

Voluntary Tender Offer

When the will to control collides with the reality of control

Par Lukaz Samb le 14 November 2023

Is there a necessary link between control on the Board of Directors and control through a shareholder's voting rights? The Swiss Takeover Board (STB) had to decide this question in its decision 853/01 of August 31, 2023 in the case of GAM Holding AG. The STB had to rule on the validity of a clause conditioning a voluntary offer on the possibility of appointing all the members of the board of directors of a listed company. The appeal lodged against this decision at the beginning of September 2023 was withdrawn a few weeks later, so that the decision has now become final.

GAM Holding AG (GAM) is a Swiss listed company with a concentrated but uncontrolled shareholder base. Nine shareholders, including the company itself, independently hold 51 % of the voting rights in GAM, with the largest shareholder holding 15 %.

A group of shareholders, including NewGame SA (NewGame) and Bruellan Holding SA, together hold 9.6 % of voting rights. In July 2023, NewGame publishes a pre-announcement to acquire additional shares corresponding to 17.5 % of voting rights. This offer, counted together with NewGame's initial stake, would ultimately give NewGame a maximum 27.1 % voting interest in GAM. As the projected total shareholding following the offer does not exceed the threshold of 33% of voting rights within the meaning of art. 135 para. 1 LIMF, this offer qualifies as a voluntary offer.

Here, NewGame decides to make its offer subject to several conditions, including one concerning changes to the Board of Directors. In a clause entitled "Renewal of the Board of Directors", NewGame made its offer conditional on a general meeting being held to (i) remove all current members of GAM's Board of Directors and (ii) elect all candidates proposed by NewGame, to the exclusion of all other candidates. In effect, NewGame's aim is to unilaterally control the Board of Directors.

As a reminder, unlike a mandatory offer or a voluntary takeover bid, a voluntary offer is not subject to the minimum price rule. However, a voluntary offer may be subject to conditions if the bidder has a justified interest in imposing them, and if they are not potestative (unlike the other two forms of offer, which must be unconditional, unless there are good reasons for not doing so; see art. 38 para. 1 OIMF-FINMA and art. 13 para. 1 OOPA).

In response to this condition, the STB begins by recalling its practice in the context of voluntary takeover bids. In the context of such offers, the bidder, who at the end of his offer would hold a

controlling interest, i.e. more than 33% of the voting rights, has a justified interest in taking control of the board of directors. Such a condition would in fact enable it to ensure a rapid transition following the offer (in particular to put in place new management as expected by the bidder).

Turning its attention to our situation, the STB points out the difference between NewGame's offer and a voluntary takeover bid. NewGame's offer is for a stake of, at most, 27.1 % of the voting rights. Insofar as NewGame remains a minority shareholder (i.e. a shareholder holding less than 33% of the voting rights), it is unusual and contrary to the principles of good governance for it to be able to elect all the members of the Board of Directors. Then again, it would at least be expected that a majority of independent directors should also be appointed, in order to comply in particular with the principles set out in art. 15 of the Swiss Code of Best Practice for Corporate Governance. The STB incidentally concludes that this condition is inadmissible and should be deleted from NewGame's offer prospectus.

In our view, the STB's conclusion in this case is correct. Following its offer, NewGame would hold 27.1 % of the voting rights, but would not control the company. This is true both from a theoretical point of view (in application of art. 135 al. 1 LIMF) and from a practical point of view (the other major shareholders holding 29 % of the voting rights in any case and being able, incidentally, to exercise a certain form of counter-power). In our view, the question would be different if there were no other major shareholders. In such a case, NewGame, albeit a minority shareholder, could have tried to assert de facto control to justify its stranglehold on the Board of Directors. In any case, as it stands, the STB's position is entirely sustainable, and NewGame has accepted it by withdrawing its appeal against this decision.

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