The Legal 500 Country Comparative Guides

Switzerland: Mergers & Acquisitions

This country-specific Q&A provides an overview to mergers & acquisitions laws and regulations that may occur in Switzerland.

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1. **What are the key rules/laws relevant to M&A and who are the key regulatory authorities?**

The key source of law relevant to private M&A is the Swiss Code of Obligations. For companies listed on a Swiss stock exchange, the Financial Market Infrastructure Act ("FMIA") contains specific rules on the disclosure of shareholdings, public tender offers, as well as insider dealing and market manipulation. The provisions of FMIA are specified in three implementing ordinances, the Financial Market Infrastructure Ordinance ("FMIO"), the Financial Market Infrastructure Ordinance by FINMA ("FMIO-FINMA") and the Takeover Ordinance by the Swiss Takeover Board ("TOO"). Companies listed on the SIX Swiss Exchange ("SIX") are also bound by, among others, the Listing Rules, the Directive on Ad hoc Publicity, the Directive on Management Transactions and the Directive on Delisting. Statutory mergers are governed by the Swiss Merger Act.

The supervising authority on public tender offers is the Swiss Takeover Board ("TOB"). The TOB issues binding decisions relating to any public tender offer. Decisions of the TOB can be appealed before the Swiss Financial Market Supervisory Authority FINMA ("FINMA"). Against FINMA's decisions an appeal can be lodged with the Federal Administrative Court. The decisions of the Federal Administrative Court are final and cannot be appealed.

Other key regulatory authorities include the Swiss Competition Commission ("COMCO"), which is the authority for merger filings, and FINMA, which supervises companies that are active in the financial sector (banks, insurance companies, funds). Approvals from other authorities may be required in transactions in sectors that require a permit or license (e.g. telecommunications, gambling, radio broadcasting or aviation).

2. **What is the current state of the market?**

M&A activity in Switzerland continued to be strong. The number of deals in 2019 was comparable to previous years. In terms of deal value, 2019 was, however, the second strongest year ever. The increase in deal value was mainly driven by activities of Novartis (including the spin-off of Alcon) and Roche. As in previous years, the majority of M&A deals in 2019 were cross-border transactions. The largest outbound transactions include Novartis' acquisition of The Medicines Company (USD 7.3bn), Roche's acquisition of Spark Therapeutics (USD 4.2bn) and Viagogo's pending acquisition of StubHub(USD 4.5bn). The largest inbound transaction was RRJ Capital's acquisition of Gategroup Holding (USD 2.8bn). As in previous years, the most active sectors were life science and pharma.

Shareholder activism continues to play a significant role in the Swiss market. The most prominent cases 2019 include Implenia (Veraison, Parmino), Sunrise (Axxion, AOC) and Panalpina (Cevian).

3. **Which market sectors have been particularly active recently?**

The M&A activity was spread across many sectors and industries in 2019, with a particular focus on the life science and pharmaceutical sectors, followed by industrials and TMT. The interest of private equity firms in Swiss targets (mainly Swiss SME's) remained high throughout 2019, partially as a result of the a continuously low interest rate environment.

4. **What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?**

The current political tensions and uncertainties (incl. the trade war between the US and China as well as Europe, Brexit, the upcoming US electionas well as the economic and political development in certain large European countries such as Italy and France and probably the Corona-Virus) are expected to have a significant influence on M&A activity in Switzerland and abroad. A slowdown in the global economy in 2020 (incl. China) may also have an effect on M&A activity Switzerland. Notwithstanding this, considering the strong constitution of Swiss corporates, Swiss companies may also take an active role as potential bidders for targets at lower valuations than were seen in the last couple of years.

5. **What are the key means of effecting the acquisition of a publicly traded company?**

The primary means to acquire a publicly traded company is the launch of a public tender offer. A statutory merger is the transaction structure of choice for mergers of equals of two Swiss companies. Reverse triangular mergers or schemes of arrangement under applicable foreign laws are used to implement mergers of equals between Swiss and foreign companies if the top holding company is to be domiciled in Switzerland after closing.

6. **What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?**

The amount of publicly available information on a Swiss target mainly depends on whether such company is privately held or publicly listed. For private companies, publicly available information is very limited. Certain information can be obtained from the commercial registry, including general corporate information, such as the share capital and number of shares, name of board members and their signing authority and articles of incorporation. The financial statements are though not publicly available.

Listed companies are required to publish substantial information. Key information can be found on the company's website and on the website of SIX. Available information includes the annual reports (incl. financial information, corporate governance), interim accounts, information on significant shareholders, transactions by board members and senior executives as well as general information on the company's stock (incl. price, volume, historical data). Under the Directive on Ad hoc Publicity, the company is required to release price-sensitive information (unless it is permitted to delay publication). These releases are accessible on the company's website.

A listed company approached by a potential acquirer is not obliged to disclose diligence-related information to such acquirer. However, if the board of a target company grants due diligence access to a bidder, the same information and documents would also have to be disclosed to any other bidder launching a competing offer.

7. **To what level of detail is due diligence customarily undertaken?**

The scope of due diligence review in negotiated public transactions varies considerably from case to case. Typically, however, the scope is much more limited in a public deal, as the level of public disclosure is higher for listed companies than for private businesses, especially as regards the financial reporting (see question 6).

A potential acquirer of a public company would typically start conducting a desktop due diligence based on publicly available information. In a second stage, a bidder would ask the target company for non-public information on equity plans and outstanding equity instruments, change of control clauses in commercial and financing agreements, terms of employment of executive management, intellectual property, compliance with laws, material correspondence with SIX and other key regulators, litigation and other matters.

8. **What are the key decision-making organs of a target company and what approval rights do shareholders have?**

The key decision-making body of a target company is the board of directors.

In a friendly transaction involving a listed company, the board of directors of the target negotiates with the bidder the terms of the contemplated tender offer. If the negotiations are successful, the company and the bidder typically enter into a transaction agreement in which, among others, the board agrees to support and recommend the tender offer to its shareholders for acceptance.

In an asset deal, it is the board of directors that approves the sale or purchase of the assets or business. However, the sale of all (or substantially all) assets of a company would be outside the board's authority and would have to be approved by the general meeting of shareholders. The same holds true if in connection with a transaction the articles of incorporation of the company need to be amended (e.g., because new shares are issued, or the corporate purpose is changed).

Statutory mergers of and de-mergers by the company under the Swiss Merger Act require the approval of the general meeting of shareholders.

9. **What are the duties of the directors and controlling shareholders of a target company?**

Directors of a Swiss company must safeguard the company's interests. Directors are subject to a duty of care and loyalty vis-à-vis the company. In addition, directors must treat shareholders equally in like circumstances. In the context of a public offer, the board of the target company will have to review the proposed offer and determine within its fiduciary duties whether it is in the best interest of the company. If the board concludes, that a potential offer is not in the company's best interest, the board will terminate discussions with the potential bidder. Once an offer has been formally made, Swiss takeover law imposes certain specific obligations on the board of the target. Particularly, the board will have to prepare a report which must include, among others, the board's recommendation (or at least a summary of the pros and cons of the offer), the reasons underlying the board's position, potential conflicts of interests and the measures taken to address such conflicts, and the financial consequences of the offer for the members of the board and the executive management. Upon the announcement of a public offer, the board may no longer take defense measures (e.g., sale of substantial assets, repurchase of shares).

Controlling shareholders are not subject to any duty of care or of loyalty vis-à-vis the company or other (minority) shareholders. However, during a public takeover, shareholders holding 3% or more of the voting rights in the target a required to notify the TOB and SIX of any dealings in securities of the target company.

10. **Do employees/other stakeholders have any specific approval, consultation or other rights?**

Swiss labor law and regulation are very liberal compared to other European jurisdictions. In general, there is no requirement to inform, consult with or seek consent from the labor force or labor unions in connection with M&A transactions. Certain exceptions apply in relation to asset deals, or if a mass dismissal or similar measures are contemplated in connection with a transaction. In case of a statutory merger, the employees' representatives of the companies must be informed or, in case measures, such as (constructive) dismissals, were contemplated, consulted prior to the merger being approved by the general meeting of shareholders. This requirement can typically be satisfied between signing and closing of a transaction.

11. **To what degree is conditionality an accepted market feature on acquisitions?**

In private M&A transactions, the parties are generally free to agree on any type of closing conditions. In the context of public transactions, the permissibility of conditions is restricted. Under the TOO, a bidder may make a voluntary offer subject to conditions that are not within the bidder's control and in which the bidder has a justified interest. If a condition requires a contribution by the bidder in order to be satisfied, the bidder has to take all reasonable actions required for the satisfaction of the condition. Within this framework, the takeover practice has established a recognized catalogue of conditions that are generally permissible and typically included in voluntary offers, including a minimum acceptance condition, receipt of required regulatory approvals, resignation of existing and election of new board members, removal of share transfer and voting right restrictions from the target's articles, no material adverse change (generally defined as an event, fact or circumstance that, alone or together with other events, facts or circumstances, results in a sustainable reduction of the annual consolidated EBIT/EBITDA of 10% or more, sales of 5% or more or equity of 10% or more, in each case measured against the last financial statements), absence of certain undisclosed liabilities or non-occurrence of share issuances, mergers and spin-offs by the target. The TOB will review these and any new, untested offer conditions and reject or order the amendment of any conditions that do not meet the legal requirements. In principle, offer conditions must be either fulfilled or waived at the expiration of the initial offer period. However, the TOB may authorize an offeror to make its offer subject to conditions that will only be fulfilled (or waived) at the settlement of the offer. In any event, acceptance and No MAC conditions will lapse at the expiration of the initial offer period. In contrast to voluntary bids, mandatory offers must not be made subject to any offer conditions except for important reasons, especially as they are required to comply with regulatory filing or approval obligations.

12. **What steps can an acquirer of a target company take to secure deal exclusivity?**

In private M&A transactions the parties are free to agree on exclusivity. In public transactions the possibilities to grant a bidder exclusivity are limited. To comply with its fiduciary duties the board of the target will generally refrain from granting exclusivity prior to signing a transaction agreement. In the transaction agreement the target board will require a fiduciary-out in case it is approached by a credible third party proposing a competing transaction.

13. **What other deal protection and costs coverage mechanisms are most frequently used by acquirers?**

A way for a bidder to receive some degree of deal protection is to include a break fee in the transaction agreement. The parties are, however, not entirely free to determine the magnitude of the break fee payable by the target. According to the practice of the TOB, a break fee has to be reasonable and limited to the expected costs of the bidder. In addition, the bidder may request the target not to solicit competing takeover proposals (no-shop provision), whereas a clause prohibiting the target from passively discussing alternative proposals with third parties (no-talk obligation) would not be permissible. Also, an undertaking from the target to inform the bidder about interloper approaches or requests for due diligence is permissible. The same goes for a contractual matching right under which the target must give the bidder the opportunity to match the price and other offer terms offered by the competing bidder before the target board withdraws or changes its recommendation of the initial offer.

14. **Which forms of consideration are most commonly used?**

A bidder may offer cash, (listed or unlisted) shares or a combination of cash and shares. Whereas the vast majority of recent public takeovers were structured as all-cash transactions, the tender offer of DSV A/S for Panalpina Welttransport that was announced in March 2019 was structured as an exchange offer (all-share transaction) . . If the bidder offers non-listed shares (or if the offered shares are illiquid), a valuation by the review body is required. Under certain circumstances a cash alternative must be offered. In particular, a cash alternative is required in a mandatory offer (for details see question 25 below), or if in the twelve months preceding the tender offer the bidder has acquired at least 10% of the target's share capital for cash or if during the offer the bidder acquires any target shares for cash.

15. **At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?**

If a person (acting alone or in concert with others) directly or indirectly acquires or disposes of shares of a listed company and reaches or crosses any of the thresholds of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔% of the voting rights of the company, such person is obliged to make a disclosure to the target company and SIX. Separate disclosure duties exist for long positions (shares, long call, short put, etc.) and short positions (short call, long put, etc.). Netting of long and short positions is not permitted. In addition, a specific disclosure duty at the same thresholds exists for persons who have the discretionary power to exercise the voting rights associated to shares of a listed company.

16. **At what stage of negotiation is public disclosure required or customary?**

Under the Directive on Ad hoc Publicity, preliminary negotiations in respect of a transaction may already be potentially price-sensitive and thus trigger a disclosure duty of the target. However, in negotiated transactions, the Swiss target is permitted to, and regularly will, postpone disclosure until a definitive transaction agreement has been signed, provided that confidentiality is ensured and an immediate disclosure is immediately made if a leak occurs. It is thus customary that a transaction is made public when the bidder launches its public offer.

17. **Is there any maximum time period for negotiations or due diligence?**

There is no maximum time period for negotiations or due diligence. Only once a bidder has formally launched an offer, a set timetable applies until completion of the transaction.

18. **Are there any circumstances where a minimum price may be set for the shares in a target company?**

Under Swiss takeover law, in a mandatory offer as well as in a voluntary offer in relation to all shares of the target company the offer consideration must comply with the minimum price rule. Under the minimum price rule, the offer price must at least be equal to the market price (defined as the 60-day volume weighted average price, 60-day VWAP) or, if higher, the highest price paid by the bidder (or any affiliate or person acting in concert) in the twelve months preceding the tender offer. The minimum price rule does not apply if the target company has validly introduced an opting-out and therefore is not subject to the mandatory offer duty regime (see question 25).

Besides the minimum price rule, any public tender offer must comply with the best price rule. Under the best price rule, a bidder has to increase the offer price if, during the tender offer or within six months after completion of the offer, the bidder (or any affiliate or person acting in concert) acquires shares in the target at a price exceeding the offer price.

19. **Is it possible for target companies to provide financial assistance?**

Swiss law does not contain specific rules on financial assistance. However, there are limits on the use of the target company's assets to secure funding of the bidder or refinance the purchase price. As long as the target has minority shareholders, it is typically difficult for the board of the target to use its assets to fund a takeover bid in light of the board's fiduciary duties and the rules limiting up-stream and cross-stream security.

20. **Which governing law is customarily used on acquisitions?**

While parties in private M&A transactions are generally free to choose the governing law, it is customary that a share purchase agreement relating to a Swiss target company will be governed by Swiss law. The same holds true for asset deals. A public tender offer for a Swiss company listed in Switzerland or a foreign company with a main listing in Switzerland is governed by Swiss takeover laws and regulations (in particular FMIA and TOO).

21. **What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?**

A Swiss public tender offer typically starts with the pre-announcement of the offer by the bidder. The pre-announcement is a short document setting out the principal terms of the offer (i.e. price, type of consideration, conditions and timetable). Within six weeks of the publication of the pre-announcement the bidder must publish the offer prospectus. The offer prospectus sets out the offer terms and contains certain information on the bidder, the target, and the securities offered in exchange, if any. Upon completion of the offer period and the additional acceptance period, respectively, the bidder must publish the respective tender results. All offer documents must be published in German and French (and on a voluntary basis in other languages) through electronic channels, and must be put on the bidder's website or a special offer website on the internet. In addition, the prospectus must be mailed to interested parties upon request. The Takeover Board will publish the offer documents on its website.

22. **What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?**

The transfer of shares in a private company requires a share purchase agreement and the delivery of the (endorsed) share certificates or, if no certificates have been issued, a written assignment declaration. If the shares are subject to transfer restrictions, transfer of legal title requires the prior approval by the board of directors. Shares in listed companies are typically in book-entry form; their transfer is executed electronically through the banking system.

Federal stamp tax is payable in connection with a transfer of Swiss shares if a securities dealer (as defined in the Federal Stamp Duty Act) is involved, either as a party or as an intermediary. Certain types of transactions or parties are exempt. Securities dealers under the Federal Stamp Duty Act include banks, dealers in securities and, among others, Swiss companies holding securities with a tax book value of more than CHF 10 million. A public tender offer regularly triggers stamp tax as it involves a bank for the settlement of the offer. The duty is typically paid by the bidder.

23. Are hostile acquisitions a common feature?

Hostile acquisitions are permitted but are not particularly frequent in Switzerland, with only around 12% of all offers in the last ten years being unfriendly offers.

24. What protections do directors of a target company have against a hostile approach?

Directors of the target are not required to enter into negotiations with or grant due diligence access to a potential bidder if they deem the approach not to be in the interest of the company (see question 6). Further, some level of protection is obtained through share transfer and voting rights restrictions in the articles of incorporation. On the other side, Swiss corporate law does not allow for staggered boards as directors must be elected on an annual basis.

Swiss takeover law prevents directors of the target from taking frustrating actions without shareholders' approval after a tender offer has been formally announced. Frustrating actions are defined as those that significantly alter the assets or liabilities of the target company as further specified in the TOO. In particular, the target board is prohibited from acquiring or disposing of treasury shares or respective derivatives, and from issuing any conversion or option rights, unless such transactions are made in the context of pre-existing employee share programs or obligations under pre-existing instruments (such as pre-existing convertible bonds). Further, the TOB has the authority to object to defensive measures that manifestly violate statutory corporate law.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

A bidder is required to make a mandatory offer if such bidder (alone or in concert with others) directly or indirectly exceeds 33⅓% of the voting rights of the target company. However, an issuer may adopt a higher threshold of up to 49% (opting-up) or may opt-out from the tender duty regime entirely by including a respective clause in its articles of association. Approximately one quarter of all SIX-listed issuers have adopted a full opting-out.

26. **If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?**

Swiss corporate law provides for various minority rights. Among others, any shareholder, irrespective of its holding, has the right to request information from the company on the affairs of the company and from the external auditors on the methods and results of their audit. Shareholders holding shares with a par value of CHF 1 million or 10% of the company's share capital have the right to call for a shareholders' meeting and to put items on the meeting's agenda. At shareholders' meeting, any shareholder can make proposals on agenda items. Certain shareholder resolutions are subject to a qualified majority of two-thirds of the voting rights and one-half of the share capital represented at a shareholders' meeting. A squeeze-out merger requires the consent of at least 90% of the voting rights of the company (see question 27). Also, the board of directors is required to treat shareholders equally.

27. **Is a mechanism available to compulsorily acquire minority stakes?**

Upon completion of a tender offer, the bidder has basically two means to squeeze-out minority shareholders. Under FMIA, the bidder holding 98% of the voting rights of the target can apply for a court decision cancelling the remaining equity securities of the target against the same consideration as offered under the offer. The request must be made within three months of the offer's additional acceptance period. The proceedings are generally uncontroversial as minority shareholders' defense possibilities are very limited. In particular, minority shareholders cannot object to the price they obtain. On the other hand, the Swiss Merger Act allows an offeror to complete a squeeze-out merger if it holds 90% or more of the voting rights of the target. In such a case, minority shareholders can be forced to accept cash or any other merger consideration in exchange for their target shares. In case of a squeeze-out merger, minority shareholders have, however, appraisal rights.