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Defensive Measures against Public Offers under Swiss Law

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Defensive Measures Against Public Offers Under Swiss Law

Nedim Peter Vogt*

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I. INTRODUCTION

A. Merger & Acquisition Activity in Switzerland

Mergers and acquisitions in Switzerland have been steadily growing over the years. This activity peaked in 1988, when a total of 274 deals and 37 joint venture agreements were publicly announced.¹ A 1989 survey listed more than 400 mergers and acquisitions.² Many of Switzerland's corporations are either privately held or controlled by one shareholder or one family. All of the acquisitions listed in the survey were made either by private agreement, by merger, or by a tender offer which was subsequently supported by the management of the offeree company.³ However, several unsolicited bids, or attempts to take over a company, have occurred over the past few years, involving such well known companies as Hero,⁴ Usego,⁵ George Fischer, Hoffman-LaRoche,

1. N. Vogt & R. Watter, *Switzerland in MERGERS AND ACQUISITIONS IN EUROPE 13/8* (1990) [hereinafter Vogt & Watter].

2. Tschaeni, 2 *TAX NOTES INT'L* 991 (199). See *id.* stating:

. . . which represents an increase of approximately 50 percent compared to the preceding year. Of the total mergers and acquisitions, out-bound activities (namely Swiss companies acquiring non-Swiss companies) have increased from under 20 percent 10 years ago to 37 percent in 1989. Here, a trend can be seen to acquire European companies. In-bound transactions (namely non-Swiss companies acquiring Swiss companies) have decreased from approximately 19 percent 10 years ago to 10 percent in 1989, while domestic mergers and acquisitions accounted for 53 percent of the total M & A activity in 1989 compared to 70 percent 10 years ago. Statistics show that mergers and acquisitions have taken place in practically all business segments. Comparatively speaking, management buy-outs (MBOs) have drastically increased, with the referenced survey showing 15 MBOs in 1989.

It is expected that M & A activities will continue at the same pace in 1990. The primary reason for this high level of activity is the creation of the 1992 common market.

Id.

3. See N. VOGT & R. WATTER, *INTERNATIONAL CORPORATE GOVERNANCE* 209 (J. Lufkin & D. Gallagher eds. 1990). See also Tschaeni, 2 *TAX NOTES INT'L* 990-92 (1990).

4. See Peters, *Protection Against Hostile Takeovers and the Exercise of Shareholder Voting Rights in Switzerland*, 11 *U. PA. J. INT'L BUS. L.* 545 n.132, 546 n.133-37 (1990).

5. See Vogt & Watter, *supra* note 1, at 210.

La Suisse,⁶ Rinsox & Ormond, Gewerbebank Baden, Publicitas, and (most recently) Mikron.⁷ None of these attempts were successful, and many were frustrated by a white knight acquiring the offeree and/or the shares held by the raider, often at a considerable premium.⁸ Although the number of management buy-outs remains rather low, the buy-outs of such firms as Juvena and Kardex have attracted considerable attention.⁹

*B. Switzerland's Securities Markets*¹⁰

At the end of 1989, 193 Swiss corporations were listed on the three major Swiss stock exchanges in Zurich, Geneva, and Basel. Many of these corporations have their bearer and registered shares listed. Some companies have even issued and listed "participation certificates," a type of non-voting stock.¹¹ Pre-exchange trading also exists on the major exchanges. Pre-exchange trading involves securities of medium and smaller sized companies which do not comply with the reporting requirements of the stock exchange or which are not listed.

Besides the three major Swiss stock exchanges, there are additional stock exchanges in Lausanne, Berne, St. Gall, and Neuchatel. Over-the-counter markets have also been organized by a number of specialized banks.

The Cantons are empowered to enact laws regarding the trading of securities. Although the Swiss stock exchanges are all self-regulating, the degree of self-regulation varies. In contrast, the listing requirements are uniformly applied to each of the three major stock exchanges. A Swiss company that wants its securities listed must: (i) generally have been in business for at least five

6. *See id.*

7. *See id.* at 219.

8. *See Peters, supra* note 4, at 548.

9. *See Tschaeni, 2 TAX NOTES INT'L* 994 (1990).

10. *See Vogt & Watter, supra* note 1, at 13/11; N. VOGT & R. WATTER, INTERNATIONAL CORPORATE GOVERNANCE 209 (J. Lufkin & D. Gallagher eds. 1990); THE HELVETIA FUND, INC., 1987 PROSPECTUS 25-29. The author of this article is Swiss legal advisor to the Helvetia Fund.

11. *See infra* notes 50-54 and accompanying text (discussing Placing Voting Shares with "Friendly" Parties).

years; (ii) have published its audited balance sheet, profit and loss statements, and its business report; or (iii) be capitalized in an amount of not less than SFr. five million. A further listing requirement is that securities have previously achieved a sufficiently wide market. Generally, when new securities are listed a member of the stock exchange will act as a sponsor for the new applicant.

Disclosure requirements at the time of the listing of a new class of shares are limited compared to other jurisdictions. There is also no stringent requirement for continuing disclosure of a listed company.

The majority of trading in domestic securities on Swiss stock exchanges is through cash transactions. These transactions are generally completed within three days. The speed at which these transactions are completed is partially attributable to the heightened use of the telequote system, a system which transmits trading information directly to banks and brokers.

One special feature of the Swiss securities market is off-the-floor trading. Switzerland has no regulations restricting such trading, which may include listed securities. Therefore, anyone licensed to deal professionally in securities may freely do so. For example, there are more than 170 registered broker/dealers in Zurich not represented on the floor of the exchange who may participate in off-the-floor trading. Further, banks, which are permitted to act as broker/dealers in Switzerland, often use off-the-floor trading as a means of off-setting customers' purchase and sale orders against each other at the current exchange price. Partially due to its accessibility, many believe that off-the-floor trading is at least as important as the reported trading on the various Swiss stock exchanges.

An additional means of trading is the Swiss Options and Financial Futures Exchange (SOFFEX). SOFFEX is a fully computerized exchange for trading in standardized options on bearer shares of a number of Swiss companies. Bearer shares often trade at a premium over registered shares because they are freely transferable and because registered shares, which are often reserved for Swiss investors, trade in a smaller market.

*C. Capital Market*¹²

In 1988, the Swiss capital market raised a total of SFr. fifty-six billion. Foreign issuers accounted for 74% of this sum. This amount is expected to decline, however, in 1989 because of the increase in interest rates during the first half of the year (for example, the average rate of treasury bonds in 1988 was 4.11%, and in August 1989 it rose to 5.15%).

In 1987, the Swiss equity market ranked seventh worldwide in terms of market capitalization.¹³ The stock market index rose in 1988 by 22.4%, and by a further 27% in the first half of 1989, approximately reaching its pre-crash level.

D. Rules Regarding Acquisitions

1. In General

The rules governing the acquisition of Swiss companies and their organizations generally may be found in the Swiss Code of Obligations. The following articles contain these rules:

- Articles 620-762, Swiss Code of Obligations regarding the organization of corporations (“Akitengesellschaft” or “Société” anonyme);
- Articles 748-751, Swiss Code of Obligations regarding the merger of corporations;
- Articles 184-215, Swiss Code of Obligations regarding the purchase of movables. These rules apply by analogy to the purchase of shares;

- Article 181, Swiss Code of Obligations regarding the transfer of business enterprises.

The Swiss Code of Obligations also contains rules relating to the execution of contracts, the rescission of contracts based on material error or fraud, the employer/employee relationship, the

12. See Vogt & Walter, *supra* note 1, at 13/5.

13. THE HELVETIA FUND, INC., 1987 PROSPECTUS 25.

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transfer of claims and liabilities and provisions regarding promissory notes. Rules relating to movable property, real property and the pledging of property including shares may be found in the Swiss Civil Code.

The federal legislature has enacted other regulations pertaining to the banking sector, competition rules, and rules regarding the acquisition of real property by foreign residents. Also, there are Cantonal rules which cover the securities markets and stock exchanges as well as court organization. Federal and Cantonal tax laws will often be decisive for the structuring of a transaction.

2. Swiss Company Law

Swiss Company Law contains rules concerning the transferability of shares, and delineates the corporate action required to transfer the shares of a business.¹⁴

Under the Swiss Company law, approval by the shareholders of the acquiring corporation (the “acquirer”) is required when:

- (i) the business of the offeree company is beyond the statutory purpose of acquirer. In this instance, the shareholders must approve a change of the articles of association of the acquirer. This change must be approved by a two thirds majority of all outstanding votes (Article 648, Swiss Code of Obligations);
- (ii) the consideration is given in shares. In this case, the shareholders must approve an increase in the share capital in order to issue the shares.

The shareholders of the offeree will also have to approve the transaction either by selling their shares or, in the case of a merger or a sale of all of the assets followed by a liquidation of the company, by a vote in the shareholders’ meeting.¹⁵

14. Articles 620-762, Swiss Code of Obligations.

15. See Article 649, Swiss Code of Obligations (requiring a special quorum). Article 649 of the Swiss Code of Obligations provides:

Save as otherwise provided in the statutes, resolutions whereby the company extends the scope of its operations by including therein a related business, remaining however within the limits of the corporate

Special disclosure requirements apply if the transaction is financed by an increase in the share capital. These disclosure requirements apply irrespective of whether the newly issued shares will be used as consideration to the seller, or whether existing shareholders or the public subscribe to these shares for cash, which in turn is used to pay the purchase price.¹⁶ If the shares are offered to the public, prospectus requirements may also apply.¹⁷

3. Rules Regulating Private Acquisitions

Articles 184-215 of the Swiss Code of Obligations govern the acquisition of shares, including controlling blocks of shares. These articles concern the sale of movable goods. These rules, however, are very general in nature and commercial parties may derogate from almost all of them by tacit, oral, or written agreement. The most important rules are found in Articles 190 and 214, regarding the default of either party, and in Article 192 and subsequent articles, pertaining to breaches of representations and warranties.

E. Information Available on Swiss Companies

Basic information about the articles of association of a corporation, share capital, the numbers and types of shares, and the names of directors, managers and officers are available at the

object, or contracts the scope of its operations, may only be adopted at a general meeting at which at least two thirds of all the shares are represented; the same shall apply to resolutions relating to a merger and those which extend the duration of the company beyond the period provided for in the statutes or which change the name of the company or transfer its registered office or give rise to its dissolution before the expiry date laid down in the statutes.

Where a first general meeting is not attended by persons representing two thirds of all the shares, a second general meeting may be convened at which the resolutions referred to in the first paragraph of this article may be adopted provided that one third of the shares are represented.

Save as otherwise provided in the statutes, the second general meeting may not be held until at least eight days after the first.

16. Article 650, ¶ [2]; arts. 628, 630, 636, Swiss Code of Obligations.

17. Article 651, Swiss Code of Obligations.

Commercial Register.¹⁸ The office on debt collections keep records which may give further indications as to the financial strength of the Offeree Company and its ability to meet payment dates.

18. The relevant provisions of the Swiss Code of Obligations provide:

Article 640

The company shall be entered in the Register of Commerce of the place where its registered office is situated.

The application for registration shall be signed by the directors in the presence of the Registrar or shall be sent to him in writing, bearing their duly attested signatures.

The following shall be annexed to the application for registration:

1. a certified copy of the statutes;
2. the notarial act recording the proceedings of the meeting of the subscribers or, in the case of incorporation in one act, the incorporative act;
3. the draft statutes and also, if appropriate, the prospectus and the founder's report;
4. the document recording the appointment of the administration and auditors, giving the address and nationality of the directors.

The names of the persons authorized to represent (i.e. to bind the company legally by their signature e.g. procuration holders) the company shall be notified to the Registrar. Where they are appointed by the board of directors, the original or a certified copy of the minutes of the meeting of the boards shall be produced.

Article 641

The following shall be entered in the Register of Commerce:

1. the date of the statutes;
2. the name and registered office of the company;
3. the objects and purpose of the undertaking and also the duration of the company if the statutes contain provisions relating thereto;
4. the amount of the capital, the amounts paid up and the par value of the shares;
5. whether the shares are registered or to bearer and, where applicable, the privileges attaching to certain classes of shares;
6. the subject-matter and price of the contributions in kind and assets acquired, and the extent and value of the advantages accorded to founders or other persons;
7. the manner (e.g. the formalities required - single or joint signature) in which the company is to be represented;
8. the names, addresses and nationality of the directors and persons authorized to represent the company;
9. the form of the notices to be published by the company and of the communications to be addressed by the directors to the shareholders, if the statutes require a special form.

Except for listed companies and companies with listed bond issues, Swiss law does not require companies to publish their balance sheets. However, under the Swiss Code of Obligations, shareholders and creditors are entitled to receive a balance sheet and a profit and loss statement.¹⁹

It should be noted, however, that Swiss balance sheets often do not reflect the true value of the company because the board of directors may create "hidden reserves" by undervaluing assets or by overvaluing liabilities. These hidden reserves have the net effect of reducing the reported earnings of a company. Because a company may attribute part of the reported earnings to "open reserves," the pay-out ratio of Swiss corporations, compared to their real earnings, is relatively small. These low dividends have, in turn, led to a general undervaluation of Swiss stock.

F. The Role of Advisers and Financial Institutions

Major Swiss banks and a number of specialized companies offer various services in the merger and acquisition field. These services include searching for possible offeree companies, and arranging the financing of a transaction.

Drafting necessary documents usually is performed by specialized law firms. These law firms may also provide advice on the relevant tax issues involved. Because tax considerations greatly influence the structuring of transactions, as well as the drafting of certain clauses in an acquisition agreement, it may be helpful either to foster a close relationship between tax advisers and legal counsel, or to retain specialized lawyers acquainted with pertinent tax issues to draft or review the documents.

G. New Trends, Outlook

Generally, there is a clear trend towards importing Anglo-American merger and acquisition practices into Switzerland. This is evident in the hostile take-over area, where English terms such

19. Articles 696/7 and 704, Swiss Code of Obligations.

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as “raider,” “white-knight,” “poison pill” and “golden parachute” have become common expressions. The Anglo-American influence is also apparent in the drafting of private acquisition agreements, which have been progressively incorporating more American-styled clauses.

Further changes in the merger and acquisition field in Switzerland are expected. Currently, there is a proposed revision of the Swiss Company Law,²⁰ a potential for future regulation of the Swiss security markets, and new rules, entitled the Swiss Take Over Code, are expected to be issued by the Association of Swiss Stock Exchanges.²¹ Each of these changes are expected to have significant legal ramifications on mergers and acquisitions.

II. REGULATORY FRAMEWORK

A. No Regulations with Respect to Tender Offers

There are presently no rules in Switzerland with regard to tender offers affecting either the acquirer or the offeree company. However, the Association of the Swiss Stock Exchanges has recently issued a take over code which may have some regulating force over tender offers. Compared to regulations in other countries, this takeover code has a relatively limited scope.²²

B. No Disclosure Rules for Acquirer

There are presently no rules requiring an acquirer of shares to disclose its present share holdings and its intention to purchase shares exceeding a certain percentage level.

20. See Peters, *supra* note 4, at 550-57.

21. See *infra* note 39 and accompanying text (discussing the Swiss Take-Over Code).

22. See *id.*

*C. No Exchange Control*²³

There are, as a general rule, no restrictions on capital transactions between Switzerland and other countries. The Swiss National Bank may, however, regulate the country's money supply and implement credit and currency policies. Foreign based entities that want to raise capital in the Swiss market (respectively their Swiss underwriters) must first obtain approval by the Swiss National Bank. Approvals are generally granted.

Under certain circumstances, the Swiss Government may prohibit the sale of securities issued by Swiss companies. For example, in 1978, the Swiss Government prohibited the sale of Swiss securities in an effort to maintain the exchange rate of the Swiss franc.²⁴ No such rules are presently in force.

*D. No Restrictions on Foreign Investment*²⁵

Foreigners may acquire all types of domestic assets and shares in domestic companies without obtaining special approval, with the exception of (i) companies engaging in certain regulated businesses, such as banks; and (ii) real property or companies that hold real property.²⁶ Despite the paucity of restrictions, many Swiss corporations limit the transfer of their registered shares to foreigners.²⁷

A change of control of a business which needs a license or a concession to operate may require approval by competent authorities. Businesses requiring a license include those dealing with transportation, health, and importing agricultural goods. In contrast to purchasing a business, merely purchasing shares of a

23. See Vogt & Watter, *supra* note 1, at 13/14; N. VOGT & R. WATTER, INTERNATIONAL CORPORATE GOVERNANCE 215-16 (J. Lufkin & D. Gallagher eds. 1990); THE HELVETIA FUND, INC., 1987 PROSPECTUS 24.

24. Article 16i, ¶ [1], § 3 of the Federal Law on the National Bank.

25. Vogt & Watter, *supra* note 1, at 13/14; THE HELVETIA FUND, INC., 1987 PROSPECTUS 24.

26. See *infra* notes 28-31 and accompanying text.

27. See *infra* notes 48-50 and accompanying text.

corporation which has been granted a license or a concession will not require such approval.

*E. Rules Regarding the Acquisition of Real Property by Foreigners*²⁸

The Federal Law on the Acquisition of Real Property by Foreigners of December 16, 1983, (usually referred to as *Lex Friedrich*)²⁹ not only limits the acquisition of real property, but also limits the purchase of shares of a company which owns real property,³⁰ or the merger with such a company. The *Lex Friedrich* applies to a purchase of shares of a company that owns real property only if (i) the acquirer is a non-resident foreigner, a foreign corporation or a Swiss corporation which is controlled by a non-resident foreigner, (ii) the acquirer holds a controlling position. The acquirer is in a controlling position if, *inter alia*, foreign ownership exceeds one-third of all shares, and (iii) the market value of the real property is more than one third of the market value of the total assets of the company

Unless the value is clearly below this threshold, the acquirer must seek a decision from competent authorities that the *Lex Friedrich* is not applicable to the purchase of the shares.³¹ In practical terms, the seller will usually seek such a decision. This is particularly true in uncertain cases, in which the purchaser will not complete the purchase unless all authorizations have been obtained.

If the value of the real property exceeds one-third of the total assets, the foreign purchaser must seek the approval by competent

28. See Kienast & Diethelm, *Foreign Investment in Swiss Real Estate*, 4 INT'L FIN. L. REV. 43 (1985); Vogt & Watter, *supra* note 1, at 13/14-15; Peters, *supra* note 4, at 543-44; Weber, *Statutory Restrictions to the Participation in Companies by Non-residents Holding Real Estate in Switzerland*, 18 INT'L BUS. LAW. 458 (1990); N. VOGT & R. WATTER, INTERNATIONAL CORPORATE GOVERNANCE 209 (J. Lufkin & D. Gallagher eds. 1990).

29. For an English translation, with an introduction by Dr. R. Friedrich, the Minister of Justice after whom the law was named, see S. WYLER & B. WYLER, LEX FRIEDRICH LAW AND ORDINANCE ON THE ACQUISITION IN SWITZERLAND OF LANDED PROPERTY BY PERSONS IN FOREIGN COUNTRIES (1989).

30. As defined in Article 4 *Lex Friedrich* and Article 1 of the implementing ordinance.

31. See Article 17 *Lex Friedrich*.

authorities. Authorization is generally granted if the real property is necessary for the corporation to conduct its business (for example, for manufacturing, office space). Oftentimes, authorization will only be granted under certain conditions such as a prohibition of resale or a requirement that the shares be deposited with the competent Cantonal authorities or agencies.³² No authorization will be granted if the real property is near a military installation or if the acquisition is considered contrary to the public interest.

A purchase of shares in a company holding real estate without obtaining the necessary approvals by the competent authorities is considered void under the *Lex Friedrich*.

*F. Rules on the Employment of Foreign Nationals*³³

Switzerland imposes very strict limitations on working permits granted to foreign employees. Each Canton has, according to the size of its economy, a yearly quota of working permits it may grant. Therefore, if a foreign group purchases a Swiss corporation, the acquirer can not expect to staff the corporation entirely with management from its home country. Working permits for top executives, skilled technicians and specialists essential to the establishment and smooth operation of a business will usually be granted subject to the availability of such permits in that Canton.

III. COMPETITION RULES³⁴

By comparison to the United States and the European Community, Switzerland has relatively limited rules regarding competition. Article 30 of the Federal Law on Cartels of December 20, 1985, provides that the Federal Commission on Cartels may investigate mergers, acquisitions and joint ventures if the

32. See Article 14 *Lex Friedrich* and Article 11 of the implementing ordinance.

33. See Vogt & Walter, *supra* note 1, at 13/15.

34. See Vogt, *Protecting Your Own*, 7 INT'L FIN. L. REV. 25 (1988); Vogt & Walter, *supra* note 1, at 13/15-16.

transactions lead to or enforce a dominant position in a market which could have either economically or socially detrimental consequences. There is, however, no duty imposed on the parties to seek authorization from the Commission prior to completing a transaction. Furthermore, the Commission has no power to order a divestiture even if it concludes that a merger will have detrimental consequences. The Commission's power is limited to issuing orders that regulate the market behavior of the new entity or the new group.³⁵ The Commission's orders must further be confirmed by the Federal Department of Economy if they are contested.

If the new entity or group has a market position that allows it to substantially influence the pricing of goods or services, price increases may fall under the control of the Federal Supervisor of Prices. This department may, under certain circumstances, prohibit such price increases.

The Federal Law on Unfair Competition may apply to certain practices in a contested take-over situation, especially if the raider is a competitor of the offeree and has attempted to influence the business decisions of the offeree's management.

IV. PUBLIC OFFERS IN GENERAL

A. Preliminary Remarks

As previously mentioned, there are presently no direct rules or regulations regarding public offers in Switzerland. However, some rules may be inferred from the directors' duty of care and duty of loyalty towards the company and its shareholders. This applies to friendly offers which the director may only accept if the offers are in the best interest of the shareholders, as well as to unfriendly take-overs where the director's duty will require the director to exclude certain defensive tactics.

Prospectus requirements exist in circumstances in which the acquirer offers shares or bonds in exchange for the shares of the

35. Article 32 of the Federal Law of Cartels.

offeree.³⁶ However, these rules rarely apply since most tender offers are made against a cash payment.

So-called friendly offers are those supported by the management of the offeree company. The management then recommends to their shareholders whether to accept the offer of the acquirer. Sometimes, the acquirer and the offeree company may enter into an agreement regarding the future cooperation of the two entities. The agreement may contain a pledge by the management of the offeree company that it will recommend acceptance of the offer. However, the board of directors of the offeree company must act carefully and treat the shareholders equally by giving them a fair opportunity to determine whether to accept the acquirer's offer.

There is no need for a shareholders' meeting to approve a friendly offer. However, the shareholders are free not to tender their shares. The opposite is true in a merger after the shareholders have approved the offer--the shareholders must tender their shares. Additionally, while a merger can only be made against shares, in the case of a friendly takeover, the acquirer has a choice of the type of consideration to be given.

Only a few unfriendly offers have been launched in Switzerland.³⁷ No court decisions presently exist which define the extent of the duty of the board of directors to fight such a public offer, or the possibilities by which the board of editors may contest the offer nor whether such action is permitted. Since there are no rules regulating the behavior of acquirer (for example, there are no rules regarding the disclosure of a purchase of a certain percentage of shares), there are also no laws or regulations that would require the management of the offeree to issue a statement or to abstain from certain defensive tactics. However, the general duty of the management towards the company and the personal liability of the members of the board of directors and of the management where this duty has been breached does provide some means of assessing

36. Articles 651 and 1156, Swiss Code of Obligations.

37. *See, e.g.*, in the case of Micron AG where, however, the opposition was successful. *See also* N. VOGT & R. WATTER, *INTERNATIONAL CORPORATE GOVERNANCE* 209 (J. Lufkin & D. Gallagher eds. 1990).

the potential reaction of the management of the offeree company.³⁸

*B. The Swiss Take-Over Code*³⁹

The Association of Swiss Stock Exchanges issued a Swiss Take-Over Code on August 30, 1989. This code entered into force on September 1, 1989. This Code is comparable to the U.K. City Code in the manner that it regulates offers. However, the Swiss Take-Over Code is much narrower in its proposed field of application and in its attempt to restrict certain practices of acquirers and offerees. In general, it may be said that the new Swiss Take-Over Code favors the interests of the management of the offeree companies.

The Swiss Take-Over Code may be viewed as an attempt by the Association of the Swiss Stock Exchanges to avoid legislation regulating take-overs. Such legislation is presently under consideration. The Code provides, *inter alia*, for a take-over commission that would monitor take-overs. The Code neither includes the duty of the acquirer to disclose information to the shareholders nor the duty of the offeree's management to issue statements that would allow the shareholders to make a well informed choice. Furthermore, it remains to be seen to what extent professional advisers and outsiders will abide by the rules of the Code since only members of the stock exchanges (namely banks) are expressly bound by it.

The main purposes of the Code are to provide shareholders with adequate information, to avoid market manipulation and generally to define what is fair behavior of all parties involved. Shareholders of the offeree should have the option to accept an offer even if the offeree management rejects it.

38. Vogt & Watter, *supra* note 1, at 13/66.

39. See Vogt, *New Swiss Take-over Code*, 17 INT'L BUS. LAW. 489 (1989); Vogt & Watter, *supra* note 1, at 13/39-41; Peters, *supra* note 4, at 571-75.

According to the Code, duties of the acquirer include:

(i) The acquirer must treat the offeree shareholders equally.

There is no specific rule, however, which would exclude purchases outside of the offer.

(ii) The acquirer may not withdrawal the offer, unless a competing offer is launched.

(iii) Partial offers are permitted but the acquirer must accept the tendered shares on a pro rata basis. If the offer was for 100%, the acquirer must grant an additional period for shareholders to tender their shares after the offer has become unconditional. The code further provides for a mandatory offer for all shares if acquirer purchases more than 50% of all outstanding shares.

(iv) The offer must remain open during at least one month, and not more than two months.

(v) A report prepared by an accounting firm confirming that the acquirer has abided by the rules of the Code must be filed with the Commission.

(vi) The acquirer may not manipulate the market, for example, by selling shares into the market during the offer.

(vii) The acquirer is also required to prepare a prospectus.

Once an offer has been made, the management of the offeree is under a duty to call a shareholders' meeting if an acquirer holding at least ten percent of the share capital (which is not necessarily identical with ten percent of the voting shares) of the offeree requests such a meeting. This shareholders meeting will be required, regardless of whether the articles of association give the board of directors full discretion to refuse or to record the acquirer as a shareholder of the corporation.⁴⁰

It is doubtful whether the duties imposed on the management of the offeree fulfill the purpose of allowing the shareholders to make a considerate choice since shareholders will usually not be able to assess the value of their shares under the existing management. The

40. See *infra* notes 47-49 (discussing Share Transfer Restrictions).

necessity of a report on the offer will make it virtually impossible to launch a surprise attack on an offeree. Considerable danger of insider dealing during the preparation of such report also exists.

C. Duty of Management vis-à-vis an Offer

There are as yet no court decisions in Switzerland that define the duties of management *vis-à-vis* an unsolicited tender offer. In addition, there are few guidelines that clearly delineate the conditions an offer must fulfill in order for management to accept it. Furthermore, a substantial degree of uncertainty exists regarding the extent to which the management of the offeree may claim that a tender offer is detrimental to the interests of employees and creditors of the company.⁴¹

Generally, shareholders should be treated equally. They should have sufficient time to consider an offer, and in the case of a partial offer, their shares should be accepted on a pro rata basis. In addition, shareholders should be given information about the Acquirer's ability to pay the purchase price and the intentions concerning the offeree. If an offer fulfills these criteria it may be accepted by the management. However, even if the offer meets this standard, the directors may reject it if they believe in good faith that the offer is not in the best interest of the shareholders. Of course, it would be considered a breach of duty by the board of directors if the rejection of an offer were based only on their personal interest in keeping their positions. Directors are personally liable for any damages incurred by their shareholders that were caused by a breach of their directorial duties.⁴²

41. The board of directors of the insurance company, La Suisse, preferred an offer (after an auction for their company) of Rentenanstalt of SFr. 12'000.-- per share over an offer by a raider for SFr. 14'000.-- and refused to declare that the latter would be recorded in the shareholders' register. Possible Lex Friedrich problems and uncertain financing of the raider as well as the interests of clients and employees were set forth as grounds. While the first two reasons seem justifiable, it is much less clear whether the interests of clients and employees would supersede the shareholders' interest to receive an additional SFr. 2'000.-- for every share they held. See N. VOGT & R. WATTER, INTERNATIONAL CORPORATE GOVERNANCE 210 (J. Lufkin & D. Gallagher eds. 1990); Peters, *supra* note 4, at 550 n.155.

42. Vogt & Watter, *supra* note 1, at 13/66.

V. DEFENSIVE MEASURES AGAINST UNFRIENDLY OFFERS⁴³

A. *Principle of Free Transferability of Shares*

Transfer rights and restrictions placed on registered and/or bearer shares in a Swiss stock company are exclusively regulated by the provisions of the Swiss Code of Obligations regarding Swiss company law.⁴⁴ There are no securities regulations comparable to those in the United States or the United Kingdom. Thus, there are no reporting or disclosure requirements with regard to the acquisition of substantial shareholdings in a Swiss company. Only the new Swiss Take-Over Code provides for certain rules regarding public offers.⁴⁵ Neither Cantonal (i.e. state) stock exchange regulations, nor the Federal Cartels Law are applicable. Further, no public authority has any power to intervene, provided that the company is not engaged in banking, insurance, or any other regulated business. One exception to this general deficiency of power is the Lex Friedrich, which regulates the acquisition of Swiss real property by foreigners.⁴⁶

In principle, under the Swiss Code of Obligations, shares in bearer or registered form are freely transferable. Title in bearer shares passes by simple transfer of the security. In addition to the transfer of ownership in the security, the transfer of registered shares needs an endorsement by the seller and the registration by the purchaser as the new shareholder in the company's shareholder register.

43. See Arnold, *Defensive Measures Against Takeovers in Switzerland*, 8 INT'L BUS. LAW. 41 (1980).

44. Vogt & Wuestiner, *Share Transfer Restrictions Under Swiss Law and Hostile Takeovers of Swiss Companies*, 16 INT'L BUS. LAW. 355 (1988).

45. See *supra* notes 39-43 and accompanying text.

46. The Lex Friedrich applies if more than one-third of the assets of a company are real property and if the company will be controlled by foreigners. See *supra* notes 28-32 and accompanying text. In practice, the Lex Friedrich restrictions have prevented take-overs especially in the hotel industry. See also Vogt & Wuestiner, *Share Transfer Restrictions Under Swiss Law and Hostile Takeovers of Swiss Companies*, 16 INT'L BUS. LAW. 357 n.2 (1988).

B. Share Transfer Restrictions

A company may restrict the free transfer of its shares in its by-laws. Article 684, paragraph 1, of the Swiss Code of Obligations, provides that a company may, in its by-laws, restrict the free transfer of its registered shares.⁴⁷ The board of directors of a company may refuse to register a purchaser in the company's register of shareholders (the "Vinkulierung"). This refusal may be based on specific grounds provided for in the by-laws.⁴⁸ (for example, i.e. foreign nationality, competitors, restriction of individual shareholdings to a certain percentage). In addition, Article 686, paragraph 2, of the Swiss Code of Obligations allows a company to provide in its by-laws that the registration of a shareholder may be denied without any specific reason and without disclosing the reason for refusal.

These provisions grant the board of directors arbitrary powers to refuse any undesirable shareholder. Originally intended to protect a company from control by foreigners in war time, and to enable

47. Article 684 of the Swiss Code of Obligations provides:

Registered Shares

Save as otherwise provided by the by-laws, registered shares shall be transferable. Transfer may be effected by delivery of the certificate endorsed in favor of the new holder.

48. Article 686 of the Swiss Code of Obligations provides:

Refusal to Register

The company shall be entitled to withhold registration on the grounds provided for in the by-laws.

The by-laws may also provide that it shall be permitted to withhold registration without disclosing the reason therefore. In the case of shares which are not fully paid up the administration may require security; if such security is not provided, registration may be withheld. Where shares have been acquired by succession, by virtue of a matrimonial regime or in execution proceedings, no securities may be required and the entry in the share register may not be withheld unless members of the administration or shareholders state that they are willing to acquire such shares at the stock exchange quotation or, if the shares are not quoted, at their real value at the time the application for such registration was made.

a company to prove its Swiss ownership,⁴⁹ these anti-alienation provisions have recently gained notoriety as mere anti-take-over devices.

C. Gentleman's Agreement of the Swiss Banking Association with Listed Swiss Companies in Support of Share Transfer Restrictions

The transfer restrictions described above are also supported by a Gentleman's Agreement of the Swiss Banking Association with Swiss companies. Under this accord, the member banks⁵⁰ agreed not to execute orders by an "unqualified buyer." In fulfilling this agreement, Swiss companies agreed with the banks that specific requirements (which are not disclosed to the public) must be met by the purchaser of their shares in order to be accepted and registered as a new shareholder. The Gentleman's Agreement has, however, not proved to be an effective means of preventing sales of registered shares to non-qualified purchasers, since the banks are increasingly reluctant to enforce the rather extensive share transfer restrictions of Swiss companies.

D. Bearer Shares, Registered Shares, and Combined/Voting Shares

The most important defensive device employed by Swiss companies against a hostile take-over is the combined issuance of registered shares and bearer shares. Under the Swiss Code of Obligations, a Swiss company may issue its shares in registered and/or bearer form. It is therefore possible for a Swiss company to have both types of shares outstanding at the same time. Shares must be issued at a par value of at least SFr. 100. However, the par

49. The transfer restrictions gained significance in the 1970s when Swiss companies became internationally attractive for investors of OPEC countries and when the danger of foreign control became a serious threat to major Swiss companies. In addition, it became more and more important to prove Swiss control with the internationalization of services, when licenses to do business (especially for banking and insurance) were only granted on mutuality.

50. Including most foreign controlled banks.

value may differ for bearer and registered shares.⁵¹ Further, the by-laws may provide that each share shall be entitled to one vote, notwithstanding its nominal value. A Swiss company may therefore create super-voting shares to the effect that a capital minority becomes the voting majority. These, voting shares must be issued in registered form.⁵²

E. Placing Voting Shares with ‘‘Friendly’’ Parties

Creating the privileged registered shares described above⁵³ requires the consent of two-thirds of the share capital. This quorum usually makes it impossible to establish voting stock once a tender offer is imminent. In addition, many companies have issued non-voting participation certificates which entitle the holder only to dividends, liquidation proceeds, and certain preemptive rights.⁵⁴

The issuance of voting shares in registered form combined with transfer restriction provisions (*Vinkulierung*) in the by-laws with regard to registered shares enables the management to select and control its shareholders and thereby reduce the danger of a hostile take-over. Today, most Swiss companies traded on a Swiss stock-exchange are structured in this fashion, and registered shareholders often hold a large majority of the votes. While no major Swiss company has limited its outstanding shares to bearer shares (with

51. Article 693, ¶ [1], Swiss Code of Obligations.

52. Article 693, ¶ [2], Swiss Code of Obligations.

53. Article 693, ¶ [2], Swiss Code of Obligations.

54. In Switzerland, the use of participation certificates developed in the early 1960s principally as a means of enabling Swiss companies not only to split their equity into more manageable portions, but also to steer the company between an increased demand for investment capital and the apparent danger of possible foreign control of the company. Certificates may be issued without a nominal value or with a nominal value of less than SFr. 100.--. Participation Certificates furthermore fulfill the function of non-voting shares (which as such are unknown to Swiss company law) and therefore permit an increase of the company's "equity" without affecting the balance of control in the company issuing such securities. See H. FREIMULLER, N. VOGT, J. MARTY-LAVAUZELLE, *HYBRID CORPORATE SECURITIES: INTERNATIONAL LEGAL ASPECTS* 30 (R. McCormick & H. Creamer eds. 1987).

the exception of Hoffman-La Roche),⁵⁵ some companies have issued shares in registered form only.⁵⁶

An alternative strategy undertaken by Swiss companies has been to increase the share capital and place the shares thereby issued with friendly shareholders. This tactic requires that present shareholders waive their option to the newly issued shares⁵⁷ through a majority vote in the shareholders' meeting. Courts will uphold such a decision if it is considered necessary to pursue the objects and interests of the offeree.

F. Shareholder Agreement

Other defensive devices to prevent hostile take-overs include shareholder agreements between individual shareholders which pool shareholder voting rights and obtain or retain control of the company. Shareholder agreements often require the pooled shares to be deposited in escrow with a fiduciary, in order to secure the enforcement of the shareholder agreement. A shareholder agreement does not have to be made public or filed with a public register. Because the shareholder's agreement need not be publicized, it is not a defense for the company itself, as much as it is a defense for a group of shareholders.⁵⁸ In addition the shareholder of closely held Swiss companies often enter into shareholder agreements in order to regulate questions of succession and continuance of control and management.

55. Hoffmann-La Roche has a share capital of only SFr. 50'000.-- divided into 16'000 bearer shares of 3 1/8 Swiss Francs par value. However, the price of such bearer shares at the Zurich Stock Exchange on July 21, 1988, was SFr. 180'500. *See id.* at 256-58 & 258 n.10.

56. Companies such as Sulzer, La Suisse, Baloise, Hasler, and Danzas. *See Vogt & Wuestiner, Share Transfer Restrictions Under Swiss Law and Hostile Takeovers of Swiss Companies*, 16 INT'L BUS. LAW. 356-58 & 358 n.9 (1988).

57. *See* Article 652, Swiss Code of Obligations.

58. It is presumed, e.g., that a shareholder agreement between the members of the founder families of Hoffmann-La Roche exists and is still in force.

G. Increasing the Share Capital and the Placement of Shares with "Friendly" Parties

As an additional means of defense, a Swiss company also may increase its share capital and subsequently float the shares to friendly shareholders. This action is subject to shareholder approval.⁵⁹ Pursuant to several decisions of the Swiss Federal (Supreme) Court,⁶⁰ this action does not violate the preemptive rights of disapproving shareholders if the transaction is necessary to pursue the objects and interests of the company. In May 1988, the management of Rinsoz-Ormond SA, a Swiss tobacco manufacturer and distributor, applied this defensive device to prevent what it considered a take-over. The decision at the shareholders' meeting to increase the share capital of Rinsoz-Ormond SA was challenged by a minority of the shareholders and forced the company to convene another shareholders' meeting in July 1988. At the July meeting, the shareholders again approved the increase of the share capital of Rinsoz-Ormond SA.⁶¹

H. Redemption of Shares

In general, Swiss law prohibits a Swiss company from redeeming its shares. But even where certain statutory exceptions apply, redeemed shares may not be voted on at the shareholders' meeting.⁶² Therefore, Swiss companies have either arranged for one of its affiliates to repurchase the shares, or tried to find a suitable third party (for example, a white knight) who agrees to purchase the outstanding shares. This happened, for example, in the cases of Sulzer, Hero, and Baloïse, where third parties bought shares either on their own account or with the intent to subsequently sell them in the market or to a suitable friendly

59. However, the creation of authorized share capital is not possible under Swiss law.

60. See, e.g., the decision by the Swiss Federal (Supreme) Court in 91 BGE II 309.

61. Peters, *supra* note 4, at 547; Vogt & Wuestiner, *Share Transfer Restrictions Under Swiss Law and Hostile Takeovers of Swiss Companies*, 16 INT'L BUS. LAW. 257-58 n.19 (1988).

62. Article 659, ¶ [1], Swiss Code of Obligations

investor.⁶³ Thus, although Swiss law prohibits greenmail, violating Article 659 of the Swiss Code of Obligations is not likely to lead to sanctions. The purchase agreement is not void and, under normal circumstances, it is rather difficult to assess the damage incurred by the company. The situation would probably be different if the company bought its own shares at a premium. In the latter case, it is likely that the responsible directors and/or officers would expose themselves to liability suits.⁶⁴

I. Limitations on Shareholder Votes

Article 692, paragraph 2, of the Swiss Code of Obligations permits a company to limit in its articles of association the votes of any one shareholder. The articles of association may further limit the number of shares any one person may represent.⁶⁵ Many Swiss companies have taken advantage of these restrictions, and they have proven to be to be a very effective anti-take-over device.

For example, Article 4c, paragraph 2, of the articles of association of Ciba-Geigy AG reads that

no shareholder may, in exercising his votes, represent more than 5% of the share capital with respect to his own shares or shares represented by him. Corporate shareholders under common control are deemed one shareholder under this rule. The board of directors may grant exceptions to this rule under special circumstances.⁶⁶

In 1989, the articles of association of Nestle were amended to the effect that, *inter alia*, no shareholder may represent more than three percent of the entire share capital in a shareholders' meeting.⁶⁷

63. Peters, *supra* note 4, at 548-49 nn.137-47.

64. See H. FREIMULLER, N. VOGT, J. MARTY-LAVAUZELLE, *HYBRID CORPORATE SECURITIES: INTERNATIONAL LEGAL ASPECTS* 19 (R. McCormick & H. Creamer eds. 1987).

65. Article 689, ¶ [2], Swiss Code of Obligations.

66. N. VOGT & R. WATTER, *INTERNATIONAL CORPORATE GOVERNANCE* 219 (J. Lufkin & D. Gallagher eds. 1990) [This is a free translation.].

67. *Id.* at 216.

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Companies may decide to include similar provisions in their articles of association by a majority vote in the shareholders' meeting. Generally, there must be justifiable reasons for the measure, and the measure must affect the shareholders equally.

If the board of directors is empowered to grant an exception to this rule, an issue arises regarding what circumstances are necessary to enable the board to grant such an exception. In all other cases, an acquirer will have to make his offer conditional upon the shareholders voting for a modification of the articles of association.

J. Golden Parachutes

Golden parachute arrangements are almost always void because of the self-dealing aspect of the directors and officers who grant themselves certain benefits to the detriment of the corporation.

K. Institutional Support

Defenses adopted by Swiss companies are also supported by Swiss banks in exercising the votes of the shares they represent on behalf of their clients. Swiss banks, pursuant to a recommendation of the Swiss Bankers' Association, generally support proposals of the board of directors submitted to shareholders' meeting. In general, the banks have refrained from challenging decisions of the management of a company. However, this complacent practice by the banks is increasingly being questioned. Banks, as portfolio managers, might be liable for failing to pursue the financial interest (short-term capital gain) of their portfolio clients. This financial interest is not necessarily identical with a (purported long-term) interest of the board of directors of a company. In light of this concern, banks have been adopting new rules and requesting precise instructions from their clients in situations which might give rise to disputes.

A foreign acquirer should be especially aware of the fact that there are often close personal ties between Swiss companies. This may be evidenced by the number of seats on the board of directors

held by chief executive officers in many other companies. Banks are particularly well represented on the boards of their corporate clientele. Naturally, banks with these characteristics will not be ready to assist in financing an unsolicited bid for such an offeree.

VI. TAKE-OVER DEVICES UNDER SWISS LAW

By planning a hostile take-over of a Swiss company, an investor will, in general, consider the following take-over devices: share purchases through fiduciaries; a tender offer; and the calling of an extraordinary shareholders' meeting. This final section examines these three take-over devices.

A. Share Purchase

A hostile take-over may be initiated by purchasing shares of the target company through banks and other persons acting as fiduciaries. Under Swiss law, there are no disclosure requirements. Further, an investor is not required to make a tender offer to shareholders once the investor has acquired a certain number (for example, five percent) of the outstanding shares.

Theoretically, this allows an investor to remain completely anonymous. The market, however, is not subject to bank secrecy, and the purchase of a substantial number of shares will be noticed on the stock exchanges.⁶⁸ This is particularly true where shares are purchased solely through one bank. With respect to registered shares, the board of directors must be informed by the bank of any transfer of ownership of shares in their company. In the past, an extraordinary increase of such purchases has been a clear indication that a take-over was under way, especially if the company did not subsequently receive the applications for registration by the new shareholders.

68. For example, the purchase of ICN of around 7% of the shares outstanding of Hoffman La-Rouche resulted in a price increase of around 50% and in the case of Sulzer the purchase of 30% of the registered shares nearly doubled its price in the summer of 1987.

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As previously mentioned, purchasers of registered shares must disclose their identity to the company if they want to be registered as shareholders. The registration through a third party as a fiduciary is, in general, not accepted by the company without first disclosing the beneficiary. Further, such third party registration has previously resulted in an immediate reversal of registration once the fiduciary capacity of the registered shareholder was discovered. However, in a recent decision by the Attorney General of the Canton (state) of Zurich it was held that any such registration would not be a criminal offense under Swiss Criminal Law.

Until the purchaser of registered shares is registered, the seller remains registered and retains all voting rights. Pursuant to the Swiss Federal (Supreme) Court,⁶⁹ the non-registration of an unwelcomed purchaser results in a division of the rights of the shareholder: The membership rights (mainly the voting rights) remains with the seller/registered shareholder (book shareholder), whereas the financial rights (dividends, liquidation proceeds) pass on to the (unregistered) purchaser. The seller of shares is not obliged to support the registration of the purchaser. The seller may even vote against the interests of the purchaser at shareholders' meetings.

Unless supported by the board of directors, the mere purchase of shares has not proved to be a successful device towards obtaining control over a company. This is due mainly to the ratio between registered shares and bearer shares of most Swiss companies. In other words, even the holder of all bearer shares in a Swiss company will almost always need support from registered shares in order to obtain a voting majority. Nevertheless, the purchase of registered shares through a fiduciary may provide some leverage to an investor who is entering into negotiations with the company.⁷⁰

69. See, e.g., Swiss Federal (Supreme) Court in 109 BGE II 44 and 109 BGE II 130.

70. See Article 693, Swiss Code of Obligations (e.g. with respect to the elections of the auditors); Article 648, Swiss Code of Obligations (e.g. with respect to the issuance of super-voting shares).

B. Tender Offers

A tender offer does not require a prospectus or any other special formalities or filings with stock exchanges or other authorities. However, take-over bids, have until recently, rarely been made in Switzerland.

The first hostile tender offer in Switzerland was made in 1988 by Denner (a food distributor) for a majority of shares in Rinsoz-Ormond. The tender offer was published as an advertisement in a Swiss newspaper.⁷¹ Although the price offered was double the price for which the shares were traded at the Swiss stock exchanges, and was substantially above the price for which the new stock had been offered to a group of friendly investors, the board of directors of Rinsoz-Ormond rejected the tender offer. Denner's take-over bid failed.⁷²

C. Calling of an Extraordinary Shareholder Meeting: Proxy Fights

A shareholder, or a group of shareholders, representing ten percent or more of the share capital may request the board of directors to call a shareholder's meeting. Such request must state the agenda of the meeting. In a case involving a hostile take-over, the meeting's agenda could include a proposal to replace members of the board of directors, an increase in the number of directors, or a change of the by-laws regarding transfer restrictions of registered shares in the company. For a new investor, the best solution is to convince a majority of the board of directors to accept the investor as a new shareholder rather than to have transfer restrictions abolished by amending the by-laws.

71. At the moment a second hostile tender-offer has been made for the shares of La Suisse (an insurance company) by one of its (Swiss) shareholders.

72. The bid by Denner was launched at the time when Rinsoz-Ormond intended to increase its share capital in order to place new shares with a group of friendly investors as a precaution against take-over attempts. Denner's tender offer was made under the condition, that the share capital of Rinsoz-Ormond was not to be increased and that the board of directors would approve the registration of Denner as a new shareholder. However, the capital increase was approved by the shareholders' meeting and the friendly group of investors was allowed to subscribe for the new shares.

Proxy fights between shareholders are generally unknown in Switzerland. This is mainly due to the fact that the shareholder register is neither open to the public nor to shareholders. Therefore, a shareholder has no right to obtain an address list of registered shareholders in order to inform them about his intentions or to ask them for a proxy. Thus, in order for a new investor to obtain shareholder support, the investor must attempt to reach the shareholders through other means. Alternative means of communication include the press, or other media or indirectly through the banks in charge of the portfolio management of the shareholders. Although restricting access to the shareholder register has posed great difficulties, shareholders have been able to successfully oppose attempts by the board of directors to inhibit shareholder rights. For example, at a shareholders' meeting of Mikron Holding AG, held in September 1989, a group of shareholders was able to prevent an increase of the share capital of Mikron Holding AG (proposed by the board of directors). The shareholders believed that the increase would be detrimental to their rights as shareholders, since they were denied their preemption rights with regard to newly issued shares in Mikron Holding AG.⁷³

VIII. CONCLUSION

Swiss companies are not protected by statute or other governmental regulations against take-overs. Nonetheless, they have succeeded in establishing, through their corporate organization and through their capital structure, an efficient system of defense against hostile take-overs. This is clearly demonstrated by the list of unsuccessful hostile take-over attempts in the last few years. However, a coordinated use of all possible techniques has never been used in any of the recent take-over attempts.

73. N. VOGT & R. WATTER, *INTERNATIONAL CORPORATE GOVERNANCE* 219 (J. Lufkin & D. Gallagher eds. 1990).

