Bär & Karrer Briefing

May 2013

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Revised Swiss Takeover Regime

On 1 May 2013, the revised Swiss takeover regime has come into force. The most relevant changes are the abolishment of the so-called control premium and the obligation to offer an all-cash alternative in a number of situations where such obligation previously did not exist. With respect to the structuring of public tender offers, bidders need to consider the implications of the revised regime and explore novel approaches.

Pre-tender Offer Stake Building

Background

Stake building prior to the launch of a public tender offer allows the bidder to increase the chances of success of its public tender offer because a significant stake at launch reduces the likelihood of a competing bid. Should a competing bid nevertheless be launched, it is likely that the initial bidder will make an attractive return on the stake he tenders into the competing bid.

Minimum Price Rule

Under the revised Swiss takeover regime of 1 May 2013, pre-offer stake building has become more complex as it is subject to a new set of rules: the bidder may no longer offer a control premium of up to 33⅓% above the subsequent tender offer price for purchases of target shares occurring prior to the launch of the public tender offer. The revised minimum price rule stipulates that the offer price in the public tender offer be at least equal to the highest price that the bidder has paid for target shares in the twelve months preceding the publication of the public tender offer (see article 32 (4) SESTA). The second cumulative element of the minimum price rule states that the offer price must be at least equal to the 60 trading days volume weighed average price (or based on a valuation if the target shares are deemed illiquid). This element has not been changed as part of the latest revision.

The minimum price rule applies to mandatory offers and change-of-control offers, i.e. offers which extend to shares whose acquisition would entail a mandatory offer obligation (see article 9 (6) TOO). The rule does not apply to purely voluntary offers which include partial tender offers and offers for any portion of shares of a target company which has a valid opting out provision in its articles of association.

The abolishment of the control premium means that in down markets or when a specific target's share price plummets due to a target specific negative event (e.g. following a profit warning), a bidder's purchases of target shares in the twelve months preceding the launch of the offer and, in particular, the ones prior to the fall of the target's share price, will set the floor for the subsequent tender offer price.

Under the revised minimum price rule, a bidder will have to carefully weigh the advantages of pre-launch stake building against the risk of setting the minimum offer price at a level which may prove unnecessarily high. A reconciling approach may be the attempt to acquire one or more stakes as close as possible to the launch date.

An instrument under the Swiss takeover regime which has previously existed but not actively been deployed, is the possibility of the Swiss Takeover Board to grant an exemption from the minimum price rule (see article 4 TOO). We expect that under the new regime, a practice for such exemptions may start to develop in order to correct the disadvantages which the revised minimum price rule may have on the recipients of the offer. To give an example, a possible scenario for such an exemption could be a situation in which a bidder is prepared to make a competing bid which is higher than the first offer but lower than the price paid by such bidder in the twelve months preceding the competing offer (i.e. a waiver from the floor setting element of pre-launch purchases by the bidder or persons acting in concert with the bidder would be granted).

As no practice of such exemptions exists today, it remains to be tested whether the Takeover Board will be prepared to grant such exemptions in the interest of the recipients of the offer.

Exchange Offers

Another new restriction on pre-launch stake building applies to exchange offers. An all-cash alternative must be offered to all recipients of a change-of-control offer if the bidder (or persons acting in concert with the bidder) has purchased 10% or more of the target shares for cash during the twelve-month period preceding the announcement of the exchange offer (see article 9a (2) TOO).

As this new pre-offer restriction is limited to change-of-control offers (and continues to apply unaltered to mandatory exchange offers), a bidder may purchase any amount of target shares for cash during the twelve months preceding the launch of the offer without triggering an obligation to offer a cash alternative if the offer is a purely voluntary one (i.e. a partial offer or an offer where the target disposes of a valid opting out).

Further Consequences

The revised rules applying to pre-launch stake building accentuate the importance for a bidder to actively monitor and control the behavior of persons acting in concert with it, such as legal entities directly or indirectly controlled by the bidder. Pre-launch purchases of such persons are attributed to the bidder with respect to the minimum price rule and the rule on all-cash alternatives in exchange offers. This increased need to control the behavior of persons acting in concert is at odds with the obligation to keep price sensitive confidential information – such as a potential public tender offer – limited to a small number of insiders.

From the perspective of the target's board, the revised minimum price rule and the new rules on cash alternatives in exchange offers reduce the signaling function of stake building as we expect more offers to be launched by bidders not holding any target shares at launch.

Opting Out to Ensure Flexibility?

The only way to avoid the applicability of the revised minimum price rule (and the obligation to offer a cash alternative in exchange offers where the bidder purchases 10% or more target shares for cash prior to the offer) is to introduce a valid opting out provision in the articles of association of the potential target company. Despite the fact that in a recent leading case (see decision on Advanced Digital Broadcast Holdings AG of 11 October 2012), the Takeover Board has aimed at restricting the possibilities to validly introduce an opting out provision in the articles of association of a potential target, there continues to be a number of situations where the chances to succeed in introducing an opting out exist.

The revised practice of the Takeover Board on opting outs stipulates the following: the shareholders' resolution on the introduction of an opting out is presumed to be in the interest of the target company or its shareholders, respectively, if a majority of votes is reached, both by counting the votes of all shareholders represented and by counting the votes of only such shareholders who have no interest in introducing the opting out provision (i.e. a majority shareholder and the shareholder who has tabled the vote on the opting out, as well as persons acting in concert with such shareholders are excluded from the count).

Even with such requirement being fulfilled, the Takeover Board may in exceptional circumstances hold that the presumption proves wrong. Shareholders may always challenge the shareholders' resolution before the competent civil court (within two months from the shareholders' meeting).

If the shareholders' resolution does not fulfill the requirements of the double counting of the votes, the Takeover Board presumes that the opting out is to the disadvantage of the minority shareholders and therefore not validly introduced. In such a situation, a current or future bidder who wishes to rely upon the provisions would need to demonstrate the contrary.

In order to allow an informed decision of the shareholders' meeting, information on the composition of the shareholder base, the plans of the requesting shareholder such as an envisaged change of control or another planned transaction must be made available to the shareholders. If the transparency requirements are not fulfilled, the opting out will be deemed invalid by the Takeover Board.

The Takeover Board has held that it will allow for opting out provisions which are limited to a specific change-of-control transaction. This change in practice is based on the reasoning that such selective opting out is less restrictive upon the shareholders of such company than a general opting out. It is not clear today whether the FINMA, which is the competent appeal authority and which has previously ruled against such selective opting outs (see decision on Esec Holding SA of 23 June 2000), will go along with the Takeover Board's leading case.

Given that the Takeover Board's new practice focuses on situations where an opting out is initiated by a shareholder or a group of shareholders, we believe that if a target board initiates the introduction of an opting out without there being any intentions among the existing shareholders to trigger a change-of-control transaction, there may be more room for the introduction of a general opting out provision.

All-cash Alternative During Exchange Offers

The rules on cash alternatives in exchange offers have not only been tightened with respect to pre-offer stake building (see Section 1.3 above), the Takeover Board has also acknowledged that, during the period following the settlement of the offer, there should no longer be any restrictions on the bidder with respect to purchases of target shares for cash. A bidder in an exchange offer may therefore acquire target shares for cash following the settlement of the offer for as long as the best price rule is respected (i.e. for six months after the end of the additional acceptance period, the price paid may not be higher than the value of the shares offered in exchange).

Another accentuation of the revised regime on exchange offers relates to the period from the publication of the offer until the settlement. It extends to all types of offers, including partial offers and offers where the target company disposes of a valid opting out provision in its articles of association. In the event that during this period the bidder (or any person acting in concert with the bidder such as the target company in case of a friendly offer) purchases any amount of equity securities of the target for cash, the bidder must extend an all-cash alternative to all recipients of the exchange offer (see article 9a (1) TOO).

With respect to all situations where a cash alternative must be offered, the cash alternative and the shares offered in exchange may differ in their respective values (see article 9a TOO). According to the Takeover Board's explanatory report on the revised rules of 10 April 2013, both types of considerations must, however, comply with the minimum price rule (i.e. a bidder may offer a premium on the share consideration, while the all-cash alternative may be limited to the minimum price). Although not explicitly mentioned in the explanatory report of the Takeover Board, this reference to the floor setting of the minimum price rule must be limited to change-of-control offers and mandatory offers. In purely voluntary exchange offers, the minimum price rule does not apply (see article 32 (4) SESTA) and may consequently not set a floor in relation to the obligation to offer a cash alternative.

With the exemption of the relaxation applying to the period following the completion of the exchange offer, the new rules are increasingly restrictive on the bidder. Among other inconveniences, the financing costs for the bidder will significantly increase with these rules.

Other Noteworthy Changes

Extension of Applicability of Swiss Takeover Regime

The applicability of the Swiss takeover regime has been extended to takeover offers for shares of target companies with registered offices abroad but with a main listing in Switzerland.

An exemption applies if the Swiss takeover regime conflicts with the foreign regime and if recipients of the offer benefit from an equivalent level of protection under the foreign regime. The list of such foreign companies is published on the SIX Swiss Exchange's website.

Shareholders' Rights in Takeover Procedures

The right of qualified shareholders to become a party to the takeover procedure and to appeal against decisions of the Takeover Board and the FINMA requires a shareholding of 3% of the target's outstanding share capital. By raising this requirement from 2% to 3%, such threshold is congruent with the first disclosure threshold under the disclosure regime applicable to significant shareholdings according to article 20 SESTA.

The change allows bidders to determine how many potential opponents he may face in the takeover procedure based on a review of the disclosure notifications. He may also approach them upfront to purchase their stake or explore their position on the potential offer (subject to compliance with the revised insider trading regime).

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