



Newsletter Banking and Securities

Federal Supreme Court Holds that a Target Company May not Discriminate between the Formal and Potential Bidders, Once a Bid Has Been Formally Announced

In the decision rendered on July 6, 2007, (2A.25/2007/fco) the Federal Supreme Court upheld on appeal of the target company SIG Holding AG, which is listed on the SWX, the decision of the Swiss Takeover Board and of the Federal Banking Commission which, amongst others, required the target company to provide the bidder, who has already announced its offer, with the same information as potentially interested third parties who have not already announced their bid.

The target company argued that the Swiss Takeover Board and the Federal Banking Commission misconstrued the equal treatment obligations under Swiss Takeover Law by expanding it in favour of the formal bidder also in relation to potential bidders or other interested parties. Such an interpretation would make it impossible for the target company to seek an alternative solution with potentially interested parties in order to foster the shareholders' freedom of choice.

The target company continued that in the case of a hostile bid it is often necessary – prior to a due diligence examination by the bidder – to offer a due diligence examination to potentially interested parties, to provide them with a cost indemnification or support them in the financing in case they launch an offer. If the equal treatment obligation also would apply between a formal bidder and a potential bidder, it would be impossible for the target company to induce a counter-offer. This would not be in the interest of the shareholders. Contacts between interested parties and potential bidders and the providing of information to such persons are not covered by the equal treatment obligation of the Swiss Takeover Law, as long as the interested parties have not themselves launched a public offer.

The Federal Supreme Court rejected the target company's arguments, arguing that the purpose of the regulation of competing offers is to create a level playing field, assuring – in the interest of the investors – an efficient and profit maximising auction proceeding.

The corner stone of the regulation is that upon the announcement of a formal offer, the shareholders and not the board should decide upon success or defeat of an offer. The Federal Supreme Court continued that, although Art. 48 UEV-UEK requires the target company to adhere to the principle of equal treatment of all bidders, bidders will have to be interpreted broadly such as to include also potentially interested parties. Once an offer has been pre-announced, the communication with potentially interested parties does no longer fall outside the reach of Art. 29 BEHG.

In particular, the Federal Supreme Court reasoned that in such a situation, there is increased danger that a target may resort to illegal defence measures. Therefore, the Federal Supreme Court also rejected the target's objection regarding their information duty to the Swiss Takeover Board.

Although the decision by the Federal Supreme Court was issued only after the battle for the target was lost by the initial bidder, the decision provides for a most welcomed clarification of the duties of a target company in the search of a white knight in a hostile takeover situation.

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