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Capital "On Demand": Equity Lines / Share Subscription Facilities for Swiss Listed Companies

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Many listed companies are seeking "on-demand" capital solutions that are tailor made to their specific needs. These companies often enter into arrangements with an institutional investor, whereby the company has the right to call specified amounts of cash from the investor against issuance or delivery of a certain amount of shares in return. Such arrangements are often referred to as "equity lines", "equity distribution agreements" or "share subscription facilities". This article explores how such agreements are best structured for Swiss listed and incorporated issuers from both a corporate and a capital markets perspective.

By Thomas Reutter/Annette Weber

1) Standard approach to equity lines in Switzerland

Swiss listed companies wishing to establish an equity line are often referred to alleged "international standard" forms of agreements by potential investors. In fact, there are a few institutional investors, particularly funds, who have invested in companies outside Switzerland and who have allegedly used their "standard form" in doing so. This form usually foresees a right of the company to demand advances in cash from the investor. The consideration of providing cash consists exclusively in shares of the listed company. In the base case scenario, the company issues new shares from authorized capital and delivers them immediately after creation of the shares to the investor in return for the cash received. Alternatively and to minimize the administrative burden that may be related to share creation in certain jurisdictions, the company may only issue shares after several draw-downs of cash. In order to bridge the time gap between cash injection and delivery of shares, another existing shareholder may step in and lend (or occasionally also sell) the shares to the investor on behalf of the company (often referred to as "share provider"). Depending on structure, the share provider either receives shares from the investor once the investor himself receives newly issued shares from the company or it receives shares directly from the company. In the latter case, the company's delivery of shares discharges the redelivery obligation of the investor in return for the investor waiving to receive shares directly from the company.

The above described arrangements usually also include a cap on the amount the company can draw down, which is set against the backdrop of the liquidity of the respective stock. The price at which the shares are sold is usually at a slight discount of a defined volume weighted average price. Since subscription rights of existing shareholders have be excluded for the purposes of issuing shares to the investor, the consideration received by the company for delivering such shares may not be significantly lower than

the "market price" (see below). This price may, however, not necessarily be the same price at which the shares are issued (issue price; *Ausgabebetrag*).

2) Problems related to share creation and listing

a) Corporate law considerations

Following international precedents, Swiss companies also look to authorized capital as the basket from which to issue shares to satisfy delivery obligations under share subscription facilities. Under Swiss corporate law, authorized capital is an authorization of the board of directors by the shareholder meeting to issue shares during a maximum period of two years and in the maximum amount of 50% of the shares registered in the commercial register. The shareholder resolution needs to be adopted by a majority of two thirds of the votes presented and the absolute majority of the nominal value of the shares presented at such meeting. If adopted, the authorization becomes part of the company's articles of association.

Authorized capital facilitates the share issuance in that the board of directors rather than the shareholder meeting can implement the actual share issuance. However, a number of drawbacks remain. In order to effect a share issuance out of authorized capital, the subscription amount must be transferred to a blocked account with a Swiss bank. In addition, a notarized deed must be established in the presence of a board member (including an amendment to the articles of association as a result of the higher outstanding number of shares and the reduced number of shares under authorized capital) and a filing needs to be made with the commercial register. Thus, the corporate share creation process out of authorized capital involves a significant amount of paperwork, administrative processes and fees (e.g. notary, commercial register) and is subject to a renewed authorization by the shareholder meeting after two years. The latter implies the risk that a shareholder meeting will not renew the authorized share capital after two years and the company is not able to draw down cash or meet its obligations under a share facility agreement.

b) Capital markets law considerations

In addition to these corporate law steps, a listing application needs to be filed with SIX Swiss Exchange ("SIX") each time new shares are issued out of authorized capital. According to the listing rules, the Regulatory Board of SIX has principally 20 trading days to review the application. No prospectus needs to be drafted as long as the new shares do not, together with shares already issued in the prior 12 months, exceed 10% of the issued shares. While the filing of the listing application can be timed such as to avoid any delays between share creation and listing, the process as a whole remains burdensome and unsatisfactory for the present purposes.

If the obligation to disclose major shareholdings is triggered (art. 120 of the Financial Market Infrastructure Act ("FMIA")), the company has to report, *inter alia*, the number of shares to be delivered under the SSF and to report it as a disposal position in equity securities. The investor has to report the corresponding long position. As the number of shares to be delivered under the SSF depends on the market price of the shares at the time of the exercise, the exact number of shares which will be delivered cannot be calculated. According to guidance by the Disclosure Office of SIX ("DO"), the maximum number of shares which may be delivered has to be reported. This number, however, is a function of the minimum share price which theoretically may be as low as the nominal value. However, in cases of significant discrepancies between the nominal value and the share price, the DO seems to suggest that number of shares can also be calculated according to the current market price of the shares at time of entering into the SSF.

Whenever the investor reaches a reportable threshold in *shares* as a result of an exercise under the SSF, a new notification has to be made. The company will generally have to update its disposal position if such exercise leads to a crossing of a (lower) threshold. Apparently, the DO wants an updated disclosure notification if the share price significantly increases or decreases (over a certain period of time) provided that a threshold of art. 120 FMIA is reached or crossed as a result of the updated calculation. It is therefore recommended to approach the DO in specific cases and to seek a ruling in order to ensure compliance with the requirements set by the DO.

c) Alternatives to shorten the issuance process: reserve shares

In light of the above shortcomings, some companies have opted to issue shares in advance and well ahead of the time when the delivery obligation arises. Such shares are reserved for the specific purpose of satisfying delivery obligations under a certain instrument such as a share subscription facility ("SSF") (*gebundene Vorratsaktien* or "reserve shares"). The process of creating reserve shares is considered permissible by a majority of commentators and has been accepted by commercial registers in practice. In this process, the shares are usually created by a subsidiary of the listed company subscribing them in cash at their nominal value (which is the minimum subscription price). However, it would also be possible, subject to certain limitations, for the company to subscribe for the shares themselves (*originärer Erwerb eigener Aktien*). Of course, the shares so issued below market price will have to be sold against a market price consideration in light of the fact that subscription rights of existing shareholders must inevitably be withdrawn.

While the creation of reserve shares helps to avoid the multiple replication of the administrative and burdensome tasks related to the creation of shares under authorized capital and related to listing, it has itself substantial shortcomings. Most importantly, shares must be created which may never be used for delivery purposes. Such unused

shares will, as a rule, have to be cancelled or offered to all existing shareholders. Such reserve shares will generally be issued at the nominal value. The fair market consideration for such shares will, if at all, only be received by the company at the time of transfer the shares to the relevant third party. Hence, the issuance of such shares will not only be dilutive in terms of number of shares outstanding, but also result in a decreased net asset value per share. The creation in advance of shares potentially needed under the share subscription facility is therefore not an ideal solution either.

3) A new proposal based on conditional capital

a) Characteristics of conditional capital

Conditional capital is a form of capital authorization that enables the board of directors to issue equity linked instruments such as convertible bonds. More precisely, it allows the board of directors to grant conversion or option rights which will trigger the issuance of new shares upon exercise or conversion. Conditional capital has traditionally been used for both capital market instruments and tailor made instruments for specific investors (PIPEs). Like authorized capital, conditional capital needs to be approved by the shareholder meeting with a majority of two thirds of the votes presented and the absolute majority of the nominal value of the shares presented, but unlike authorized capital, it has no statutory limitation on availability. The share creation under conditional capital is straightforward: New shares are created upon payment or declaration to set-off to a Swiss bank. The process obviates the need for a blocked account, a board resolution or a notarial deed for the creation of the new shares, all of which are required for authorized capital. A filing with the commercial register is made only once per year and is merely declaratory in nature, i.e. is not needed to legally perfect the creation of new shares.

The advantages of conditional capital at the level of listing are even more striking. All shares that can potentially be issued under conditional capital can be formally listed in advance with a simple listing application. There is no need to draft a prospectus even if the 10% threshold of existing shares will be exceeded if the shares to be listed are issued in connection with the exercise of rights which are convertible into shares.

b) Use of conditional capital for share subscription facilities

The question therefore arises how a SSF can be designed by using conditional capital instead of authorized capital. The answer is embedded in the purpose of the conditional capital: The SSF has to be structured as an equity linked instrument. In light of the nature of the capital raising, the SSF will also have to be designed as a private investment in a public entity (PIPE) rather than a capital market instrument offered to the public. The host instrument will be a simple credit or loan facility setting out the conditions and process for draw-down of funds. The structure further envisages two

conversion rights embedded in the host instrument. On the one hand, the investor has a right to convert the outstanding balance of cash advances previously made. On the other hand, the company has a *de facto* right to convert as well by forcing conversion by the investor.

The investor's conversion right is structurally the same as a conversion right in any convertible bond; the only difference relates to the conversion price, which is not predetermined in advance, but will be set in each conversion in relation to the volume weighted share price prior to the conversion declaration and which will also usually be at a slight discount rather than a premium to the share price. In case of a SSF, the share price is obviously a moving target and not frozen at the time of launch of the instrument. Hence, contrary to a traditional convertible instrument, the investor does not realize a capital gain if the share price increases prior to conversion.

The *de facto* conversion right of the company, however, needs a specific design in order to fit the purpose of conditional capital. Conditional capital pre-supposes a right of the holder of the equity-linked instrument to trigger the share creation. It is unclear if the company can be the beneficiary of such right as well. Most of the commentators limit the beneficiaries to the holders of options and conversion rights, but without any further reasoning. The prudent approach therefore is, in our view, to design the company's "conversion right" or share settlement option such as to maintain the formal right of the investor to exercise the conversion, but to provide an economically compelling reason for the investor to exercise such right. This can be done by conferring the ability on the company to write-down the outstanding balance of the facility to zero. Prior to such write-down, the investor has the right to exercise conversion, generally at the same terms at which he would otherwise have exercised such right. In order to protect the investor, the terms of the SSF can further provide that the investor is deemed to have converted if no conversion declaration is received during a specified period of time.

4) Challenges and Conclusions

If the parties' intention is to convert immediately after each draw down the question may be asked whether this would somehow evade the rules of share creation under authorized capital or, conversely, whether the law prescribes a certain minimum term during which a conversion right cannot be exercised. Clearly, there is no minimum "holding" or "non-exercise" period for conversion rights stipulated in any statutory act. Also and to our knowledge, no court precedent or commentator has taken the view that there is such a minimum period for conversion rights. The legislator did not prefer any form of share creation over the other. Indeed, we are not aware of any reason why there should be any legal issue if the share creation under the SSF complies with the requirements for conditional capital even if the parties' intent was to convert immediately.

A SSF structured as a convertible instrument using conditional capital is essentially a credit facility with share settlement features. In lieu of redemption, the parties agree to convert outstanding debt balances of the company in shares. The right to convert should economically inure to the benefit of both parties whereby in either case the legal right to demand conversion will formally remain with the holder of the instrument (see above). If the SSF is structured as share settled credit facility using conditional capital, the share creation and listing process is substantially easier compared to the traditional approach using authorized capital share creation. Market players should therefore, if investing in Swiss listed companies, rethink their traditional approach and adopt the approach which is better suited in light of the local regulatory framework.

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Amended Swiss Rules regarding Disclosure of Significant Shareholdings in Listed Companies in Switzerland

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On 1 January 2016, revised regulations regarding the disclosure of significant shareholdings in listed Swiss companies or non-Swiss companies with their primary listing in Switzerland entered into effect. In most respects, the new law restated the former regulations. However, the legislation also introduced some significant changes and imposes important new disclosure obligations, in particular upon asset managers who discretionarily exercise the voting rights of the shares held or managed on behalf of their clients.

By Hans-Jakob Diem

1) Introduction

On 19 June 2015, the Swiss Parliament adopted the new Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA). The new statute establishes the regulatory regime applicable to key market infrastructures, such as securities exchanges, trading platforms, central depositaries and payment systems. Trading in derivatives is also regulated. The FMIA further incorporates the rules on public takeovers and disclosure of significant interests in listed companies which were hitherto embodied in the Stock Exchange Act.

On 9 December 2015, the Financial Market Supervisory Authority (FINMA) published its new Ordinance on Financial Market Infrastructure (FMIO-FINMA) which imple-

ments, among other things, the new rules on disclosure of significant interests in listed companies. The revised law entered into effect on 1 January 2016.

2) New disclosure obligation of persons having discretionary voting power

One of the key purposes of the revision was to require asset managers to disclose the positions that they hold for the account of their clients. In a decision of 2013, the Swiss Supreme Court considered that the former FINMA regulations on this topic lacked a statutory basis and were consequently not enforceable. The Swiss Parliament saw the adoption of the FMIA as an opportunity to remedy this situation.

The new rules, in effect since 1 January 2016, provide two distinct disclosure obligations:

(i) As in the past, the disclosure obligation of the person who beneficially owns a disclosable interest in a listed company; and

(ii) A new disclosure obligation of the person who has the power to exercise the voting rights in its discretion.

The disclosure obligations of the beneficial owners and of the persons with discretionary voting power are separate and independent from one another. Certain shareholdings may consequently have to be reported twice: once by its beneficial owner, and once by the person who has the discretionary voting power. To avoid the confusion that could otherwise result from this "double counting", the new rules require that the reporting person specifies whether the positions disclosed are held in a capacity as a beneficial owner or as a person with discretionary voting power.

The new disclosure obligation of persons having discretionary voting power affects, in particular, *asset managers* who are authorised to direct the voting of the shares managed on behalf of their clients. Besides asset managers, also *proxy advisors* who are authorised to vote the relevant shares or to complete the voting instructions to the independent proxy may be subject to the new disclosure duty.

In this context, the FMIO-FINMA contains a significant change compared to the draft on which FINMA had consulted. While the draft ordinance provided that the disclosure obligation of a discretionary proxy holder rests with the person who has the power to exercise the voting rights (*i.e.*, in case of asset managers, on the asset manager itself), the final rules impose this obligation on the person or the persons who ultimately control the proxy holder. This rule, introduced "in the last minute", is of significant importance for financial groups that have a controlling shareholder or a group of controlling shareholders. Such controlled groups are in principle required to consolidate the positions beneficially owned by the controlling shareholder(s), including the *nostro* posi-

tions held by the financial group itself, with the positions which they hold or manage on the account of their clients and for which they have the power to discretionarily direct the voting, in order to determine whether a disclosure duty exists or arises.

3) New definition of the beneficial owner

The imposition of a distinct disclosure obligation upon the person who has discretionary voting power comes together with a new definition of beneficial owner. In the past, the recognition as a beneficial owner of a disclosable interest depended exclusively on the ability to control the exercise of voting rights. Under the new rules, the beneficial owner is defined as a person who controls the exercise of voting rights *and*, in addition, bears the economic risk of the relevant shareholding. The new definition of beneficial ownership may trigger an obligation to make new filings, in particular for structures that dissociate voting power from economic interests such as trusts. However, the significance of the change is reduced by the fact that the important instances of dismemberment of ownership – securities lending and collective investment schemes – are governed by specific rules.

4) Reporting in case of indirect share ownership, in particular by groups of companies

The revised regulations change the way in which indirectly held positions are to be disclosed. Under the former rules, the entire chain of entities between the beneficial owner and the direct holder of the relevant positions had to be disclosed. The new rules only require the identification of the beneficial owner and of the direct holder. A description of the full chain of ownership between the beneficial owner and the direct holder is no longer required. On the flipside, the intermediate entities in the chain can no longer be regarded as a group for disclosure purposes and the "black box" principle can no longer be applied. As a result, if a reportable share position is transferred by the direct holder upstream to an intermediate holding company that has not held any of the relevant shares prior to such transfer, a new disclosure duty will arise.

5) Collective investment schemes

The revised law includes special rules for collective investment schemes (funds). In respect of collective investment schemes that are authorized for public distribution in Switzerland, FINMA has confirmed the current regime. These funds are deemed to beneficially own the positions that they hold. Their disclosable interests must be aggregated at the level of the fund management company (but not at the level of the financial group that controls the fund management company), for each single fund and for each segment of each relevant fund.

For funds that are not authorised for public distribution in Switzerland, FINMA has introduced new provisions. The new rules are of significant practical relevance as they

apply to most funds worldwide (to the extent that they hold disclosable interests in companies listed in Switzerland) and in particular to hedge funds. The new rules distinguish funds that are sponsored by a financial group and "independent" funds. Disclosable interests held by sponsored funds must be aggregated with the positions held by their "sponsor" financial group. Disclosable interests held by independent funds must be treated pursuant to the same principles as they apply to funds authorized for distribution in Switzerland. However, the independence criteria imposed by the rules are strict and only few funds are likely to fall into this category.

6) Other changes

The revised law brought about certain other changes to the disclosure regime, in particular:

- In the event of the death of a holder of a reportable position, the heirs now have 20 trading days to report their holding, and no longer only four trading days as it was the case under the former rules.

- The postponement of the duty to notify changes in significant shareholdings during a takeover period – which formerly only benefited the bidder and the persons acting in concert with him – has been extended to the other persons required to report their trades during the offer period, *i.e.* the target and the persons holding 3% or more of the voting rights in that company.

- The circumstances under which a notice of significant shareholding must be updated are now specified. The general rule pursuant to which "any change" in the disclosed information had to be notified within four trading days has been abandoned. This change is a welcome clarification of the legal situation.

- Under the revised regulations, a listed company that repurchases its own shares under a repurchase program is no longer exempted from the disclosure duty. Accordingly, in addition to the reporting pursuant to the regulations governing the buyback, if the issuer reaches or exceeds a reportable threshold, it will have to make a disclosure under the FMIA within four trading days.

- As in the past, reportable positions held by banks or security dealers for settlement purposes remain exempted from the disclosure duty. However, the exemption only applies if the positions are held by no more than two (instead of three) trading days.

7) Transitional rules and new reporting forms

FMIO-FINMA stipulates that notices of significant interests made prior to the entry into effect of the new rules remain valid until a new disclosure threshold has been reached or crossed. Notices that include information that is no longer required (*e.g.* in-

formation regarding the chain of ownership between the direct holder of the positions and their beneficial owner) consequently do not need to be amended until a new disclosure threshold has been reached or crossed.

Notices that have to be filed as a result of the entry into force of the new rules (*e.g.* the disclosure of the disclosable interests held by discretionary voting proxies) had to be made by 31 March 2016. Until the same date, notices relating to circumstances having occurred as from 1 January 2016 could be filed pursuant to the old regime. As from 1 April 2016, all notices have to be made pursuant to the new rules. To that effect, the Disclosure Office of the SIX Swiss Exchange has made available amended notification forms, the use of which is, however, not mandatory. The new forms are accessible under <www.six-exchange-regulation.com/en/home/investor/obligations/disclosure-of-shareholdings/board. html>.

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Kuoni and EFG International: Recent Decisions of the Swiss Takeover Board

Reference: CapLaw-2016-20

This article summarises two decisions of the Swiss Takeover Board regarding the recently announced takeover offer for Kuoni by EQT, which, inter alia, contain relevant guidance in relation to the so-called "Minimum and Best Price Rules" and "irrevocables". In addition, during the first quarter of 2016 the Swiss Takeover Board has passed a noteworthy decision in relation to EFG International concerning the non-existence of a tender offer duty in connection with the entry into a shareholders agreement.

By Philippe Weber / Thomas Brönnimann

1) Kuoni

a) Background

On 2 February 2016, Kiwi Holding IV S.à r.l. (**Kiwi IV**) pre-announced a public tender offer for all publicly held class B Shares with a nominal value of CHF 1 each (**Class B Shares**) of SIX listed Kuoni Reisen Holding AG (**Kuoni**). Kiwi IV is a Luxembourg domiciled SPV, which funds managed by EQT control through three intermediate holding companies (**Kiwi I, II, III**).

The tender offer does not extend to the voting preference class A shares of Kuoni with a nominal value of CHF 0.20 each (**Class A Shares**), which represent 25% of the vot-

ing rights but only 6.25% of the capital of Kuoni and which are held by the Kuoni and Hugentobler-Stiftung (**Stiftung**).

On 1 February 2016, i.e. immediately before the pre-announcement of the tender offer, the Stiftung and EQT/Kiwi had entered into a Term Sheet, a Shareholders Agreement and a Contribution Agreement regarding, inter alia:

- the contribution by the Stiftung of all Class A Shares into Kiwi III against issuance of Kiwi III shares to the Stiftung, conditional upon the successful completion of the tender offer and at a value to be determined based on a pre-agreed formula;
- a limited exclusivity right in favour of EQT/Kiwi, according to which the Stiftung agreed that it would not tender the Class A Shares to another party in a competing offer, unless the offer price in such competing offer would be at least 10 per cent higher than the price offered by EQT/Kiwi;
- conditional upon completion of the tender offer, certain governance and exit rights, including a drag-along right in favour of EQT/Kiwi.

With respect to the value at which the Class A Shall should be contributed, the Stiftung and EQT/Kiwi agreed as follows:

- number of Class A Shares held by the Stiftung divided by 5 (gives equivalent in Class B Shares) **multiplied** by the final tender offer price for Class B Shares
- **plus an additional compensation** for the contribution of the Class A shares taking into account net benefits arising from further undertakings of the Stiftung in favour of Kiwi/EQT under their agreement to the extent confirmed by the review body and the Takeover Board to be permissible under takeover law (whereby such compensation should not exceed 20% compared to the final tender offer on an adjusted basis).

In other words, according to part one of the above formula, the Stiftung would receive the same price as holders of Class B Shares in the public tender offer **plus** a compensation for certain benefits arising from ancillary undertakings.

According to the below described decision of the Takeover Board, the "benefits" were meant to, inter alia, include the granting by the Stiftung to Kiwi/EQT of (i) a significant shareholding in Kuoni, (ii) the afore mentioned limited exclusivity right, and (iii) the exit rights including the drag along.

b) Decision of the Takeover Board of 25 February 2016

In its decision of 25 February 2016, the Takeover Board, inter alia, held as follows with respect to the contemplated tender offer by EQT/Kiwi and their related arrangements with the Stiftung:

- It is permissible not to extend the tender offer to the Class A Shares because these shares are not listed.

- Nevertheless, for purposes of the so-called "Best Price Rule" the consideration paid by EQT/Kiwi to the Stiftung in connection with the contribution of the Class A Shares must be taken into account. According to the Best Price Rule the public tender offer price must be at least equal to the highest price paid by the offeror (including any person acting in concert) for equity securities of the target since publication (or pre-announcement) of the offer until 6 months after expiry of the extended offer period).

  In this connection, the Takeover Board assessed the relevance of the above described additional compensation and concluded that:

  - the limited exclusivity right in favour of EQT is not permissible under Swiss takeover law, because (as a rule) Swiss takeover law does not recognise so-called "irrevocables"; consequently, the granting of such exclusivity right would also not justify any additional compensation to the Stiftung outside the scope of the Best Price Rule;

  - the granting of a significant shareholding does not justify a compensation outside the scope of the Best Price Rule, because since a change of law in 2013 Swiss takeover law no longer allows for a control premium (outside the scope of the Minimum and Best Price Rules);

  - according to the Takeover Board, in large share deals such as in the present case between EQT/Kiwi and the Stiftung, the granting of certain representations, covenants, governance and exit rights is customary and, hence, in the present case the stated exit and drag-along rights will not justify any additional compensation outside the scope of the Best Price Rule.

As a consequence of the above, the Takeover Board ordered that at the relevant time the mandated review body (*Prüfstelle*) will have to confirm to the Takeover Board the compliance with the Best Price Rule in the tender offer, whereby any compensation paid to the Stiftung for granting EQT a significant shareholding in Kuoni, the limited exclusivity right and exit and drag-along rights would have to be taken into account as compensation under the Best Price Rule (and consequently would like to a duty to increase the tender offer price for Class B Shares).

c) Conclusions

The Kuoni decision of the Takeover Board is of significant practical relevance. It states that even limited exclusivity (as described above) is not compatible with the restrictions applicable to "irrevocables"; it also contains quite far reaching assumptions and conclusions about the valuation of additional representations, covenants and undertakings in connection with governance and exit rights and their meaning within the scope of the Minimum and Best Price Rules.

The public tender offer was published on 29 February 2016. The tender offer period started on 15 March 2016 and is expected to end on 13 April 2016. If successful, closing of the tender offer is expected to take place on 19 May 2016 (subject to potential extensions).

On 30 March 2016, the Takeover Board published a decision by which the appeal of the Stiftung against the Takeover Board decision of 25 February 2016 was dismissed. The Stiftung filed an appeal against both Takeover Board decisions before FINMA and requested FINMA to suspend the appeal procedure in order to reach a mutual agreement with the Takeover Board. The FINMA Takeover Committee has approved this request and has provisionally suspended the appeal procedure until 22 April 2016.

2) EFG International

a) Background

On 22 February 2016, EFG International AG (**EFGI**) announced the combination of EFGI and BSI SA through the acquisition of 100% of the share capital of BSI SA by EFGI from Banco BTG Pactual S.A. (**BTG**). The purchase price payable to BTG will be satisfied by a combination of cash and newly issued shares of EFGI. The cash component will be financed out of existing reserves and by way of a capital increase and the issue of tier one capital instruments. Upon completion of the transaction, BTG will hold, directly or indirectly, approx. 20% to 30% of the share capital and voting rights of EFGI, while the shareholding of EFG Bank European Financial Group SA (**EFG Group**), the principal shareholder of EFGI, will be reduced from 54.8% to approx. 38%. EFG Group's shareholding in EFGI will under no circumstances fall below 33$^{1}/_{3}$% of the share capital and the voting rights of EFGI.

EFG Group is not a party to the acquisition agreement between BTG and EFGI regarding the sale and purchase of the BSI-shares. EFG Group's support of the transaction is secured by a letter agreement (**Letter Agreement**) between EFG Group, EFGI and BTG entered into simultaneously with the acquisition agreement. Under the Letter Agreement, EFG Group commits to EFGI on the one hand and BTG on the other hand as follows: EFG Group will (i) not sell any EFGI-shares during the term of the Letter Agreement; (ii) vote its shares in favour of the capital increases required for the com-

pletion of the transaction; (iii) support the financing of the transaction through its participation in the capital increase; (iv) prior to closing, elect one (BTG shareholding in EFGI at closing <25%) or two (BTG shareholding in EFGI at closing >25%) directors nominated by BTG to the board of directors of EFGI subject to closing occurring; (v) sign the Pre-Emption Agreement (see below) at closing of the Transaction. The Letter Agreement will terminate automatically at closing of the transaction.

It is further contemplated that at closing of the transaction, EFG Group and BTG will enter into a shareholders' agreement (**Pre-Emption Agreement**) which provides for the following: (i) *Right of first offer*: If BTG intends to sell all or a part of its EFGI-shares in a private transaction, i.e. not over the stock exchange or in an ABB-transaction, to a third party, BTG has to invite EFG Group to submit a first offer for the price indicated by BTG. If EFG Group submits an offer, BTG will have the right to accept the offer or refrain from the sale. If EFG Group does not submit an offer, BTG will be permitted to sell the EFGI-shares at the indicated price within a certain period to a third party; (ii) *Right of notification of EFG Group in the event of an Accelerated Bookbuilding Transaction*: If BTG intends to sell all or a part of its EFGI-shares through an ABB or a similar transaction, BTG has to notify EFG Group of its intention 20 days prior to the ABB-transaction; (iii) *Restriction on pledge*: BTG is only permitted to pledge its EFGI-shares in the context of borrowing or issuance of guarantees under the condition that the creditor or the guarantor declare towards EFG Group that EFG Group shall have the right of first offer in the event of an enforcement of the pledge; (iv) *Composition of the Board of directors of EFGI*: BTG has the right to nominate one (BTG shareholding in EFGI at closing <25%) or two (BTG shareholding in EFGI at closing >25%) members of the board of directors of EFGI and EFG Group undertakes to vote for the member(s) so nominated by BTG. In addition, EFG Group and BTG agree that the majority of the members of the board of directors of EFGI shall at any time fulfil the independence criteria defined by FINMA for members of the board of directors of banks. The Pre-Emption Agreement will terminate automatically if the shareholding of EFG Group or BTG falls below 5% of all the shares in EFGI.

The articles of association of EFGI do not contain an opting-out or an opting-up provision. Accordingly, the provisions of articles 135 s. FMIA regarding the duty to submit a tender offer apply to shareholders of EFGI. Prior to the announcement of the transaction, EFG Group and BTG jointly filed an application to the Takeover Board requesting the Takeover Board to declare that the entering into the Letter Agreement and the Pre-Emption Agreement do not subject EFG Group and/or BTG (as well as their respective direct or indirect controlling shareholders) to the duty to submit a tender offer for all the shares in EFGI or, alternatively, to grant EFG Group and BTG (as well as their respective direct or indirect controlling shareholders) an exemption from the duty to submit a tender offer for all the shares in EFGI.

b) Decision of the Takeover Board of 22 February 2016

In its decision of 22 February 2016, the Takeover Board held that neither the conclusion of the Letter Agreement nor the conclusion of the Pre-Emption Agreement will subject EFG Group and/or BTG (as well as their respective direct or indirect controlling shareholders) to the duty to submit a tender offer for all the shares in EFGI.

The main considerations of the Takeover Board were the following:

– A group of shareholders whose combined shareholding exceeds 33 1/3% of the voting rights of the target company becomes subject to the tender offer duty if the shareholders act in concert or as an organised group *with a view to control* the target company (art. 33 FMIO-FINMA). According to the practice of the Federal Supreme Court (BGE 130 II 540), the acting in concert must enable the shareholders to control the target company and the circumstances must indicate that the shareholders seek control over the target company. Upon closing of the transaction, BTG will hold 20% to 30% of the voting rights of EFGI while EFG Group will still hold more than 33 1/3% of the voting rights. The building of BTG's stake in EFGI does, by itself, not indicate the intention of the involved parties to exercise joint control because EFG Group still retains a controlling interest in EFGI. However, even in the case of a controlling interest, a *change of control* may occur *if agreements among the parties have the effect that control can only be exercised together with other shareholders*.

– With respect to the Pre-Emption Agreement, the "right of first offer" by itself is not sufficient to form a group of shareholders subject to tender offer duty within the meaning of art. 33 FMIO-FINMA. The same is true for the "restriction on pledge" and the "ABB notification right". In contrast, EFG Group's promise to elect one or two representatives of BTG to the board of directors of EFGI is suitable in principle to influence the direction of the company. However, given that EFG Group retains a controlling interest in EFGI, EFG Group still has a controlling position in the shareholders' meeting and can determine all the other members of the board of directors. EFG Group's promise to elect one or two BTG's representatives to the board of directors of EFGI does not enable BTG to exert significant influence on the controlling position of EFG Group. The regulatory requirements by FINMA in relation to independency of board members are not decisive in the present context. Overall, from an objective point of view, the Pre-Emption Agreement has not the effect that EFG Group and BTG will have joint control over EFGI.

– As the transaction and its structuring through the Pre-Emption Agreement does not trigger a tender offer duty, it does not need to be further analysed whether or not the preparatory arrangements under the Letter Agreement subject the parties to a tender offer duty.

c) Conclusions

For the Takeover Board it was decisive that EFG Group will still have a controlling interest in EFGI and that the Pre-Emption Agreement does not restrict EFG Group from exercising a controlling influence in the shareholders' meeting. The Takeover Board stressed however that even in case the acting in concert involves a controlling interest, a change of control may occur if one party has significant influence on the controlling position of the other. Further, the decision clarifies that a (unilateral) right of first offer by itself is unproblematic.

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FINMA Introduces Technology-Neutral Regulation to Facilitate Client Onboarding Through Digital Channels

Reference: CapLaw-2016-21

With effect from 18 March 2016, FINMA introduced a new circular on video and online identification and amended the circular regarding guidelines on asset management. These changes are a first step to develop technology-neutral regulation and to reduce potential hurdles to technological innovation in the Swiss financial sector.

By Katrin Ivell / Benjamin Leisinger

1) FINMA's Position Towards Technological Innovations / FinTech Strategy

Back in September 2015, Mark Branson, the CEO of the Swiss Financial Market Supervisory Authority (FINMA), held a speech about technological change and innovation in the financial sector. Amongst others, he referred to financial technology – or FinTech – as an important new development. He reminded his audience that it was one of FINMA's responsibilities as a supervisor to stay abreast of technological changes in the financial sector. In fact, Art. 5 of the Financial Market Supervision Act (FINMASA) states that one of the objectives of financial market supervision was to contribute to the competiveness of Switzerland's financial centre.

One of the aspects mentioned by Mr. Branson was that regulation should be neutral with regard to technological change and should neither encourage nor hinder it. Mr. Branson also mentioned that it was vital to prevent the emergence of technology-based regulatory gaps which might threaten client protection and the financial system as a whole. Bearing this in mind, he said that FINMA had a vital interest in developing and adapting regulation to the needs of a digital world.

2) Indentifying Obstacles to Technological Innovation

According to a press release issued by FINMA on 17 March 2016, FINMA reviewed the existing regulation with a view to establishing whether specific provisions in the various FINMA ordinances and FINMA circulars disadvantaged some technologies. In FINMA's view, very few such obstacles existed. One of the areas where FINMA identified potential for improvements without risking disadvantages to client protection and financial stability and security was the identification process for anti-money laundering purposes in the course of the onboarding of clients. In FINMA's view, the new video and online identification circular, therefore, is an important step towards eliminating potential disadvantages to some technologies.

3) FINMA's Video and Online Identification Circular (FINMA Circ. 2016/7)

Legally, FINMA circulars merely summarize FINMA's practice. They do not create legally binding obligations vis-à-vis regulated entities or even third parties. Notwithstanding this, these circulars nevertheless play an important role in the Swiss financial market regulation – possibly similar to no action letters, interpretive letters, or exemption letters issued by the staff of the U.S. Securities and Exchange Commission, albeit not focused on a specific request as a no action letter but rather on a more generalized fact pattern or question of interpretation.

In publishing the new FINMA Circ. 2016/7 facilitating video and online client identification for know-your-customer and anti-money laundering purposes, FINMA took a first step to keep Mr. Branson's word. FINMA's new FINMA Circ. 2016/7 entered into effect on 18 March 2016 and sets out the anti-money laundering due diligence requirements for digital business. Unlike other jurisdictions, Switzerland heavily relied on in-person identification in face-to-face meetings for the identification of future customers in the onboarding process. In the past, the financial intermediary thus had to identify the contracting partner by inspecting an official identification document with a photograph (passport, identity card, driving license or similar document) and putting on record a copy of the identification document. Alternatively, when a business relationship was established by correspondence or via the internet, the bank had to verify the identity of the contracting partner by obtaining an authenticated copy of an identification document as mentioned before and checking the contracting partner's address either by postal delivery or by another equivalent method (see Articles 9 and 10 of the Agreement on the Swiss Bank's Code of Conduct with regard to the exercise of due diligence (CDB 16)). Quite obviously, this procedure could result in some obstacles for FinTech providers, *i.e.*, providers of financial services that solely (or at least predominantly) rely on the internet or mobile apps to contact their clients and to communicate with them. In order to level the playing field and to foster technological developments, FINMA Circ. 2016/7 now provides for the possibility of financial interme-

diaries to on-board clients by means of video transmission and other forms of online identification.

Such video onboarding is subject to specific requirements, though. In order to be eligible, for example, the video identification must occur via live communication between the contracting party and the financial intermediary, and the technology used must ensure a secure transmission and the reading and deciphering of the information contained in the so-called Machine Readable Zone (MRZ) on the identification document. The quality of the live communication must be such that the flawless identification of the contracting party is possible. For purposes of the video identification, the full length of the discussion must be recorded. For purposes of identifying the contracting partner via video, the circular contains specific rules, including asking certain questions or paying attention to certain behaviours that should detect fraud. If the quality of the communication is not sufficient, if doubts exist regarding the authenticity of the identification document of the identity of the customer, or if the relationship is one of certain pre-defined increased risks , the financial intermediary must abort the online identification. In that case, the financial intermediary remains free, however, to refer the person to a traditional means of identification (face-to-face meeting, traditional identification by correspondence).

For legal entities or business partnerships, additional requirements apply. These requirements include excerpts from relevant registers and acknowledgment of the regulations for representation of the legal entity and identification of the persons acting on behalf of the legal entity.

For online identification, the circular contains rules on required documents in case of an onboarding by way of correspondence, or where the online identification occurs by means of an electronic copy of the identifying document. FINMA Circ. 2016/7 also includes provisions on the identification and declarations of beneficial owners and control persons. Finally, the FINMA circular clarifies how some specific provisions of the anti-money laundering ordinance of FINMA can be read (and fulfilled) in a technology-neutral way.

4) Guidelines on Asset Management (FINMA Circ. 2009/1)

The "Guidelines on asset management" circular (FINMA Circ. 2009/01) contained the requirement for written client identification for certain contracts. In light of the review of FINMA and the new FINMA Circ. 2016/7, this requirement was removed to make the regulations fully technology-neutral.

5) Is this Enough?

It remains to be seen whether the detailed rules set forth in the new FINMA Circ. 2016/7 do away with the hurdles for service providers in the FinTech world. According

to FINMA's report on the consultation comments received with respect to the circular, the idea was not to lower the requirements but to simply make them "technology-neutral". In fact, for FinTech start-ups, the regulations can be difficult to comprehend – one of the reasons why FINMA introduced a specific section of FINMA's website devoted to FinTech (https://www.finma.ch/en/authorisation/fintech/). In fact, while the consultation of the new FINMA Circ. 2016/7 was generally positively received, several submissions contained a request to reduce the stringent requirements and (perceived or existing) complexity of the existing regulation.

In light of these requests and the need for innovation to keep the Swiss financial market competitive, FINMA explicitly stated in its press release of 17 March 2016 that it supported the introduction of a new licensing category for financial innovators and a licence exempt area (so-called sandbox). The new licensing category would be for business models which carry out some banking activities, but with limited acceptance of client assets and no lending activity. In FINMA's view, because the risks are lower and the scope of business limited, the licensing requirements would be less extensive than for a banking licence. For example, financial services providers that do not accept more than CHF 50 million in deposits could apply for this type of financial innovators' licence provided they hold 5% of the deposits and at least CHF 300,000 capital as collateral. The issuance of such licences would lower the entry threshold for providers of payment systems, applications for managing assets digitally and crowdfunding platforms. The sandbox, *i.e.*, a fully licence-exempt environment would be conceivable in FINMA's views particularly for start-up companies, up to a deposit threshold of CHF 200,000 and irrespective of the number of depositors. According to the press release, FINMA is currently discussing a range of ideas with the banking sector and the competent authorities.

It remains to be seen how far FINMA and the legislator are actually willing to reduce regulatory hurdles in order to further incentivize technological innovation in the Swiss financial sector.

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VAT Group AG launches IPO on SIX Swiss Exchange

Reference: CapLaw-2016-22

On March 31, 2016, VAT Group, the leading global manufacturer of high-end vacuum valves and related products and services headquartered in Haag (Switzerland), announced the launch of its initial public offering (IPO) on SIX Swiss Exchange with the publication of the Offering Memorandum and the start of the book-building process. The IPO aims at broadening the shareholder base of VAT through the sale of 12,000,000 existing shares plus an over-allotment option of up to 1,800,000 existing shares. The price range for the offered shares was set at CHF 39 to CHF 46 per share. On 13 April 2016, the final offer price was fixed at CHF 45 per share, resulting in an offer size of CHF 540 million (respectively CHF 621 million assuming full exercise of the over-allotment option) and an implied market capitalization of CHF 1,350 million, which makes this the largest IPO in Europe of the year to date. The shares of VAT started trading on SIX Swiss Exchange on April 14, 2016 with an opening price of CHF 52.

HNA announces a recommended all cash offer to acquire SIX listed gategroup

Reference: CapLaw-2016-23

On 11 April 2016, Chinese HNA Group Co., Ltd. ("HNA") announced an all cash public tender offer for all publicly held registered shares of gategroup Holding AG ("gategroup") at a price of CHF53 per share. Including the dividend, the offer price represents a 37.8% premium to the volume weighted average price during the last 60 trading days prior to the pre-announcement of the offer and a 20.9% premium to the closing share price as of 8 April 2016. According to the media release, gategroup's Board of Directors unanimously supports the public tender offer and recommends that shareholders accept the offer.