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Validity of opt-out clauses: Takeover Board issues decisions in Sika battle

Contributed by **Meyerlustenberger Lachenal**

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Authors

Alexander Vogel

Dimitar Morarcaliev

Introduction

The Securities and Stock Exchange Act provides for a mandatory offer obligation where a shareholder or group of shareholders acting in concert exceeds a threshold of 33.3% (or 49% when a company has introduced an opt-up clause) of the voting rights in a company listed on the stock exchange. According to Article 22 of the act, the shareholders of a listed company can choose to opt out from the mandatory offer obligation by including an opt-out clause in the articles of association, regardless of whether this clause is included before or after listing. Opt-out clauses are not uncommon among Swiss listed companies. According to a recent survey, more than 25% of Swiss listed companies included in the Swiss Performance Index have adopted such a clause in their articles of association. As a result, a large shareholder of any issuer holding more than 33.3% of the voting rights can sell its participation – even at a premium – to an acquirer which can, as a result, acquire control over the listed target without having to make a public offer to minority shareholders.

Two recent Takeover Board decisions determined the validity of an opt-out clause in the Sika takeover battle. In the first decision, the Takeover Board had to ascertain the validity of an opt-out clause in Sika's articles of association. In the second decision, the Takeover Board had to determine whether Sika's opt-out clause applied in the contested acquisition by Compagnie de Saint-Gobain SA of Sika's voting shares, which would enable Saint Gobain to acquire the majority of the voting rights and thereby control over Sika.

The opt-out clause[1] was introduced shortly after entry into force of the Securities and Stock Exchange Act and its transitional provisions (the transitional provisions were later abrogated). In the first decision, the Takeover Board was also asked to give its view on the applicable procedure in case of an abrogation of an existing opt-out clause (so-called 'opt in'). In particular, the Takeover Board was asked whether the minority protection rules applicable for an opt-out clause adopted by a company after listing its shares, as required by the *Advanced* decision of October 11 2012,[2] and confirmed in subsequent *Perfect*[3] and *Logan*[4] decisions, are applicable to an opt-in (for further details please see "Takeover Board confirms opt-out practice" and "Continuation of past practice regarding introduction of opt-out clauses"). Should the opt-out rules be applicable, the elimination of an opt-out clause from a company's articles of association would require only the consent of a majority of the minority shareholders, while the majority shareholder's votes would be disregarded.

In Sika's case, the Burkard family agreed to sell to French competitor Saint-Gobain SA the entire share capital of its family holding company Schenker-Winkler Holding AG, which in turn, by means of preferred voting shares, held 52.4% of the voting rights in Sika but only 16.1% of the outstanding equity capital. Under the terms of the share purchase agreement, on closing the sale of its interests in Sika, the family would receive a total consideration of Sfr2.75 billion, representing a premium of approximately 80% on the share price at the time that the transaction was announced. The combination of two classes of share (preferred voting shares and common shares), as well as an opt-out clause should allow Saint Gobain to acquire control of Sika by indirect acquisition of only 16% of the share capital, without the obligation to launch a public offer for the benefit of the remaining holders of common shares and representing 84% of Sika's share capital. Saint Gobain publicly announced that it had no intention to launch a public offer to acquire Sika's common shares and thus confirmed its intention to control Sika exclusively by means of the voting shares to be acquired.

Sika's board of directors and management board were informed that an agreement was concluded between the Burkard family and Saint Gobain in early December 2014. On being informed, several board members and members of the management board spoke out against the transaction, resulting in the family formally requesting that the board call an extraordinary shareholders' meeting to replace the dissenting board members with new members supporting the family's interests so as to close the transaction as soon as possible.

The board of directors rejected the request, arguing that Sika's articles of association restricted registered shareholders from holding more than 5% of registered shares.(5) Therefore, voting rights held by the Burkard family through the family holding company should be limited to the statutory 5% threshold, since the family had allegedly formed a group with Saint Gobain and was likely to exercise its voting rights at shareholders' meetings based on Saint Gobain's instructions.

Consequently, the family and Schenker-Winkler Holding would also lose the right to convene an extraordinary shareholders' meeting. The family, aggrieved by the resistance of Sika's board of directors and management board, filed a legal motion requesting the 5% limitation of its voting rights to be lifted and to push forward with convening the requested shareholders' meeting in order to oust opposing board members. The court denied the request. It argued that no particular urgency existed and – in view of the annual ordinary shareholders' meeting scheduled for April 14 2015 – that there was therefore no need to hold an extraordinary shareholders' meeting shortly before the ordinary shareholders' meeting. However, it left open the issue on the limitation of Schenker-Winkler Holding's voting rights. Further, a request by Schenker-Winkler Holding for an *ex parte* order prohibiting any restrictions of its voting rights in the context of this proceeding before the Zug Cantonal Court was dismissed. Schenker-Winkler Holding's appeal against the Zug Supreme Court decision, as well as a renewed request for an *ex parte* order with regard to the upcoming ordinary shareholders' meeting, were denied by the Zug Supreme Court.

Sika's board of directors and management board position was backed by several shareholders, including the Bill and Melinda Gates Foundation Trust and Cascade Investment LLC (together the Gates shareholders), Fidelity Worldwide Investment, Threadneedle Investments and the Ethos Foundation. These shareholders have, among other things, filed a request with the board to submit a motion to the shareholders' meeting to remove the opt-out clause from Sika's articles of association, arguing that it penalises minority shareholders in the case of a sale of the stake of a controlling shareholder. Further, the investors argued that Schenker-Winkler Holding, as majority shareholder, should not be allowed to vote on the removal of the clause in view of its inherent conflict of interest – as would be the case for the introduction of a new opt-out clause. If that was the case, the 48% voting rights held by minority shareholders would have the right to decide whether to maintain or remove the opt-out clause. Further, the Gates shareholders filed a request with the Takeover Board for a ruling on whether Saint Gobain was entitled to invoke Sika's opt-out clause when acquiring the Burkard family stake in Sika, and if so, whether doing so would constitute an abuse of law. These investors – supported by Sika's board and other shareholders(6) – argued that the opt-out clause in Sika's articles of association applied, for historical reasons, only to Burkard family members as Sika legacy shareholders since before its listing on the stock exchange. Incidentally, Sika and the minority shareholders invoked that the application of such clause to Saint Gobain's acquisition of the voting shares from Schenker-Winkler Holding constituted an abuse of law. Particularly in view of the fact that Saint Gobain claimed that the share transfer limitations provided in Sika's articles of association granting the board the right to restrict registered shareholders from holding more than 5% of registered shares would not be applicable for its acquisition of Sika's voting shares, since it intended to acquire Schenker-Winkler Holding's shares and not Sika's shares directly.

On March 5 2015, having evaluated the validity of the opt-out clause in Sika's articles of association, the Takeover Board concluded that such clause was considered valid in principle. However, it left open whether the application of the clause in the transaction between Saint Gobain and the Burkard family could be considered abusive.

On April 1 2015 the Takeover Board ruled that Saint Gobain was entitled to invoke the opt-out clause of Sika's articles of association and confirmed that the opt-out application to Saint Gobain's (indirect) acquisition of the voting shares was not considered abusive.

Opt-out procedures

The obligation to submit a mandatory offer based on Article 32 of the Securities and Stock Exchange Act applies to someone that directly or indirectly, alone or in concourse with third parties, obtains a total of 33.3% voting rights in a company, irrespective of whether the voting rights can be exercised. An offeree company may raise the threshold in its articles of association to 49% of the voting rights.

The main purpose of the mandatory offer under Article 32(1) is the protection of minority shareholders. Minority shareholders, in case of a change of control (ie, in case of a (new) majority shareholder or a shareholders' group), have the right to exit the investment.(7)

Until the entry into force of Chapter 5 of the Securities and Stock Exchange Act (January 1 1998), no legal regulation imposed an obligation to submit the mandatory offer. The introduction of a mandatory offer was heavily debated in Parliament.(8) The mandatory offer was finally adopted with a legislative compromise, where the possibility was given to exclude the duty to make a mandatory offer (opt out). As a result, the law provides that listed entities are entitled to exclude the mandatory offer provided for under Article 32(1) by including an opt-out clause. In case the shareholders decide to take such an option, the adoption of the clause in the articles of association and the legal rules regarding the mandatory offer are waived. This means that the shareholders give up the right to a public offer according to Article 32(1) in case of a change of control, which could potentially enable them to exit and benefit from a change of control premium.

Depending on the timing of an introduction of an opt-out clause, certain scenarios can be distinguished.

A statutory exclusion of the mandatory offer can occur before the listing. For that purpose, a company should provide in its articles of association that a potential buyer is not obliged to submit a public offer according to Article 32(1) (opt-out before listing; Article 22(2)). An opt-out before listing is not subject to prudential control of the Takeover Board and whether the clause has been validly adapted. The decision can therefore be challenged based only on the general remedies provided by company law (Article 706 and 706a of the Code of Obligations).

The same applies for statutory exclusions occurring within a two-year transitional period after the entry into force of the Securities and Stock Exchange Act.(9) Article 22 and following of the act and the former transitional provisions (Articles 51 to 54) entered into force on January 1 1998. The two-year transitional period lapsed on December 31 2000.(10) The Takeover Board does not review the validity of opt-out clauses – as in the case of an opt-out adopted before listing.(11)

The transitional provision was repealed with the partial revision of the Securities and Stock Exchange Act , which entered into force on May 1 2013. In view of the fact that the two-year transitional period had lapsed, companies that listed their shares or would have done so after the entry into force of the act would no longer be able to make use of it. However, the Takeover Board confirmed that an opt-out clause validly adopted within the transitional period remains valid even though the opt-out possibility in the sense of the former Article 53 has been formally repealed.

Finally, a company may at any time exclude statutorily the obligation for a mandatory offer, even after its listing. However, according to Article 706 of the Code of Obligations (subsequent opt-out; Article 22 (3) of the Securities and Stock Exchange Act), this applies only to the extent that it is not disadvantageous to shareholders. The reference to Article 706 must be read as an additional (Stock Exchange Act based) validity requirement. It does represent legal grounds for the Takeover Board to control the validity of a subsequent opt-out clause.(12) The Takeover Board can verify:

- whether the subsequent introduction represents a disadvantage for shareholders with respect to transparency requirements; and
- whether the major part of the minority shareholders has voted in favour of the subsequent introduction.(13)

Opt-out clause in light of *Sika*

Opt-out clause and validity
The Sika opt-out clause was a transitional period opt-out clause. Both Sika's bearer shares and registered shares were listed at the time of entry (the registered shares were delisted on September 4 2003 and consequently only bearer shares remain listed to date) and the general meeting adopted the introduction of an opt-out by unanimous decision on May 27 1998. The amendment of the articles of association also occurred on May 27 1998 by public deed and was registered with the Zug Canton Commercial Register by Sika's board of directors on May 29 1998 and published on June 5 1998 in the *Official Gazette of Commerce*. Formerly included in Section 7 of the articles of association, the opt-out clause was later integrated with no material amendments in Article 5, following a partial revision of the articles of association.

Consequently, the Takeover Board considered that the opt-out clause in Article 5 is and shall remain valid as long as it is not repealed by the general meeting.

However, Sika brought forward that the opt-out clause validly in place at that time could be considered void in the context of the sale of Sika shares to Saint Gobain. The opt-out clause is abusive and consisted in an abuse of rights by Schenker-Winkler Holding and Saint Gobain. The question of Sika remains unanswered, since the Takeover Board considered that it had not been requested to decree on this point based on Schenker-Winkler Holding's (limited) request. In addition, Schenker-Winkler Holding's second request opened for debate whether a company could opt in for a mandatory public offer and if so, under what circumstances.

Opt-in procedure
Swiss law provides for an opt-out clause, but does not explicitly provide for opting in (there is no applicable procedure for implementing an opt-in). In addition, an opt-in clause has never been tested in the Swiss courts and therefore no court decision exists in this respect. In an earlier decision, the Takeover Board had to review a case where an opt-in clause was provided for by the respective issuer without having to scrutinise its validity.(14)

Pursuant to the Takeover Board, rules applying to a subsequent opt-out clause are not applicable to an opt-in, since the interests of the shareholders in case of a subsequent opt-out and opt-in are not comparable. A subsequent opt-out clause affects the existing legal situation of minority shareholders. According to Article 32 of the Securities and Stock Exchange Act, such minority shareholders are being deprived of their rights to receive a mandatory offer in case of a change of control and of obtaining similar conditions to exit the company. But since a single controlling shareholder or a controlling majority of shareholders may introduce the opt-out clause with a simple majority of votes cast against the opposition of the minority shareholders, the rights given to the minority shareholders are revoked by an opt-out clause. According to Takeover Board practice, a prejudice of the minority shareholders in case of a subsequent opt-out clause can be excluded presumably to the extent that shareholders were duly informed in a transparent fashion about the introduction of the opt-out clause and its consequences and that a majority of the minority shareholders had agreed to its introduction.

In view of the Takeover Board, in case of an opt-in the situation is different. Even if the interests of majority and minority shareholders are also different – as in the case of an opt-out – the risk of discrimination against minority shareholders does not exist, since minority shareholders have no right to an opt-in. Should the majority of all shareholders decide to opt in, the statutory provision of Article 32 comes back into effect (ie, the minority shareholders get (back) the right to receive a mandatory offer in case of a change of control). Consequently, from a legal perspective, an opt-in provides the minority shareholders with increased protection in case of a takeover.

Thus, the restrictive procedural safeguards developed by the Takeover Board for a subsequent opt-out clause are – based in the *Sika* decision – not applicable to an opt-in.

Opt-out clause application

As applicants, the Gates shareholders argued in their motion to the Takeover Board that the opt-out clause must be read and construed with regard to the statutory limitation restricting any registered shareholders from holding more than 5% of the registered shares. This view is supported by Sika's request that such clause is construed in view of its historical context and in view of the intentions of the board of directors at the time of its inclusion in the articles of association. The board minutes noted that the purpose of the opt-out clause was to give the Burkard family leeway for any change in its aggregate shareholding by avoiding that fluctuations in the aggregate shareholding lead to a mandatory offer to other shareholders; implying, however, that the clause leads to unequal treatment of public shareholders in case of a sale. The Takeover Board rejected this view, arguing that the statutory limitation and opt-out clause need to be treated and interpreted separately. The board argued that articles of association of listed companies should be interpreted according to the same principles as the interpretation of legislation in the form of a statute (ie, in a way that a new shareholder could reasonably interpret them). Therefore, the starting point for the interpretation of the clause must be its wording and only in exceptional cases where strong evidence suggests that the meaning of a clause does not comply with its wording can this be altered. Without strong evidence in the present case, the wording of the opt-out clause in Sika's articles of association is, pursuant to the Takeover Board, clear and unambiguous, and thus must be construed as being applicable to all acquirers of shares and not only to the Burkard family.

Abusive use of opt-out clause

The Gates shareholders and Sika's board further argued that the opt-out clause invoked by Saint Gobain was abusive. This was because Saint Gobain took conflicting positions on the interpretation of the statutory limitation restricting the acquisition of the registered shares and the opt-out clause and because the Burkard family allegedly breached the legitimate expectations of the public shareholders created by its earlier statements and assurances. The Takeover Board denied any abuse of law, arguing that Saint Gobain requested only the application of the opt-out clause and its intention, which was the non-application of a mandatory offer when acquiring the majority stake in Sika held by the Burkard family. While Article 2 of the Civil Code forbids the abuse of rights and the exercise of a right is considered to be abusive when it causes material iniquity or blatant injustice – which can be the case if a right is used against its originally intended purpose or in case of conflicting and contradictory behaviour – the Takeover Board ruled that this was not the case when Saint Gobain invoked the opt-out clause, irrespective of whether it would be subject to the shares transfer restriction provided for in Sika's articles of association. The Takeover Board further noted that it has no jurisdiction regarding the application of the shares transfer restriction to Saint Gobain, since this issue must be reviewed by the civil courts.

Comment

Since the Gates shareholders appealed the decision to the Swiss Financial Supervisory Authority (FINMA), the FINMA takeover chamber will have to review the matter on its merits and rule on the validity and application of the opt-out clause to Saint Gobain in its attempt to acquire control over Sika. The parties (ie, the Gates shareholders, Sika, Saint Gobain and Schenker-Winkler Holding), will each have the opportunity to lodge an appeal against FINMA's decision with the Federal Administrative Court. However, such appeal will have no suspensive effect.(15) Further, depending on the outcome of the resolutions of the upcoming Sika shareholders' meeting, any shareholder can file both a request to block the commercial register and a claim with the Zug Cantonal Court, alleging that the resolutions of the shareholders' meeting violate the articles of association or mandatory corporate law (eg, by allowing or disallowing Schenker-Winkler Holding to vote with all of its shares).

For further information on this topic please contact Alexander Vogel or Dimitar Morarcaliev at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91) or email (alexander.vogel@mll-legal.com or dimitar@morarcaliev@mll-legal.com). The Meyerlustenberger Lachenal website can be accessed at www.mll-legal.com.

Endnotes

(1) Article 5 of Sika's articles of association reads as follows: "An acquirer of shares of the Company is not obliged to make a public purchase offer pursuant to Art. 32 and 52 of the Swiss Law on Stock Exchanges and securities trading."

(2) *Advanced Digital Broadcast Holdings AG*, Takeover Board 518/01, October 11 2012.

(3) *Perfect Holding SA*, Takeover Board 531/01, April 26 2013.

(4) *Logan Capital AG*, TB Takeover Board 539/01, June 24 2013.

(5) Article 4 of Sika's articles of association reads as follows:

> "*The Board of Directors reserves the right to refuse an acquirer of registered shares as shareholder, if the number of registered shares held by him exceeds 5% of the total number of registered shares entered in the commercial register. The limitation of 5% also applies to the subscription to or the purchase of registered shares by means of exercising subscription rights, options, or conversion rights of registered or bearer shares or other securities issued by the Company or third parties. Legal entities and partnerships with legal capacity, which are affiliated through common ownership or votes, through common control or in any similar manner, as well as natural persons or legal entities or, which act in concert in view of a circumvention of registration limitations, are regarded under these provisions as a single buyer.*"

(6) While the Gates shareholders together hold 3% of Sika voting rights, and thus fulfil the requirements as qualified shareholders entitled to take part in the proceedings in front of the Takeover Board and to file requests with the latter, Fidelity Worldwide Investment, Threadneedle Investments and the Ethos Foundation, each holding less than 3%, have the right to submit notifications pursuant only to Article 62 of the Takeover Ordinance to the Takeover Board, but not to formally act as a party in the proceedings in front of the board.

(7) Federal Message, February 24 1993, relating to the Securities and Stock Exchange Act, BBI 1993 I 1369 and following, 1389, 1417.

(8) For example, the plea of the rapporteur Pascal Couchepin, *Federal Gazette* 1994 II 1051; the pleas of Michael Dreher, *Federal Gazette* 1994 II 1064; the pleas of Walter Frey, *Federal Gazette* 1994 II 1965. Regarding historic data see also Robert Bernet, *Die Regelung öffentlicher Kaufangebote im neuen Börsengesetz*, Dissertaion, Bern 1998 page 69 and following.

(9) The original version of Article 53 of the Securities and Stock Exchange Act, in force until its partial revision on May 1 2013, reads as follows:

> "*Companies that are already listed may within two years of the entry into force of this Act adopt in their articles of association a provision based on Article 22 Section II. Article 22 Section III shall not be applicable to the Takeover Board confirmed*."

AS 1997 68; opt out during transitional period.

(10) *Société Bancaire Privée SA*, Ext.1.1, Recommendation 324/01, August 8 2007.

(11) However, the question was left open in *Société Bancaire Privée SA*. See also Isabelle Chabloz, *Les clauses d'opting out sélectives* in *Schweizerisches Übernahemrecht in der Praxis, Schweizerische Übernahmekommission* (*Hrsg*), Zürich/Basel/Genf 2005, page 116.

(12) Luc Thévenoz/Lukas Roos, Opting out, in: Mergers and Acquisitions XVII, Hrsg: Rudolf Tschäni, Zürich/Basel/Genf 2015, page 40.

(13) *Advanced Digital Broadcast Holdings AG*, Takeover Board 518/01, October 11 2012; *Perfect Holding AG* 531/01, April 26 2013 and *Logan Capital AG* 539/01, June 24 2013.

(14) *Unaxis Holding Ltd*, Takeover Board Recommendation 0240/02, June 27 2005, reviewing whether Victory Industriebeteiligung AG had to submit a (mandatory) public offer to Unaxis shareholders after its acquisition of 34.04% of shares in Unaxis, thereby confirming that an opt-in decision by the shareholders' meeting becomes effective with its filing for registration in the register of commerce and has no retroactive effect (pursuant to *Calida Holding Ltd*, Recommendation 0064/01, June 8 2000). Since Victory had acquired its stake immediately before the introduction of the opt-in, the latter was not obliged to submit a public offer to the other Unaxis shareholders.

(15) For further details please see "Federal Administrative Court rules on Quadrant public takeover" and Federal Administrative Court decision, May 11 2009, regarding Harwanne Compagnie de participations industrielles et financières SA (BVGer B-2414/2009, No 14-15 and 20).