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This dual system will add complexity and the question is why the Federal Council did not propose a complete switch to the paying agent system. A main reason for not doing so may be that Switzerland can introduce an exception for foreign debt holders and abandon residual interest withholding tax entitlements under double tax treaties without losing a lot of tax money as foreign investors normally anyway do not hold debt subject to Swiss tax withholding, whereas this may not be true for deposits and equity instruments.

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Takeover Board Opts-Out from Opting-Out

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Opting-out from the mandatory offer has been in again since the Takeover Board (TOB) rendered its decisions in the matters CI Com SA and COS Computer Software AG in 2010. At the core of the debate has been the question as to who should regulate the right to opt-out from the mandatory offer obligation–the civil courts or the TOB? On 22 September 2011, the TOB issued a decision in the matter LEM Holding SA, reinforcing the TOB's position taken in the CI Com SA decision, pursuant to which the TOB should not be involved in the realm of corporate law as long as shareholders make an educated decision when voting in favor of the opting-out.

By Frank Gerhard

This contribution analyses the LEM Holding SA decision (decision 0490/01 of the TOB dated 22 September 2011) and its position within the line of other TOB precedents, and includes a matrix of the competences of the TOB when faced with an opting-out clause, in particular in connection with a corporate transaction.

1) Mandatory Offer at the Disposal of Shareholders

All European Union countries as well as Switzerland have introduced the mandatory offer obligation in case a shareholder (or a group of shareholders acting in concert) exceeds a certain threshold (in Switzerland: 33.33%) of the voting rights in a listed company. However, opting-out from the mandatory offer obligation is a Swiss specialty: the laws of no other European jurisdiction provide for a mechanism through which the shareholders of a listed company can elect to "opt out" from the mandatory offer regime. In fact, the Swiss regime on the opting-out goes further than permitting an exemption/whitewash in a certain specific situation (see *e.g.,* article 32 (2)/(3) and (6) Stock Exchange Act (SESTA) and article 38 and 39 FINMA Stock Exchange Ordinance (SESTO-FINMA)): once validly introduced, an opting-out is valid for any acquirer,

for an unlimited period of time (assuming no subsequent deletion from the articles of incorporation) and irrespective of the reason why such an acquirer has exceeded the mandatory offer threshold. The possibility to opt-out from the mandatory offer regime is a concession by the Swiss Parliament made in connection with the controversial introduction of the mandatory offer in the SESTA in 1995. Interestingly, the Dispatch *(Botschaft)* of the Federal Council on the draft SESTA originally provided for a mere voluntary application of the SESTA (opting-in). A general mandatory offer obligation was only added to the SESTA by the Parliament debates with an aim to protect minority shareholders from a change of control that would be against their interests by offering them the opportunity to tender their shares at a certain minimum price (and thereby participate in the potential control premium paid by the acquirer).

2) The Statutory Regime on Opting-Out

The SESTA distinguishes between electing to opt-out ***before*** and electing to opt-out ***after*** the listing of the shares of the issuer on a stock exchange (article 22 (2), respectively article 22 (3) SESTA). If the election is made ***after*** the listing, article 22 (3) SESTA requires that such election shall not prejudice the interests of the shareholders within the meaning of article 706 of the Code of Obligations (CO). Accordingly, shareholders may not elect to opt-out from the mandatory offer obligation after listing if such election would (i) withdraw or restrict the rights of the shareholders in breach of the law or the articles of incorporation of the company (article 706 (2) (1) CO), (ii) withdraw or restrict the rights of shareholders in an improper manner (article 706 (2) (2) CO), (iii) give rise to the unequal treatment or disadvantaging of the shareholders in a manner not justified by the company's purpose (article 706 (2) (3) CO) or (iv) revoke the profit-making orientation of the company without the consent of all shareholders (article 706 (2) (4) CO). Unless the articles of incorporation provide otherwise, an election to opt-out requires an amendment of the articles of incorporation by a notarized resolution of the shareholders' meeting adopted by at least a simple majority of the votes represented (article 703 CO).

Despite the straightforward wording of the applicable legal provisions, electing to opt-out ***after*** listing turned out to be an exercise with perilous obstacles that a practitioner reading article 22 (3) SESTA and article 706 CO would not have expected. In addition, so far, decisions to opt-out have only kept the TOB and the FINMA (respectively its predecessor, the Federal Banking Commission (FBC)), and not the civil courts, busy. Why? The decision to opt-out is taken by shareholders' resolution and, therefore, any review of such decision should lie within the competence of the civil courts (article 706 CO), as long as such resolution is not taken while a public takeover offer is pending on the company (article 22 (1) SESTA *e contrario*). It is worthwhile to take a step back here in order to understand why the introduction of the opting-out became so perilous and why the FBC, respectively the TOB (and not the civil courts) were the stumbling block.

3) The Development of the Opting-Out Doctrine

The first relevant intervention by the TOB was made in the ***ESEC Holding AG/Unaxis Holding AG*** case in 2000 (Recommendation 0018/02 of the TOB dated 6 June 2000). The applicant Unaxis Holding AG (Unaxis) held 13.28% of the voting rights in ESEC Holding AG (ESEC) and was about to exercise a call option which would have resulted in a participation of 76.66% of the voting rights in ESEC. Before such exercise, Unaxis wanted a confirmation from the TOB that it was not subject to the mandatory offer obligation, provided ESEC had introduced an opting-out clause in its articles of incorporation. Both Unaxis and ESEC were of the opinion that it was in the interest of ESEC to remain a listed company. In addition, because ESEC wanted to restrict the rights of its shareholders in the most limited way possible, the board proposed to limit the duration of the opting-out to 14 months and its applicability to one specific acquirer (Unaxis), and to have such provision vetted by the independent shareholders in a special meeting. The TOB dealt with the question with a certain distant view, because the election to opt-out was basically a corporate law issue: the shareholders could vote on the introduction of the opting-out clause after having been fully informed about the circumstances and consequences of such a resolution. The only legal ground on which the TOB could look into the request was if it involved a preliminary question on an issue that fell within the TOB's competence. The TOB decided in the affirmative, because the question put forward was whether the mandatory offer obligation was applicable—which was clearly a question of takeover law—and, in order to answer such question, it had to be determined whether the shareholders' resolution was valid, and, in order to make such determination, whether the opting-out provision was compatible with the general standard of corporate law enshrined in article 706 CO. Interestingly, the TOB concluded that if the opting-out provision was approved by both the general meeting and the special meeting of independent shareholders (*i.e.,* the shareholders who would ***not*** benefit from the introduction of the opting-out provision) there would be no reason to challenge the resolution for non-compliance with the general principles of corporate law. In other words, a proper procedure would ensure that the substance of the resolution was correct. The TOB had thereby indirectly expressed the opinion that electing to opt-out should in fact be a matter to be dealt with by the civil courts. Yet, the FBC (Decision of the FBC dated 23 June 2000) overturned the TOB's decision and held that an the opting-out provision which is only in favor of a specific acquirer or in view of a specific transaction is not permissible under Swiss law, whether or not the provision was approved by a special majority of the minority shareholders. The FBC insisted on the *numerus clausus* of the possibilities offered by the SESTA to waive the mandatory offer. In other words, the general and specific exemptions from the mandatory offer obligation (which were not applicable *in casu*) on the one hand, and the opting-up and the opting-out provisions which are, based on the wording of article 22 (2) SESTA, applicable to all acquirers and not limited in duration on the other hand, leave no room for such a formally selective cherry picking. *Tertium non datur.* Against this background,

the FBC did not evaluate in depth whether ESEC's opting-out provision complied with article 706 (2) CO as provided in article 22 (3) SESTA. *Ite missa est.* One could only speculate whether the opting-out practice that followed this decision would have been different had the board of ESEC, instead of trying to limit the effect of the opting-out provision, proposed a generic and unrestricted opting-out provision, *i.e.,* not limited to a specific transaction and a specific acquirer.

In the 2004 case ***Adval Tech Holding AG***, the TOB expanded the practice initiated by the FBC and held that an opting-out provision introduced in view of a specific acquirer or a specific transaction—even if such acquirer or transaction was not explicitly disclosed—is not enforceable under the takeover law: indeed, it was tantamount to a selective opting-out—not formally (as in ESEC), but as to its substance—and therefore violated the principle of equal treatment of the shareholders because it did not benefit all shareholders (Recommendation 0184/01 of the TOB dated 3 March 2004 in the matter Adval Tech Holding AG, confirmed by the Recommendation 0203/01 of the TOB dated 7 July 2004 in the matter Société de Gares Frigorifiques et Ports Francs de Genève SA). The TOB then completed its autonomous interpretation of the opting-out provision and stated that any opting-out provision introduced within five years prior to a change of control would be deemed introduced in favor of a specific acquirer or a specific transaction and thus still selective in substance. At this stage, neither the FBC nor the TOB had really addressed the general principles of corporate law as set forth in article 706 CO in their 2000 and 2004 cases. Positively, this practice prevented the introduction of an opting-out clause in connection with a specific transaction because such clause would per se violate the principle of equal treatment of the shareholders. Indeed, who in today's world is actually planning more than five years ahead? Further, negatively, this practice forced potential acquirers to obtain advance rulings from the TOB any time a target had an opting-out clause in place since any such acquirer would want to make sure that such opting-out clause was not selective and, therefore, enforceable.

Only in 2010, the TOB rendered two decisions that adopted a more relaxed approach as to examine the opting-out clause and setting the ground work for the changes resulting from its LEM Holding SA decision. In the ***CI Com SA*** decision (Decision 0437/01 of the TOB dated 4 March 2010), the TOB held that although the opting-out clause at stake was introduced only three years prior to a change of control, such clause was not selective in substance, *i.e.,* was not introduced in view of a specific acquirer or a specific transaction whose identity, even though not explicitly named, was implicit in light of the circumstances. In addition, and more importantly, the TOB held that the mere fact that an opting-out clause was introduced by a majority shareholder and would preponderantly benefit such majority shareholder (indeed, CI Com SA had a 60.9% shareholder at the time of the introduction of the opting-out) does not invalidate such clause ***from a takeover law point of view***. In such a situation, it would

be clear to the other shareholders from the outset that such a majority shareholder would benefit from an opting-out and the majority shareholder was readily identifiable by the other shareholders; under these circumstances, it is not necessary to extend the protection granted by article 706 CO and article 706a CO, which entitle any shareholder to challenge the shareholders' resolution within two months, through a mechanism embedded in the takeover law. Thus, the intervention of the TOB is superfluous.

In the ***COS Computer Systems AG*** decision of 4 June 2010, the TOB applied a new reasoning. In connection with a strategic review with the purpose of making the company an interesting partner for a reverse takeover, the board of COS Computer Systems AG proposed introducing an opting-out clause into its articles of incorporation to its shareholders in 2009—without having a specific acquirer or a specific transaction in mind. A reverse takeover was later completed in 2010, but first contacts with the acquirer were not initiated until ***after*** the introduction of the opting-out clause. The TOB found itself in a different position than in the CI Com SA case, since no acquirer was around at the time the clause was introduced, and there was no major shareholder who would implicitly benefit from the introduction of the opting-out clause. So the TOB could not use the transparency argument since the shareholders could *per se* not make an educated decision. However, instead of declaring that the clause was not selective because it was not introduced in favor of a specific acquirer or a specific transaction (which would have made it easy for the TOB to declare the opting-out clause valid from a takeover law point of view), the TOB held that an opting-out clause, whether formally selective or selective in substance, could be enforceable ***if it does not prejudice the interests of the shareholders within the meaning of article 706 CO***. In other words, for the first time the TOB decided to actually look at the substance of the matter by applying the requirements of article 706 CO—thereby accepting that a selective opting-out clause is not *per se* invalid from a takeover law perspective, but should (and could) be valid if the limitation on the rights of shareholders is based on valid reasons and any disadvantages or unequal treatment incurred by the shareholders are justified by an overwhelming corporate interest (see article 706 (2) (2) and (3) CO). *In casu,* the opting-out clause was an element of COS Computer Software AG's new strategy and thus justified by an overriding corporate interest. Moreover, no shareholder had challenged the introduction of the opting-out clause in court under corporate law.

4) The LEM Holding SA Decision

a) The Facts

Werner O. Weber has been a shareholder of LEM Holding SA since 2001. Over time, he steadily increased his stake in the company. He crossed the 5% threshold in October 2001, 10% in April 2004, 15% and 20% in October 2007 and the 25% threshold in June 2008. At a board meeting on 29 January 2010, he unveiled his intention

to cross, together with another shareholder (and a board member), Ueli Wampfler, the 33.33% voting rights threshold. Weber also mentioned his intention to introduce an opting-out clause into the company's articles of incorporation so that there would be no obligation to launch a mandatory offer. In connection with the 2010 AGM, Werner O. Weber requested the introduction of an opting-out clause into the company's articles of incorporation to be put on the agenda of the shareholders' meeting (according to Swiss law, any shareholder holding shares of at least CHF 1 mio in nominal value or 10% of the share capital can put items on the AGM agenda). After the board of LEM Holding SA in its invitation to the AGM scheduled for 25 June 2010 recommended to reject Weber's proposal, it reiterated its view during the AGM, putting forward that an opting-out would not be in the interest of the shareholders. At the 2010 AGM, the shareholders resolved to introduce the opting-out clause into the articles of incorporation with 71% of the votes represented. Attendance at the AGM was high with 70.07% of the share capital represented (39.84% of the votes represented (or 27.8% of the outstanding share capital) were held by Werner O. Weber).

On 26 May 2011, a year after the 2010 AGM, Werner O. Weber announced that he is acting in concert with Ueli Wampfler, board member of LEM Holding SA. On 7 June 2011, the shareholder group Weber/Wampfler announced a stake corresponding to 32.38% of the voting rights. On 31 August 2011, they requested a confirmation from the TOB as to the validity of the previously introduced opting-out clause.

b) Takeover Board Considerations and Ruling

The TOB qualified the opting-out clause as being selective in substance, since it had been introduced less than 5 years prior to its application and benefited mainly one specific shareholder, Werner O. Weber, who owned 27.8% at the time of its introduction and had requested its introduction. However, the TOB did not address the question of whether the clause was in compliance with the corporate principles enshrined in article 706 CO as it did in the COS Computer Systems AG case. Instead, the TOB came to the following conclusions:

- At the time of the 2010 AGM, the shareholders knew that Werner O. Weber held a significant stake in the company (27.8%) and that he was the author of the request to introduce the opting-out into the articles of incorporation of the company.
- Although Werner O. Weber did not disclose his intention to continue stake building and thereby to exceed the threshold triggering the mandatory offer obligation, it was implicitly clear that he would benefit from the opting-out clause and would be relieved from launching a mandatory offer should he ever exceed the threshold.

– Further, the board of directors recommended that the shareholders reject the proposal and explained the potential effects of such a clause on the company and its shareholders during the shareholders' meeting.

Hence, according to the TOB, the shareholders took an educated decision when voting in favor of the opting-out clause since the information provided to them was complete and transparent. In fact, without counting the votes of Werner O. Weber, the opting-out would still have been adopted by 53% of the votes represented at the AGM. In addition, following the shareholders' meeting, any shareholder could have challenged the introduction of the opting-out clause before the civil courts (which no one did), which would have made the intervention of the TOB superfluous. Hence, extending the two months deadline provided by corporate law in article 706 CO and article 706a CO would be contrary to the need of the security of transactions.

c) Position of the Board of Directors of LEM Holding SA

In its opinion rendered to the TOB, the board of directors of LEM Holding AG (Ueli Wampfler abstained from participating as he was conflicted) was of the view that the opting-out clause had been validly passed by the shareholders' meeting for following reasons:

– Sufficient information had been disclosed, and the potential effects of such opting out clause had been explained, at the shareholders' meeting.

– The opting-out clause had been approved by a large majority of the shareholders represented at the general meeting (71% of the votes represented voted in favor of the opting out) despite the negative recommendation of the board of directors.

– The company had benefited from a stable shareholder base in the past years ("important factor contributing to the continuous, independent and successful development of LEM Holding SA in the best interest of LEM and its shareholders").

d) Comments

The LEM Holding SA decision merges both the CI Com SA and the COS Computer Software AG practice (in both the CI Com SA and the COS Computer Software AG cases, the opting-out clauses were however not introduced in view of a specific acquirer or a specific transaction): the TOB will no longer review opting-out clauses, even if they are selective in substance, as long as the shareholders approved such clause after having been fully informed of the circumstances and the consequences of such approval. The only reason for the TOB to intervene in the realm of corporate law is to protect the shareholders against the introduction of an opting-out clause approved without being sufficiently informed about the perspective of a specific transaction. If such undisclosed transaction is then completed (by such a majority shareholder) more

than two months after the shareholders approved the opting-out clause, the (minority) shareholders are no longer able to challenge the approval of such clause. We welcome this approach whereby the TOB "opts out" from reviewing questions of corporate law when this can be done by the civil courts. This is in line with the approach the TOB has taken in other similar situations. For instance, in response to prevailing criticism of the TOB's scrutiny of share buyback's compliance with the 10% limitation set out in article 659 CO (Decision 408/01 of the TOB dated 2 April 2009 in the matter Partners Group Holding AG, c.2), it issued a new Circular No. 1 dated 26 February 2010 on share buybacks which no longer includes this practice (which practice was actually already dropped in the ***Transocean Ltd.*** case (Decision 435/02 of the TOB dated 24 February 2010 in the matter Transocean Ltd., c. 1/2)).

We will never know whether LEM Holding SA's opting-out clause would have been upheld if a shareholder had challenged the shareholders' resolution—however, we doubt it. Indeed, according to article 706 (2) (2) and (3) CO, the opting-out clause must be based on valid reasons *(matériellement fondée), i.e.,* must contribute to reaching the goal set by the company or must not aim at favoring the interests of select shareholders, and must be proportionate *(proportionnée), i.e.,* must be adequate and necessary in order to pursue the interest of the company and the advantages to the company must supersede the interests of the minority shareholders (Decision 0437/01 of the TOB dated 4 March 2010 in the matter CI Com SA, c. 2.1, confirmed in Decision 0490/01 of the TOB dated 22 September 2011 in the matter LEM Holding SA, c. 2.1). Maybe Werner O. Weber was just lucky that no shareholder challenged the shareholders' resolution... Indeed, we believe that Werner O. Weber's move was rather bold: his request to introduce such a clause was driven by purely private interests, namely in order to enable him to continue his stake building without triggering the takeover offer obligation, or, even bolder, to thereafter sell his stake to an acquirer without forcing the latter to launch a mandatory offer, hence allowing Werner O. Weber to collect the entire premium for the control over the target. From the perspective of Werner O. Weber, this is a maximization of the value of its own shareholdings to the detriment of all other shareholders (which, under Swiss law, is not *per se* prohibited as a shareholder owes no duty of loyalty to the company or the other shareholders). The board of directors was aware of this and recommended to vote against the opting-out clause. As a side note, the report of the board to the TOB issued more than one year later is rather sibylline as it formally opines only on the validity of the resolution by the shareholders' meeting (which is easy to state if the formalities for the AGM have been complied with, the resolution has not been challenged and the resolution is not null and void from the outset), but makes certain contradictory statements in the introduction, such as, on the one hand, that the stable shareholder structure of the company during the past years has been an important factor contributing to the continuous, independent and successful development of the company, in the best interest of the company and its shareholders, but then, on the other hand, the board wishes the acquisition of shares of the company to

remain an attractive investment for institutional and private investors and, therefore, will continue to pay great attention to equal treatment of the company's shareholders.

Moreover, considering that the board of directors provided comprehensive information as to the opting-out and other factual circumstances only at the AGM (and not prior to, *e.g.,* in the invitation to the AGM), the TOB's conclusion (and key requirement to distant itself from any further scrutiny of the opting-out clause), being that the shareholders have made an educated decision, may come as a slight surprise. In future, we would not be surprised to see more elaborated invitations to the shareholders' meeting resolving upon an opting-out, possibly accompanied by additional means of communications, to ensure educated approvals.

5) The Opting-Out Matrix, in particular in Connection with Corporate Transactions

The new picture after the LEM Holding SA decision permits the practitioner to address three different situations:

a) The shareholders made an educated decision when voting in favor of the opting-out clause

If the shareholders were clearly informed about the circumstances and the consequences of the introduction of the opting-out clause, the TOB will not meddle in the realm of the civil courts; the shareholders can fend for themselves using the means offered by general corporate law. This is true even if the opting-out is selective in substance. This is for example the case when a major shareholder that is clearly identified would immediately benefit from the clause when selling its shareholding (*e.g.,* CI Com SA matter, where the shareholder owned more than 33.33% at the time of the adoption of the opting-out clause) or the shareholders may infer from the circumstances that such a major shareholder could exceed the mandatory offer threshold and thereby benefit from such a clause (*e.g.,* LEM Holding SA, where the shareholder owned 27.8% at the time of the adoption of the opting-out clause). So far, no such cases have been brought to civil courts. However, we believe that the introduction of an opting-out clause to pursue private interests only of a given shareholder will not pass the test of article 706 CO. Indeed, the shareholder or the company will have to explain why such opting-out clause contributes to reaching the goal set by the company or is not aiming at favoring the interests of certain specific shareholders, and is proportionate, *i.e.,* is adequate and necessary in order to pursue the interest of the company and the advantages to the company supersede the interests of the minority shareholders. The mere privatization of the control premium—without any overwhelming corporate interest—will not justify the introduction of the opting-out clause.

The assessment could, however, be different if the opting-out clause is introduced by a target in connection with a corporate transaction (*e.g.*, ESEC Holding AG, where the shareholder owned 13.28% and intended to exercise a call option to reach 76.66%): the introduction would be based on a valid reason and any disadvantages incurred by the shareholders could be justified by the overwhelming corporate interest of such a target. Another situation that could justify the introduction of an opting-out clause arises when an acquirer issues ***new*** securities as consideration for an acquisition, and such issue of securities would result in a person being obliged to make a mandatory offer. For instance, the UK Takeover Panel under the City Code on Takeovers and Mergers (the Code) will normally waive the obligation to launch a takeover offer in such a situation, provided that the shareholders who are independent of the transaction pass a resolution approving the waiver. This is known as the so called whitewash procedure. By providing for the whitewash procedure, the Code gives the independent shareholders of the company, subject to certain safeguards, the opportunity to assess the commercial merits of a transaction against the possibility of giving away control of the company. This procedure was, by the way, exactly the procedure chosen by ESEC in 2000.

b) The opting-out clause is not selective because it is not introduced in favor of a specific acquirer or a specific transaction, or was adopted more than five years ago

In such cases, the clause will be valid from a takeover law point of view. Indeed, the only reason for the TOB to intervene in the realm of corporate law is to protect the shareholders against the introduction of an opting-out clause if approved not being privy to the perspective of a specific transaction. In other words, the company would have misrepresented or dissimulated the situation to the shareholders. This is not the case if the company introduces the opting-out clause without having a specific acquirer or a specific transaction in mind, and no shareholder can be identified that would immediately or potentially benefit from the clause. We also believe that a company introducing an opting-out clause in connection with a strategic review (see the COS Computer Software AG case) would fall into this category. These cases are not problematic, and are not relevant in practice—except that they may lead to an application to the TOB for a declarative opinion confirming the validity of the opting-out clause from a takeover law perspective—because it is unlikely that a transaction calling for an opting-out clause would be planned more than five years in advance.

c) The opting-out clause is selective in substance because it is introduced in favor of a specific acquirer or a specific transaction, and the shareholders' meeting had not taken an educated decision when approving the opting-out clause

This is the situation where the TOB functions as the long arm of the civil courts and would, under certain conditions only, reach into the realm of corporate law by scruti-

nizing an opting-out clause after the lapse of the two month period provided by article 706a CO. Indeed, if such undisclosed transaction is completed (by such a majority shareholder) more than two months after the shareholders approve the opting-out clause, the (minority) shareholders are no longer able to challenge the approval of such clause. The TOB would therefore review the opting-out and would consider its validity (from a takeover law point of view) if any limitations on the rights of the shareholders are based on valid reasons and any disadvantages incurred by the shareholders are justified by an overwhelming corporate interest (see article 706 (2) (2) and (3) CO). The TOB voluntarily placed itself in this situation in the COS Computer Services AG matter because it held that it was not clear whether the relevant opting-out clause was selective in substance since the clause was adopted in connection with a strategic review process started in 2007, which led to a change of control in 2010.

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Proceedings Regarding the Duty to Launch an Offer: Exemption From the (Potential) Target's Duty to Issue and Publish a Board Report

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In a recent order the Takeover Board had to rule on whether the sale of a minority stake in a parent of the controlling shareholder of a listed company triggered the duty to launch a tender offer, if such sale leads to a change in the group of shareholders controlling the listed company. The decision is of particular interest with regard to the duty of the (potential) target company to issue and publish a board report. In the case at hand the Takeover Board granted an exemption from such duty upon the petitioners' request.

By Severin Roelli / Christian Leuenberger

1) Facts

a) Ownership Structure in Absolute

On 13 September 2011 HarbourVest Acquisition GmbH (Offeror), a special purpose vehicle ultimately controlled and managed by HarbourVest Partners, LLC (HarbourVest), settled its public tender offer for all publicly held shares of Absolute Private Equity Ltd (Absolute), an investment company listed at SIX Swiss Exchange, and thereby acquired ownership of 98.68% of all shares and voting rights in Absolute. Upon settlement, the ownership structure in Absolute and the Offeror was as follows: