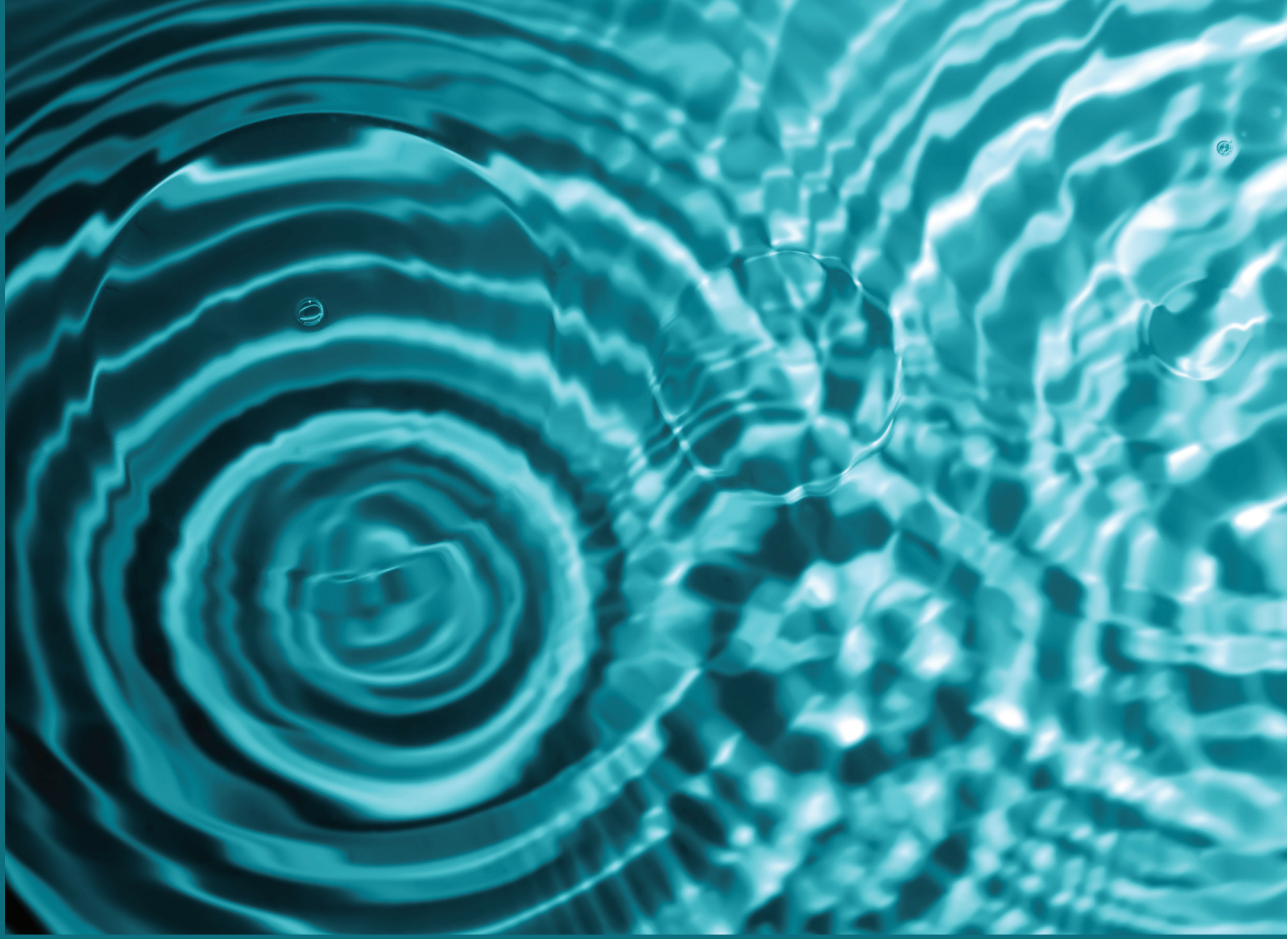




Mergers and Acquisitions Report **2016**

Lead contributor Patrick Sarch

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Section 1: GENERAL OUTLOOK

1.1 What have been the key recent M&A trends or developments in your jurisdiction?

The total value of M&As with Swiss involvement dropped by a total of 55% in 2015 to \$84.9 billion. This development is largely attributable to the absence of many of the large-scale transactions that made 2014 a strong year for M&A in Switzerland. With a traded volume of \$28.3 billion, the merger between insurers Chubb and ACE was by far the largest transaction.

2015 also saw serious changes to the Swiss economic situation with the National Swiss Central Bank giving up the exchange floor for the euro and setting the euro's exchange rate at a minimum of 1.2 Swiss francs. This was intended to remedy the rise of the currency versus the euro. The appreciation of the Swiss franc in the aftermath of this shock resulted in difficult economic conditions for export-oriented Swiss corporations having a cost base in Swiss francs. Acquisitions into the Swiss market also became even more expensive.

Despite the strong Swiss franc, the Swiss market has seen intense competition for quality assets.

Private equity investments have grown in popularity as an option for increasing returns and reducing volatility in investors' total equity exposure.

1.2 What is your outlook for public M&A in your jurisdiction over the next 12 months?

The outlook for the Swiss market in 2016 is quite positive. An increase in M&A transactions, with a particular focus in the areas of electronics, information technology, services and life science, is expected. Given the currency activity mentioned above, for Swiss corporations with a cost base in CHF, the sustained strength of the Swiss franc will continue to negatively affect the profitability in particular of export-oriented companies. In such competitive and challenging market conditions, reserves are slowly being exhausted, and some corporations may face severe liquidity issues. Hence, what made inbound acquisitions costly in 2015 is expected to have a vitalising effect on the M&A market in 2016, namely with regard to companies in financial distress looking for new equity or new owners.

Section 2: REGULATORY FRAMEWORK

2.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?

Public M&A activity is primarily governed by the Financial Market Infrastructure Act (FMIA). This regulates both friendly and hostile public takeovers for Swiss resident companies with at least one class of equity security listed on a Swiss exchange and foreign resident companies, provided their shares are mainly listed on a Swiss exchange. Pure merger transactions are subject to the provisions of the Swiss Merger Act. An exception applies if one of the merging companies acquires a controlling stake in the other before the effective date of the merger, thereby triggering the obligation to submit a public offer according to the FMIA. However, in that case, the Takeover Board, allows the 'acquirer' to postpone the offer and instead complete the merger with the consequence that the obligation to submit a public offer lapses due to the absorption of (usually) the target company.

Once a public offer has been pre-announced, the board of the target is no longer permitted to take any defensive measures that could significantly alter the assets or liabilities of the target but has to submit such measures to the shareholders' meeting for approval.

To the extent an acquisition is financed by the issuance of securities or the transaction structure provides for additional securities to be issued, the relevant provisions of Swiss corporate law dealing with the obligation to prepare a prospectus and the technicalities of a capital increase have to be complied with. If the issuer is listed on a Swiss stock exchange the listing rules of such stock exchange will apply.

2.2 How, by whom and by what measures, are takeover regulations (or equivalent) enforced?

Compliance with FMIA is supervised by the Takeover Board, which issues binding administrative orders in the form of binding decrees. Any decision of the Takeover Board can be brought to the Financial Market Supervisory Authority (Finma) for review. Any party can appeal Finma's decisions to the Federal Administrative Court.

Section 3: STRUCTURAL CONSIDERATIONS

3.1 What are the basic structures for friendly and hostile acquisitions?

In most cases, a public offer starts with a preliminary announcement. Within six weeks after the publication of the pre-announcement, the offeror must publish the (final) offer. After the pre-announcement of the offer, the price and conditions of the offer can only be amended in favour of the shareholders. As a consequence, the preliminary announcement fixes the minimum price and triggers the best price rule as well as certain disclosure requirements for share transactions during the offer period. If the offeror elects to publish no pre-announcement, these effects are triggered on publication of the offer prospectus.

Shareholders holding three percent or more of the voting rights of the target company can request the status of a party in the proceedings before the Takeover Board and submit objections or requests to the latter and/or appeal against a decree issued by the Takeover Board. By making use of their procedural rights, qualifying shareholders can considerably delay a takeover. This is because in the case of an objection or appeal filed by a qualified shareholder, the cooling off period will in most cases be extended. Thus the offer period will not start until the Takeover Board – or in the case of an appeal the Finma – has issued its decision. The threat of extended litigation with a minority shareholder may force the offeror to the negotiation table, trading better offer terms in exchange for withdrawing the legal challenges.

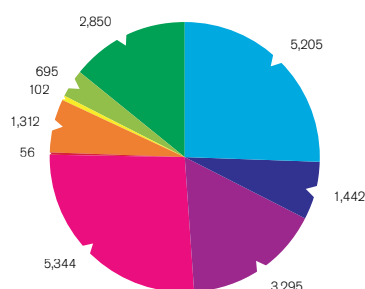
FMIA defines when a purchaser has to make a mandatory offer for all outstanding equity securities of a target. This is the case if an acquirer directly or indirectly controls more than 33.3% of the company's voting rights. Exceptions apply if the target had increased this threshold in its articles of incorporation to up to 49% (opting up) or if the latter contain an opting out clause.

3.2 What determines the choice of structure, including in the case of a cross border deal?

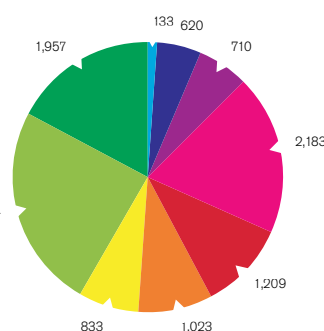
In the case of a cash consideration, a tender offer is the only available solution since in a merger, cash may only be offered as part of the consideration in addition to shares of the absorbing entity. If shares are

dealogic

OUTBOUND



INBOUND



NB only deals with publicly disclosed values are represented in the charts and infographics



offered as consideration, a merger has the advantage of forcing all shareholders to exchange their shares in the target (provided the two-thirds majority of the votes represented at the general meetings, holding the absolute majority of the par value of shares represented, is met or exceeded). Conversely, the defence rights of minority shareholders in a merger are broader and any potential appeals by shareholders will likely take longer to be decided or settled than in the case of an exchange offer.

Conversely, after a cash or exchange offer, the acquisition of all shares of the target company can take much longer in the case the offer does not reach an acceptance rate of 98% or at least 90%, allowing for the squeezing out minority shareholders.

3.3 How quickly can a bidder complete an acquisition? How long is the deal open to competing bids?

In a friendly offer situation, if the target's board report is submitted together with the offer prospectus to the Takeover Board ahead of the publication of the prospectus and no shareholders file an appeal within the cooling-off period, the offer period can start 10 trading days after the publication of the offer. A competing offer can be launched until the last day of the offer period, whereupon the offer period of the initial offer is automatically extended to match the offer period of the competing offer. In the case of an unconditional offer or a conditional, voluntary offer, if the conditions of the offer are met (or waived), a mandatory extension period of 10 days for acceptance needs to be granted after the publication of the final interim result to those shareholders who have not accepted the offer during the offering period.

3.4 Are there restrictions on the price offered or its form (cash or shares)?

The offer price may be paid in the form of a cash consideration or by offering securities in exchange. However, in the case of a mandatory offer, the offeror must offer a cash consideration as an alternative to the shares

offered in exchange to the remaining shareholders of the target.

FMIA provides that the price of an offer must at least equal both the current stock exchange price and the highest price paid by the offeror for shares (or other equity securities of the target company) in the 12 months preceding the announcement of the offer.

3.5 What level of acceptance/ownership and other conditions determine whether the acquisition proceeds and can satisfactorily squeeze out or otherwise eliminate minority shareholders?

Following a successful public offer, an offeror can request a squeeze out of the remaining shareholders if it holds more than 98% of the target's voting rights by filing a request for cancellation of the remaining target shares with the relevant court within three months after the end of the additional acceptance period. The remaining shareholders receive the same consideration as offered under the public offer. Alternatively, the Merger Act allows an offeror that holds more than 90% of the target's shares to effect a squeeze out merger between the target and a wholly owned subsidiary of the bidder.

3.6 Do minority shareholders enjoy protections against the payment of control premiums, other preferential pricing for select shareholders, and partial acquisitions, for example mandatory offer requirements, ownership disclosure obligations and a best price/all holders rule?

FMIA defines when a purchaser has to make a mandatory offer for all outstanding equity securities of a target. This is the case if an acquirer directly or indirectly controls more than 33.3% of the company's voting rights. Exceptions apply if the target had increased this threshold in its articles of incorporation to up to 49% (opting up) or if the latter contain an opting out-clause.

The relevant stock exchange and the company must be notified by any person, if the voting rights in the target held by it reach, exceed or fall below three, five, 10, 15, 20, 25, 33 1/3, 50 or 60% of the total voting rights in the company.

The possibility for an offeror to pay a control premium to the controlling shareholders of a target company shortly before the launch of a public tender offer was abolished in 2013.

3.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?

The conditions provided for in mandatory offers are limited to obtaining regulatory approval that no injunctions are outstanding preventing settlement of the offer or related to the registration of the offeror as a shareholder with voting rights.

Voluntary public takeover offers may be made conditional, yet can only be made subject to objective conditions precedent, which have to be outside the bidder's control. The offeror may reserve the right to waive certain conditions in the offering document. At the end of the offer period, the offeror must declare whether the conditions to the voluntary offer have been satisfied (or waived). Financing conditions are not allowed.

Section 4: TAX CONSIDERATIONS

4.1 What are the basic tax considerations and trade-offs?

A transfer stamp duty of 0.15% applies to the acquisition of the Swiss target company shares. In case of an exchange offer, an additional stamp duty of 0.15% (or 0.3% if the shares offered as consideration are issued by a foreign issuer) will be levied, provided that either the buyer or the vendor qualifies as a Swiss securities dealer. This is subject to exemptions, which may be available in certain circumstances.

4.2 Are there special considerations in cross-border deals?

Three key issues must be carefully analysed. If the seller is a Swiss resident, the buyer must plan around the concept of indirect partial liquidation, which could lead to the taxation of excess cash available in the target, as income on the level of the seller. While the tax would generally hit the seller, the latter would usually request an indemnification from the buyer in the share purchase agreement.

The other issues apply irrespective of the seller: acquiring companies must be aware that Swiss dividend withholding tax is comparatively high at 35%, so profit repatriation planning is important when structuring an acquisition. In particular, acquiring companies must be aware that although they may be entitled to treaty benefits, the Swiss tax authorities might deny such benefits based on the so-called old reserves practice. As matter of course, planning opportunities are available to avoid any tax leakage upon profit repatriation.

Thirdly, debt push-down strategies are available only to a limited extent in Switzerland. Should debt push-down be a critical element to a transaction, careful planning is required.

Section 5: ANTI-TAKEOVER DEFENCES

5.1 What are the most important forms of anti-takeover defences and are there any restrictions on their use?

The bidder is not required to notify the target board or the Takeover Board of an offer before announcing it publicly. Once a public offer has been pre-announced the target board may no longer take defensive measures, provided, however, that it can submit such measures to the shareholders for approval. Yet, the target board has to publish a detailed report summarising the advantages and disadvantages of the offer, where it may recommend to accept or decline the offer. Further, the target may search actively for a so-

called white knight in the case of an unsolicited offer. The support by the target board will become more important, if the target's articles of association contain provisions affecting public takeovers or the corporate governance from a bidder's perspective. The removal of these provisions requires shareholders' approval in a general meeting.

5.2 How do targets use anti-takeover defences?

Once a public offer has been pre-announced, the target's board is no longer permitted to take defensive measures that could significantly alter the assets or liabilities of the target until the publication of the tender offer, unless it has obtained shareholders' approval. An alteration of 10% or more of the balance sheet total is deemed significant.

Before the pre-announcement, defence measures are permitted even if the target knows that a tender offer is imminent. In particular, the board is barred from implementing, inter alia, the following measures: selling or acquiring assets worth more than 10% of its assets based on the last consolidated annual or interim accounts, selling parts of its business that have been designated by the bidder as crown jewels, issuing new shares, convertible debt or warrants without granting the existing shareholders a pre-emptive right (unless the board was authorised in advance by the shareholders to effect such an issue) or significantly changing the compensation or severance packages of senior management.

5.3 Is a target required to provide due diligence information to a potential bidder?

In general, the target's board has no obligation to provide a potential bidder with due diligence material, but there is discretion as to timings, and the type of information provided to a bidder. It is in the bidder's interest to perform as much due diligence as possible before pre-announcing the offer, considering the fact that withdrawal from an announced offer is only possible in limited circumstances.

However the target's board is often reluctant to increase the scope and depth of diligence, as it should not make insider information available. In the case of a competing hostile offer, it must treat that bidder equally and provide the same information. Therefore, the target's board must carefully assess the information disclosed to maximise the value of the offer while weighing that with the drawbacks of revealing confidential information if the transaction were to fail, or an unsolicited bidder to enter.

As a result, target companies usually disclose information gradually, ensuring compliance with both insider trading and ad hoc publicity rules on one hand, and applicable antitrust provisions and competition issues on the other. The bidder must confirm in the offer prospectus that it has not received any material undisclosed information from the target likely to influence the target shareholders' decision on accepting the bid (or, if applicable, disclose such information).

Hostile bid

Generally, the bidder is not entitled to conduct due diligence, and the completion of a satisfactory due diligence exercise cannot be a condition of the offer. However, the bidder can protect itself by including a clearly defined material adverse change (MAC) condition in the offer prospectus.

The bidder is therefore usually limited to obtaining publicly available information. However, if the target grants access to information to a potential bidder, any other bidder, even if hostile, is entitled to receive the information disclosed to the original bidder.

5.4 How do bidders overcome anti-takeover defences?

Certain statutory provisions may require the offeror to make its offer subject to the condition that the offeror is entered into the share register, or the restrictions are removed from the articles of incorporation.

5.5 Are there many examples of successful hostile acquisitions?

According to a study, only approximately 10-15% of all offers launched in the past were hostile takeovers.

Section 6: DEAL PROTECTIONS

6.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile interloper?

In a friendly takeover, the offeror and the target will often enter into a transaction agreement which sets out the terms and conditions of the offer and the obligation of the target to recommend the offer to its shareholders. Furthermore, major shareholders may agree to tender their shares or vote in favour of a merger.

6.2 To what extent are deal protections prevented, for example by restrictions on impediments to competing bidders, break fees or lock up agreements?

Reasonable break fees, provided they do not substantially exceed the bidder's cost in connection with the offer, are admissible.

Section 7: ANTITRUST REVIEW

7.1 What are the antitrust notification thresholds in your jurisdiction?

Notification of a concentration is compulsory, if, during the financial year preceding the concentration, the aggregate turnover of the undertakings concerned amounted to at least CHF2 billion (approximately \$2.03 billion) worldwide or, CHF500 million within Switzerland and the aggregate turnover in Switzerland by at least two of the undertakings involved amount to CHF100 million or more. Special rules to determine and calculate the relevant thresholds apply for specific industries.

7.2 When will transactions falling below those thresholds be investigated?

A planned concentration must be notified even if it does not reach the above thresholds, if a party already enjoys a dominant position in the relevant market affected by the concentration.

7.3 Is an antitrust notification filing mandatory or voluntary?

Provided the notification thresholds are met or exceeded, the filing of such notification with the Competition Commission (CC) is compulsory.

7.4 What are the deadlines for filing, and what are the penalties for not filing?

There is no specific deadline for filing, but a proposed transaction may not be consummated until the termination or expiration of the waiting period. This begins on the date of receipt of the filing.

The party required to file may face a fine of up to CHF1 million if the proposed transaction is consummated without filing. The management may also be personally fined up to CHF20,000.

A transaction which has been consummated without filing the required notification is suspended, and the companies may be ordered to take measures to reinstate effective competition if the CC does not approve the concentration.

7.5 How long are antitrust review periods?

Following notification of a contemplated acquisition, the CC may initiate an in-depth investigation within one month after receipt of the notification, otherwise the takeover may be completed. If an in-depth investigation is initiated, the competition commission must complete the investigation within four months, unless the delay has been caused by the enterprises.

7.6 At what level does your antitrust authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?

The sanctions – fines in particular – which may be imposed for failure to notify a concentration are not dependent on the effect of such concentration on competition. If the notification thresholds are met or exceeded, but no notification is filed with the competition authorities, a fine may be imposed regardless of the outcome of the investigation.

7.7 What other regulatory or related obstacles do bidders face, including national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?

Of particular importance in practice are the notification and/or consent requirements in the banking, financial services and insurance sectors. Ownership restrictions apply in other regulated industries, such as aviation or nuclear power and with regard to residential buildings. Employees of the target company do not have to be consulted and have no say in public takeovers.

Section 8: ANTI-CORRUPTION REGIMES

8.1 What is the applicable anti-corruption legislation in your jurisdiction?

Bribery in the public sector is governed by the Swiss Criminal Code. In the private sector, it is governed by the Unfair Competition Act. However in September 2015, the Swiss parliament amended the law, resulting in bribery in the private sector being transferred to the Swiss Criminal Code, too. The Swiss government has not yet set a date for implementation, but it can be expected in the near future. The amendment is not only of a formal nature: upon implementation, the scope of prohibition of bribery in the private sector will be extended, and such acts will generally be prosecuted ex officio: without the need for a criminal complaint.

8.2 What are the potential sanctions and how stringently have they been enforced?

Bribing a Swiss or foreign public official, such as a member of the takeover board, can result in imprisonment of up to five years, or a monetary penalty. In the private sector, bribery could result in imprisonment of up to three years or a monetary penalty. While there are regular bribery convictions in the public sector, bribery in the private sector rarely leads to criminal convictions. However, the legislative amendment mentioned in 8.1 will likely lead to increased enforcement activities and subsequently, more convictions.

Section 9: OTHER MATTERS

9.1 Are there any other material issues in your jurisdiction that might affect a public M&A transaction?

Under the Environmental Protection Act, a target company qualifying as a polluter is responsible for the clean-up of polluted real estate. The polluter is, primarily, the business that caused the pollution, but also the owner of the polluted real estate. Depending on the particularities of the case, the clean-up or remediation costs will be allocated between the actual polluter and the real estate owner. Potential liability can also extend to real estate that was used or sold some time before the acquisition, or to the real estate of a former entity merged into the target some time before the transaction.



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