/home/publications/opting-up-out.html.

3. *The Scope of Application for the Voluntary Public Tender Offer*

A voluntary public tender offer is possible in three cases: It is possible if the bidder wants to buy an amount of shares whereby he or she ends up with not more than 33.3 % (resp. in a case of opting-up with not more than 49 % of the shares). Furthermore, it is also possible in cases where the target company used the opting-out from the mandatory rule, but now wants to acquire shares. Finally, a voluntary public tender offer is used if the bidder already holds shares above the trigger of 33.3 % (49 %) and wants to purchase the rest of the shares.

4. *Threshold of the Mandatory Public Tender Offer*

a. *Regular Threshold*

An offer has to be made if a natural or legal person acquires ownership[32] of more than 33.3 % of all voting rights of the target company. As already mentioned, target companies may raise this threshold up to 49 % of the voting rights in its articles of association (*opting-up*).

When defining voting rights, the law encompasses all voting rights (whether exercisable or not). Examples of not exercisable voting rights are:

- Own shares of the company (art. 659a (1) CO),
- Shares that are subject to voting restrictions (art. 692 (2) CO),
- Registered shares until the owner is signed into the stock register (art. 685f (2), (3) CO) or
- Shares with suspended voting rights as a sanction for the violation of the duty to disclose the amount of shareholdings (art. 144 (a) FMIA).

b. *Grandfathering*

The threshold is 50 % for all companies in which a shareholder or group of shareholders already had more than one third (but less than 50 %) of the voting rights as at 1 February 1997 (art. 163 (1) FMIA). The same applies to shareholdings that for the first time fell into the scope of the law after its reform in 2013 (art. 163 (2) FMIA).[33]

5. *Addressees of the Duty*

a. *Direct and Indirect Acquisition*

The mandatory public tender offer is triggered if a person directly or indirectly acquires equity securities and exceeds one third of the voting rights (art. 135 (1) FMIA, art. 31 FMIO-FINMA). A direct acquisition is given if the person buying the securities is identical with the beneficial owner behind the transaction, i.e. if a natural or legal person buys the shares for him/herself.

An indirect acquisition is defined as a transaction whereby a person acting under her own name executes in favour of another person who will exercise the voting rights (art. 32, 11 FMIO-FINMA). Thus, the formal owner and the beneficial owner are not identical. This is true for trusts and for directly or indirectly controlled legal entities (group of companies). The duty to make the offer is incumbent only on the beneficial owner, but not on the formal owner (art. 32, 11 FMIO-FINMA).[34]

---

[32] Not sufficient is the (prior) claim to ownership by a mere purchase agreement. Decisive is the *in rem* status; Barthold/Schilter, in: Sethe et al., SK FinfraG (footnote 16), art. 135 Note 21 et seq.; Hofstetter/Schilter-Heuberger/Brönnimann, in: BSK FINMAG/FinfraG (footnote 16), art. 135 Note 71.

[33] If such a person transfers the shares, the duty to make an offer is triggered already for shareholdings between 33⅓ and 50 % of the voting rights (art. 36 FMIO-FINMA).

[34] Case 0423/01 in the matter of EFG International AG of 24 July 2009, 3.3.

b. Acting in Concert or as an Organised Group

A public tender offer has not only to be submitted if *one* person fulfils the prerequisites of art. 135 FMIA, but also if several parties – by contract or other organised procedure or by law – are *acting in concert* or as *an organised group* (art. 33, 12 (1) FMIO-FINMA). Two constellations are covered:

- The group is founded in order to purchase more than one third of all voting rights with the intention to control the company.
- Persons who are already shareholders coordinate their actions or set up a group that owns more than one third of the voting rights in order to control the company.

According to the Swiss Federal Court, in both constellations "control intent" is necessary. Such intent however can be deducted from the external circumstances of the transaction and/or the behaviour of the parties.[35] The duty to make the offer is incumbent on the group (joint liability of all members) or the persons acting in concert. In addition, any member of the group who owns shares of more than one third of all shares is subject to the same duty.[36]

c. Change in the Capital Structure

The obligation for submitting a mandatory offer can also be triggered if the total number of voting rights within the company is reduced with the effect that one shareholder or a group of shareholders exceed the threshold. Such a situation can occur, for instance, after a capital reduction by redemption of own shares or after an asymmetric demerger of the company. Because the person or group that as a result owns more than one third of the voting rights might not have intended to acquire such a quota, the law provides for an exemption clause in this case (*cf.* art. 136 (1) (b) FMIA, see *infra* IV. 6. c).

6. Exemptions

a. Acquisitions by Act of Law as a General Exemption

The duty to make an offer does not apply if the voting rights have been acquired as a result of a donation, succession or division of an inheritance, matrimonial property law, or compulsory execution proceedings (art. 136 (2) FMIA).

The claim to an exception needs to be notified to the Takeover Board which must initiate an administrative procedure within five trading days if it has reason to suspect that the conditions of the exemption have not been met (art. 40 (2) FMIO-FINMA). The exemption is deemed granted if the period expires without any action by the Takeover Board.

b. Acquisitions for Certain Purposes

No offer has to be made if the threshold is exceeded during a restructuring resulting from a capital downgrade and a prompt capital increase for the purpose of offsetting a loss. Also no offer is required if banks or securities dealers acquire equity securities as part of an issue of those securities and sell that part of equity securities exceeding the threshold within three months.[37] The temporary shareholding does not entail a change of control. With regard to the application for an exemption, see art. 40 (2) FMIO-FINMA, as described above.

---

35 See decision of the Federal Supreme Court BGE 130 II 530, 6.5.

36 See Fahrländer (footnote 16) Note 599.

37 The period may be extended if necessary and justified, cf. art. 40 (3) FMIO-FINMA.

c. Discretionary Exemptions on a Case-by-Case Basis

The Takeover Board has the discretion to grant exemptions from the duty to make an offer in certain justified cases. The law mentions the following non-exhausting list of examples:

- No offer is needed where the transfer of voting rights occurs within a group organised pursuant to an agreement or otherwise. In such a case, only the group as such shall be subject to the duty to make an offer, and the transfer within the group does not change the voting structure as such (art. 136 (1) (a) FMIA).
- If the threshold is exceeded as a result of a decrease in the total number of voting rights of the company, the shareholders (in most cases) do not intend to change the control of the company. This justifies an exemption (see *supra* IV. 5. c) (art. 136 (1) (b) FMIA).
- No offer is needed where the threshold is exceeded only temporarily (art. 136 (1) (c) FMIA).
- In the normal course of business, securities might be acquired without consideration (*bonus shares*) or on exercise of pre-emptive rights pursuant to a share capital increase. These incidents are normally not intended to change control within the company (art. 136 (1) (d) FMIA).
- Another exemption is possible if the securities have been acquired in order to rescue the business enterprise. Otherwise it would be difficult (or impossible) to find a person willing to reorganise the enterprise (art. 136 (1) (e) FMIA).
- If the person acquiring more than one third cannot control the target company because another person or group already has a higher amount of voting rights, no offer is needed (art. 41 (2) (a) FMIO-FINMA).
- If a member of an organised group (see art. 136 (1) (a) FMIA) exceeds the threshold additionally to the excess of the threshold by the group, he or she must not make an offer because the group is already obliged to do so.
- The Takeover Board may grant an exemption if the previous acquisition was made indirectly, the acquisition was not one of the main aims of the transaction and the interests of the target company's shareholders remain protected.

In all cases a decision of the Takeover Board is necessary (art. 61 (1), (2) TOO). Conditions may be attached when granting exceptions, in particular the setting of obligations incumbent on the acquiring person in the future (art. 41 (3) FMIO-FINMA). According to art. 41 (4) FMIO-FINMA, those conditions are binding for a legal successor who acquires a shareholding exceeding one third of the voting rights, even if the legal successor is exempt from the duty to make an offer under Art 136 (2) FMIA.

7. Other Requirements and the Subject of the Offer

The rules applicable for voluntary public tender offers also apply to mandatory ones. However, the latter are subject to a number of special restrictions. The offer must relate to all of the target's equity securities (i.e. shares, participation certificates, profit-sharing certificates or other participation rights) listed on a Swiss stock exchange. A partial offer is inadmissible because all minority shareholders shall have the opportunity of an exit.

The offer does not relate to bonds or other debt instruments, even if these are listed. The same is true for convertible rights or options on securities even if these rights are listed.[38] There is one exception though: The offer must include new equity securities created through equity derivatives,

[38] Case 0033/02 in the matter of Banca del Gottardo of 26 April 1999, 3; Tschäni/Iffland/Diem, in: BSK FINMAG/FinfraG (footnote 16), art. 125 Note 5.

if the associated rights are exercised prior to the expiry of the extended offer period under art. 130 (2) FMIA (art. 35 (2) FMIO-FINMA).[39]

In order to avoid a conflict with other jurisdictions that might lead to the liability of the offeror, a public tender offer may exclude shareholders residing in certain jurisdictions (*sales restrictions*).[40] Sales restrictions have to be limited to the minimum necessary in order to reach the pursued goal of excluding any liability. In other words: The offeror has no discretion but needs to prove the existence of objective grounds for any restriction.

It goes without saying that the offer can exclude all equity securities that already belong to the bidder or the bidding group.[41]

8. *Conditional Offer*

As a general rule, a mandatory offer may not be subject to any conditions. This distinguishes the mandatory offer from voluntary offers. This rule prevents constellations whereby the offeror tries to circumvent a mandatory offer by imposing impossible conditions. However, a conditional mandatory offer is allowed in exceptional cases, e.g. if a purchase needs an administrative approval (such as the consent of the antitrust authorities).[42]

V. The Bid Price in Cases of a Mandatory Offer

1. *The Purpose of Legally Fixing the Bid Price*

The minimum bid price of a mandatory public tender offer is fixed by law.[43] Otherwise the bidder could circumvent the obligation to make an offer by fixing an artificially low price. Therefore, the price offered must be at least as high as the higher of the following two amounts: a. the stock exchange price; b. the highest price that the offeror has paid for equity securities of the target company in the preceding twelve months (art. 135 (2) FMIA). The combination of these two methods to determine the bid price serves the purpose of equal treatment of all shareholders of the target company. If the target company has issued several classes of equity securities, there must be an appropriate relationship among the prices offered for the various classes of equity securities (art. 135 (3) FMIA, art. 42 (1) FMIO-FINMA).

2. *The Legal Requirements in Fixing the Price*

a. *The "Stock Exchange Price"*

The "stock exchange price" depends on the following factors:

- As a general rule, the stock exchange price corresponds to the volume-weighted average price of the stock exchange trades of the last 60 trading days prior to publication of the offer or the preliminary notification (art. 42 (2) FMIO-FINMA).
- The price must be adjusted to negate the effects of significant price influences triggered by any special events (e.g. dividend distribution or capital transactions) that occurred during this

---

39 Case 0171/02 in the matter of EIC Electricity SA of 21 August 2003, 2.2.

40 For details see Fahrländer (footnote 16) Note 610, 431 et seq.; Gericke/Wiedmer (footnote 16), art. 9 Note 85 et seq.; Glatthaar/Bernet/Luginbühl (footnote 16) p. 66.

41 Case 0171/02 in the matter of EIC Electricity SA of 21 August 2003, 2.2.

42 Hofstetter/Schilter-Heuberger/Brönnimann, in: BSK FINMAG/FinfraG (footnote 16), art. 135 Note 120 et seq.; Gericke/Wiedmer (footnote 16), art. 13 Note 13 et seq.

43 The minimum price is not applicable to a voluntary offer. Only the best price rule applies because it is derived from the rule of equal treatment which is valid for all kinds of offers.

period. In order to prevent manipulations, an audit firm must confirm the adequacy of the adjustment and show the calculation basis in its report (art. 42 (3) FMIO-FINMA).

- If the listed equity securities are not liquid[44] prior to disclosure of the offer or prior announcement, an audit firm must evaluate the company by means of a report. In its report the audit firm shall outline the evaluation methods used and the basis for evaluation. It shall provide an explanation of whether and, if so, to what extent, the setting of the minimum price is based on the stock exchange price or company value (art. 42 (4) FMIO-FINMA).

b. The "Highest Price paid within the last 12 Months"

The "highest price paid within the last 12 months" is determined as follows (cf. art. 43 FMIO-FINMA):

- Relevant is the highest price paid by the offeror for equity securities in the target company over the past 12 months prior to publication of the offer or prior notification.
- The price must be determined separately for each type of equity security. The price of the most expensive equity security relative to the nominal value forms the basis for setting the appropriate ratio between the prices of different types of equity security.
- If the bidder has acquired equity securities of the target company through an exchange of securities instead of payment in cash, the price is calculated at the value of these securities at the time of their exchange.
- If the person buying or selling has added other benefits (e.g. guarantees, payment in kind, personal discount) in addition to the main payment for the previous acquisition, the price for the previous purchase shall be reduced or increased correspondingly.
- If the acquisition took place in form of an exchange of securities or with the addition of benefits, an audit firm must review the valuation of the equity securities and the adequacy of the increase or decrease in the price. The calculation details must be shown in the report.
- To prevent circumventions, art. 44 FMIO-FINMA stipulates that the buyer – if the prior acquisition was made indirectly – must disclose the price he or she paid (indirectly) for his/her share of the target company's equity securities. This information is part of the offer prospectus. The valuation must be audited by an audit firm.
- Art. 47 FMIO-FINMA provides for the possibility of exemptions to these rules which may be granted for good cause by the Takeover Board.

c. The Best Price Rule

In addition, the offeror has to abide by the "best price rule" (art. 10 TOO):

- If the offeror directly or indirectly acquires equity securities of the target company within the period running from the publication of the offer until six months after the additional acceptance period at a price that exceeds the offer price, he or she must offer this price to all recipients of

---

44 The Takeover Board gave a definition of the term "liquidity" in its Circular No. 2 re Liquidity in the context of takeover law of 26 February 2010 (status as of 1 January 2016): A security included in the Swiss Leader Index of the SIX Swiss Exchange (SLI) shall always be deemed liquid. Other securities are considered illiquid if the monthly median of the daily volume of on-exchange transactions is less than 0.04% of the tradable portion of the relevant security (*free float*) in at least 10 of the 12 full months preceding the publication of the offer or the pre-announcement.

the offer. The term "recipients of the offer" means not only those shareholders who accepted the offer but includes all shareholders of the target company.[45]

- The best price rule also applies to a group of offerors acting in concert. This means that the best price rule is triggered for the whole group if one member buys at a price that exceeds the offer price. However, the risk for the group members is significant. Some groups therefore conclude an agreement whereby they undertake not to buy any shares of the target company. However, such an agreement can be a "blunt sword".[46] If one member ignores it, the best price rule is applicable and the group members are jointly liable to pay the extra amount to the shareholders. They can claim damages from the violating group member. Thus, this remedy is only worthwhile if the perpetrator has enough funds available.
- The rule is even applicable if the acquisition of the shares is undone at a later date.[47]
- The best price rule also applies to the acquisition of participation derivatives and to offers relating to such instruments.
- It also applies to acquisitions within the group acting in concert. This extensive interpretation of the rule safeguards that bidders do not form a group simply for the purpose of giving a premium to one of its members.[48]
- If a bank or a broker was involved into the takeover, the question arises whether they are prevented from making trades in the target share market for the next six months. The Takeover Board differentiates as follows: If the bank or broker acquires shares on the account of customers the rule does not apply. The opposite is true if the purchase is for proprietary trading or for the account of an investment company that is managed by the bank. However, the takeover board may also grant an exception in extraordinary circumstances (art. 4 (1) TOO).
- Another exception of the rule are share buyback programmes. Otherwise the target company would be hampered in its business activities which would violate the purpose of the takeover law to safeguard the ongoing business of the target company as far as possible.
- After publication of the offer, auditors shall verify whether the provisions of the FMIA and ordinances, as well as the decisions of the Takeover Board in connection with the offer, have been complied with throughout the offer period (art. 28 (1) TOO). It shall in particular verify whether the best price rule was observed. The auditors submit their report to the takeover board.

3. *Abolition of the Control Premium*

From 1 January 1997 until 1 Mai 2013, it was allowed to pay a control premium of up to 33⅓. This premium was an exception of the duty of equal treatment and could be paid to a major shareholder. It was not necessary that the acquisition from that major shareholder in turn led to a position for the buyer to control the target. Therefore, the bidder had discretion to whom he paid the premium and to whom not.[49]

---

[45] Swiss Banking Commission (EBK), Ruling in the matter of Implenia AG of 20 December 2007, 24 et seq.; Barthold/Schilter, in: Sethe et al., SK FinfraG (footnote 16), art. 135 Note 128.

[46] Barthold/Schilter, in: Sethe et al., SK FinfraG (footnote 16), art. 135 Note 126.

[47] Case 0624/01 in the matter of Syngenta AG of 2 February 2016, 4.4; Case 0572/03 in the matter of UBS AG of 3 October 2014, 8.3; Barthold/Schilter, in: Sethe et al., SK FinfraG (footnote 16), art. 135 Note 130.

[48] Case 0542/01 in the matter of Società Elettrica Sopracenerina S.A. of 31 July 2013, 5.2.

[49] Gruber, Die Pflicht zum Übernahmeangebot im neuen Börsengesetz, Zurich 1996, p. 105 et seq.

It was argued that the controlling position in a company had a higher value than a minority position or a mere splinter involvement.[50] Academic scholars argued that a major shareholder bears a higher risk than an average shareholder because his/her capital was not diversified and he/she therefore had to monitor his investment more closely. The control premium was seen as remuneration for bearing this extra risk.[51] Another justification for the control premium was the fact that when selling their shares, major shareholders often had to give representations and warranties to the buyer. The control premium compensates for the risks inherent in those guarantees.[52]

The abolition of the control premium was based on the consideration that the premium was unique within Europe and a major disadvantage for Switzerland as a location for IPOs.[53] The Swiss capital market is in strong competition with the markets of its neighbouring countries which all belong to the European Union where a control premium does not exist.

4. *Ways of Settlement of Mandatory Offers*

Depending on the kind of offer, the bid price may be paid either in cash or in exchange of securities or in a mixture of both. However, settlement against securities is permitted provided full payment in cash is offered as an alternative. Thus, shareholders of the target company, who do not want to become shareholders of the bidder, have the option to take cash (art. 45 FMIO-FINMA). In addition, the option has a second purpose – it hinders a bidder to make an unattractive exchange offer.

As long as the minimum price rule and the best price rule are observed, it is possible that the value of the payment in cash and the one in exchange of securities may differ (art. 9b TOO). Therefore, a bidder has the possibility to make the exchange of securities more attractive than the cash offer.

VI. Sanctions for Violations of the Duty to Publish a Tender Offer

1. *Criminal Sanctions*

A fine not exceeding CHF 10 million shall be imposed on any person who wilfully fails to comply with a legally binding duty to make an offer (art. 152 FMIA).

2. *Sanctions in Supervisory Law*

Because the takeover proceedings are administrative by their very nature, a mandatory offer may in theory be enforced by means of an administrative act. However, the Swiss Financial Market Authority does not have the power to establish contractual obligations between the shareholders and the offending offeror.

---

50 Botschaft zu einem Bundesgesetz über die Börsen und den Effektenhandel (Börsengesetz, BEHG) of 24 February 1993, BBl 1993 I 1418; Statement Takeover Board, Kontrollprämie, Stellungnahme an das Eidgenössische Finanzdepartement EFD, Staatssekretariat für internationale Finanzfragen (SIF), Leiterin Rechtsdienst EFD, of 21. Januar 2011, Note 12 <https://www.newsd.admin.ch/newsd/message/attachments/21917.pdf>.

51 Statement Takeover Board (footnote 50), Note 13; Gruber (footnote 49), p. 106; Frei, Öffentliche Übernahmeangebote in der Schweiz, 2nd ed. Berne 1997, p. 128.

52 Frei (footnote 51), p. 128.

53 In favour of the abolition: Thévenoz/Roos, Die sogenannte Kontrollprämie im Übernahmerecht, SZW 2011, p. 612 et seq.; against it: Reiser/von der Crone, Mindestpreis nach Art. 32 Abs. 4 BEHG, GesKR 2012, p. 29 et seq.

Only the sanctions of a suspension of the voting rights and the prohibition to purchase additional shares or pre-emptive rights of the target company (*cf.* art. 135 (5) FMIA) are therefore effective. The suspension lasts until the duty to make an offer has been clarified or, as appropriate, the duty to make an offer has been fulfilled.

3. Civil Law Sanctions

The mandatory rule is seen not only as a matter of administrative law but also as one of civil law (double nature). Therefore, the shareholders might sue the offending person to make a mandatory offer.[54]

[54] Tschäni/Diem/Gaberthüel (footnote 1) Note 89.