for copyright infringement is still not established. For this reason, wherever practical, copyright complaints should be filed in the name of the copyright owner.

VI. Japan

A. Introduction to Tokyo Stock Exchange Stock Index Futures

Following recent legislation, the Tokyo Stock Exchange (TSE) will, for the first time in its history, trade stock futures on the basis of a newly introduced stock index, the TSE Stock Price Index (TOPIX). The index indicates the overall movement of the market by means of the aggregate market value of all first section stocks listed on the Tokyo Stock Exchange, by comparison of the increase and decrease in the value at any given date with the aggregate market value at the base date, April 1, 1968.

Securities firms, and those foreign firms recognized by government decrees that are not members, will have the right to conduct futures transactions, as the TSE considers appropriate, after investigations of their economic structures, financial affairs, and administrative systems. Potential participants will be subject to case-by-case reviews on the merits of each participant. For the time being, there is no set limit to the number of nonmembers of the TSE that may deal directly in TOPIX futures.

Switzerland*

I. Recent Developments in Limitations on Transferability of Shares in Swiss Companies

The decision announced in November 1988 by Nestlé SA, the Swiss food giant company, to open for the first time its stock ledgers to "foreign nationals and institutions" has again focused attention on the negotiability of Swiss companies' registered shares. Ironically, it was the same firm whose ban on the sale of registered stock to foreigners had earlier this year led to considerable

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resentment during the initially unfriendly takeover bid for Rowntree, the British confectioner.[1]

The whole question on corporate self-defense mechanisms to reinforce Swiss companies' immunity to takeovers by restricting shareholders' rights has been the subject of heated debate in Switzerland in the last two years.[2] The purpose of this report is to attempt to outline some of the current issues involved under Swiss law with respect to share transfer restrictions.

A. Transfer Restrictions of Shares in Swiss Companies

Under the Swiss Code of Obligations, a Swiss company may issue its shares in registered and/or in bearer form, and in principle both of them are freely transferable. Title in bearer shares passes by simple transfer of the security. The transfer of registered shares needs, in addition to the transfer of ownership in the security, an endorsement by the seller and the registration of the purchaser as a new shareholder in the company's shares register.

The Swiss Code of Obligations permits the bylaws of a company to subject transfers of the registered shares to the approval of the board of directors, who may refuse to register a purchaser in the company's register of shareholders. The board may refuse to enter a new shareholder for any reason provided for in the bylaws (art. 686, para. 1), or alternatively, the bylaws may provide that entry in the stock ledger may be refused without disclosing the reason for this refusal, (art. 686, para. 2).[3]

According to Swiss Federal Tribunal practice since 1957,[4] the nonregistration of an unwelcome shareholder by the board of directors of the company leads to

1. On April 26, 1988, Nestlé launched an unfriendly takeover bid for Rowntree that was prompted by a raid on Rowntree shares by its Swiss rival, Jacobs Suchard. The British confectionery company tried to convince the United Kingdom Government to intervene and to help prevent its acquisition by a Swiss company. Rowntree's main allegation was that U.K. companies would be prevented by Swiss law from acquiring a Swiss company by means of a hostile takeover bid.

On May 25, 1988, the British Government announced its decision not to refer either Nestlé's bid or Suchard's 29.9 percent stake to the Monopolies and Mergers Commission. Finally, on June 23, 1988, Rowntree accepted Nestlé's revised offer of 1075 p. per share.

2. For example, in the beginning of May 1988, when Nestlé and Jacobs Suchard takeover tactics in the United Kingdom were at their peak, the Boards of Sandoz and Ciba-Geigy, two big Swiss chemical groups, won authority from shareholders to limit to 2 percent the maximum stake in their share capitals that can be registered in the name of a single shareholder.

3. Art. 686, para. 2, was introduced in the last revision of the Swiss Commercial Law, which dates back to 1936. At that time and during the war, major firms began to fear acquisition by foreign interests, more particularly by Nazi Germany, and felt the need to prove Swiss nationality and consequent "neutrality." As a consequence many Swiss companies switched from the traditional bearer shares and adopted transfer restrictions provisions in their bylaws. The Sulzer brothers' engineering concern showed the way in 1943 by converting its bearer shares into registered stock. Nestlé introduced registered stock in 1959, and the big banks in the 1970s.

4. The Federal Tribunal is the Swiss Supreme Court. *See Häring*, 83 Arrêts du Tribunal fédéral suisse II [ATF II] 297 (1956). *See also* Robert Patry, 2 Précis de droit suisse des sociétés 151–52. More recently see also the decision of April 19, 1988, in H. v. K. & UTH, 114 ATF II 57 (1988).

a division of the rights of the shareholder: the unwelcome buyer will not be allowed to exercise his membership rights (mainly the voting rights), which will remain with the seller shareholder, but will receive his dividends or liquidation proceeds, since the financial rights are transferred to the purchaser. As only registered shareholders can vote at company's meetings, the purchaser whose application in the stock register is rejected cannot gain control of the company.

In addition, Swiss companies may also issue shares in different categories varying in par value and thus in voting rights.[5] Alongside registered shares of SFrs. 100 par value, each with one vote, a company can issue bearer shares at par of SFrs. 1000 or any multiple of SFrs. 100, each with one vote. Thus, by creating supervoting shares a capital minority may dispose of a voting majority.

Voting shares in registered form combined with transfer restriction provisions constitute the most important defense device of Swiss companies against a hostile takeover. Most listed Swiss companies are structured in this way, which explains the importance of the actual discussion of this issue.[6]

B. Share Transfer Restrictions in the Context of Swiss Law

In contrast to, say, U.S. or French law, Swiss law is liberal in that it has no bureaucratic control on purchasers, Swiss or foreigners, acquiring substantial shareholdings in a Swiss company. There are no securities regulations, no disclosure requirements with respect to the acquisition of signifient shareholdings in a Swiss company, and takeover bids do not have to be made in the form of a public tender offer. There is no regulatory authority supervising securities transactions. As a consequence, no public authority has any power of intervention, provided that the company is not engaged in banking, insurance, or otherwise governmentally regulated business such as air and sea transport.

Nevertheless, defense against foreign raiders is reinforced by the Lex Friedrich, the law limiting foreigners' right to buy property in Switzerland. Originally passed to meet the public reaction against massive foreign buying of homes, it has the effect of preventing a foreigner from buying shares of a Swiss company that has more than one-third of its assets in real estate.

Finally, one should also mention that transfer restrictions may also be backed by the Swiss Banking Association, which has signed a Gentleman's Agreement with the listed Swiss companies. In this agreement the member banks agreed to refuse to execute purchase orders for registered shares in a Swiss company by a

5. Pursuant to art. 693, para. 1, Swiss Code of Obligations, the bylaws may provide for a voting right based on the number of shares held by each shareholder irrespective of the par value, so that each share has one vote. However, such voting shares have to be issued in registered form (art. 693, para. 2).

6. Use of transfer restrictions as an antitakeover device began to be widely discussed in Summer 1986 when the retail concern Usego refused to enter a group of Swiss shareholders close to the privately owned discount group Denner into its register, thus depriving them of voting rights.

buyer who will not meet the specific requirements of the same company in order to be registered.

Notwithstanding the absence of statute or governmental regulations protecting them against hostile takeovers, Swiss companies have succeeded in establishing almost exclusively through the provisions of the Swiss Code of Obligations an efficient corporate defense system that is in essence very simple.

Unfriendly takeover bids launched in other countries by Swiss companies (first Hoffmann-Laroche against Sterling Drug in the United States, and then both Jacobs-Suchard and Nestlé against Rowntree in the United Kingdom), however, provoked adverse reactions on an international level. It became obvious that Swiss companies could acquire foreign firms, but were themselves virtually impregnable. Resentment abroad has given the European Commission the opportunity to pressure the Swiss Legislature to reform restrictive shareholding laws when Switzerland negotiates its post-1992 relationship with the EC.

C. Main Features of the Draft Amending Swiss Commercial Law with Respect to Transferability of Shares

The Swiss Government started to revise the commercial code twenty years ago. After fifteen years the draft was finally ready to be presented to the two Chambers of Parliament.[7] At that time the government essentially meant to protect the small registered shareholders who could be the unfortunate owners of stock whose negotiability became uncertain. This approach explains why the proposal amending the Code of Obligations is less than radical. In the main it stipulates that boards of listed companies must invoke "just" reasons for refusing to register shares. The draft enumerates those reasons, which in addition shall be provided for in the bylaws.

In its autumn 1988 session the Upper Chamber of Parliament discussed the draft, and unlike the Lower Chamber, modified it in depth. Even if not definitive, it is possible today,to outline its main features as follows:

(a) Companies whose shares are not quoted will still be authorized to refuse to enter a purchaser in its stock ledgers for any reasons provided for in its bylaws.

(b) The reasons for nonregistration of a purchaser of shares in listed companies are restricted to the ones enumerated in the draft and as long as the bylaws mention them. The draft permits "foreigner status" and a maximum-stake provision as specific grounds for refusal. In the first case it is provided that bylaws can direct that foreign individuals domiciled abroad will not be registered. Refusal can also be given to corporate entities domiciled abroad or controlled by foreigners.

Three other reasons for refusing entry in the stock ledger are also offered to listed companies:

7. *See* [1983] II Feuille Fédérale 757.

—When the new purchaser does not apply for registration within fifteen days following the acquisition. In turn, the company must give its decision as to the entry within twenty days after the application.

—The bylaws may allow companies to refuse entry without disclosing reasons on condition that they offer to purchase the shares of the applicant. The purchase price shall be equal to the stock market value of the shares, but must be at least the value of the price paid by the person requesting the entry, including interest and expenses. Companies may purchase these shares to the extent that their nominal value does not exceed 20 percent of the share capital of the corporation.

—When the purchaser is not able to prove that he acted for himself and not for a third party.

These rules do not apply if the shares have been acquired through succession, division of an estate, as a consequence of matrimonial property proceedings between husband and wife, or in case of bankruptcy. In these situations the corporation shall be entitled to refuse the transfer only if it has previously offered to purchase the shares from the owner.

(c) The division of the rights between the seller shareholder and the unwelcome buyer has been abolished. In order to facilitate shares' negotiability and to avoid voting instructions between buyer and seller, the draft provides that the whole rights linked to the shares pass to the purchaser on transfer of the security. The purchaser, however, will be entitled to exercise them only after the purchaser is entered in the stock ledger. The purchaser's right to the dividend expires after one year beginning from the term of the required time for application or from refusal to register. The bylaws can provide that voting rights of not yet registered shareholders may be divided between shareholders already entered in the ledger.

(d) It will be compulsory for any seller's bank to inform the board of directors of a company whose shares have been sold. This rule is deemed to help companies keep track of their shares' transfer.

The parliamentary proposal favoring "foreigner status" as a specific ground for nonregistration is seen by many Swiss as inopportune at a time when the Nestlé raid on Rowntree has given the European Commission the opportunity to recall that reciprocity applies also to stock market and corporate practices. No doubt this issue will be thoroughly discussed again when the draft is reexamined by the lower Chamber.

It appears, however, that Swiss companies' defenses will not be fundamentally weakened. Registration will definitely not be open to all comers, not least in view of the increasingly common maximum stake rule that will certainly be embodied in the final version of Switzerland's equity laws.[8]

8. Nestle's board is proposing to incorporate into the statutes a 3 percent holding limit for registered stock, as well as a voting ceiling of 3 percent of total capital.