CENTRE DE DROIT
BANCAIRE ET FINANCIER

Public takeover bids

The reintroduction of the mandatory bid, a perpetuation of legal uncertainty

Par Lukaz Samb le 30 November 2021

On 4 November 2021, the Takeover Committee issued Decision 795/01 in which an exemption from the mandatory offer was granted to the group of shareholders made up of the Hoffmann family (hereinafter : the applicants) in the context of a planned buyback of own shares relating to a block of Roche shares held by Novartis.

In order to reduce its shareholding, Novartis entered into discussions with the Roche board of directors to buy back and cancel 53.3 million Roche shares. As a result, the applicants, who held 45.01 % of the voting rights, would see their shareholding increase to 67.5 %. The applicants would therefore be obliged to make a public takeover bid because their shareholding would exceed the threshold of 50 % of the voting rights established in Article 37 OIMF-FINMA. In order to avoid having to fulfil this obligation, the applicants asked COPA to grant them an exemption from the obligation to submit an offer (art. 136 para. 1 let. b LIMF).

COPA first verified whether the applicants were subject to the obligation to submit an offer, then considered the possibility of granting an exemption.

With regard to the obligation to make a bid, the applicants contested both the legality of Art. 37 OIMF-FINMA and its interpretation in the present case.

When the former Stock Exchange and Securities Trading Act (SESTA) came into force, a dual regime of mandatory offer submission was established to take into account certain majority shareholders who would not have been subject to the obligation to submit an offer because they already held more than 33? % of the voting rights of a target company. Under Art. 52 aLBVM (current Art. 163 para. 1 LIMF), if a shareholder held more than 33? % but less than 50 % of the voting rights, they would also be subject to the mandatory offer once they exceeded the 50 % threshold from the date the law came into force. Shareholders holding more than 50 % were therefore not subject to the mandatory offer (art. 32 para. 1 LBVM ; current art. 135 para. 1 LIMF) or to the additional requirement of art. 52 aLBVM, which was the case for the applicants who held more than 50 % of Roche shares.

However, the Federal Banking Commission, which was competent at the time, had exercised its legislative prerogative enshrined in Art. 32(6) aLBVM (now Art. 135(4) LIMF) in order to provide for an additional obligation by means of an ordinance. Art. 31 SESTO-CFB (current art. 37 OIMF-FINMA) stipulated that anyone holding more than 50 % of the voting rights would also be

obliged to make an offer if their shareholding fell below the 50 % threshold and exceeded it again.

The majority doctrine considers that this standard goes beyond the legislative mandate conferred by the aLBVM, which did not provide for any additional obligation for shareholders holding more than 50 % of the voting rights when the aLBVM came into force. The Federal Court, which had been confronted with this question in ATF 130 II 530, had left the question open (c. 5.1.3).

In addition to this, the French version of art. 37 OIMF-FINMA refers to ‘quiconque’ (anyone), suggesting that a group of shareholders could be subject to this obligation, while the German version refers to ‘une personne’ (a person), which would restrict the scope of application.

In this decision, the COPA decided not to rule on these two questions, as the applicants fulfilled, in its opinion, the conditions for an exemption from the mandatory offer.

Art. 136 para. 1 let. b LIMF allows the COPA to grant an exemption when the threshold is exceeded as a result of a reduction in the total number of voting rights in the company. Taking into account the financial consequences of a mandatory bid, the Federal Supreme Court and FINMA have recognised a right for taxpayers to benefit from an exemption if no particular circumstances prevent it and no evidence of circumvention can be detected (ATF 130 II 530, c. 7.4. 3 ; FINMA decision of 6 December 2019 in the SCHMOLZ+BICKENBACH AG case, Nm 35).

COPA begins by recalling its practice in Recommendations 27/01 of 25 February 1999 in the Julius Baer Holding Ltd case, c. 5.2 and 93/01 of 2 April 2001 in the Helvetia Patria Holding AG case, c. 1.2 and 3 as well as in an unpublished decision 589/01 of 11 February 2015. According to it, in order to be able to benefit from an exemption under Art. 136 para. 1 let. b LIMF, the increase in the applicant’s participation must in principle take place independently of his will.

In the case in question, there is nothing to suggest that the repurchase and cancellation of the shares are within the applicants‘ control. It was not they, but Novartis, that initiated and negotiated the transaction, the applicants’ representatives on the board of directors having recused themselves during the vote approving this decision. The applicants only undertook to approve the decision at a general meeting. They therefore only take part in the execution of the transaction and not in its elaboration. Finally, the petitioners already control the company prior to the transaction, given their effective participation in the general meeting (de facto control), and the increase in voting rights to 67.5 % does not change this.

This decision reminds us of the importance for COPA that the increase in the applicant’s shareholding takes place independently of his will when he requests an exemption from the mandatory offer based on art. 136 para. 1 let. b LIMF. It is regrettable that the COPA did not take the opportunity to decide on the applicability of Art. 37 OIMF-FINMA, as applicants are not the only shareholders of a listed company who may be confronted with it in the future.