



Liquidity in the context of 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 security in question is liquid. If this is not the case, a valuation established by an auditing company or a securities dealer (Art. 25 SESTA) has to be carried out. TOB Circular No. 2 of 26 February 2010 on liquidity in the context of takeover law regulates the conditions under which a security is considered liquid in terms of Art. 40 para. 4 SESTO-FINMA.

TOB Circular No. 2 replaces Communication No. 2 of 3 September 2007, effective up to now, and aims to eliminate the weaknesses of the former regulation.¹ Until now, a security has generally been considered 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 and the lack of consideration of volumes made this criterion vulnerable to temporary fluctuations and manipulation.

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

From a historical point of view, all securities which have constantly fulfilled the liquidity criterion over the last 5 ½ years represent in total 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 is designed solely to serve 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 financial markets.

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

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

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