Decision 672/01

of 26 January 2018

Regarding the duty to make a tender offer according to art. 135 of the Financial Market Infrastructure Act (**FMIA**) by Himalaya (Cayman Islands) TMT Fund, Himalaya Asset Management Ltd., Xiang Xu, Kun Shen, GF Fund Management Co. Ltd., Zhuhai Hokai Medical Instruments Co. Ltd. and Mengke Cai with respect to SHL Telemedicine Ltd.

Facts:

A.
The subsequently enumerated facts form the basis of the following decision and are structured as follows:

- Letters B. – I.: The parties as well as other natural, respectively, legal persons related to the parties are shortly presented.
- Letters J. – O.: Information regarding the publicly disclosed shareholdings in SHL Telemedicine Ltd. (**SHL**) pursuant to art. 120 FMIA in the period relevant for the case at hand is described.
- Letters Q. - RR.: The facts are laid out that chronologically refer to potential acquisitions of shares in SHL and to a potential expansion of SHL into China.
- Letters TT. - JJJ.: The current composition of the board of directors and then, in the following, the relevant events that took place within a context to the shareholders' meetings of SHL of 5 January 2017, of 11 May 2017 and of 28 June 2017 are laid out.
- Letters LLL. - DDDDD.: The mainly procedural steps are enumerated that took place since 10 July 2017 until the moment the present decision was issued.

The arguments brought forward by the respective parties to the procedure will be entered into in the considerations of this decision.

B.
SHL is a company incorporated under the laws of the State of Israel with registered office at 90 Yigal Alon Street, Tel Aviv, Israel. SHL specializes in the development and marketing of innovative telemedical systems. SHL has an outstanding share capital in the amount of 108'785 Israeli Shequel (hereinafter: "**NIS**"), divided into 10'878'491 registered shares with a nominal value of NIS 0.01. Further, the company has a conditional share capital in the amount of NIS 5'829, divided into 582'935 registered shares with a nominal value of NIS 0.01. All of the outstanding shares entitle to one vote each. The shares of SHL are primary-listed on the SIX Swiss Exchange (**SIX**) with the ticker symbol SHL TN.

C.
Nehama & Yoram Alroy Investment Ltd. holds 459'555 shares in SHL representing approximately 4.2% of the voting rights. Elon Shalev is the holder of 425'652 shares in SHL representing approximately 3.9% of the voting rights. Nehama & Yoram Alroy Investment Ltd. and Elon Shalev (together the **Applicants**) made an application to the Swiss Takeover Board (**TOB**) on 10 July 2017 regarding a potential infringement of the duty to make an offer according to art. 135 FMIA with respect to SHL. The Applicants form part of the Alroy & Shalev Group (see lit. N below).

D.
Xiang Xu is the director of Himalaya Asset Management Limited (**Himalaya AM**) and of Himalaya (Cayman Islands) TMT Fund (**Himalaya TMT Fund**). Himalaya TMT Fund is a Cayman Islands based fund that *"started as a family investment vehicle in 2013 and opened up to outside investors in 2015, when Himalaya Asset Management Ltd. became the fund manager"* (act. 59/1, note 8). Kun Shen and Xiang Xu are the two directors of Himalaya TMT Fund (act. 59/1, *loc. cit.*). Himalaya AM is authorized to manage Himalaya TMT Fund and has two responsible officers, Xiang Xu and Zhong Xia, who are under the regulation of the Securities and Futures Commission (**SFC**) in Hong Kong (see act. 59, note 11). Himalaya AM and Himalaya TMT Fund are collectively called **Himalaya** in the following.

E.
Xiang Xu is married to Kun Shen (act. 34, page 2, section 2, 1st sentence; art. 50/2, page 1, lit. A). Kun Shen is also an investor in Himalaya TMT Fund (art. 50/2, page 1, lit. A). As of today, Kun Shen is the only investor in Himalaya TMT Fund (act. 57/1, page 5, note 10).

F.
Mengke Cai is a Chinese business woman. Together with Zhenxi Hao, her husband, she founded Zhuhai Hokai Medical Instruments Co., Ltd. (**Hokai**). Today, she has an interest of approximately 16% in Hokai. She is the vice chairman of the board of Hokai.

G.
Hokai is a company listed at the Shenzhen stock exchange. The stock code of Hokai is 300273. Hokai was founded in 1996 and is headquartered in Zhuhai, China. It has branch offices in 23 provinces and autonomous regions in China. The company offers medical equipment, medical services, medical information services, medical supply chain and medical and financial services. Hokai has more than one thousand employees. Its clients are mainly hospitals.

H.
Jinsheng Dong is a corporate officer of Hokai and holds the position of a vice president in Hokai. He is responsible for the overseas business of Hokai. In particular, he is looking for products abroad that may be brought to China and may be distributed in China.

I.
GF Fund Management Co Ltd. (**GF Fund**) is a professional fund management company with a license as qualified domestic institutional investor. Any Chinese person wishing to invest abroad

needs to use such fund management company to process the investment. Neither Mengke Cai nor Hokai have shares in GF Fund.

J.
The following letters K. – N. contain information regarding the publicly disclosed shareholdings in SHL pursuant to art. 120 FMIA during the period relevant for the present case which runs from the beginning of 2016 to the date of this decision.

K.
Pursuant to the database of the Disclosure Office of SIX (**SIX-DO**), Copper Valley Finance Ltd, Prime Finance Corporation, Eli Alroy and Barak Capital Ltd. disclosed on 10 August 2016 that their previous holding in SHL of 29.83% – according to the respective notification of 5 January 2016 – had fallen under the threshold of 3%. Mengke Cai disclosed on 11 August 2016 a holding of 29.85% of the shares in SHL.

L.
Furthermore, also pursuant to the database of the SIX-DO, Himalaya disclosed its holdings in SHL as follows:

- On 18 February 2016, Himalaya disclosed a holding of 3.43%;
- On 12 March 2016, Himalaya disclosed a holding of 5.33%;
- On 18 August 2016, Himalaya disclosed a holding of 10.12%;
- On 24 March 2017, Himalaya disclosed a holding of 16.10%;
- On 13 June 2017, Himalaya disclosed a holding of 20.05%;
- On 14 October 2017, Himalaya disclosed a holding of 0.08%.

M.
Pursuant to the database of the SIX-DO, Kun Shen disclosed on 14 October 2017 a holding of 23.52% of the shares in SHL. On 8 November 2017, Kun Shen increased her participation in SHL to 25.02% of the shares in SHL.

N.
Pursuant to the database of the SIX-DO, the current significant shareholders in SHL are the following:

- Mengke Cai holds 29.85% of the shares in SHL indirectly through GF Fund Management Co. Ltd. since 11 August 2016;
- Kun Shen holds 25.02% of the shares in SHL since 8 November 2017;

- Yoram Alroy, Erez Alroy, Yariv Alroy, Hila Alroy, Nahama Alroy, Elon Shalev and Ziva Shalev hold 23.05% of the shares in SHL as an organized group in the sense of art. 12 al. 1 FMIO-FINMA indirectly through Nehama & Yoram Alroy Investment Ltd., Y. Alroy Family Ltd., Elon Shalev Investments Ltd. and Southland Holding Ltd. since 22 December 2016 (the **Alroy & Shalev Group**);

- Ziv Carthy holds 8.47% of the shares in SHL indirectly through G.Z Assets and Management Ltd. since 9 December 2015;

- SHL directly holds 3.58% own shares since 9 December 2015.

O.
Out of the Alroy & Shalev Group, Nehama & Yoram Alroy Investment Ltd. holds 459'555 shares in SHL representing approximately 4.2% of the voting rights (act. 1/62) and Elon Shalev is the holder of 425'652 shares in SHL representing approximately 3.9% of the voting rights (act. 1/63). Thus, the Applicants together hold a total of 885'207 shares representing 8.1% of the voting rights in SHL.

P.
In the subsequent letters Q. - RR., the facts are laid out which chronologically refer to potential or actual acquisitions of shares in SHL and to a potential expansion of SHL into China.

Q.
On 18 February 2016, Himalaya disclosed a holding of 3.43% of the shares in SHL (see lit. L. above).

R.
On 24 February 2016, the annual general shareholders' meeting of SHL was held in Tel Aviv. Xiang Xu appeared in said meeting. He was accompanied by Jinsheng Dong who was presented as the translator of Xiang Xu (act. 1/18, page 1).

S.
On the same day, a meeting took place between Xiang Xu and Yariv Alroy from the Alroy & Shalev Group. Xiang Xu wanted to discuss a potential acquisition of the block of shares held by the Alroy & Shalev Group by Himalaya. Jinsheng Dong did also take part in this meeting, this again as a translator for Xiang Xu (act. 1, note 50).

T.
Himalaya acquired additional SHL shares and crossed the 5% threshold of shares in SHL on 9 March 2016. The respective notification was published on the disclosure platform of SIX on 12 March 2016 (see lit. L above).

U.
On 10 March 2016, Xiang Xu wrote an email to Haggai Ravid. Haggai Ravid serves as the CEO and managing partner of the Chinese branch of Cukierman & Co Investment House Ltd., an Israel

based company offering M&A services (act. 1, note 44). Xiang Xu wrote said email to Haggai Ravid in order to inform him that Himalaya had increased its position in SHL (act. 1/20).

V.
On 6 April 2016, Xiang Xu held a telephone conference with Yoav Rubinstein, the former Head of Business Development with SHL, and with other participants. One of the topics of said conference was to find potential partners for the distribution of SHL solutions in China (act. 27/21).

W.
In a subsequent email of 7 April 2016, Xiang Xu introduced Hokai to Yoav Rubinstein. Xiang Xu wrote that he was convinced that Hokai is the best partner for SHL in China's medical market. He added that Hokai would like to purchase a set of SHL's products and invited Yoav Rubinstein to China in order to continue the discussion of a cooperation. Xiang Xu included attachments about Hokai and asked Yoav Rubinstein to contact him if he had any question (act. 27/20).

X.
On 11 April 2016, Xiang Xu wrote an email to Yoav Rubinstein in which he introduced Jinsheng Dong and organized a meeting between Yoav Rubinstein and Jinsheng Dong during the same week. Xiang Xu also stated that Jinsheng Dong "*and his boss really welcome you [Yoav Rubinstein] to visit their company [Hokai] in China.*" (act. 27/20). Jinsheng Dong was copied into this email.

Y.
On 12 April 2016, Xiang Xu wrote another email to Yoav Rubinstein and again copied Jinsheng Dong into said email. Xiang Xu wrote to Yoav Rubinstein that Hokai sincerely welcomed him to Zhuhai to visit their company and to *"discuss the potential partnership"* (act. 27/20).

Z.
Jinsheng Dong then wrote to Yoav Rubinstein on 13 April 2016 after their direct conversation, in particular asking Yoav Rubinstein to lay out his arrangements for his visit to China and to Hokai in May 2016 (act. 27/20).

AA.
Xiang Xu further wrote the following to Haggai Ravid in an email of 15 April 2016:

> *"This week Hokai had a conference call with the management team of SHL. They now determined to purchase the shares of SHL's current major shareholders. Before that, if it is possilbe [recte: possible] for you, could you please help Hokai purchase a set of product of SHL and take it to China?(…) Zhuhai Hokai wants to invite you to Zhuhai and discuss the purchase of the shares of SHL" (*act. 1/24).

BB.
On 15 April 2016, the annual general shareholders' meeting of LifeWatch AG (**LifeWatch**) was held. LifeWatch is a company incorporated under the laws of Switzerland which is active in the field of telemedicine. According to the database of the SIX-DO, Himalaya held 15.26% of the voting rights of LifeWatch since 23 December 2014 (act. 1/60). In said general shareholders'

meeting, Himalaya proposed the election of Jinsheng Dong as a member of the board of directors of LifeWatch (act. 1/61) and Jinsheng Dong was elected as member of the board of directors of LifeWatch (act. 1/61, page 10 and 13).

CC.
At the beginning of June 2016, Yuval Shaked, the former CEO of SHL, and Yoav Rubinstein were invited to visit Hokai in China. Presumably, the meeting between the representatives of SHL and Hokai included Jinsheng Dong and took place on 5 and 6 June 2016. Haggai Ravid wrote in an email of 8 June 2016 to Yariv Alroy that *"Shaked and Rubinstein came to ZhuHai and had a comprehensive business discussion with Hokai on 5th and 6th June"* (act. 1/25).

DD.
Xiang Xu also participated in these meetings. This results from an email sent by Xiang Xu to Yuval Shaked and Yoav Rubinstein dated 8 June 2016 (act. 1/26; see lit. FF. below).

EE.
On 7 June 2016, Xiang Xu sent an email to Haggai Ravid containing the following text:

> *"Recently, I found a listed company which has made determination to acquire 25-30% shares of SHL by using a merger and acquisition fund under its control*
>
> *[. . .]*
>
> *As this time I am only a [recte: an] intermediary and you are an expert in such issue, I will certainly follow your instruction"* (act. 1/27).

FF.
Xiang Xu wrote an email to Yuval Shaked and Yoav Rubinstein on 8 June 2016:

> *"After meeting you in ZhuHai, we have decided to acquire 25%-30% shares of SHL"*
> (act. 1/26).

GG.
On 11 August 2016, Mengke Cai disclosed a holding of 29.85% of the shares in SHL (see lit. N above and act. 1/32). Originally, she had the intention to purchase shares from the Alroy & Shalev Group. Mengke Cai had asked Jinsheng Dong to negotiate with Eli Alroy as a representative of the group around Barak Capital, Eli Alroy and Copper Finance Ltd. Eli Alroy and Jinsheng Dong reached an agreement at a price of CHF 8.70 per SHL share. The transaction was executed in a trade entered into on 5 August 2016. There was no written agreement on said transaction (act. 16/1, note 26). Also, Mengke Cai had to use GF Fund in order to execute this investment outbound of China (act. 16/1, note 89; act. 35). GF Fund is described as a "*pass through vehicle or nominee*" by Mengke Cai (act. 35/1, note 35).

HH.
On 17 August 2016, Himalaya raised its holding in SHL to 10.12% of the voting rights (see lit. N above).

II.
On 15 September 2016, a meeting took place between Elon Shalev and Yariv Alroy from the Alroy & Shalev Group on one side and Jinsheng Dong on the other side. In said meeting Jinsheng Dong asked whether the Alroy & Shalev Group was willing to cooperate with Hokai. Elon Shalev and Yariv Alroy denied and told Jinsheng Dong that the Alroy & Shalev Group would rather sell its participation (act. 1, note 81; act. 16/1, note 94 – 95). Xiang Xu did not attend this meeting.

JJ.
On 18 September 2016, Jinsheng Dong referred Elon Shalev and Yariv Alroy from the Alroy & Shalev Group to Xiang Xu in order to talk about a share purchase (act. 1, exhibit 15). According to Mengke Cai, Jinsheng Dong referred the Alroy & Shalev Group to Xiang Xu since he knew or believed to know that Xiang Xu had tried to find other potential Chinese investors that might be interested to buy shares in SHL (act. 16/1, note 94 – 95).

KK.
Xiang Xu contacted Elon Shalev and Yariv Alroy by email on 30 October 2016 with the following query:

> *"Now our fund has obtained about 11 % shares of SHL companies. Given that 33% is the threshold for the tender offer according to the regulation of Swiss Exchange, our fund could only acquire at most 22% of (shares of SHL [recte:)].*
>
> *I am looking forward to hearing your ideas about how much percentage shares of SHL you would like to sell now and what is your expected price?"* (act. 1/37)

Jinsheng Dong was not copied in this email.

LL.
On 4 January 2017, a telephone conversation took place between Haggai Ravid, Jinsheng Dong and Xiang Xu.

MM.
On 14 March 2017, Xiang Xu informed Yariv Alroy that the potential buyer could not execute the trade *"due to a very strict control for foreign currency from the Chinese Government"* (act. 1/39).

NN.
On 24 March 2017, Himalaya informed that it had crossed the threshold of 15% of the voting rights in SHL (see lit. L above).

OO.
On 1 May 2017, Elon Shalev and Jinsheng Dong met in Zurich. Jinsheng Dong communicated to Elon Shalev that there was an interest in buying the shares of the Alroy & Shalev Group, but that they would have to wait until August 2017 (act. 1, note 94).

PP.
On 13 June 2017, Himalaya disclosed a holding of 20.05% of the shares in SHL (see lit. L above).

QQ.
In the period of 23 – 29 June 2017, Jinsheng Dong was in Israel in order to participate in the special general shareholders' meeting of SHL of 28 June 2017. He joined the orientation meetings with the management of SHL and, in this period of time, met Elon Shalev several times. In these meetings, Jinsheng Dong told Elon Shalev that Hokai would like to conclude a memorandum of understanding relating to the acquisition of the SHL shares held by the Alroy & Shalev Group. Further, he informed Elon Shalev that a final agreement could only be reached after obtaining internal and state approvals around August 2017. Jinsheng Dong finally mentioned that the acquisition should be followed by a public offer to all of shareholders in SHL (act 1, note 98; see also act. 16, note 107).

RR.
On 14 October 2017 Himalaya disclosed a holding of 0.08% of the shares in SHL (see lit. L above). On the same day Kun Shen disclosed a holding of 23.52% of the shares in SHL (see lit. M above). On 8 November 2017, Kun Shen increased her participation in SHL to 25.02% of the shares in SHL (see lit. M above).

SS.
The letters TT. - III. first present the current composition of the board of directors of SHL (see lit. TT. - UU.) and then, in the following (see lit. VV. - III.), the relevant events that took place within a context to the shareholders' meetings of SHL of 5 January 2017, of 11 May 2017 and of 28 June 2017.

TT.
The board of directors of SHL is currently composed of the following eight members:

1. Xuewen Wu is the chairman and was proposed by Mengke Cai;
2. Elon Shalev was proposed by the Alroy & Shalev Group;
3. Cailon Su was proposed by Mengke Cai;
4. Amir Lerman was proposed by Himalaya TMT Fund;
5. Shenlu Xu (daughter of Xiang Xu and Kun Shen) proposed by Himalaya TMT Fund;
6. He Yi who was proposed by Mengke Cai;
7. Xuequn Qian who acts as the first independent board member; and
8. Yehoshua Abramovich who acts as the second independent board member.

UU.
Three of these eight board members of SHL were proposed by Mengke Cai, two by Himalaya and one by the Alroy & Shalev Group.

VV.
On 5 January 2017, a special general shareholders' meeting of SHL took place. On the agenda was namely the election of an external independent board member (act. 1/42). Mengke Cai as well as Himalaya both voted by written ballot. Mengke Cai and Himalaya voted for Ronen Harel – who was elected – and against Gil Sharon as external independent board member (act. 1/46 and act. 1/47).

WW.
On 12 January 2017, the Applicants filed a complaint with the competent Israeli court seeking that the resolution of the special general shareholders' meeting of 5 January 2017 relating to the election of Ronen Harel be declared void. They were convinced that Mengke Cai and Himalaya qualified as controlling shareholders under Israeli law and were not entitled to vote for the election of external independent directors (act. 1, note 111).

XX.
On 5 April 2017, Ruth Ben Yakar and Ronen Harel, who both served as external independent directors of SHL, resigned from office with immediate effect (act. 1/8).

YY.
On 11 May 2017, the annual general shareholders' meeting of SHL took place. Again, Mengke Cai and Himalaya did not participate in person but voted by written ballot (act. 1, exhibit 50). Mengke Cai and Himalaya both did not vote with regard to the re-appointment of the external auditors. They both voted for the approval of the new office holder compensation policy and for the approval of an option to be granted to the newly elected external independent board members (act. 1/50).

ZZ.
With respect to the election of up to seven directors, the following candidates were proposed:

1. Cailong Su was proposed by Mengke Cai;
2. Xuewen Wu was proposed by Mengke Cai;
3. He Yi was proposed by Mengke Cai;
4. Amir Lerman was proposed by Himalaya TMT Fund;
5. Shenlu Xu was proposed by Himalaya TMT Fund;
6. Elon Shalev was proposed by the Alroy & Shalev Group; and
7. Ziv Carty was proposed by G.Z. Assets and Management Ltd.

AAA.
Mengke Cai voted only for two directors proposed by herself and abstained with respect to the vote for a third director proposed by her (He Yi). She voted for the two directors proposed by Himalaya and for the director proposed by the Alroy & Shalev Group and against the director proposed by G.Z. Asset and Management Ltd (Ziv Carty) (act. 1/50).

BBB.
Himalaya voted for the two directors proposed by itself (Amir Lerman and Shenlu Xu), for two directors proposed by Mengke Cai (Cailong Su and Xuewen Wu) but against the third director proposed by Mengke Cai (He Yi), for the director proposed by the Alroy & Shalev Group (Elon Shalev) and against the director proposed by G.Z. Asset and Management Ltd (Ziv Carty) (act. 1/50).

CCC.
Finally, Cailong Su, Xuewen Wu, He Yi, Amir Lerman, Shenlu Xu and Elon Shalev were elected as members of the board of directors of SHL (act. 1/50). The following chart reflects the voting behavior of Mengke Cai and of Himalaya TMT Fund:

Candidate	**Proposed by**	**Vote of Mengke Cai**	**Vote of Himalaya TMT Fund**	**Results**
Cailong Su	Mengke Cai	yes	yes	Elected
Xuewen Wu	Mengke Cai	yes	yes	Elected
He Yi	Mengke Cai	abstain	no	Elected
Amir Leman	Himalaya TMT Fund	yes	yes	Elected
Shenlu Xu	Himalaya TMT Fund	yes	yes	Elected
Elon Shalev	Alroy & Shalev Group	yes	yes	Elected
Ziv Carty	G.Z. Assets and Management Ltd	no	no	Not Elected

DDD.
With respect to the vote for the external independent director, Mengke Cai and Himalaya both voted against the candidates proposed by the Alroy & Shalev Group and by G.Z. Assets and Management Ltd but in favor of the candidate proposed by Himalaya (Xuequn Qian) (act. 1/50).

EEE.
Elon Shalev, the chairman of the board of directors of SHL at that moment in time, decided to reclassify the shares held by Mengke Cai and by Himalaya as shares of controlling shareholders in the sense of Israeli Companies Law. Thus, the votes of Mengke Cai and Himalaya did not count for the election of Xuequn Qian who was therefore not appointed as an independent external Director of SHL (act. 1/50, page 6 et seq.).

FFF.
After the counting of the votes, Elon Shalev in his role as chairman of the meeting drew the attention of the shareholders to the fact that legal proceedings were instigated by the Alroy & Shalev Group before the competent court in Tel Aviv claiming that Himalaya and Hokai were acting in concert (act. 1/50).

GGG.
On 25 June 2017, Jinsheng Dong attended the meeting of the board of directors of SHL (see act. 1, note 148; act. 16/1, note 121).

HHH.
On 28 June 2017, a special general shareholders' meeting of SHL took place with respect to the election of two independent directors. Five candidates were in the race. Yehoshua Abramovich and Devorah Kimhi were proposed by the Alroy & Shalev Group, Noga Knaz and Hava Shechter, were proposed by Mengke Cai and Xuequan Qian was proposed by Himalaya (act. 1/52).

III.
The votes with respect to this election of external independent directors were cast by Mengke Cai and by Himalaya in the following way, when again, Mengke Cai and Himalaya voted by written ballot (act. 1/52):

Candidate	**Proposed by**	**Vote of Mengke Cai**	**Vote of Himalaya TMT Fund**	**Result**
Yehoshua Abramovich	Alroy & Shalev Group	abstain	yes	Elected
Devorah Kimhi	Alroy & Shalev Group	abstain	no	Not elected
Noga Knaz	Mengke Cai	abstain	no	Not elected
Hava Shechter	Mengke Cai	abstain	no	Not elected
Xuequan Qian	Himalaya TMT Fund	yes	yes	Elected

JJJ.
In said shareholders' meeting of 28 June 2017, the new chairman of the board of directors of SHL, Xuewen Wu, did not reclassify the shares held by Mengke Cai and by Himalaya as shares of controlling shareholders in the sense of Israeli Law. Xuewen Wu said at that meeting that there was no conclusive evidence that Mengke Cai and Himalaya were acting in concert and approved the appointment of Yehoshua Abramovich and of Xuequan Qian as independent external directors of SHL (art. 1/52, page 6).

KKK.
The letters LLL. - DDDD. enumerate the procedural steps that took place since 10 July 2017 until the moment the present decision was issued. The arguments brought forward by the respective parties to the procedure will be addressed in the considerations of this decision.

LLL.
On 11 July 2017, the Swiss Takeover Board (**TOB**) received an application and complaint dated 10 July 2017 (the **Application**; act. 1) by the Applicants in the above mentioned procedure (the **Procedure**) containing the following motions:

> *"1. Himalaya (Cayman Island) TMT Fund and/or Himalaya Asset Management Ltd. and/or Mr. Xiang Xu and/or GF Fund Management Co. Ltd. and/or Zhuhai Hokai Medical Instruments Co. Ltd. and/or Mrs. Mengke Cai shall be ordered to make an offer for all listed equity securities in SHL Telemedicine Ltd. in accordance with art. 135 FMIA.*
>
> *2. It shall be declared that, for the purposes of the calculation of the minimum price to be paid by Himalaya (Cayman Island) TMT Fund and/or Himalaya Asset Management Ltd. and/or Mr. Xiang Xu and/or GF Fund Management Co. Ltd. and/or Zhuhai Hokai Medical Instruments Co. Ltd. and/or Mrs. Mengke Cai, the highest price paid by these parties respectively organisations controlled by these parties for equity securities in SHL Telemedicine Ltd. during the period beginning 12 months prior to the expiry of the deadline according to art. 39 para. 1 FMIO-FINMA and ending at the time of the publication of the prospectus or the publication of the pre-notification shall be relevant.*
>
> *3. All of the voting rights and associated rights of, respectively controlled by, Himalaya (Cayman Island) TMT Fund and/or Himalaya Asset Management Ltd. and/or Mr. Xiang Xu and/or GF Fund Management Co. Ltd. and/or Zhuhai Hokai Medical Instruments Co. Ltd. and/or Mrs. Mengke Cai shall be suspended until the duty to make an offer has been fulfilled.*
>
> *4. Himalaya (Cayman Island) TMT Fund and/or Himalaya Asset Management Ltd. and/or Mr. Xiang Xu and/or GF Fund Management Co. Ltd. and/or Zhuhai Hokai Medical Instruments Co. Ltd. and/or Mrs. Mengke Cai shall be prohibited from purchasing further shares or acquisition or disposal rights relating to shares of SHL Telemedicine Ltd., be it directly, indirectly or acting in concert with third parties.*

5. The Applicants shall be admitted as parties to the proceedings with immediate effect."

The Application also contains the following procedural request:

"The motions as per 3. and 4. above shall be granted as interim measures (vorsorgliche Massnahmen) for the duration of the proceedings."

MMM.
On 19 July 2017, the president of the TOB issued a procedural decision that jointly and severally ordered the Applicants to pay an advance fee of CHF 20'000 in connection with the Procedure (act. 2).

NNN.
On 22 July 2017, the advance fee of CHF 20'000 was received by the TOB.

OOO.
On 7 August 2017, the TOB issued a procedural decision (**Procedural Decision 1**) stating that SHL is a party to the Procedure and giving it the opportunity to make a statement and express its opinion with respect to the Application. SHL was also asked to inform the TOB whether it may send the Application to the Respondents and whether it has knowledge of a legal representative of the Respondents in Switzerland. SHL was granted a deadline for such statements until 21 August 2017 (act. 3).

PPP.
On 21 August 2017, SHL responded to the Procedural Decision 1 stating that it did not have any means of sending the Application to the Respondents for it to be deemed duly served and that it did not have any knowledge of a legal representative of the Respondents in Switzerland (act. 6).

QQQ.
On 11 September 2017, the TOB issued a procedural decision (**Procedural Decision 2**; act. 8) granting Himalaya TMT Fund, Himalaya AM, Xiang Xu, GF Fund, Hokai and Mengke Cai a deadline until 26 September 2017 for the following purposes:

a. naming legal representatives in Switzerland or communicating addresses of service (*Zustelladressen*) in Switzerland to the TOB for the purposes of the Procedure;

b. exercising their respective right to be heard in the Procedure and exercising the possibility to consult the documents of the Procedure; and

c. making a statement and expressing their opinion with respect to the Application.

The Procedural Decision 2 was published on the website of the TOB (www.takeover.ch) on 11 September 2017 after the close of the market. The findings (*Dispositiv*) of the Procedural Decision 2 were published in the Swiss Official Gazette of Commerce (**SOGC**) on 12 September 2017 (act. 10).

RRR.
On 25 September 2017, Mengke Cai approached the TOB and asked for an inspection of the files of the Procedure and for an extension of the deadline set pursuant to the Procedural Decision 2 until 16 October 2017 (act. 11).

SSS.
On 25 September 2017, Mengke Cai was granted an extension of the deadline until 16 October 2017 for the purpose of exercising her right to be heard in the Procedure. Furthermore, the documents of the Procedure were sent to Mengke Cai by courier on the same day (act. 12).

TTT.
On 11 October 2017, Himalaya sold its holding in SHL to Kun Shen (see lit. L and M above).

UUU.
On 12 October 2017, Mengke Cai asked for a further extension of the deadline until 23 October 2017 (act. 14).

VVV.
On 13 October 2017, Mengke Cai was granted an extension of the deadline until 23 October 2017 (act. 15).

WWW.
On 18 October 2017, the Economic Department of the Tel Aviv Jaffa District Court rendered a default judgment concluding that, as of the date of the filing of the claim on 12 January 2017, Mengke Cai and Himalaya were controlling shareholders of SHL (act. 27/22).

XXX.
On 23 October 2017, Mengke Cai filed a statement of defense (**Statement of Defense 1**; act. 16 and act. 17) containing the following prayers for relief:

> *"1. The Applicants' motions 1 to 4 are to be dismissed in their entirety.*
>
> *2. The Applicants are to be obliged being liable jointly and severally (solidarisch) to bear the procedural costs and to compensate Respondent for costs, including attorneys' fees incurred by Respondent in connection with this proceeding, plus VAT, where applicable."*

YYY.
Also on 23 October 2017, Xiang Xu filed a statement of defense (**Statement of Defense 2**; act. 18) containing the following prayers for relief:

> *"1. The Applicants' motions 1 to 4 are to be dismissed in their entirety.*
>
> *2. The Applicants are to be obliged being liable jointly and severally (solidarisch) to bear the procedural costs and to compensate Respondent for costs, including attorneys' fees incurred by Respondent in connection with this proceeding, plus VAT, where applicable."*

ZZZ.
On 24 October 2017, the TOB forwarded the Statements of Defense 1 and 2 to the Applicants and granted them a deadline until 31 October 2017 to express their views on the Statements of Defense 1 and 2 and on the fact that Himalaya had sold its participation in SHL on 11 October 2017. Mengke Cai and Xiang Xu were granted a deadline until 7 November 2017 to express their views on the statements of the Applicants which would be transmitted to them by the TOB upon receipt (act. 19 - 23).

AAAA.
On 25 October 2017, the TOB precised that both Mengke Cai and Xiang Xu could express their view on their respective statements (act. 24).

BBBB.
On 25 October 2017, the Applicants applied for an extension of the deadline until 7 November 2017 (act. 25).

CCCC.
On 26 October 2017, the TOB extended the Applicants' deadline until 3 November 2017 as well as the deadline for Mengke Cai and for Xiang Xu until 10 November 2017 (act. 26).

DDDD.
On 3 November 2017, the Applicants filed the replica to the Statements of Defense 1 and 2 (**Replica**; act. 27) and therewith fully adhered to their motions as set out in the Application.

EEEE.
On 6 November 2017, Xiang Xu asked for an extension of the deadline until 12 November 2017 (act. 29), which was granted by the TOB on the same day (act. 30).

FFFF.
On 10 November 2017, Mengke Cai asked for an extension of the deadline until 14 November 2017 (act. 32) which was granted by the TOB on the same day (act. 33).

GGGG.
On 12 November 2017, Xiang Xu filed his duplica (**Duplica 2**; act. 34).

HHHH.
On 14 November 2017, Mengke Cai filed her duplica (**Duplica 1**; act. 35) containing the same prayers for relief as her Statement of Defense 1.

IIII.
On 15 November 2017, the TOB forwarded Duplica 1 and Duplica 2 to the Applicants (act. 36).

JJJJ.
On 17 November 2017, the TOB issued a procedural decision (**Procedural Decision 3**; act. 37) granting a deadline until 28 November 2017 to Kun Shen from Hong Kong for the following purposes:

a. naming a legal representative in Switzerland or communicating an address of service (Zustelladressen) in Switzerland to the TOB for the purposes of the Procedure;

b. exercising her right to be heard in the Procedure and exercising the possibility to consult the documents of the Procedure; and

c. making a statement and expressing her opinion with respect to the Procedure.

The Procedural Decision 3 was published on the website of the TOB (www.takeover.ch) on 17 November 2017 after the close of the market. The findings (*Dispositiv*) of the Procedural Decision 3 were published in the SOGC on 21 November 2017 (act. 38).

KKKK.
On 19 November 2017, Mengke Cai made a filing in the case pending in Israel with a view to cancel the *ex-parte* default judgement rendered by the court in Israel (act. 39/1 – act. 39/6 as well as the unofficial translation of said filing in act. 44/1).

LLLL.
On 21 November 2017, Mengke Cai submitted additional information regarding the case currently pending in Israel with a view to cancel the *ex-parte* default judgement rendered by the court in Israel (act. 39).

MMMM.
On 22 November 2017, the TOB forwarded the information received on 21 November 2017 to the Applicants and to Xiang Xu (act. 40 – 42).

NNNN.
On 23 November 2017, the TOB received information from the SIX-DO regarding a notification of the SIX-DO to the Swiss Financial Market Supervisory Authority FINMA (**FINMA**) of 14 November 2017. The notification concerned potential violations of the disclosure duty within the meaning of art. 120 FMIA (act. 43). In its notification, the SIX-DO stated that Himalaya was held to 90% by Xiang Xu und to 10% by Xia Zhong. The SIX-DO further referred to an email dated 3 Mai 2017, in which Himalaya had confirmed that Xiang Xu was involved in the voting right decision making process with respect to holdings managed by Himalaya (act. 43, page 2). The SIX-DO further stated in its notification to the FINMA that it had not yet reached clarity about the beneficial ownership and thus the person who would have been obliged to make the disclosure provided for in art. 120 FMIA in conjunction with art. 10 al. 1 FMIO-FINMA (act. 43, page 2 et seq.).

OOOO.
On 26 November 2017, Mengke Cai submitted an unofficial translation of the filing she had submitted to the TOB on 21 November 2017 (see lit. LLLL. above) in the case currently pending in Israel (art. 44).

PPPP.
On 28 November 2017, Kun Shen approached the TOB and asked to exercise her right to consult the documents of the Procedure and for an extension of the deadline set pursuant to the Procedural Decision 3 until 8 December 2017 (act. 45 and 46).

QQQQ.
On 28 November 2017, Kun Shen was granted an extension of the deadline until 6 December 2017 for the purpose of exercising her right to be heard in the Procedure. Furthermore, the documents of the Procedure were sent to Kun Shen. Also, in the letter of 28 November 2017, the TOB asked Kun Shen to answer several questions with regard to the Procedure (act. 47/1).

RRRR.
On 4 December 2017, Kun Shen requested a second extension of the deadline until 11 December 2017 (act. 48) which was granted by the TOB on the same day (act. 49).

SSSS.
On 11 December 2017, Kun Shen submitted responses (act. 50/2-5) to the questions asked by the TOB (act. 47/1; see QQQQ. above). In her submission, Kun Shen explicitly reserved the right to submit a statement regarding the substance of the Procedure should the TOB decide to extend the Procedure to her (act. 50/1).

TTTT.
On 12 December 2017, the Procedure was extended to Kun Shen and she was granted a deadline until 20 December 2017 in order to submit a statement regarding the substance of the Procedure and to enumerate all investments she holds in which Xiang Xu is also invested. Furthermore, additional questions were posed to Xiang Xu, Himalaya and Kun Shen with respect to Himalaya (act. 52/1).

UUUU.
On 14 December 2017, Himalaya and Xiang Xu (act. 53) as well as Kun Shen (act. 54) requested an extension of the deadline granted by the TOB on 12 December 2017. On the same day, the deadline was extended for Himalaya, Xiang Xu and Kun Shen until 3 January 2018 (art. 54/1).

VVVV.
On 20 December 2017, the TOB received an additional unsolicited submission by the Applicants (act. 56).

WWWW.
On 2 January 2018, the TOB received the submission from Himalaya and Xiang Xu (act. 57).

XXXX.
On 3 January 2018, the TOB received Kun Shen's submission (act. 59). It contained the following motion:

"The procedure against Kun Shen regarding a potential infringement of the duty to make an offer according to art. 135 FMIA with respect to SHL Tele medicine Ltd. shall be suspended (sei einzustellen)."

YYYY.
On 3 January 2018, the TOB granted the Applicants, Himalaya, Xiang Xu, Kun Shen and SHL a last deadline until 11 January 2018 allowing for final arguments (act. 60/1).

ZZZZ.
On 10 January 2018, the TOB received the submission from Kun Shen within the deadline (act. 62). Kun Shen's submission repeated the motion made in her submission of 3 January 2018 (motion 1) and added the following motion (motion 2):

"2. The Applicants shall be obliged jointly and severally to bear the procedural costs and to adequately compensate Kun Shen for costs, including attorneys' fees, incurred by Kun Shen in connection with this procedure."

AAAAA.
On 11 January, the TOB received the submissions from Mengke Cai (act. 63), the Applicants (act. 64) as well as from Himalaya and Xiang Xu (act. 65) within the deadline.

BBBBB.
In her submission of 11 January 2018 (act. 64/1), Mengke Cai brought forward the following motions:

"1. The Applicants' motions 1 to 4 are to be dismissed in their entirety.

2. A public hearing shall be held.

3. The Applicants are to be obliged being liable jointly and severally (solidarisch) to bear the procedural costs and to compensate Respondent for costs, including attorneys' fees incurred by Respondent in connection with this proceeding, plus VAT, where applicable."

CCCCC.
In their submission of 11 January 2018, the Applicants reiterated their motions 1 through 4 which had been brought forward in their previous submission, however, adding the clarification that Kun Shen was to be included as a respondent into the Applicants' motions 1 through 4 (act. 65/1).

DDDDD.
The TOB formed a delegation for the Procedure composed of Thomas A. Müller (President), Jean-Luc Chenaux, Lionel Aeschlimann and Franca Contratto.

Given the above, the TOB takes into consideration:

1. Procedure

1.1 Language of the Procedure

[1] According to art. 66 al. 1 TOO, the working languages of the TOB are German, French, Italian and English. Decisions of the TOB are issued in one of the Swiss official languages, normally in the language spoken at the Swiss headquarters of the offeree company (art. 66 al. 2 TOO). In the case at hand, the target company's registered office is in Tel Aviv, Israel. The TOB, therefore, has to define the language of the Procedure *ex officio* based on art. 4 al. 1 TOO.

[2] In the present case, all the submissions of the parties (Application, Statement of Defense 1 and 2, Duplica, Replica 1 and 2 and so on) as well as all the procedural decisions issued by the TOB (namely Procedural Decisions 1 through 3) have been written in English. The registered office of the target company SHL is in Tel Aviv, Israel. Mengke Cai lives in China whereas Xiang Xu and Kun Shen are Hong Kong residents. It would be both disproportionate and inexpedient to make such international parties who are based in Israel, China and Hong Kong translate all their petitions into a Swiss official language.

[3] Given these facts and with a view to ensure the straightforwardness of the procedure (art. 63 al. 1 TOO), the TOB decides to conduct this Procedure in English and, on the basis of art. 4 al. 1 TOO, to issue this decision in English *ex officio*.

1.2 Notification of Parties Residing Abroad

[4] Subject to the exemptions stipulated in art. 139 al. 2 – 5 FMIA, proceedings before the TOB are governed by the provisions of the Federal Act of 20 December 1968 on Administrative Procedure (**APA**) according to art. 139 al. 1 FMIA. Procedural questions before the TOB are regulated in the art. 54 – 70 of chapter 12 of the TOO. Pursuant to art. 63 al. 1 TOO, the proceedings shall be straightforward and take into account the short time limits within which the decisions are issued. Art. 63 TOO provides for special rules taking into account the specific circumstances of procedures in takeover matters and, thus, precedes the APA as *lex specialis* as well as as *lex posterioris* (DIETER GERICKE/KARIN WIEDMER, Kommentar Übernahmeverordnung (UEV), Zurich/Basel/Geneva 2011, note 5 to art. 63 TOO). These rules should ensure a simple and straightforward procedure in view of the takeover matters which have to be conducted under pressure of time (SONJA BLAAS, Entstehung und Nachweis der angebotspflichtigen Gruppe, thesis, Bern 2016, note 673).

[5] In the present case, the Procedure was opened against Mengke Cai, Himalaya TMT Fund, Himalaya AM, Xiang Xu, GF Fund and Hokai (together the **Respondents**) with a procedural decision issued by the president of the TOB on 19 July 2017 (see lit. MMM. above and act. 2). All of

the Respondents had their place of residence abroad and, at that point in time, none of them had a contactable representative in Switzerland.

[6] Pursuant to art. 36 lit. b part 1 APA, an authority may notify its rulings by publication in an official gazette to any party who resides abroad and has no contactable representative provided that service at their place of residence is impossible. The SOGC is an official gazette in the sense of art. 36 PA.

[7] In the present case, all of the Respondents as well as Kun Shen resided abroad and had no contactable representative pursuant to art. 36 lit. b part 1 APA. Additionally, under the specific circumstances of the case at hand, a legally binding notification at the place of residence of the Respondents would have been impossible in the sense of art. 36 lit. b part 1 PA. Proceedings before the TOB have to be conducted in a swift and straightforward way. This is not only a precondition of a well-functioning capital market but also in the interest of all parties involved in the procedure, including namely the target company as well as its shareholders (see GERICKE/WIEDMER, cit. in note [4], note 6 to art. 63 TOO). A formal notification of the Respondents and of Kun Shen by way of legal assistance (*Rechtshilfe*) would have been extremely time consuming. According to the Federal Office of Justice (**FOJ**), a notification by way of legal assistance to China would take between nine and twelve months and would have to be accompanied by a translation of the respective documents in Chinese. This would have thwarted the aforementioned goal of a straightforward procedure that ensures an effective legal protection in the area of takeover law.

[8] In view of the above, the TOB considers that the Respondents and Kun Shen have been notified of and included into this Procedure in a formally correct and legally binding way. None of the parties to this Procedure has asserted the opposite in any of their submissions.

1.3 Establishment of Facts and Permissible Evidence

1.3.1 Inclusion of Late Filings

[9] On 11 September 2017, the TOB issued its Procedural Decision 2. Therein, the TOB granted a deadline until 26 September 2017 for the Respondents for, particularly, making a statement and expressing their opinion with respect to the Application (see lit. QQQ. above and act. 8). On 23 October 2017, Himalaya submitted its Statement of Defense 2, this without having filed a request to delay the deadline which expired on 26 September 2017.

[10] The Applicants claim that Himalaya's Statement of Defense 2 should be disregarded and excluded from the files as it was not filed within the applicable deadline (Replica, act. 27/1, note 9).

[11] As mentioned above in note [4], proceedings before the TOB are governed by the provisions of the APA but are subject to the exemptions stipulated in art. 139 al. 2 – 5 FMIA. Neither art. 139 al. 2 – 5 FMIA nor art. 54 – 70 TOO provide for specific rules regarding the establishment of facts. Thus, art. 12 al. 1 APA is applicable in the present case. In its first part, art. 12 al. 1 APA states

that the authority shall establish the facts of the case *ex officio*. This provision is the basis of applying the principle of investigation (*Untersuchungsmaxime*) in an administrative proceeding (PATRICK KRAUSKOPF/KATRIN EMMENEGGER/FABIO BABEY, in: Praxiskommentar Verwaltungsverfahrensgesetz, 2nd ed., BERNHARD WALDMANN/PHILIPPE WEISSENBERGER (editors), Zurich/Basel/Geneva 2016, note 15 to art. 12 APA).

[12] Given that the principle of investigation has to be applied in the present case and given that the facts have to be established *ex officio,* the TOB considers that all of Himalaya's submissions have to be taken into account in order to sufficiently establish the facts of the present case.

1.3.2 Hearings (Parties, Witnesses, Informants)

[13] In their submissions, the Applicants have offered or asked in their Application that Elon Shalev, Yariv Alroy and Ariella Lahav be questioned as witnesses before the TOB (see act. 1, notes 81, 94, 98, 132, 134, 137, 142, 147 and 149 for Elon Shalev; notes 50 and 81 for Yariv Alroy; note 102 for Ariella Lahav). The same holds true for their Replica (see act. 27, act. 1, note 86 for Yariv Alroy and notes 145 et seq. for Elon Shalev and Yariv Alroy). Neither Mengke Cai nor Xiang Xu have commented on said motions by the Applicants.

[14] In her submission of 11 January 2018, Mengke Cai asked for a public hearing to be held (act. 63/1, motion 2).

[15] As mentioned (see note [4] above), proceedings before the TOB are governed by the provisions of the APA according to art. 139 al. 1 FMIA but are subject to the exemptions stipulated in art. 139 al. 2 – 5 FMIA. Procedural questions before the TOB are regulated in the articles 54 – 70 of chapter 12 of the TOO. Pursuant to art. 63 al. 2 TOO, proceedings shall in principle be conducted in writing.

[16] Art. 14 al. 1 APA states that, if it is not possible to establish the facts of the case sufficiently in any other way, certain authorities may order the examination of witnesses. These authorities are enumerated exhaustively in art. 14 al. 1 lit. a – f APA. The TOB, however, is not mentioned as one of the authorities having the power to examine witnesses. This goes in line with the general rule, according to which Federal administrative authorities who serve as primary instances do not have the right to hear and to examine witnesses (PHILIPPE WEISSENBERGER/ASTRID HIRZEL, in: Praxiskommentar Verwaltungsverfahrensgesetz, 2nd ed., BERNHARD WALDMANN/PHILIPPE WEISSENBERGER (editors), Zurich/Basel/Geneva 2016, note 27 to art. 14 APA).

[17] Furthermore, art. 14 al. 1 APA provides as a general rule that an authority is only allowed to examine witnesses if the facts of the case cannot be established in any other way. The proof by examining witnesses is always subsidiary to all other means of evidence (WEISSENBERGER/HIRZEL, cit. in note [16], note 20 to art. 14 APA).

[18] In the Procedure at hand, the TOB granted the parties the possibility to make at least three submissions each. Given the substance and the level of detail contained in these submissions, the

TOB is convinced that the facts of the case could be established sufficiently without hearing witnesses and without scheduling an oral hearing in the sense of art. 63 al. 4 TOO. In view of the above, the Applicants motion to hear Elon Shalev, Yariv Alroy and Ariella Lahav as witnesses (*Zeugen*) or as informants (*Auskunftspersonen*) as well as Mengke Cai's motion for a public hearing are rejected.

1.3.3 Use of the Transcript of the Telephone Conversation of 4 January 2017

[19] The Applicants submitted a transcript of a telephone conversation that took place in January 2017 as act. 1/38. Jinsheng Dong, Xiang Xu and Haggai Ravid were the participants in said telephone conversation.

[20] According to the Statement of Defense 1, Jinsheng Dong never gave his consent to this recording (act. 16, note 54 and act. 17/4). Jinsheng Dong reserved the right to file criminal charges with respect to a (potential) recording of said telephone conversation (act. 16, note 55).

[21] Given that the circumstances under which this piece of evidence was gathered remain contested, act. 1/38 will not be used as a proof in this decision. The question whether and under what circumstances a transcript of a telephone conversation could, in principle, be used as evidence in a procedure before the TOB can, therefore, be left open.

1.3.4 Documents in Chinese Language

[22] According to art. 66 al. 1 TOO the working languages of the TOB are German, French, Italian and English.

[23] The Applicants point out that some of the exhibits submitted by Mengke Cai with her Statement of Defense 1 were in Chinese language and that this was not admissible in view of art. 66 TOO. The Applicants claim that these exhibits should therefore be disregarded and excluded from the files unless an English translation of said documents was produced within a short time limit (Replica, act. 27, note 3).

[24] Mengke Cai counters the Applicants' arguments by saying that the language of the Procedure as set forth in art. 66 TOO did not imply that all the attachments needed to be filed in such language (Duplica, act. 35, note 13, al. 1).

[25] In view of the fact that the working languages of the TOB are enumerated in art. 66 al. 1 TOO and that Chinese is not a working language of the TOB, the documents in Chinese are dismissed from the Procedure.

2. In the Substance: Preliminary Remarks

[26] The subsequent considerations of the TOB with regard to the substantive legal questions of the case at hand will be structured as follows:

- In section 3, the duty to make a public tender offer by shareholders acting in concert will be presented: First, the applicable rules to the present case will be enumerated (section 3.1) and the relevant case law will be summarized (section 3.2). Then, the question shall be examined, whether an acting in concert within the meaning of art. 33 FMIO-FINMA has to be of a certain duration (section 3.3). Also, a short overview over the difficulty to reconcile the notion of acting in concert within the meaning of art. 33 FMIO-FINMA with the discussions about corporate governance shall be given (section 3.4).

- Section 4 analyzes in detail, whether there has been an acting in concert within the meaning of art. 33 FMIO-FINMA in the present case. First, it shall be examined, if Jinsheng Dong's actions can to be attributed to Mengke Cai (section 4.1). Subsequently, Kun Shen's position in the present procedure will be examined, particularly in view of the question whether she is acting in concert with Himalaya and Xiang Xu in the sense of art. 33 FMIO-FINMA (section 4.5). Afterwards, the incidents referring to a potential coordination related to the acquisition of shares in SHL and to a potential expansion of SHL into China will be interpreted (section 4.6) before taking a closer look at the exercise of the voting rights of Mengke Cai and of Himalaya in SHL's shareholders meetings in 2017 (section 4.7). These deliberations will be followed by an assessment of the result gained thus far (section 4.8).

- Section 5 treats the question, at what moment in time a potential duty to make a mandatory tender offer could have arisen in the case at hand.

- Section 6 interprets the rules regarding the minimum price for a mandatory tender offer in conjunction with the case at hand.

- Section 7 assesses the Applicants' motions to suspend the voting rights and the associated rights of the Respondents and of Kun Shen in SHL and to prohibit the Respondents and Kun Shen from acquiring further shares in SHL.

- Section 8 summarizes the results gained above.

3. The Duty to make a Public Tender Offer by Shareholders Acting in Concert

3.1 The relevant Rules

[27] According to art. 135 para. 1, 1st sentence FMIA, anyone who acquires equity securities directly, indirectly or by acting in concert with third parties and so exceeds the threshold of 33 ⅓% of

the voting rights of a target company, must make an offer to acquire all listed equity securities of said target company. Art. 33 FMIO-FINMA states, that art. 12 al. 1 FMIO-FINMA applies to persons acting in concert or as an organized group in order to acquire holdings requiring a mandatory offer in the target company with a view to taking over the target company. Art. 12 al. 1 FMIO-FINMA further says that any party whose conduct regarding the acquisition or sale of shareholdings or the exercise of voting rights is acting in concert with third parties by contract or other organized procedure or by law, is deemed to be acting in concert or as an organized group.

3.2 The relevant Jurisprudence

[28] Pursuant to the jurisprudence of the Federal Supreme Court (**FSC**), an acting in concert in the sense of art. 33 FMIO-FINMA – and thus in the sense of the duty to make a tender offer – can be assumed, if the joint or common control is objectively made possible by the actions of the relevant parties and if, based on the circumstances, one can conclude therefrom that exercising a joint control is sought (BGE 130 II 530, consideration 6.5.7: *"Es rechtfertigt sich daher, Vorkehren im Hinblick auf eine Beherrschung bereits dann anzunehmen, wenn der gemeinsame Erwerb eine solche objektiv ermöglicht und aufgrund der Umstände darauf zu schliessen ist, dass eine Beherrschung auch angestrebt wird."*). Further, an acting in concert in the sense of art. 33 FMIO-FINMA can legally and bindingly be based on an implicit behavior (BGE 130 II 530, consideration 6.4.4: *„Auch eine abgestimmte Verhaltensweise im Sinne des Börsengesetzes kann rechtsverbindlich auf einem konkludenten Verhalten beruhen."*). A written agreement is not necessary for this purpose (BGE 130 II 530, *ibidem*). In view of the above, the deciding authority has to establish the facts leading to the mandatory tender offer. In doing so, the immanent difficulties of proof have to be accommodated when the relevant standard of evidence is set (BGE 130 II 530, consideration 6.5.7: *"Bei der Festlegung des Beweismasses muss aber den sachimmanenten Beweisschwierigkeiten Rechnung getragen werden"*).

[29] In its practice since the above cited decision of FCS, the TOB has rendered several decisions with respect to the interpretation of art. 33 FMIO-FINMA. In the case Helvetia Patria Holding AG, the TOB stated that a mandatory tender offer has to be made if the jointly acquired voting rights objectively enable a common control – by being exercised in concert – and if, based on the circumstances, it has to be concluded that a joint control is sought (Recommendation 218/01 of the TOB of 24 November 2004 in the case *Helvetia Patria Holding AG*, consideration 1.2.1: *"Dies – und damit eine Angebotspflicht – ist dann anzunehmen, wenn gemeinsam erworbene Stimmrechte eine Beherrschung objektiv ermöglichen (…) und aufgrund der Umstände darauf zu schliessen ist, dass eine Beherrschung auch angestrebt wird."*).

[30] In the case Forbo Holding AG, the TOB decided, that, in case of negotiations before a shareholders' meeting with the goal of procuring a change of control, as a tendency, an acting in concert in the sense of art. 33 FMIO-FINMA should be assumed (Recommendation 218/01 of the TOB of 3 June 2005 in the case *Forbo Holding AG*, consideration 4.2: *„Werden im Vorfeld einer Generalversammlung unter den Aktionären, welche einzeln oder gemeinsam den Grenzwert von*

Art. 32 Abs. 1 BEHG überschreiten, Verhandlungen geführt, mit dem Ziel, einen Kontrollwechsel der Gesellschaft herbeizuführen, dann ist tendenziell von einer Gruppe auszugehen.").

[31] In the year 2007, the predecessor of the FINMA, the Federal Banking Commission (**FBC**), decided that a singular coordination of voting rights could not lead to an acting in concert in the sense of art. 33 FMIO-FINMA, even if it concerns the deselection (*Abwahl*) of the board of directors. Pursuant to the long standing practice of the TOB, also social and factual relationships – such as close relationships or gentlemen's agreements – could be of such an intensity that would lead to the shareholders not being completely free in deciding about their voting rights (Decision of the FBC dated 6 December 2007 in the case *Sulzer AG*, note 52). Further, the FBC deemed decisive, that, from the point of view of the minority shareholders, the common actions between the shareholders were developed in such a way, that the group acting in concert in the sense of art. 33 FMIO-FINMA could have the same decisive influence on the fate of the target company as an individual shareholder with the same voting power (Decision of the FBC dated 6 December 2007 in the case *Sulzer AG*, note 55).

3.3 No Necessity of a Certain Duration for an Acting in Concert in the Sense of Art. 33 FMIO-FINMA

[32] In several of its decisions, the TOB viewed that a certain duration is not necessary in order to assume an acting in concert in the sense of art. 33 FMIO-FINMA. The TOB did so explicitly in the following decisions: Recommendation 210/01 of 15 April 2004 in the case *Compagnie Industrielle et Commerciale du Gaz S.A.*, consideration 2.2.1; recommendation 209/01 of 15 April 2004 in the case *Société du Gaz de la Plaine du Rhône SA*, consideration 2.2.1; recommendation 203/02 of 24 August 2004 in the case *SGF Société de Gares Frigorifiques et Ports Francs de Genève SA*, consideration 1.2.3; recommendation 184/01 of 3 March 2004 in the case *Adval Tech Holding AG*, consideration 2.2.3; recommendation 135/01 of 23 July 2002 in the case *Quadrant AG*, consideration II.A.1.3. Implicitly, the TOB did not assume that a certain duration is necessary for an acting in concert in the sense of art. 33 FMIO-FINMA in the following decisions: decision 402/01 of 10 February 2009 in the case *Esmertec AG*, consideration 2; recommendation 271/01 of 28 March 2006 in the case *Adecco S.A.*, consideration 1.2.4; recommendation 242/01 of 3 June 2005 in the case *Forbo Holding AG*, consideration 4.2; recommendation 132/01 of 26 June 2002 in the case *Tornos Holding AG*, consideration 2.1; recommendation 115/01 of 7 November 2001 in the case *Crossair, Aktiengesellschaft für europäischen Regionalluftverkehr*, consideration 1.1.

[33] In the legal doctrine, the question of the duration of an acting in concert in the sense of art. 33 FMIO-FINMA is controversially discussed (see BLAAS, cit. in note [4], note 623 et seq. and the cited authors). It is debated whether a one-time coordination is sufficient in order to let an acting in concert in the sense of art. 33 FMIO-FINMA arise. The preponderant opinion in this respect is that the duration is not a relevant criteria or a condition for the formation of an acting in concert in the sense of art. 33 FMIO-FINMA. Thus, a unique coordination of voting rights can suffice to trigger the duty to make a tender offer if it relates to a strategic or structural substance (BLAAS, cit. in note [4], note 638; MIRIAM EGGEN, Das Verhältnis der Angebotspflicht nach Art. 32 BEHG

zum Fusions- und Kartellgesetz, Berne 2007, page 50 et seq.). For example, the number of board members that are running for election can be a decisive criteria (see recommendation of the TOB 198/01 of 4 June 2004 in the case *Vontobel Holding AG*, consideration 2.2.5).

3.4 The Notion of Acting in Concert in the Sense of Art. 33 FMIO-FINMA and its Relation to the Discussions about Corporate Governance

[34] If the notion of acting in concert, particularly in the sense of art. 33 FMIO-FINMA, is understood too broadly, this could have a negative impact on the corporate governance within all listed companies. In doing so, it would become unnecessarily difficult for shareholders to meet and to discuss their respective agenda with regard to the relevant listed company at hand. As long as such shareholders meet, express and exchange their opinions without reaching a formal or informal agreement in the sense of art. 33 FMIO-FINMA regarding the control of the target company, their actions are not only desirable, but even necessary in order to make the market for corporate control work properly.

[35] Thus, there is a thin line between just expressing or exchanging opinions on one side and acting in concert in the sense of art. 33 FMIO-FINMA on the other side. The legal consequence of doing the latter with respect to a listed company – unless its articles of incorporation provide for an opting out clause – is that a public tender offer for all listed shares of said company has to be made by the parties acting in concert in the sense of art. 33 FMIO-FINMA.

4. Acting in Concert in the Sense of Art. 33 FMIO-FINMA in the Present Case

4.1 Introduction

[36] In the following, it will be examined whether Mengke Cai, Hokai, GF Fund, Xiang Xu, Himalaya TMT Fund, Himalaya AM and Kun Shen were acting in concert in the Sense of Art. 33 FMIO-FINMA in the present case.

[37] Subsequently, the role of Hokai (see section 4.2 below) and of GF Fund (see section 4.3 below) will be further assessed. Thereafter, it shall be examined whether Jinsheng Dong acted for and on behalf of Mengke Cai in the present case (see section 4.4 below). Section 4.5 below will present and answer the question whether Kun Shen is acting in concert with Himalaya TMT Fund, Himalaya AM and Xiang Xu in the sense of art. 33 FMIO-FINMA before enumerating the incidents referring to a potential acquisition of shares in SHL and to a potential expansion of SHL into China in section 4.6. Section 4.7 will then treat the exercise of the voting rights of Mengke Cai on the one side and of Xiang Xu, Himalaya TMT Fund, Himalaya AM on the other side during the shareholders' meetings of SHL in the year 2017. Finally, in section 4.8, the circumstantial evidence in the present case will be examined.

4.2 Hokai

[38] Mengke Cai has an interest of approximately 16% in Hokai (Statement of Defense 1, act. 16, exhibit 1, note 3). She is the vice chairman of Hokai's board of directors. Her husband, Zhenxi Hao, is the chairman of the board of Hokai and holds approximately 20% in Hokai. As Hokai does not hold any shares in SHL, neither directly nor indirectly, the question whether Hokai is controlled by Mengke Cai may be left open. Therefore, an acting in concert with the other parties in the sense of art. 33 FMIO-FINMA cannot be determined as far as Hokai is concerned.

4.3 GF Fund

[39] GF Fund is a professional fund management company with a license as a so called "qualified domestic institutional investor" or QDII (Statement of Defense 1, act. 16, exhibit 1, note 10). In this respect, Mengke Cai states in her Statement of Defense 1, that *"due to Chinese government policies on overseas investments, any Chinese person that wishes to invest abroad needs to use such fund management company to process the investment"* (Statement of Defense 1, act. 16, exhibit 1, note 10 with references to Statement of Defense 1, act. 16, exhibit 1, notes 48 et seq.). Also, Mengke Cai stated that GF Fund was not controlled by herself or by Hokai (Statement of Defense 1, act. 16, exhibit 1, note 10 in the end) and that she had to use GF Fund in order to execute this investment outbound of China (see lit. GG. above and act. 16/1, note 89; act. 35). GF Fund is described as a "*pass through vehicle or nominee*" by Mengke Cai (act. 35/1, note 35). Mengke Cai controls the shares in SHL.

[40] In view of the above information as well as with view of the information provided by Jinsheng Dong in his submission to the SIX-DO on 9 August 2016, which corresponds with the information provided by Mengke Cai (see act. 43, exhibit 2 [SIX-DO exhibit 20]), the TOB retains that GF Fund is a pure conduit that Mengke Cai was forced to use due to Chinese Regulation in order to realize her investment in SHL. GF Fund does not have the possibility to use the voting rights of these shares. The TOB does not have sufficient elements to consider that GF Fund is anything else than a pass-through vehicle. Therefore, GF Fund cannot be deemed to have been acting in concert in the sense of art. 33 FMIO-FINMA with the other parties of the Procedure. The situation with GF Fund nonetheless remains questionable to say the least, in particular as far as the disclosure duty according to art. 120 FMIA is concerned.

4.4 Actions of Jinsheng Dong can legally be attributed to Mengke Cai

[41] It has to be established whether Jinsheng Dong acted for and on behalf of Mengke Cai in the present case.

[42] In her Statement of Defense 2, Mengke Cai writes, that it has to be noted that Jinsheng Dong *"does not have and never had any discretion regarding the private shares of Ms. Cai. He is not authorized, and never was, to make any decision in respect of these shares. The only thing that Mr. Dong is allowed to do is to act in accordance with the express instructions of Ms. Cai"* (act. 35/1, note 7).

[43] The same is confirmed by Jinsheng Dong in his written statement dated 13 November 2017:

> *"I [i.c. Jinsheng Dong] do not have and I never had any discretion regarding the private shares of Ms. Cai held in SHL Telemedicine Ltd. I am not authorized, and never was authorized, to make any decision in respect of these shares. The only thing that I am allowed to do is to act in accordance with the express instructions of Ms. Cai"* (act. 35/2, section 1).

[44] Furthermore, Jinsheng Dong at first negotiated with the Alroy & Shalev Group regarding a potential transaction in the shares the latter hold in SHL. However, when no agreement could be reached, Mengke Cai decided that "*Jinsheng Dong shall negotiate with the other shareholder group*", as her representatives explain in their statement of 23 October 2017 (act. 16/1, note 26), i.e. with Copper Valley Finance Ltd, Prime Finance Corporation, Eli Alroy and Barak Capital Ltd.

[45] Also, Mengke Cai's representatives wrote the following:

> *"Mr. Eli Alroy and Mr. Jinsheng Dong negotiated the purchase and sales transaction. The negotiations started at a price of CHF 9.50 per share. An agreement was reached at CHF 8.70, for which price the Respondent [NB: Mengke Cai] decided to buy the shares"* (act. 16/1, note 26).

[46] The above is only the first element of a chain of evidence showing that Jinsheng Dong was acting for and on behalf of Mengke Cai.

[47] Additionally, Jinsheng Dong confirms this fact in his confirmation letter dated 23 October 2017 by stating that "*[o]riginally, Ms. Mengke Cai intended to purchase shares from the Alroy / Sharev Group. However, Mr. Ravid Haggai who presented himself as the representative of that group or at least as an intermediary with access to that group, asked that there shall be first a firm commitment to buy at CHF 9.50 per share in SHL Telemedicine Ltd. before Mr. Ravid Haggai would let anyone contact the Alroy / Sharev Group directly. Since this was not acceptable, Ms. Mengke Cai decided that I shall negotiate with the other shareholder group [underline added]. I met Eli Alroy as representative of that other group built around Barak Capital, Eli Alroy and Copper Finance Ltd. Mr. Eli Alroy and I negotiated the purchase and sales transaction (without the support of Mr. Xiang Xu). The negotiations started at a price of CHF 9.50 per share. An agreement was reached at CHF 8.70, for which price Ms. Mengke Cai decided to buy the shares"* (act. 17/4, section 8).

[48] The above statements and citations of the representatives of Mengke Cai and of Jinsheng Dong both show (i) that Jinsheng Dong acted *"in accordance with the express instructions of Ms. Cai"* (act. 35/2, section 1), (ii) that he negotiated the purchase of the shares in SHL for and on behalf of Mengke Cai and (iii) that it was her decision to invest in SHL.

[49] Furthermore, the role of Jinsheng Dong was not solely limited to the negotiation of the purchase of shares in SHL by Mengke Cai. He also participated in meetings as well as discussions with the responsible people on the side of SHL, this partly in the presence of Xiang Xu, and had

several contacts with the latter (see section 4.6 below). Given that Mengke Cai is an important shareholder of Hokai and that she decided to mandate Jinsheng Dong, a corporate officer and vice president of Hokai, to negotiate the purchase of the shares in SHL on her behalf, it is presumed that she knew about the actions of Jinsheng Dong in that matter and that she supported them.

[50] In view of the facts stated above, it is more than plausible that any of the actions carried out by Jinsheng Dong have been carried out according to instructions of or in agreement with Mengke Cai. From a legal point of view, these actions can be attributed to Mengke Cai.

4.5 Acting in Concert of Kun Shen with Himalaya and Xiang Xu in the Sense of Art. 33 FMIO-FINMA

[51] On 14 October 2017, Kun Shen disclosed a holding of 23.52% of the shares in SHL (see lit. M above). On the same day, Himalaya disclosed that its holding in SHL had decreased to 0.08% of the shares in SHL (see lit. L above). On 8 November 2017, Kun Shen increased her participation in SHL to 25.02% of the shares in SHL (see lit. M above).

[52] Xiang Xu is married to Kun Shen (act. 34, page 2, section 2, 1st sentence; art. 50/2, page 1, lit. A). Furthermore, Kun Shen is an investor and director of Himalaya TMT Fund (act. 50/1, note 5, dash 1). She has redeemed some of her shares in Himalaya TMT Fund *"in exchange for shares in SHL at the net asset value (NAV)"* (act. 50/1, note 5, dash 3).

[53] In the following, the circumstances under which Kun Shen redeemed her shares of Himalaya TMT Fund and personally acquired a part of her shares in SHL will be assessed. In particular, it will be examined whether Himalaya, Xiang Xu and Kun Shen have been and are acting in concert in the sense of art. 33 FMIO-FINMA with respect to SHL and if they form a subgroup in that sense and matter. As the present decision will subsequently examine whether the Respondents were acting in concert in the sense of art. 33 FMIO-FINMA, the role of Kun Shen, who currently owns the shares in SHL which had previously been purchased by Himalaya, needs to be clarified. If Kun Shen forms part of a subgroup in the sense of art. 33 FMIO-FINMA with Himalaya and Xiang Xu, she could also be deemed to be acting in concert with Mengke Cai in the sense of art. 33 FMIO-FINMA.

[54] In November 2013, Himalaya TMT Fund started to operate as a family investment vehicle with only two investors in the fund: Xiang Xu and Kun Shen (act. 57/1, page 4, lit. d, section 6; act. 59/1, note 8). From January 2014 to December 2015, seven other investors subscribed new participating shares in Himalaya TMT Fund. The total amount of new participating shares took up less than 30% of the assets under management of Himalaya TMT Fund, whereas Xiang Xu's and Kun Shen's investments aggregated to over 70% of the assets under management (act. 57/1, page 4, lit. d, section 7). From January 2016 to 30 June 2017, only Xiang Xu and Kun Shen invested cash in Himalaya TMT Fund (act. 57/1, page 4, lit. d, section 8).

[55] According to Himalaya and Xiang Xu, investors *„started to redeem their shares“* after *„the beginning of this legal proceeding in July 2017“*. On 13 December 2017, the assets under management of Himalaya TMT Fund amounted to USD 8.4 million (act. 57/1, page 5, lit. d, section 9). Currently, Kun Shen is the only investor in Himalaya TMT Fund (act. 57/1, page 4, lit. d, section 10).

[56] The Applicants claim that the sale of the shares in SHL from Himalaya to Kun Shen was *„a fake, rendering the alleged purchase legally null and void”* (act. 27/1, note 35). They write that Himalaya *“tries to escape its obligation to make a public offer”* (act. 27/1, note 36). They continue by stating that the in their view alleged sale of the shares in SHL to Kun Shen *“proves that Himalaya has something to hide, which is Himalaya's acting in concert with the other Respondents”* (act. 27/1, note 36). Therefore, in doing so, *“Himalaya cannot escape its duty to make an offer according to art. 135 FMIA”* in the view of the Applicants (act. 27/1, note 37).

[57] According to her representatives, Kun Shen is a private investor who *“makes her investment decisions independently”* (act. 50/1, note 6). Furthermore and as mentioned above, Kun Shen is an investor and director of Himalaya TMT Fund (act. 50/1, note 5, dash 1). Currently, she *“holds the shares in SHL in her own name and for her own account”* (act. 50/1, note 5, dash 4; see also act. 50/2, page 1, lit. A.a). Kun Shen also states that the acquisition of the shares in SHL from Himalaya was not fake. According to her, *“[t]he reason for the redemption was to reassure concerned investors who had started to leave the fund in July 2017 because of the negative publicity relating to SHL and this proceeding”* (act. 50/2, page 2, see also pages 3 and 5). She subsequently confirms having *“the sole control over these shares [in SHL] as well as the exercise of the voting rights”* (act. 50/2, page 2).

[58] In an attachment to the submission of 11 December 2017, Kun Shen herself stated the following: *“I now hold the SHL shares in my own name and on my own account, and certainly not on behalf of anybody else”* (act. 50/2, page 1, comment to note 17). She added that she has “*the sole control over these shares as well as the exercise of the voting rights”* (art. 50/2, page 2, comment to note 22). When asked about her reasons to exit the Himalaya TMT Fund and to accept SHL shares as a consideration, Kun Shen wrote the following:

> *“The investors of Himalaya (Cayman Island) TMT Fund are mainly Chinese individuals who are not familiar with Swiss and Israeli law. Therefore, the mere fact that there were investigations with respect to SHL, created uncertainty among those investors. Despite the reassurances of the fund managers, the investors were concerned about the negative publicity and thus started to redeem their shares in the fund in July 2017. After assessing the situation, the fund managers Xiang Xu and Zhong Xia came to the conclusion that the SHL shares constituted a reputational risk for the fund and should be disposed of. In September 2017, I decided to use this opportunity to hold the SHL shares in my own name and offered to purchase the SHL stake from the fund by way of redemption”* (act. 50/2, page 5, answer c).

[59] Furthermore, Kun Shen confirms that there was *"no written share purchase agreement"* regarding the acquisition of 23.52% of the voting rights in SHL from Himalaya (act. 50/2, page 5, lit. B.e). Finally, she expressly states that there is *"no agreement in any form between me and any person (…) with respect to SHL"* (act. 50/2, page 6, answer h). The TOB considers that this transaction represents a transfer from an indirect to a direct holding and does not have any impact on the considerations whether Kun Shen is part of the group or not.

[60] With procedural decision of 12 December 2017, the TOB asked Kun Shen to submit a statement regarding the substance of the procedure (act. 52/1). In that statement, Kun Shen's representatives write that *"[t]he only way Ms. Kun Shen could be deemed as a party to this procedure is if she were to form a subgroup with another person or other persons who are parties to this procedure"* (act. 59/1, note 15). In the following, the question whether Kun Shen forms a subgroup with Himalaya and Xiang Xu will be further examined.

[61] According to Kun Shen's representatives, she first started investing in Himalaya TMT Fund late in 2013. In the years to come, she made multiple additional investments in Himalaya TMT Fund. That said, between December 2013 and February 2017, she invested approximately USD 15'021'920 in Himalaya TMT Fund (act. 59/1, note 16; see also act. 50/2, page 3, lit. B.a). Kun Shen's role in Himalaya TMT Fund is one *„of a passive investor and a director, without any possibility to influence investment decisions"* (act. 59/1, note 17). Kun Shen's representatives further state that *"[t]he investment decisions relating to the assets of the Himalaya [TMT] Fund are taken by Himalaya [AM] as the licensee (…) and asset manager of the Himalaya [TMT] Fund"* (act. 59/1, note 17, see also act. 50/2, page 4 et seq., lit. B.b and B.d). According to them, *"[t]he decisions to invest parts of the assets of the Himalaya [TMT] Fund in SHL were taken by Himalaya [AM] in its sole discretion, respectively Himalaya's directors and responsible officers Mr. Xiang Xu and Mr. Zhong Xia"* (act. 59/1, note 21). Kun Shen is deemed not to have a say in any investment decisions. However, after the investment decisions were made, *"Kun Shen was, in her function as a director of the Himalaya Fund, informed of the investments made by the Himalaya TMT Fund"* (act. 59/1, note 21, see also act. 50/2, page 5, lit. B.d).

[62] Kun Shen's representatives conclude that there is no indication that she coordinated her conduct with Himalaya and/or with Xiang Xu (act. 59/1, note 30) and that, as there is no acting in concert between them, there is *„no basis to conclude that Ms. Kun Shen formed a (sub-)group with the Himalaya [TMT] Fund, Himalaya [AM] and/or Mr. Xiang Xu"* (act. 59/1, note 31). Finally, in their view, the mere fact that Kun Shen and Xiang Xu are married, *„without any contractual agreement or any additional organized measures with a view to control the company, is not enough to come to the conclusion that they formed a group"* (act. 59/1, note 54).

[63] During the period in which Himalaya TMT Fund acquired its holding in shares of SHL, at least 70% of the invested capital in Himalaya TMT Fund was held by Xiang Xu and Kun Shen (see note [54] with further references). Although the decisions about the investment in SHL were apparently taken by Himalaya AM, i.e. by Xiang Xu and Zhong Xia, Kun Shen was informed about them, this in her quality as a director of the Himalaya TMT Fund next to Xiang Xu (see note [61]

in fine above and act. 59/1, note 21). Furthermore, Kun Shen and Xiang Xu were the only investors who continued to invest cash in the Himalaya TMT Fund between January 2016 and June 2017. Therefore, it has to be assumed that Kun Shen was well informed about the strategy of Himalaya TMT Fund, as she continued to invest in said fund.

[64] In October 2017, Kun Shen decided to redeem her units in Himalaya TMT Fund by acquiring the shares in SHL in her own name. Currently, Kun Shen is the only investor in the Himalaya TMT Fund (see note [55] and act. 57/1, page 4, lit. d, section 10). As mentioned before, Xiang Xu and Kun Shen are married. Furthermore, they founded Himalaya TMT Fund in 2013 alone and always held the at least 70% of the units in said fund. The investment decisions of Himalaya TMT Fund were apparently taken by Himalaya AM and Kun Shen was admittedly informed about these decisions. She obviously approved the strategy to buy shares in SHL as she continued to invest money in Himalaya TMT Fund from January 2016 to June 2017. The TOB considers that this shows that Kun Shen makes her investment decisions on her own and that she pursues a long term strategy in buying SHL shares. It is more than plausible that she always had a say in these decisions, even when she held the SHL shares indirectly though Himalaya TMT Fund.

[65] In view of (i) the history of the Himalaya TMT Fund, (ii) of the fact that Xiang Xu and Kun Shen always disposed of at least 70% of the units of the fund and (iii) of the fact that Xiang Xu and Kun Shen are married, the TOB considers that Xiang Xu, Kun Shen, Himalaya TMT Fund and Himalaya AM were acting in concert in relation to the purchase of shares in SHL in the sense of art. 33 FMIO-FINMA. Therefore, they formed a subgroup in the sense of art. 33 FMIO-FINMA for that matter. Thus, in view of the following considerations regarding the duty to make a mandatory offer (see 4.6, 4.7 and 4.8 below), Xiang Xu, Himalaya and Kun Shen will be regarded as acting in concert in the sense of art. 33 FMIO-FINMA (all of them together: the **subgroup Himalaya**).

4.6 Incidents Referring to a Potential or Actual Acquisition of Shares in SHL and to a Potential Expansion of SHL into China

[66] Letters Q. - RR. of the facts enumerated the incidents that chronologically refer to a potential strategy relating to acquisitions of shares in SHL and to an expansion of SHL into China through the establishment of business with Hokai. These incidents go back to February 2016, almost 24 months before the present decision is issued.

[67] It is established that Xiang Xu was accompanied by Jinsheng Dong to the annual shareholders' meeting of SHL on 24 February 2016 (see lit. R. above). It is also established that Xiang Xu and Jinsheng Dong met Yariv Alroy subsequently on 24 January 2017 (see lit. S. above). Then, on 7 April 2016, Xiang Xu introduced Hokai to Yoav Rubinstein of SHL (see lit. W. above). Four days later, on 11 April 2016, Xiang Xu also introduced Jinsheng Dong to Yoav Rubinstein and organized a meeting between the three of them by copying Jinsheng Dong into his email (see lit. X. above). During the following week, from 12 April 2016 through 15 April 2016, additional emails

were send by Xiang Xu and by Jinsheng Dong to Yoav Rubinstein and by Xiang Xu to Haggai Ravid (see lit. Y. – AA. above).

[68] At the beginning of June 2016, Yuval Shaked and Yoav Rubinstein met Jinsheng Dong and Xiang Xu in China (see lit. CC. – DD. above).

[69] On 18 September 2016, after Mengke Cai had disclosed a holding of 29.85% in SHL (see lit. N. and lit. GG. above and also art. 1/32), Jinsheng Dong referred Elon Shalev and Yariv Alroy of the Alroy & Shalev Group to Xiang Xu in order to talk about a share purchase (see lit. JJ. above as well as act. 1/15). According to the representatives of Mengke Cai, Jinsheng Dong referred the Alroy & Shalev Group to Xiang Xu since he knew or believed to know that Xiang Xu had tried to find other potential Chinese investors that might be interested in buying shares in SHL. Mengke Cai's representatives write the following in this respect:

> "*Why should Mr. Dong not help Alroy/Sha[l]ev Group by such reference and by maintaining contacts. The Alroy Group was an obstacle since they were only interested in selling their shares, and so it was better to get them out of the company*" (act. 16/1, notes 94 and 95).

[70] On 30 October 2016, Xiang Xu contacted Elon Shalev and Yariv Alroy by email without copying Jinsheng Dong into his email (see lit. KK. above).

[71] The above summarized overview of the contacts that occurred during the period between 24 February 2016 and 29 June 2017 (see lit. Q. – QQ. above) shows several emails and meetings between Xiang Xu and Jinsheng Dong with representative of either SHL or of the Alroy & Shalev Group. These incidents concerned different topics:

- First, there were several contacts between Xiang Xu and Jinsheng Dong with the Alroy & Shalev Group. The subject of such contacts was the potential acquisition or sale of the holding of the Alroy & Shalev Group in SHL (see lit. S., JJ., KK. above).

- Second, there were numerous contacts of Xiang Xu and Jinsheng Dong with representatives of SHL, namely Yuval Shaked and Yoav Rubinstein. Therein, a potential expansion of SHL into China through the development of business relationships between SHL and Hokai was the central topic (see lit. W., X., Y. – AA., CC. – DD. above).

[72] The facts mentioned in this section 4.6 will be subsumed in section 4.8 below.

4.7 Exercise of the Voting Rights of Mengke Cai on one Side and of the Subgroup Himalaya on the other Side in the Shareholders' Meetings of SHL in 2017

[73] The letters TT. - UU. above first presented the current composition of the board of directors of SHL. Then, in the letters VV. - JJJ. above, the relevant events were described that took place with-

in a context to the shareholders' meetings of SHL of 5 January 2017, of 11 May 2017 and of 28 June 2017.

[74] Mengke Cai's and Himalaya's voting behavior in the above mentioned meetings constitutes a clear indication for an acting in concert in the sense of art. 33 FMIO-FINMA:

- In the extraordinary shareholders' meeting of SHL of 5 January 2017 both Mengke Cai and Himalaya TMT Fund voted for the then elected Ronen Harel and against Gil Sharon (see lit. VV above and act. 1/46 as well as act. 1/47).

  On 12 January 2017, the Applicants filed a complaint seeking that the resolution of the general shareholders' meeting of 5 January 2017 relating to the election of Ronen Harel is declared void (see lit. WW. above and act. 1, note 111).

  On 5 April 2017, Ronen Harel, who served as external independent director of SHL, resigned from office with immediate effect (see lit. XX. above and act. 1/8).

- In the annual general shareholders' meeting of SHL of 11 May 2007, Mengke Cai voted only for two directors proposed by her and abstained with respect to the vote for a third director she proposed (He Yi). Then, she voted for the two directors proposed by Himalaya TMT Fund, for the director proposed by the Alroy & Shalev Group and against the director proposed by G.Z. Asset and Management Ltd (see lit. AAA. above and act. 1/50). Himalaya TMT Fund voted for the two directors proposed by itself (Amir Lerman and Shenlu Xu), for two directors proposed by Mengke Cai (Cailong Su and Xuewen Wu), but against the third director proposed by Mengke Cai (He Yi) – He Yi being the same one Mengke Cai did abstain from voting for –, for the director proposed by the Alroy & Shalev Group (Elon Shalev) and against the director proposed by G.Z. Asset and Management Ltd (Ziv Carty) (see lit. BBB. above and act. 1/50). In the end, He Yi was elected as a member of the board of directors of SHL, even though Mengke Cai abstained from voting for him and Himalaya did vote against him.

  Furthermore, Mengke Cai and Himalaya voted identically on the following topics: the reappointment of external auditors, the new office holder compensation policy, the approval of an option to be granted to the newly elected independent board members (see lit. XX. above and act. 1/50) and the appointment of the external independent director (see lit. DDD. above and act. 1/50).

  In the end, Cailong Su, Xuewen Wu, He Yi, Amir Lerman, Shenlu Xu and Elon Shalev were elected as members of the board of directors of SHL (see lit. CCC. above and act. 1/50).

  Elon Shalev, the chairman of the board of directors of SHL at that moment in time, reclassified the shares held by Mengke Cai and by Himalaya TMT Fund as shares of control-

ling shareholders in the sense of Israeli Companies Law. Thus, the votes of Mengke Cai and Himalaya TMT Fund did not count for the election of Xuequan Qian who was not appointed as an independent external Director of SHL (see lit. EEE. above and act. 1/50, page 6 et seq.). Elon Shalev as the chairman of the meeting also drew the attention of the shareholders to the fact that legal proceedings were instigated by the Alroy & Shalev Group in Tel Aviv claiming that Himalaya and Hokai are acting in concert (see lit. FFF. and act. 1/50).

- In the extraordinary shareholders' meeting of SHL of 28 June 2017, Mengke Cai abstained from voting for the candidates she proposed herself as independent directors as well as from voting for the candidates proposed by the Alroy & Shalev Group. She only voted for Xuequan Quan who was proposed by Himalaya TMT Fund. As Himalaya TMT Fund voted for Xuequan Quan as well, he was elected as an independent board member. Yehoshua Abramovich was also voted for by Himalaya TMT Fund, but not by Mengke Cai. Yehoshua Abramovich was elected to the board of directors of SHL as an independent board member on that day as well (see lit. III. above and act. 1/52).

  In the shareholders' meeting of 28 June 2017, the new chairman of the board of directors of SHL, Xuewen Wu, did not reclassify the shares held by Mengke Cai and by Himalaya TMT Fund as shares of controlling shareholders in the sense of Israeli Law. Xuewen Wu approved the appointment of Yehoshua Abramovich and of Xuequan Qian as independent external directors of SHL (see lit. JJJ. above and art. 1/52, page 6).

[75] In all three shareholders' meetings mentioned above, Mengke Cai and Himalaya both voted by written ballot.

[76] In the Applicants' view, "*it is obvious*" that Mengke Cai and Himalaya communicated with each other and coordinated the exercise of their voting rights in the election of Ronal Harel as an independent director in the shareholders' meeting of 5 January 2017 (Application, act. 1, N 105). As for the shareholders' meeting of 11 May 2017, the Applicants give an interpretation of the voting behavior of Mengke Cai and Himalaya with respect to He Yi and conclude that their potential strategy to conceal a fake candidacy of He Yi failed as he was elected by the other shareholders (Application, act. 1, N 123 – 126). With respect to the third shareholders' meeting of 28 June 2017, the Applicants write that the *"votes of Himalaya and Hokai seem to be rather uncoordinated"*, but, by taking a closer look, *"that they have pursued a common strategy also in the general shareholders' meeting on June 28, 2017"* (Application, act. 1, N 139). The fact that Mengke Cai did not vote for at least one of her two candidates is emphasized as strange by the Applicants (Application, act. 1, N 140). Also, to them, *"[i]t is obvious that Hokai and Himalaya made a joint decision to elect Mr. Xuequan Qian (who was proposed by Himalaya) and Mr. Yehoshua Abramovich (who was proposed by the Alroy [& Shalev] Group)"* (Application, act. 1, N 141). Further, they explain the election of Yehoshua Abramovich by the fact that he *"may always be outvoted by the other members"* (Application, act. 1, N 142) within the audit committee of SHL. In the view of the Applicants, thus *"the conclusion of any cooperation agreement between SHL and Hokai or one of its affili-*

ates may not be effectively stopped any longer by the audit committee" (Application, act. 1, N 142 in the end). In their Replica, the Applicants repeat the above allegations (Replica, act. 27/1, notes 111 – 115) and conclude with the remark that *"the voting behavior of Mrs Mengke Cai (…) can only be explained with an acting in concert between Mrs Mengke Cai/Hokai and Himalaya"* (Replica, art. 27/1, note 116 in the end). In their unsolicited submission of 20 December 2017, the Applicants further state that *"one of the (true) motives for engaging in the alleged transfer of the shares from Mr Xu Xiang / Himalaya [added: to Kun Shen] was the concealment of the formation of a group"* (act. 56/1, note 40). They express the opinion that *"the fake sale was not only geared towards covering up the acting in concert, but also served Mr Xu Xiang / Himalaya and Mrs Mengke Cai / Hokai to maintain control over SHL respectively its audit committee"* (act. 56/1, note 40).

[77] In her Statement of Defense 1, Mengke Cai explained her thoughts behind her voting and said that she did not know why Xiang Xu and Himalaya voted the way they voted (Statement of Defense 1, act. 16/1, notes 44 – 46). She further states that she did not discuss any nominations and did not coordinate her voting with either Xiang Xu or Himalaya. Then, Mengke Cai's representatives add the following: *"Even if they had discussed the candidates and would have tried to convince the other to vote in this or that way, this would not have been a reason to conclude that there is a group of shareholders that strive for common control"* (Statement of Defense 1, act. 16/1, note 46). In her Duplica 1, Mengke Cai's representatives hold that *"[t]here is zero evidence for Ms. Cai having entered into any agreement with the Himalaya fund or Mr. Xu and subjecting her voting right under a joint plan of a group of shareholders"* (Duplica 1, act. 35/1, note 6). After stating that Mengke Cai is a *"Non-Executive Vice Chairman at Hokai and thus not involved in the day-to-day business"* (Duplica 1, act. 35/1, note 7), any discussions between Mengke Cai and Himalaya on how to vote are negated (Duplica 1, act. 35/1, note 9). Her representatives conclude stating that there is no evidence that Mengke Cai and Himalaya subjected *"their votes to the decision of a group"* (Duplica 1, act. 35/1, note 9) and thus ask for the motions of the Applicants *"to be dismissed in their entirety"* (Duplica 1, act. 35/1, note 10). Mengke Cai's representatives further write that *"there is no evidence that Ms. Cai and Himalaya ever talked to each other on the voting"* and that *"there is no evidence whatsoever"* for the formation of a group. (Duplica 1, act. 35/1, note 83, 3rd dash).

[78] Himalaya takes the position that it voted for Ronen Harel in the shareholders' meeting of 4 January 2017 *„because he was proposed by the chairman"* (Statement of Defense 2, act. 18/1, note 14). The submission of Himalaya does not contain detailed information about the shareholders' meetings of 11 May 2017 and of 28 June 2017 (see Statement of Defense 2, act. 18/1, notes 14). In the Duplica 2, Himalaya says that it never sought to control one of its portfolio companies (Duplica 2, act. 34/1, page 1, III.) and that it has exercised its *"voting rights properly and independently, with the aim of strengthening corporate governance in SHL"* (Duplica 2, act. 34/1, page 1, IV.). Thereafter, Himalaya explains that it decided to invest in SHL after its stock became undervalued following a failed takeover by Shanghai Jiuchuan Investment Group at a price of CHF 10.50 per share of SHL (Duplica 2, act. 34/1, page 4, note 8). In Himalaya's view, it negotiated with the Alroy & Shalev group *"because we wanted to purchase some shares from them at the right price. However, no agreement was ever reached because they kept insisting on an unacceptable*

premium" (Duplica 2, act. 34/1, page 5, note 13). Thereafter, Himalaya writes, that *"it never entered into any written, oral or implicit agreement with Ms. Mengke Cai, Hokai or Mr. Jinsheng Dong regarding her acquisition of SHL shares"* (Duplica 2, act. 34/1, page 5, note 17). Himalaya also states that, on 4 January 2017, it *"voted for Ronen Harel for reasons of neutrality"* (Duplica 2, act. 34/1, page 7, note 23) and that it had *"no understanding as to why Ms. Cai voted for this candidate but not the other"* (Duplica 2, act. 34/1, page 7, note 24). As to the shareholders' meetings of 11 Mai 2017 and of 28 June 2017, Himalaya does not say why it voted the way it did and whether it had coordinated its voting rights with Mengke Cai (Duplica 2, act. 34/1, page 8, note 29 – 32).

[79] According to Kun Shen's representatives, the Applicants did not provide *"any evidence proving a joint interest to form a controlling group"* (act. 59/1, note 42). In their view, Himalaya and Mengke Cai *"cannot be considered to have constituted a group to collectively purchase SHL shares to jointly control SHL"* (act. 59/1, note 42). Furthermore, they write that *„the fact that several shareholders elect the same board members is no prove of an acting in concert"* and that it *"is rather the typical case of (uncoordinated) parallel behavior"* (act. 59/1, note 43). Additionally, the *"fact that the Himalaya [TMT] Fund and Ms. Mengke Cai voted differently with respect to certain elections shows that they were making their voting decisions independently based on their own interests and preferences. Even if the Himalaya [TMT] Fund and Ms. Mengke Cai had voted in the same way with respect to all election items – which (…) they have not – this in itself would not be proof that there was a coordination in the sense of an acting in concert according to art. 33 FMIO-FINMA but is to be considered as merely parallel behavior of shareholders"* (act. 59/1, note 45). With regard to the formation of a group between the Himalaya, Xiang Xu and namely Mengke Cai, Kun Shen's representatives are of the view that *"the file of this procedure does neither contain any substantiated allegation nor evidence of a coordination regarding the joint acquisition of shares or the exercise of voting rights"* (act. 59/1, note 57). The fact that Himalaya and Mengke Cai voted similarly is, in the view of Kun Shen's representatives, in itself *"no proof of a coordinated approach"* and their *"voting is to be considered a mere parallel behavior"* (act. 59/1, note 59). In their view, *"there has been no coordination in an attempt to control SHL"* and, therefore, *„the Himalaya [TMT] Fund and Ms. Mengke Cai cannot be deemed to form a group"* (act. 59/1, note 60). Finally, the representatives of Kun Shen write that she *„has neither coordinated her acquisitions of SHL shares nor the exercise of her voting rights by way of an agreement or any other organizational procedure with any other shareholder of SHL"* (act. 59/1, note 54).

[80] The facts mentioned in this section 4.7 will be subsumed in the following section 4.8.

4.8 Subsumption of the Circumstantial Evidence in the Present Case

[81] As mentioned above, the FSC has already stated that every fact leading to the mandatory tender offer has to be proven (see note [28] above). However, when deciding which standard of evidence will be used, the relevant authority can take into account the practical difficulties regarding the proof of facts (BGE 130 II 530, consideration 6.5.7). Due to the difficulties to provide direct evidence of a coordination, it is undisputed that circumstantial evidence (*Indizienbeweis*) is

admissible in order to demonstrate an acting in concert in the sense of art. 33 FMIO-FINMA (BGE 130 II 530, consideration 6.5.7; see also the Decision 448/01 of 22 July 2010 in the case of *Genolier Medical Network SA*, consideration 3 and BLAAS, cit. in note [4], notes 712 et seq.).

[82] The TOB retains that Mengke Cai on the one side and the subgroup Himalaya on the other side coordinated their actions in order to take the control over SHL in the sense of art. 33 FMIO-FINMA. This coordination lasted for many months and pursued a common goal and strategy, which was to ensure an expansion of the business of SHL towards China by creating a business relationship with Hokai. In order to do so, Mengke Cai and the subgroup Himalaya coordinated their purchase of together more than 50% of the shares in SHL, doing so in particular in order to avoid that another strategic Chinese investor could buy an important holding in SHL. The motives of this acting in concert in the sense of art. 33 FMIO-FINMA might be different for Mengke Cai and the subgroup Himalaya. On one hand, the motives of Mengke Cai seem to be mainly of commercial nature. She wanted to ensure the creation of a business relationship between SHL and Hokai in which she holds 16% of the shares. On the other hand, the motives of the subgroup Himalaya look like those of an investor interested in maximizing his investment and in realizing a gain on his invested capital. However, these different motives cannot negate the fact that Mengke Cai and the subgroup Himalaya pursued a common goal and that there was a common strategy set up by both of them in order to take control of SHL through an acting in concert in the sense of art. 33 FMIO-FINMA. This will be further substantiated in the following paragraphs.

[83] First and based on the facts mentioned in section 4.6 alone, the question arises why Jinsheng Dong referred the Alroy & Shalev Group to Xiang Xu on 18 September 2016 (see note [69] above with references). Mengke Cai, acting through Jinsheng Dong, wanted *"[t]o make sure that no other Chinese company with a strategic interest could reasonably invest into SHL"* (act. 17/2, section 2). Therefore, she needed to have either Xiang Xu and Himalaya or the subgroup Himalaya further and additionally invested in SHL. The goal of this strategy was to prevent other strategic investors from acquiring significant holdings in SHL.

[84] However, solely based on the facts mentioned in section 4.6 above, an acting in concert in the sense of art. 33 FMIO-FINMA between Mengke Cai on one side and the subgroup Himalaya on the other side could not be established yet. From these facts alone, one could not conclude that the taking over of the control over SHL was sought by Mengke Cai as well as by the subgroup Himalaya through an acting in concert in the sense of art. 33 FMIO-FINMA.

[85] There, the actions of Mengke Cai and of the subgroup Himalaya in the shareholders' meetings of SHL in 2017 have to be considered. These actions are enumerated in section 4.7 above.

[86] Even if Mengke Cai and Himalaya did coordinate the exercise of their voting rights before the extraordinary shareholders' meeting of SHL of 5 January 2017 took place (see note [74], 1st bullet point above), which can remain open in the present case, such coordination alone would not yet lead to an acting in concert in the sense of art. 33 FMIO-FINMA. Such coordination would not be relevant with view of the control over SHL. In particular, the sole election of Ronen Harel as

an external independent board member of SHL did not have direct consequences with view of the control over SHL.

[87] However, the shareholders' meeting of 11 Mai 2017 had further effects on SHL than the one of 5 January 2017. After said meeting of 11 May 2017, five of eight members of the board of directors of SHL were either representatives of Mengke Cai (Xuewen Wu, Cailon Su and He Yi) or of the subgroup Himalaya (Amir Lerman and Shenlu Xu). Even if He Yi has neither been elected by Mengke Cai nor by Himalaya AM, he was still proposed as a board member of SHL by Mengke Cai. This means that representatives of Mengke Cai and of the subgroup Himalaya – if accumulated – hold the majority of the representatives on the board of directors of SHL.

[88] Furthermore, the contacts that took place in the period between 24 February 2016 and 29 June 2017 (see lit. Q. – QQ. and section 4.6 above) need to be considered. These contacts consist of several emails and meetings between Xiang Xu and Jinsheng Dong – the latter acting in the name of Mengke Cai – with representatives of SHL on the one side and of the Alroy & Shalev Group on the other side (see note [71] above with further references). That substantiates an acting in concert in the sense of art. 33 FMIO-FINMA between Mengke Cai on one side and the subgroup Himalaya on the other side.

[89] Additionally, the fact that Mengke Cai and Himalaya TMT Fund both voted by written ballot in all three shareholders' meetings of 5 January 2017, 11 May 2017 and 28 June 2017 as well as the fact that their voting behavior looks pretty sophisticated and well-thought-out in order to obtain the majority within the board of SHL provides additional circumstantial evidence that their voting rights have only been exercised after a mutual conversation as well as after an agreement on the question which people they wanted to have elected on the board of directors of SHL.

[90] Finally, in the shareholders' meeting of 28 June 2017, the new chairman of the board of directors of SHL, Xuewen Wu, did not reclassify the shares held by Mengke Cai and by Himalaya TMT Fund as shares of controlling shareholders in the sense of Israeli Law (see lit. JJJ. above and act. 1/52, page 6). Thus, Himalaya TMT Fund and Mengke Cai both were able to cast their voting rights in order to appoint the independent directors in SHL as they wished.

[91] In view of the considerations just mentioned and in view of the overall assessment of the circumstantial evidence as presented in sections 4.5, 4.6 and 4.7, the TOB concludes that Mengke Cai and the subgroup Himalaya coordinated their purchases of shares in SHL as well as the election of the strategic direction of SHL as set out in lit. f – j of note [92] below. Furthermore, the TOB determines that Mengke Cai and the subgroup Himalaya coordinated their voting behavior in the shareholders' meetings of 5 January 2017, of 11 May 2017 and of 28 June 2018 as set out in lit. k – m of note [92] below.

[92] This conclusion is based on the circumstantial evidence in the present case, being the following:

a. Mengke Cai is an important shareholder of Hokai holding 16% of the shares and voting rights in Hokai. She founded the company with her husband who holds 20% of the shares and voting rights in Hokai. She mandated Jinsheng Dong who is a corporate officer and vice president of Hokai in order to negotiate the purchase of shares in SHL. She acquired 29.85% of the voting rights in SHL as disclosed on 11 August 2016.

b. The actions carried out by Jinsheng Dong in the context of the present procedure can be attributed to Mengke Cai (see section [40] and note [50] above).

c. A relationship of mutual confidence between Xiang Xu and Jinsheng Dong exists and is further supported by the fact that Himalaya proposed Jinsheng Dong as its representative to the board of directors of LifeWatch AG on 15 April 2016 (see lit. BB. above and act. 1/61).

d. Xiang Xu, Kun Shen, Himalaya TMT Fund and Himalaya AM are acting in concert in relation to the purchase of shares in SHL and to the exercise of the voting rights in SHL in the sense of art. 33 FMIO-FINMA and they therefore, form a subgroup in the sense of art. 33 FMIO-FINMA (see section 4.5 and in particular note [64] et seq. above).

e. Jingsheng Dong accompanied Xiang Xu to the general shareholders' meeting of SHL on 24 February 2016 where he assumedly translated for Xiang Xu (see lit. R. above and act. 1/18, page 1).

f. There have been several contacts between Xiang Xu and Jinsheng Dong regarding a potential acquisition of the shares of the Alroy & Shalev Group by either Himalaya, Hokai or Mengke Cai (see section 4.6 and note [71] above).

g. There have been repeated talks between Xiang Xu and Jinsheng Dong and representatives of SHL about a potential expansion of SHL to China, this through the establishment of business relationships between SHL and Hokai (see section 4.6 and note [71] above).

h. Mengke Cai wanted *"[t]o make sure that no other Chinese company with a strategic interest could reasonably invest into SHL"* (act. 17/2, section 2) and therefore had Jinsheng Dong refer the Alroy & Shalev Group to Xiang Xu so that they could talk about a potential share purchase (see note [82] above).

i. Jinsheng Dong introduced Xiang Xu to the Applicants as a potential buyer of their holding in SHL (see lit. JJ. above as well as act. 1/15).

j. The introduction of Xiang Xu and the increase of the position of Himalaya, respectively the subgroup Himalaya, has to be, in this context, qualified as a strategic move from Mengke Cai pursuing her goal not to have another Chinese company with a strategic interest enter as a significant shareholder in SHL (see act. 17/2, section 2). The fact that the subgroup Himalaya held a significant position of shares in SHL made it hardly possi-

ble for another (Chinese) investor with a strategic interest to acquire a significant shareholding in SHL.

k. Mengke Cai and the subgroup Himalaya both voted in the shareholders' meetings of 5 January 2017, of 11 Mai 2017 and of 28 June 2017 by written ballot.

l. The exercise of the voting rights of Mengke Cai on one side and of the subgroup Himalaya on the other side in the shareholders' meetings of SHL of 5 January 2017, of 11 Mai 2017 and of 28 June 2017 was apparently coordinated (see section 4.7 as well as notes [86], [87] and [89] above).

m. Thus, after the shareholders' meeting of SHL of 11 May 2017, five of eight members of the board of directors of SHL were either representatives of Mengke Cai (Xuewen Wu, Cailon Su and He Yi) or of the subgroup Himalaya (Amir Lerman and Shenlu Xu) (see section 4.7 and note [74], 2nd dash above).

n. In the shareholders' meeting of SHL of 28 June 2017, Xuewen Wu – acting as the newly elected chairman of the board of directors of SHL after being elected on 11 May 2017 – did not reclassify the shares held by Mengke Cai and by the subgroup Himalaya as shares of controlling shareholders in the sense of Israeli Law and approved the appointment of the independent external directors of SHL (see lit. JJJ. above and art. 1/52, page 6).

[93] Therefore, the TOB assumes that an acting in concert in the sense of art. 33 FMIO-FINMA between Mengke Cai on one side and the subgroup Himalaya on the other side was present with respect to SHL. Such acting in concert started at the latest on 11 Mai 2017, date of the annual shareholders' meeting where the majority of the members of the board of directors of SHL was exchanged. Thus, a mandatory tender offer for all publicly held shares in SHL has to be made pursuant to art. 135 al. 1 FMIA in relation with art. 33 FMIO-FINMA by Mengke Cai and by the subgroup Himalaya within a period of two months according to art. 39 al. 1 FMIO-FINMA.

5. Moment of the Emergence of the Duty to Make a Tender Offer

[94] If shareholders of a listed company decide to act in concert, e.g. by taking a decision about the composition of the board of directors of the target company, and if they hold over 33 1/3% of the voting rights in said company, these shareholders are viewed as acting in concert in the sense of art. 33 FMIO-FINMA irrespective of whether they buy additional shares in the target company subsequently (Recommendation of the TOB of 3 June 2005 in the case *Forbo Holding AG*, consideration 3.2; see also URS SCHENKER, Schweizerisches Übernahmerecht, Bern 2009, page 489; GEORG GOTSCHEV, Koordiniertes Aktionärsverhalten im Börsenrecht, thesis, Zurich/Basel/Geneva 2005, note 510 and 663).

[95] On 5 August 2016, Mengke Cai bought 29.85% of the shares in SHL. Eli Alroy – for the sellers – and Jinsheng Dong – for and on behalf of Mengke Cai – reached an agreement at a price of

CHF 8.70 per SHL share. There was no written agreement on said transaction (see lit. GG. above with other references). In doing so, Mengke Cai paid a premium of 35.73% for the block of 29.85% of shares in SHL compared to the VWAP of 3 August 2017 of CHF 6.41.

[96] Based on the circumstantial evidence at hand, the TOB concludes that an acting in concert in the sense of art. 33 FMIO-FINMA presented itself at the latest on the day of the annual shareholders' meeting in which the majority of the members of the board of directors of SHL was exchanged, i.e. on 11 May 2017 (see section 4.8 above and note [93] in particular). Thus, and in view of the above, the duty to make a public tender offer for all shares in SHL emerged on 11 May 2017 at the latest.

6. Minimum Price of the Mandatory Tender Offer

[97] In case of a mandatory tender offer, the offered price must be, pursuant to art. 135 al. 2 FMIA, at least as high as the higher of the following two amounts: the stock exchange price (lit. a) or the highest price that the offeror has paid for equity securities of the target company in the preceding twelve months (lit. b).

[98] Pursuant to art. 42 al. 2 FMIO-FINMA, the relevant stock price in the sense of art. 135 al. 2 lit. a FMIA, corresponds to the volume-weighted average price of the on-order-book trades of the last 60 trading days prior to publication of the offer or the preliminary notification. According to art. 43 al. 1 FMIO-FINMA, the price of the previous acquisition in the sense of art. 135 al. 2 lit. b FMIA corresponds to the highest price paid by the buyer for equity securities in the target company over the past 12 months prior to publication of the tender offer or of the preannouncement of the tender offer.

[99] Thus, and as a general rule, the relevant moment for the determination of the compliance with the rules regarding the minimum offer price in the sense of art. 135 al. 2 FMIA, is the moment in which the respective offer is either preannounced or published. However, in case of a mandatory offer, this moment is not necessarily identical with the moment in which the duty to make a public tender offer arises (see RUDOLF TSCHÄNI/HANS-JAKOB DIEM/JACQUES IFFLAND/TINO GABERTRHÜEL, Öffentliche Kaufangebote, 3rd edition, Zurich/Basel/Geneva 2014, note 391). Should an offeror not publish his mandatory offer within the period of two months granted to him according to art. 39 al. 1 FMIO-FINMA, the last day of this two months period is seen as the determining moment for the calculation of the minimum offer price (Recommendation III of 28 June 2007 of the TOB in the matter *GNI Global Net International AG*, consideration 3.2; see also BEAT BARTHOLD/INÈNE SCHILTER, in: Kommentar zum Finanzmarktinfrastrukturgesetz FinfraG, ROLF SETHE/OLIVIER FAVRE/MARTIN HESS/STEFAN KRAMER/ANSGAR SCHOTT (editors), Zurich/Basel/Geneva 2017, note 102 to art. 135 FMIA). Furthermore, if, as in the present case, the duty to make a mandatory tender offer has been breached and if such breach has not been rectified yet by the people obliged to make such mandatory offer, the twelve month period relating to the determination of the relevant minimum offer price at hand would have to be calculated from

the moment backward where the duty to make a mandatory tender offer arose including the last day of the period of two months in the sense of art. 39 al. 1 FMIO-FINMA.

[100] On 5 August 2016, Mengke Cai acquired 29.85% of the shares in SHL. Then, Eli Alroy – for the sellers – and Jinsheng Dong – acting for and on behalf of Mengke Cai – reached an agreement at a price of CHF 8.70 per SHL share. In doing so, Mengke Cai paid a premium for the block of 29.85% of shares in SHL. The equality of treatment requires that the same price is offered to the current shareholders of SHL in the context of the mandatory tender offer to be made.

[101] Based on the evidence at hand, the TOB concluded that an acting in concert in the sense of art. 33 FMIO-FINMA has presented itself on 11 May 2017 (see sections 4.8 and 5 above). Thus, in view of consideration [99] above, the minimum offer price in the sense of art. 135 al. 2 lit. b FMIA for equity securities in SHL will have to be calculated as the highest price paid by the Mengke Cai or by the subgroup Himalaya over the past 12 months prior to 11 July 2017. As on 5 August 2016, the price paid by Mengke Cai for an SHL share amounted to CHF 8.70 and as this apparently was the highest price per share in SHL paid by one of the parties acting in concert, the minimum offer price in the present case is deemed to be CHF 8.70 per SHL share.

7. Suspension of Voting Rights and Prohibition from Acquiring further Shares pursuant to art. 135 al. 5 FMIA

[102] If there are sufficient indications that a person has not met the duty to make a tender offer, the TOB may, pursuant to art. 135 al. 5 FMIA, take two measures until the duty to make an offer has been clarified or, as appropriate, the duty to make an offer has been fulfilled. First, the TOB may suspend the voting rights and associated rights of this person (lit. a). Second, the TOB may prohibit this person from acquiring further shares or acquisition or disposal rights relating to shares of the target company, be it directly, indirectly or acting in concert with third parties (lit. b).

[103] In their motion 3, the Applicants requested for the voting rights and associated rights of Himalaya and/or Xiang Xu and/or GF Fund and/or Hokai and/or Mengke Cai to be suspended until the duty to make a public tender offer has been fulfilled. In motion 4, the Applicants claimed that Himalaya and/or Xiang Xu and/or GF Fund and/or Hokai and/or Mengke Cai should be prohibited from acquiring further shares or acquisition or disposal rights relating to the shares of SHL, be it directly, indirectly or acting in concert with third parties. The Applicants also ask in their procedural request that the motions 3 and 4 above should be granted as interim measures (*vorsorgliche Massnahmen*) for the duration of the proceedings (see lit. LLL. above as well as the Application, act. 1, page 4). On 11 January 2018, the Applicants included Kun Shen into these motions (see lit. CCCCC. above and act. 65/1).

[104] Neither Mengke Cai nor anyone from the subgroup Himalaya has explicitly expressed their opinion with respect to the motions 3 and 4 and to the procedural motion of the Applicants.

[105] As the Applicants have pointed out themselves (Application, act. 1, note 177, 1st sentence), no shareholders' meetings of SHL are currently scheduled. In view of that and to the contrary of the plea of the Applicants, a suspension of the voting rights and of the associated rights of Mengke Cai and of the subgroup Himalaya is currently not viewed as necessary until the period of two months which is given in order to make a mandatory tender offer according to art. 39 al. 1 FMIO-FINMA elapses. In view of the above, motions 3 as well as the procedural request of the Applicants are denied.

[106] However, the TOB considers that, due to the circumstances, it is necessary to impose a prohibition on Mengke Cai and the subgroup Himalaya to acquire further shares or acquisition or disposal rights in SHL until a mandatory tender offer is published. This will enable to maintain the *status quo* and to avoid further extensions of the holdings of Mengke Cai and of the subgroup Himalaya in SHL. In order to prevent one of them from doing so, the TOB revokes the suspensive effect of an appeal against this ruling pursuant to art. 55 al. 2 1st sentence PA in this respect.

8. Result

[107] Given the above considerations, the results up to this point can be summarized as follows:

- Mengke Cai and the subgroup Himalaya are jointly and severally obliged to make a public tender offer for all shares in SHL pursuant to art. 135 al. 1 in conjunction with art. 33 FMIO-FINMA (see section 4.8 and notes [91] – [93]).
- The duty to make a public tender offer pursuant to art. 135 al. 1 FMIA emerged on 11 May 2017 at the latest (see section 5 above, in particular note [96]).
- The minimum offer price in the present case is deemed to be CHF 8.70 per share in SHL (see section 6 above, in particular note [101]).
- A suspension of the voting rights and of the associated rights of Mengke Cai and of the subgroup Himalaya at this moment of time is not necessary (see section 7, in particular note [105]).
- Mengke Cai and the subgroup Himalaya are prohibited from acquiring further shares or acquisition or disposal rights in SHL until they publish a mandatory tender offer. In this respect, the TOB revokes the suspensive effect of an appeal against this ruling (see section 7, in particular note [106]).

9. Publication of the Decision

[108] The TOB publishes its decisions on its website (art. 61 al. 3 TOO). The offeree company publishes pursuant to art. 61 al. 4 TOO a potential statement of its board of directors (lit. a), the dis-

positive part of the decision of the TOB (lit. b) and a notice of the time limit and conditions by which a qualified shareholder may file an objection against the decision of the Takeover Board (lit. c). Art. 6 and 7 TOO apply to this publication (art. 61 al. 4 TOO).

[109] Pursuant to art. 6 al. 1 in conjunction with art. 61 al. 4 TOO, the publication of the dispositive part of the decision of the TOB by the offeree company, which in the present case is SHL, must appear in German and French. Furthermore, based on art. 6 al. 2 1st sentence in conjunction with art. 61 al. 4 TOO, the version published by the target company in a different language – in the case at hand in English – must correspond to the German and French texts. Said publications have to be made simultaneously (art. 6 al. 2, 2nd sentence in conjunction with art. 61 al. 4 TOO). Finally, according to art. 6 al. 3 in conjunction with art. 61 al. 4 TOO, SHL is responsible for ensuring congruency between the various language versions.

[110] Given the above, SHL has to, based on art. 61 al. 4 TOO, publish the dispositive part of the present decision in English, German and French. SHL is granted a time limit until Monday, 29 January 2018 to do so. Additionally, the present decision will be published by the TOB on its website immediately after its notification and before the opening of the market on 26 January 2018 pursuant to art. 138 al. 1 2nd sentence FMIA. Furthermore, the TOB will publish the dispositive findings of the present decision in the SOGC.

10. Fee

[111] Pursuant to art. 118 al. 1 sentence 1 FMIO, the TOB shall levy a fee if it has to make a decision in other circumstances relating to takeovers, particularly on whether or not a duty to make an offer exists. Such fee shall be up to CHF 50'000 depending on the scope and complexity of the case in question (art. 118 al. 2 FMIO).

[112] On 19 July 2017, the president of the TOB issued a procedural decision by which the Applicants were jointly and severally ordered to pay an advance fee of CHF 20'000 in connection with the present Procedure (act. 2). On 22 July 2017, the advance fee of CHF 20'000 was received by the TOB (see lit. NNN. above).

[113] The present case proved to be of extraordinary complexity, both with regard to the relevant facts and the applicable law. The submissions made by the parties amount to no less than over 300 pages and the Procedure has, therefore, been extremely time consuming. Given these circumstances, it seems appropriate to levy the maximum fee of CHF 50'000 for the handling of the present case.

[114] In view of the result of the Procedure, this fee shall be borne by Mengke Cai and by the subgroup Himalaya jointly and severally. The TOB will return the advance fee of CHF 20'000 borne by the Applicants once the present decision becomes final.

11. Compensation of Attorneys' Fees

[115] Mengke Cai (Statement of Defense 1, motion 2 as well as Replica 1, motion 2) as well as Himalaya and Xiang Xu (Statement of Defense 2, motion 2) ask for the compensation of attorneys' fees incurred in connection with this Procedure including VAT, where applicable. In her statement dated 11 January 2018, Kun Shen also asks for a compensation of the attorney's fees incurred by her in connection with this Procedure (see lit. ZZZZ. above and act. 62, motion 2).

[116] Art. 64 APA regulates the adjudication of a compensation of attorneys' fees in the context of administrative appeals. However, art. 64 APA is not applicable to proceedings before the primary instance unless such rule is explicitly provided for in a special regulation (*lex specialis*) (BGE 132 II 47, consideration 5.2). However, in Swiss takeover law, namely in the FMIA and in the TOO, no such special rule exists (decision 0410/02 of 16 June 2009 in the case *Quadrant AG*, section 7, note 31). Furthermore, the substantive motions of Mengke Cai, Himalaya, Xiang Xu and Kun Shen submitted in this Procedure were largely rejected. Thus, the respective motions of Mengke Cai, Himalaya, Xiang Xu and Kun Shen for compensation of attorney's fees are rejected.

Given the above, the Swiss Takeover Board decides:

1. Mengke Cai, Xiang Xu, Himalaya (Cayman Islands) TMT Fund, Himalaya Asset Management Ltd. and Kun Shen are obliged to make a public tender offer for all listed shares in SHL Telemedicine Ltd. in accordance with art. 135 FMIA. The minimum price of said offer shall be CHF 8.70 per share of SHL Telemedicine Ltd.

2. Mengke Cai, Xiang Xu, Himalaya (Cayman Islands) TMT Fund, Himalaya Asset Management Ltd. and Kun Shen are granted a period of two months to make the public tender offer pursuant to section 1 above.

3. Mengke Cai, Xiang Xu, Himalaya (Cayman Islands) TMT Fund, Himalaya Asset Management Ltd. and Kun Shen are prohibited from acquiring further shares or acquisition or disposal rights relating to SHL Telemedicine Ltd. The suspensive effect of an appeal against this ruling is revoked in this respect.

4. Motion 1 of Nehama & Yoram Alroy Investment Ltd. and Elon Shalev is rejected as far as GF Fund Management Co. Ltd. and Zhuhai Hokai Medical Instruments Co. Ltd. are concerned.

5. Motions 3 as well as the procedural request of Nehama & Yoram Alroy Investment Ltd. and Elon Shalev regarding the suspension of the voting rights and the associated rights of Mengke Cai and of Kun Shen in SHL Telemedicine Ltd. are rejected.

6. SHL Telemedicine Ltd. is obliged to publish the dispositive of the present decision in English, German and French according to the TOB Circular No 4 until Monday, 29 January 2018.

7. The present decision will be published on the Swiss Takeover Board's website immediately after its notification and before the opening of the market on 26 January 2018.

8. The Swiss Takeover Board will publish the dispositive findings of the present decision in the SOGC.

9. The motions 2 of Mengke Cai, Xiang Xu, Himalaya (Cayman Islands) TMT Fund, Himalaya Asset Management Ltd. and Kun Shen regarding the compensation of attorneys' fees are rejected.

10. All remaining motions, in particular the motion of Kun Shen regarding the suspension of the procedure, are rejected.

11. Mengke Cai, Xiang Xu, Himalaya (Cayman Islands) TMT Fund, Himalaya Asset Management Ltd. and Kun Shen shall jointly and solidary bear a procedural fee of CHF 50'000. The advance fee of CHF 20'000 paid to the Swiss Takeover Board shall be returned to Nehama & Yoram Alroy Investment Ltd. and Elon Shalev once the present decision becomes final.

The President of the TOB:

Thomas A. Müller

This decision is sent to the following parties:

- SHL Telemedicine Ltd., represented by Dr. iur. Thomas Müller and PD Dr. iur. Daniel Dedeyan, Walder Wyss Ltd., Seefeldstrasse 123, 8008 Zurich, Switzerland;
- Nehama & Yoram Alroy Investment Ltd. and Elon Shalev, both represented by André A. Girguis and Matthias Hirschle, Blum&Grob Attorneys at Law Ltd, Neumuehlequai 6, 8021 Zurich, Switzerland;
- Mengke Cai, represented by Dr. iur. Matthias Courvoisier and Martina A. Kessler, Baker McKenzie Zurich, Holbeinstrasse 30, 8034 Zurich, Switzerland.
- Himalaya Asset Management Ltd., Himalaya (Cayman Islands) TMT Fund and Xiang Xu, c/o Himalaya Asset Management Ltd., No 15, 20/F Shatin Galleria, 18-24 Shan Mei Street, N.T., Hong Kong;
- Kun Shen, represented by Dr. iur. Mariel Hoch, Bär & Karrer Ltd, Brandschenkestrasse 90, 8027 Zurich, Switzerland.

Instruction on the Right to Appeal:

Appeal (art. 140 of the Financial Market Infrastructure Act, SR 958.1):
This decision can be appealed within a period of five trading days with the Swiss Financial Market Supervisory Authority FINMA, Laupenstrasse 27, CH-3003 Bern. The appeal must be made in writing and must be substantiated. The appeal has to suffice the requirements of art. 52 of the Federal Act on Administrative Procedure.

Objection (art. 58 of the Takeover Ordinance, SR 954.195.1):
A shareholder with a holding of at least three per cent of the voting rights of the target company (qualified shareholder, art. 56 TOO) who has yet to participate in the proceedings may file an objection with the Takeover Board against the first decision issued by the Takeover Board on the offer within five trading days of the publication of the decision or, in all other procedures, within five trading days of the publication of the decision. The objection has to be presented to the Takeover Board within five trading days after the publication of the present decision. The objection must contain a formal request and a summary of the legal grounds, as well as proof of the holding in accordance with art. 56 para. 3 and 4 TOO.