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MERGERS AND ACQUISITIONS REPORT 2014



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Section 1: REGULATORY FRAMEWORK

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

Public M&A activity is primarily governed by the Federal Act on Stock Exchanges and Securities Trading (SESTA). This regulates both friendly and hostile public takeovers irrespective of the consideration for Swiss resident companies with at least one class of equity security 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 before the effective date of the merger a controlling stake of the other merging company, thereby triggering the obligation to submit a public offer according to the SESTA. 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. If the merger is not completed, the 'acquirer' will be obliged by the Takeover Board to follow through with its public offer SESTA provides for a mandatory offer obligation in the case of a shareholder or group of shareholders acting in concert exceed a threshold of 33 1/3% of the voting rights in a company listed on the stock exchange. SESTA, however, also provides for an opting out mechanism. Alternatively, the shareholders of the target can also increase the threshold in its articles of association to up to 49%.

The Federal Act on Cartels and Other Restraints of Competition (Anti-Trust Act) and similar anti-trust regulation of any other jurisdiction the parties involved in the M&A transaction are active in, need to be taken into consideration, particularly if the consolidated turnover of each of the parties involved is significant.

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 – either SIX Swiss Exchange or BX Berne Exchange – will apply.

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

Compliance with SESTA 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. Against decisions of the Finma any party can make an appeal to the Federal Administrative Court whose decisions are final.

Section 2: STRUCTURAL CONSIDERATIONS

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

In most cases, a public offer starts with a pre-announcement. Within six weeks after the publication of the pre-announcement, the offeror must publish the (final) offer. After the pre-announcement, the price and conditions of the offer can only be amended in favour of the shareholders. As a consequence, the pre-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 3% 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. In view of these rights granted to qualified shareholders, the offeror has to comply with a mandatory cooling-off period of usually 10 stock exchange days. Further, due to the possibility of an appeal, the terms of the offer and the offer documents will be – even though reviewed by the Takeover Board – published with only a preliminary approval of the Takeover Board, since the qualified shareholders may file an objection with the Takeover Board which might cause the Takeover Board to reconsider its approval or an appeal against the decision of the Takeover Board might be filed with the FINMA. By making use of their procedural rights, qualifying shareholders have the possibility to considerably delay a takeover, because in case of an objection or appeal filed by a qualified shareholder, the cooling off period will in most cases be extended – and thus the offer period will not start – until the Takeover Board – or in case of an appeal the FINMA – has issued its decision. Such delays may considerably increase the transaction risks of both the offeror and the target company: the offeror on the one hand risks to be bound to its offer – and thus be exposed to market risks – for a much longer period than anticipated which in turn increase the offeror's costs and the difficulties to obtain financing. The threat of extended litigation with a minority shareholder may thus well force the offeror to the negotiation table, trading better offer terms in exchange for withdrawing the legal challenges.

SESTA defines when a purchaser is required to make a mandatory offer for all outstanding equity securities of a target which is the case if an acquirer directly or indirectly controls more than 33.3% of the company's voting rights whether exercisable or not. 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.

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

In the case of a cash deal, a tender offer is the only available solution since in a merger transaction, cash can only be offered as part of the consideration in addition to shares of the absorbing entity. In a share deal, a merger transaction has the advantage of forcing all shareholders to exchange their shares in the target. Conversely, the defence rights of minority shareholders in a merger transaction are broader and any potential appeals by shareholders will most likely take longer to be decided or settled than in the case of an exchange offer. Thus, a contested exchange offer is likely to give the acquirer control more quickly than a merger.

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. In this situation it takes time and effort to acquire the remaining shares. An exchange offer on the other hand requires under certain circumstances (see 2.4.) in addition to the stock offered in consideration if such stock is not considered liquid according to the criteria provided for in the takeover regulations.

2.3 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 thus is included in the offer prospectus and no shareholders file an appeal within the offer period, it can start 10 trading days after the publication of the offer and must last at least 20 trading days. A competing offer can be launched until the last day of the offer period. In the case of an unconditional offer or if the conditions of the offer are met, after the publication of the final interim result a mandatory extension period of 10 days for acceptance needs to be granted to those shareholders who have not accepted the offer during the offering period. If a competing offer is launched, the Takeover Board can – and usually will – extend the timetable changes to ensure that the shareholders can choose between the competing offers.

2.4 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 is required to offer a cash consideration as an alternative in addition to the shares offered in exchange to the remaining shareholders of the target.

2.5 What ownership and other conditions determine whether the bidder makes the acquisition 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 target with the relevant court within 3 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 offeror. This merger is subject approval by 90% of the target's shareholders.

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

The Swiss legislature passed an amendment to the rules governing the disclosure of shareholdings and the minimum price rules applicable in a public tender offer. The new rules abolished 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.

The revised version of Article 32(4) of the SESTA 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. These revised provisions will effectively prevent an offeror from acquiring a block from a significant shareholder before the launch of the public offer at a price exceeding the offer price offered to the minority shareholders. An offeror that wishes to acquire – or a significant shareholder willing to sell – a significant block of shares at a higher price than offered to the public must do so at least 12 months before the announcement of the offer. The new rules relating to limiting the payment of control premiums came into force in April 2013.

2.7 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?

Voluntary public takeover offers can only be made subject to objective conditions precedent, which have to be outside the offeror's control. The offeror can reserve the right to waive certain conditions. If the offeror's co-operation is necessary to satisfy the conditions, the offeror must take all reasonable steps to ensure such satisfaction. At the end of the offer period, the offeror must declare if the conditions have been satisfied. Financing conditions are not allowed and thus funding must be in place before the offer is announced.

Further, 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.

2.8 How do buyers and sellers seek to maximise value through their price and other deal strategies?

Not applicable

Section 3: TAX CONSIDERATIONS

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

Not applicable

3.2 Are there special considerations in cross-border deals?

Not applicable

SECTION 4: ANTI-TAKEOVER DEFENCES

4.1 What are the most important forms of antitakeover defences, including antitrust, national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?

Once a public offer has been pre-announced (or announced), the board of the target company may no longer take defensive measures which have a significant impact on the target company, provided however, that it can submit such measures to the shareholders for approval.

4.2 How do targets use antitakeover defences?

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

4.3 How do bidders overcome anti-takeover defences?

Common examples of anti-takeover defence measures in Switzerland are, extraction of net worth by capital decrease and/or dividends, repurchase of own shares (up to 10%) and placement of shares with white knights and/or friendly investors.

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

Certain statutory provisions, such as transfer restrictions and restriction on voting rights (providing that a shareholder acquiring more than a certain percentage of shares, for example five percent, may not be entered into the share register with voting rights) 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.

4.4 Are there many examples of successful hostile acquisitions?

Hostile acquisitions are rather rare in Switzerland.

Section 5: DEAL PROTECTIONS

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

Ways for an acquiror to protect a friendly deal include provisions that prohibit the target company from soliciting other offers; agreements with major shareholders acquiring their stakes in the target or obligating them to tender their shares or vote in favour of a merger; and completion of the transaction before a competing offeror has time to launch a competing offer.

5.2 To what extent are deal protections limited, for example by restrictions on impediments to bidding competition, break fees or lock up agreements?

If an offer is recommended, it is common that the offeror and the target enter into a transaction agreement which sets forth terms and conditions of the offer and the obligation of the target to recommend the offer to its shareholders offer. The transaction agreement also provides for additional points such as the future board composition or management structure the target's undertakings not to solicit or recommend other offers, or certain guarantees regarding the keeping of production regarding the locations or employees of the target.

Section 6: ANTITRUST REVIEW

6.1 What are the notification thresholds in your jurisdiction?

Notification of a concentration is compulsory if, during the financial year preceding the concentration, both: the aggregate worldwide turnover of the undertakings concerned amounted to at least CHF2 billion or the aggregate turnover of the undertakings within Switzerland amounted to at least CHF500 million and the aggregate turnover in Switzerland by at least two of the undertakings involved amounted to at least CHF100 million. The Anti-Trust Act contains special rules to determine and calculate the relevant thresholds for specific industries (such as insurance companies and banks).

6.2 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 Swiss market; Or the planned concentration relates to either the market in which the party holds the dominant position, a neighbouring market.

6.3 Is a notification filing mandatory or voluntary?

Filing is mandatory for covered transactions.

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

There is no specific deadline to file, but a proposed transaction may not be

consummated until the termination or expiration of the waiting period, which 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. In addition, the management (individuals) may also be personally fined up to CHF20,000. Furthermore, the enterprise may be required to take measures to reinstate effective competition, either by unwinding the transaction, by ceasing to exercise effective control, or by any other appropriate action.

6.5 How long are review periods?

If the enterprises concerned do not receive a notification of the opening of an investigation within one month, the transaction may be completed without reservation. The enterprises may receive a comfort letter issued by the Competition Commission prior to the expiry of such period, approving that the contemplated transaction can be consummated. If the Competition Commission decides to initiate an within one month after receipt of the filing by the enterprises, such investigation must be completed within four months, unless the delay has been caused by the enterprises.

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

Not applicable

Section 7: ANTI-CORRUPTION REGIMES

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

Bribery in the private sector, as opposed to the public sector, is not regulated by the Swiss criminal code, but rather by the Unfair Competition Act (UCA). As the UCA catches bribery in the private sector as an illegal conduct affecting fair competition, a criminal offence is committed if someone offers or requests undue advantages in exchange for an employee, member, agent, director etc carrying out (or omitting to carry out) an act in connection with its function, either in contravention of its duties or when exercising discretion.



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