Recent developments in securities regulation
(Public takeover offers, disclosure of shareholdings, squeeze out)

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The second part of the Federal Act on Stock Exchanges and Securities Trading6 and of its implementing regulations (ordinances)5 came into force on January 1, 1998. This article aims to contribute to a general survey of the first rulings handed down in application of this regulation.

I. Public takeover offers

The Takeover Board publishes its practice, and the legal texts applicable, continuously on its Internet site3. The Federal Banking Commission (FBC) reproduces some of its decisions in its Bulletin1. It also started up its own Internet site at the end of April 19995.

A. Scope of application of the regulation

1. Spontaneous offers

Generally speaking a public takeover offer is intended to obtain or to strengthen the control of the offeror over the offeree. However, this is not always the case. Some public offers have only marginal influence over the shareholder structure. This may be the case in particular with transactions in which the shares of an operating company are exchanged against the shares of a holding company4, or of offers put forward by an issuer for a small proportion of its own shares.

There is a greater need for regulation in corporate takeovers than in public offers which have no influence on control7. In theory, two approaches are possible: either to exclude public offers with no influence on control from the scope of regulation, or to subject these transactions, while reserving possibilities of exemption, taking into account their particular character.

Under the aegis of the Swiss Take-Over Code that was then in force, the Commission for Regulation and the Swiss Exchange had generally opted for the first solution8. However, the entry into force of the Stock Exchange Act saw confirmation9 of a trend to have recourse to the second. Thus, the new Takeover Board noted that the absence of change in the shareholder structure did not exclude application of the rules on public takeover offers, but could only justify certain exceptions to the latter10. The Takeover Board and the FBC also ruled that public offers put forward by an issuer on its own equity securities are subject to the regulations on public takeover offers regardless of the impact which these operations may have on the shareholder structure11. However, according to the FBC, these buybacks may be exempted not only from some of the rules of the Takeover Ordinance, but even from the whole of the Stock Exchange Act12.

* The author is legal adviser to the Takeover Board. The opinions expressed in this article are not binding on the Board.
1 SR 954.11.
3 www.takeover.ch. All the documents of the Takeover Board mentioned below may be consulted at this address.
5 www.sfbc.admin.ch, or www.cfb.admin.ch, or www.ebk.admin.ch.
6 As a case in point, see recommendations Zurich of April 30 and June 12, 1998.
10 Recommendation Zurich of June 12, 1998, at I.
11 Recommendation of the Takeover Board of February 17, 1998, and ruling of the FBC of March 4, 1998, in the matter of Pharma Vision 2000 AG, BK Vision AG and Stillhalter Vision AG. This last ruling is reproduced in Bulletin EBK/CFB, 36/1998, 38 ff. See also the recommendation SGS of July 20, 1998 (optional exchange of registered shares for bearer shares subject to the regulations on public takeover offers but exempted from compliance with these rules in this case), recommendation confirmed by the FBC on October 5, 1998 (unpublished ruling).
In its Vision ruling of March 4, 1998, the FBC took another step, considering that art. 22 ff. SESTA is applicable to «buyback programmes», i.e. announcements by which issuers state their intention to buy back their shares on the market. Implicitly, this decision indicates that the idea of an «offer» may be interpreted more widely in the regulations on public takeover offers than in the Code of Obligations (CO). It also raises a delicate question: Are the rules on public takeover offers applicable to any announcement of an intention to intervene on the market, or only to those made by the issuer? In the absence of a legal basis making it possible to distinguish offers put forward by the issuers from those presented by third parties, the first solution seems to be the case.

The takeover regulation applies to public takeover bids for the equity securities of Swiss companies that have at least one class of their equity securities listed on a stock exchange in Switzerland. The Takeover Board leaves it to the decision of the stock exchange concerned to determine if a share is «listed» in terms of the meaning in art. 22 and 2 let. c SESTA. An offer limited to shares of which listing has been suspended is still subject to the takeover regulations, if the stock exchange concerned does not assimilate that suspension to delisting.

2. Mandatory Offers

The Stock Exchange Act makes organised groups subject to different regulations with regard to the announcement of shareholdings and mandatory offers. The transfer of a holding within a group does not give rise to any obligation to announce. It is different for a mandatory offer. An obligation to present an offer is triggered if one determining threshold is exceeded:

- either by the group itself,
- or by one of its members, individually.

Thus, a spontaneous offer may be subject to the rules on mandatory offers, even though it is put for-

ward by a company in the major shareholder group and therefore does not affect control of the offeree. As with spontaneous offers, the absence of influence on control does not necessarily exclude subject to the regulations, but allows for the granting of exemptions.

B. Interpretation of the takeover regulations

1. Spontaneous Offers

The new regulations codify in large part the practice developed by the Commission for Regulation of the Swiss Exchange under the aegis of the Swiss Take-Over Code. However, it also contains several important innovations. In particular, it requires the Board of the offeree to publish a report stating the position taken on the offer, the grounds for which must be given in the report. The referral to a report drawn up by a third party attesting to the equitable nature of the price offered does not dispense the Board from this obligation. If the Board bases its statement of position on the opinion of an independent third party, this opinion must itself indicate the reasons on which it is based. It becomes an integral part of the Board’s report and must therefore be published in the same way. If it is not reproduced in full in the Board’s report, any interested party must be able to obtain a copy of it free of charge. The Takeover Board is competent to determine whether the Board’s report complies with the legal requirements. However, the review body is not required to check the contents of this document.

Offers published between the end of a business year and the publication of that year’s results raise a delicate problem with which the Commission for Regulation had already been confronted under the aegis of...

14 Art. 22.1 SESTA.
16 Art. 20.3 SESTA and 15.4 SESTO-FBC.
17 Communication no. 2 of the Takeover Board of July 21, 1997, on mandatory offers, at II.
18 Ibid., at 4.2.
19 Cf. Section I.A.1 above.
20 However, see recommendation Zurich of April 30, 1998 (rules on the mandatory offer not applicable to the operation, since the offeror intended only to substitute a holding company for an operating company and the operation did therefore not affect the shareholders’ rights).
21 Art. 29.1 SESTA.
22 Art. 29.4 TOO.
23 Recommendation Pirelli of April 21, 1998 at II.
24 So-called «fairness opinions».
27 Ibid., at 4.2.
the Swiss Take-Over Code\textsuperscript{28}. The Takeover Board has stated that the Board of the offeree is under a general obligation to keep recipients of the offer informed on business developments. This duty is particularly important if the results of the last business year have not yet been published\textsuperscript{29}. In such a case, art. 29.1 SESTA probably requires the Board of the offeree to publish its unaudited results or the forecasted results that come into its possession up to the expiry of the offer. This requirement would certainly be relaxed if the results for the previous quarter were already published.

The Takeover Board has also had occasion to pronounce upon the extent of the «best price rule» described in art. 24.2 SESTA and 10.6 TOO. It has stated that this rule does not only apply within the duration of the offer, but also during the six months following the end of the additional acceptance period described in art. 14.5 TOO\textsuperscript{30}. The offeror cannot therefore pay more than the offer price to certain shareholders during that period without violating the principle of equal treatment.

2. Buyback of own shares

After consultation of the Federal Banking Commission, the Takeover Board has published the criteria that a public offer or a programme to buyback own equity securities should satisfy to benefit from the exemption regulations introduced by the Vision ruling\textsuperscript{31}. This communication replaces former Communication no. 1 of November 3, 1997. The latter text still excluded certain types of buybacks from the scope of the takeover regulations, which the Vision ruling does not allow any more\textsuperscript{32}. The new communication makes it possible to exempt offers and buyback programmes that safeguard «equal treatment, transparency, fairness and good faith». In concrete terms, the communication tends to exempt operations which are unlikely to affect the control of the issuer or the liquidity of the securities concerned, and which meet certain minimal standards of transparency.

Since the adoption of Communication no. 1, the Takeover Board has exempted several offers\textsuperscript{33} and buyback programmes from application of the takeover regulations. The buyback programmes are often carried out by special trading lines, on which the issuer’s broker alone may introduce the bid prices\textsuperscript{34}. This procedure makes it possible to levy the withholding tax which has to be charged when the shares are acquired in order to be cancelled. However, the application of the takeover regulations is not limited to the buyback of shares carried out on a special trading line. The announcement of an intention to acquire the shares on the ordinary trading line constitutes a «public take-over offer» in the meaning of art. 2 let. e SESTA and must therefore be the object of an exemption procedure\textsuperscript{35}.

In theory, the reasons for which a buyback programme is published are irrelevant. However, the Takeover Board has stated that it doubted that buybacks implemented with the aim of influencing prices are compatible with company law. It has also cast doubt that respect for the provisions of art. 659 CO shelters the issuer from all liability under the securities laws\textsuperscript{36}.

A recent recommendation allows it to be supposed that the Takeover Board may subject the exemption of buyback programmes to a new condition. In the context of the procedure on the extension of the programme of Schindler Holding AG, the Takeover Board noted, incidentally, that in a market controlled by the offeror, the stock exchange prices at which the buybacks were made could incorporate an element of premium. The latter would possibly vary throughout the duration of the programme or for the different categories of the issuer’s shares, which could be contrary to the principle of equal treatment\textsuperscript{37}. In future, the Ta-

\textsuperscript{28} SRBL/RSDA/SZW 70 (1998) 250–251.
\textsuperscript{29} Recommendation Danzas of January 15, 1999, at 4.3.
\textsuperscript{31} Communication no. 1 of the Takeover Board of June 22, 1998, on the buyback of own shares.
\textsuperscript{32} Vision ruling of the FBC of March 4, 1998 (see note 11), at 2b.
\textsuperscript{33} Recommendations Rieti of December 21, 1998, and Züblin of January 11, 1999. The Mövenpick buyback offer was not exempted, since it was on more than 10% of the issuer’s capital. See recommendation of February 23, 1999. Before the adoption of Communication no. 1, the Takeover Board had also exempted the buyback offer of Ems-Chemie Holding AG from the application of the takeover regulations (recommendation of May 6, 1998).
\textsuperscript{35} Recommendations UBS of February 17, 1999, at 1, and Altin of April 12, 1999, at 1.
\textsuperscript{36} Recommendation Altin of April 12, 1999, at 3.
\textsuperscript{37} Recommendation Schindler of February 16, 1999, at 1. See also the recommendation Mövenpick of February 23, 1999, at 3.
The takeover Board could therefore make the exemption of buyback programmes subject to proof that the latter could take place without an excessive influence on the market for the offeree’s shares.

3. Mandatory Offers

The list of companies having adopted a clause of opting out or of opting up may be consulted on the Swiss Exchange Internet site. The Takeover Board has indicated that it would enforce such clauses against minority shareholders, unless they are clearly invalid. In order to be effective, an opting out or opting up clause must be entered on the Commercial Register at the time when the determinant threshold for the mandatory offer is exceeded.

An obligation to make an offer is triggered if the member of an organised group individually exceeds a shareholding threshold. However, the member concerned may obtain an exemption if the nature of the group is not changed on that occasion. According to the practice of the Takeover Board, this condition is in principle met if the control holding held by a 100% subsidiary is transferred to another 100% subsidiary of the same holding company or if a control holding held by a company is transferred to its only shareholder.

It has happened that obligations to make an offer have been triggered unintentionally. In such cases the Takeover Board has requested the shareholders concerned to bring their holdings below the determining threshold. Their exceeding the threshold having been only temporary, it has then granted an exemption from the rules on mandatory offers.

II. Disclosure of Shareholdings

In principle the Disclosure Office of the Swiss Stock Exchange does not publish its recommendations. In exceptional cases it informs the public of its rulings by way of a communiqué. In addition, it publishes certain points of its practice through «notices», which may be consulted on its Internet site. A database containing announcements published should also be available for consultation on the Internet in the course of this year.

The Disclosure Office has recently stated that the shareholders of companies listed after January 1, 1998 will not benefit from the transitional arrangements mentioned in art. 51 SESTA and art. 45.1 SESTO-FBC. Holdings higher than 5% must be announced at the time of listing, and not only at the end of the three-year transitional period mentioned in art. 51 SESTA. However, the holdings mentioned in the listing prospectus do not need to be announced a second time in application of art. 20 SESTA.

Financial intermediaries may have a disclosure obligation distinct from that of their clients if they can exercise, autonomously, the right to vote in respect of the shares held for the account of the latter. In theory, this is not the case for institutions subject to the Federal Act on Banks and Professional Asset Managers, nor is it for nominee companies that hold shares in a fiduciary capacity for the account of third parties.

The determining capital for calculation of the holdings of shareholders is the capital registered on the Commercial Register. This capital does not necessarily correspond to the issued capital, to the listed capital, the profit and loss account capital or the capital due for subscription.

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capital or to the capital in free float. In particular, treasury stocks held by the issuer are not deducted from the total capital.

The federal regulations on the disclosure of shareholdings do not contain particular provisions for the trading portfolios of securities dealers. The Disclosure Office has also refused to subject generally these shareholdings to particular rules. In one particular case, it has nevertheless agreed to relax the legal requirements in favour of a securities dealer – Olayan Investments Company Establishment – which had disclosed a holding of more than 5% of the votes of Credit Suisse Group and expected that its holding would fluctuate around this point in the future. The Disclosure Office exempted Olayan from making new announcements so long as its holding remained in a corridor situated between 4.5% and 10% of voting rights.

In the context of the merger between Swiss Bank Corporation and Union Bank of Switzerland, the Disclosure Office considered that the two companies were not acting in concert until the execution of the merger and could therefore continue to disclose their holdings separately.

III. Squeeze out

The first rulings given in this field brought to light the procedural difficulties caused by the cancellation of the outstanding securities after a public takeover offer («squeeze out»). The instruments of cantonal civil procedure do not seem to be well adapted to this type of procedure. The most delicate point for the judge to decide is on the compensation or indemnity which should be paid to shareholders whose shares are cancelled in a procedure to which they are not necessarily party. The Zurich commercial court refused to decide on such a compensation, deeming that the defendant company lacked capacity to be sued. However, the commercial court of the Canton of St. Gallen arrived at the opposite conclusion, and decided on the amount of the indemnity for minority shareholders at the same time as it declared the cancellation of the remaining shares. This controversy should soon be of historical interest only, since the Zurich commercial court seems to restrict the double procedure to the sole case where the squeeze out is based on the transitional provisions of the Stock Exchange Act; the action based on art. 33 SESTA could in any case be handled in a single procedure.

IV. Concluding remarks

The Swiss securities regulations are at present characterized by the large number of authorities mandated with their implementation: the FBC, the Takeover Board, the civil judge, the Disclosure Office and other departments of the stock exchanges, all having to apply autonomously rules which are often comparable. Inconsistency and contradiction may be the result. A simplification of the implementation system would, without doubt, be in the joint interest of the investors, the regulators, and the Swiss financial market as a whole.

54 Disclosure Office Notice III / 99 of February 26, 1999: calculation of shareholdings. These principles are also valid for mandatory offers. Cf. art. 28.1 SESTO-FBC.
57 Art. 33 and 54 SESTA, art. 54, 55 and 58.10–11 SESTO. See also Communication no. 3 of the Takeover Board of July 21, 1997, on cancellation of «outstanding equity securities» after a public takeover offer.
60 Unpublished ruling of September 22, 1998.
61 Art. 54 SESTA.