

Report

False disclosure of HNA Group's (former) shareholding in Dufry

Date:
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1 Background

HNA Group Co. Ltd. (hereinafter HNA Group) is a Chinese conglomerate headquartered in Haikou, China. It is primarily active in the aviation and tourism sectors. HNA Group was founded in 1998 by Feng Chen and Jian Wang, who together managed the company as Co-Chairmen until the death of Jian Wang in July 2018.

HNA Group has expanded globally in recent years. In Switzerland, it acquired the former Swissair companies Swissport, Gategroup and SR Technics. In addition, in 2017 it built up an indirect participation of (at one point) 20.92 per cent in the duty-free retailer Dufry AG (hereinafter Dufry), a company listed on SIX Swiss Exchange.

When HNA Group announced its new organisational structure in July 2017, the Swiss Takeover Board (hereinafter TOB) reviewed the information provided by HNA Group in connection with the Gategroup takeover. In its openly published ruling of 22 November 2017, the TOB concluded that the offer prospectus of 20 May 2016 contained untrue or incomplete information on the ownership situation of HNA Group. For its part, FINMA commenced an investigation into the beneficial owners behind HNA Group in relation to the disclosure of its participation in Dufry.

2 Disclosure obligations in Switzerland

According to Swiss disclosure legislation (Art. 120 FMIA), shareholders of companies listed in Switzerland must make formal disclosure when they reach or breach (either upwards or downwards) certain voting right thresholds. When determining the beneficial owner to whom the disclosure obligation applies, what matters is who controls the voting rights that arise from the shareholding in question, and who bears the economic risk associated with this shareholding (Art. 120 para. 1 FMIA in conjunction with Art. 10 para. 1 FMIO-FINMA). With regard to the control of voting rights, it is not only legally enforceable constellations and agreements that must be taken into account. Rather, all processes are included that could give rise to the genuine possibility of control over the controlling legal entity. Whether or not control is actually exercised is not relevant in this context. The aim of the legislation is to ensure that the actual control situation is disclosed. It

therefore also extends to processes through which natural persons or legal entities are used to circumvent the reporting obligation.

3 Disclosure reports regarding the Dufry stake and participation structure of HNA Group

Between 26 April 2017 and 6 February 2019, HNA Group made six disclosure reports in respect of its stake in Dufry. In each case, the China-based Hainan Province Cihang Foundation (hereinafter Cihang Foundation) was disclosed as the beneficial owner.

The Cihang Foundation is a private non-profit organisation founded on 8 October 2010 by Feng Chen and Jian Wang. This non-profit organisation is managed by a Council comprising nine individuals, including Feng Chen and (up until his death) Jian Wang.

The ownership structure of HNA Group has changed greatly over the years. When the company was founded, Feng Chen and Jian Wang owned all shares between them on a 50-50 basis. In the first decade of the new millennium, they transferred these holdings to two fiduciaries as well as to the "Employee Union", i.e. the trade union of Hainan Airlines Company Ltd. (hereinafter Hainan Airlines), a company founded by Feng Chen, Jian Wang and four other co-founders. Officially therefore, at the end of 2008 the two Co-Chairmen did not hold any stake in HNA Group, either directly or indirectly. However, the Employee Union granted the two Co-Chairmen and the four other co-founders of Hainan Airlines option rights for the (re-)transfer of the shares held in trust.

In September 2013, the Employee Union transferred a part of its stake in HNA Group to the Cihang Foundation. In December 2015, Feng Chen, Jian Wang and the four other co-founders of Hainan Airlines exercised the aforementioned option rights, whereupon the Employee Union transferred the remaining HNA Group shares to them in 2016. The majority of these shares were transferred to Feng Chen and Jian Wang. Following these transactions, from 2016 onwards Feng Chen and Jian Wang each once again held an indirect participation in HNA Group of 14.98 per cent.

4 Findings of FINMA's investigation

In its proceedings, FINMA found that the key position and role of Feng Chen and Jian Wang within the HNA conglomerate remained unchanged, despite the various shareholding transfers and the establishment of foundations. The two Co-Chairmen continued to hold effective control over HNA Group and its subsidiaries, the Employee Union and the Cihang Foundation, whose decisions were always taken unanimously under the leadership of the two Co-Chairmen.

FINMA has therefore concluded that Feng Chen and Jian Wang, as a result of their key position and role within the HNA conglomerate and their own indirect stake in HNA Group, held joint control over the Cihang Foundation in their capacity as a shareholder group up until the death of Jian Wang. They had a *de facto* control possibility, which was therefore relevant from a disclosure perspective, and, due to their indirect stake of 14.98 per cent each in HNA Group, bore a considerable and as a group (29.96 per cent) the greatest economic risk arising from the HNA Group shareholding in Dufry (Art. 10 para. 1 FMIO-FINMA).

As a result of this constellation, Feng Chen and Jian Wang should have been disclosed and reported in Switzerland as the shareholder group holding beneficial ownership in respect of the Dufry stake, rather than the Cihang Foundation (Art. 120 para. 1 and Art. 121 FMIA). Consequently, the six disclosure reports submitted between April 2017 and February 2019 were incorrect. Accordingly, the parties to these proceedings – Feng Chen and the Cihang Foundation – breached their reporting obligation (pursuant to Art. 120 paras. 1 and 121 FMIA) and disregarded both the disclosure obligation and the associated transparency requirement under Swiss law.

Even after FINMA opened its preliminary investigation and requested a correction of the reports, the parties did not take steps to mitigate the unlawful situation. Instead, after the sale of the Dufry stake, they again reported the Cihang Foundation as the beneficial owner in the disclosure report of 6 February 2019.

Overall, FINMA concludes that this constitutes a serious breach of obligations under financial market law (Art. 32 FINMASA). In addition, FINMA will be registering a complaint with the Criminal Law Division of the Federal Department of Finance (FDF).