



## Liquidity in terms of the Takeover Law – new TOB-Circular No. 2

If minimum price rules are applicable to a public takeover or exchange offer, the stock exchange price is in general decisive for the determination of the offer price. However, the stock exchange price is only decisive if the according security is liquid. In other respects, a valuation established by an auditing company or a securities dealer (Art. 25 SESTA) has to be carried out. The TOB-Circular No. 2 of 26 February 2010 on liquidity in terms of the takeover law regulates, under which requirements a security is considered liquid in terms of Art. 40 para. 4 SESTO-FINMA.

The TOB-Circular No. 2 replaces the Communication No. 2 of 3 September 2007, effective up to now, and aims to eliminate the weaknesses of the former regulation.<sup>1</sup> Until now, a security was generally considered as liquid, if it has been traded on at least 30 days out of a period of 60 trading days prior to publication of the offer or prior announcement. The relatively short period under review as well as the (generally) missing consideration of volumes made this criterion vulnerable to temporary fluctuations and manipulation.

The new liquidity criterion of the TOB-Circular No. 2 was developed on the basis of an expert report.<sup>2</sup> The criterion is based on the volume generated daily on-exchange in relation to the free float of the security. The period under review amounts to 12 months. If the monthly median of the daily volume of a security relative to its free float is at least equal to 0.04% over 10 out of the last 12 months prior to the publication of the offer or prior announcement, the security is considered liquid. Besides, securities which belong to the SLI are considered liquid at all times.

On the basis of a historical point of view, all securities which constantly fulfil the liquidity criterion over the last 5 ½ years represent all together approximately 97.5% of the market capitalization and 99.75% of the market turnover of all securities listed on the SIX Swiss Exchange.

The new liquidity criterion suits exclusively the interpretation of Art. 40 para. 4 SESTO-FINMA. It does not claim to be a universally valid formula for the determination of liquidity on the financial markets.

Should you have any questions, please feel free to contact Prof. Luc Thévenoz, Chairman of the TOB.

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<sup>1</sup> The last time these weaknesses occurred on the occasion of the transaction regarding *Harwanne Compagnie de participations industrielles et financières SA*, see decision 403/2 of 16 March 2009.

<sup>2</sup> Dr. Nicole Beiner, NB RiskControl, GMBEiner Conseil d'Entreprises SA. A summarizing report to this is published on the Website of the TOB: <http://www.takeover.ch> -> Legal texts -> Circulars and communications of the TOB -> Circular No. 2