



TOB Circular No. 4: Voluntary public exchange offers

of 9 February 2009¹

The amendment of the Stock Exchange Ordinance-FINMA (**SESTO-FINMA**) effective 1 January 2009 resulted in a number of uncertainties as to the question of whether, in the case of a public takeover offer, it is permissible to settle the offer price solely through the exchange of equity securities. In response to the numerous comments received by the Takeover Board and the FINMA with regard to this question, at its meeting of 30 January 2009 the Takeover Board prepared an interpretation of Art. 9 (6) of the Takeover Ordinance (**TOO**) with reference to Art. 43 SESTO-FINMA. The Board has decided to publish its decision immediately. [1]

Art. 43 (2) SESTO-FINMA relates to obligations to make an offer within the meaning of Art. 32 of the Stock Exchange Act (**SESTA**). A shareholder who is obliged to make a takeover offer may only settle the offer price by means of an exchange against equity securities provided he also offers cash payment. The offeree may choose between the two forms of settlement. This is to ensure that minority shareholders still have a viable exit option after a change of control. [2]

Art. 43 (2) SESTO-FINMA does not apply to voluntary offers, including those offers which exceed the threshold that would trigger the obligation to make an offer. In terms of meaning and purpose, the reference in the second sentence of Art. 9 (6) TOO does not relate to the obligation to offer a cash payment as an alternative within the meaning of Art. 43(2) SESTO-FINMA. This is because unlike in cases where an offer is mandatory, offerees who receive a voluntary offer have an opportunity to reject it and so prevent an offeror from acquiring a controlling holding. Moreover, if the offer of a cash payment as an alternative were mandatory, this would greatly impair the viability of such voluntary offers since the offeror would have to ensure the availability both of the equity securities needed to complete the exchange offer and of the necessary financial resources to be offered as an alternative (cf. Art. 20 (1) TOO). [3]

However, in the event that during the period stipulated in Art. 10 TOO the offeror of a voluntary exchange offer acquires, against payment in cash, equity securities or financial instruments to which the offer relates, the Takeover Board will in future take the view that the principle of equal treatment of all offerees (Art. 24(2) SESTA) obliges the offeror to offer all offerees a payment in cash. [4]

¹ The title has been modified on 22 March 2010, in order to unify the nomenclature of the publications of the TOB. With regards to contents, no alterations have been made.



Frequently Asked Questions (FAQ)

1. FirstCo AG (FirstCo) holds 23% of the voting rights of Target AG (Target) after having acquired a 14% block of shares against payment in cash. Can FirstCo launch a public takeover offer for all Target shares in public hands and merely offer its own shares in exchange? [5]

YES. FirstCo is not obliged to offer payment in cash since its offer is voluntary. The value of the FirstCo shares offered in exchange must, however, satisfy the minimum price rules (Art. 32(4) SESTA). [6]

2. Can FirstCo launch an exclusive exchange offer even if the equity securities offered in exchange are illiquid? [7]

YES. However, the equity securities offered in exchange must be valued by auditors in accordance with Art. 24 (6) TOO and 44 SESTO-FINMA. The methods and principles of valuation applied will be subjected to particular scrutiny by the Takeover Board. [8]

3. Assuming that FirstCo's exchange offer results in FirstCo holding 76% of Target's voting rights after completion of the offer, is FirstCo obliged to make a new offer to the remaining shareholders, but this time against payment in cash? [9]

NO. The exchange offer provided Target's shareholders with an opportunity to exercise the right, founded on Art. 32 SESTA, to relinquish their holding in the company. [10]

4. Can FirstCo acquire Target shares against payment in cash during the exchange offer period? [11]

YES. FirstCo must adapt its offer and give all offerees the choice of receiving the cash price which it (FirstCo) paid for the Target shares (Art. 10 TOO). [12]

5. In such circumstances, can a Target shareholder who already accepted the offer prior to the adjustment now subsequently opt for payment in cash? [13]

YES. The adjusted offer applies to all offerees, including those who accepted the offer prior to adjustment. However, the adjustment does not entitle offerees to revoke their prior acceptance commitments. [14]



6. Can an offeror offer settlement in the form of equity securities higher in value than the cash payment offered? [15]

YES. The two forms of settlement must satisfy the minimum price rules, but they do not have to represent the same value. In other words, settlement with equity securities may contain a premium against cash payment. The principle of equal treatment of shareholders is safeguarded since each offeree can choose between the two forms of settlement. [16]