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Growing Asian Prospects

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Swiss Business Environment

General

Despite a difficult market environment, the Swiss economy has managed to stay in relatively good shape so far with an estimated GDP growth of 1.0 per cent in 2012 and an expected GDP growth of 1.3 per cent in 2013 and 2.1 per cent in 2014 according to the State Secretariat for Economic Affairs (SECO). The Swiss Market Index (SMI), Switzerland's blue-chip stock market index, meanwhile rose by an impressive 14.9 per cent in 2012. In the first five months of 2013, the SMI has gained another 16 per cent.

This sound performance of the Swiss economy is to a large extent due to a steady increase of Swiss exports to Asian countries: with the economic prospects for many neighbouring countries remaining gloomy, Swiss companies increasingly turned towards Asia in search of growth opportunities. After years with very strong growth of Swiss exports to Asia (+13.4 per cent in 2010 and +9.8 per cent in 2011), Swiss exports to Asia cooled down in the year 2012 (+2.2 per cent), but nevertheless largely outperformed exports to Europe (-0.2 per cent in 2011 and -0.6 per cent in 2012).

Whereas exports to China (including Hong Kong) reached record heights in 2010 and 2011 with growth rates of 28 per cent and 20 per cent, respectively, the year 2012 saw a slight decline of four per cent. Meanwhile, imports from China (including Hong Kong) that now account for around 6.5 per cent of total imports are still growing with a vigorous 50 per cent increase in 2012. It has to be noted in this context that Switzerland is one of very few Western countries to (still) have a positive trade balance with China.

The enactment of a free trade agreement between China and Switzerland is expected to further boost the Sino-Swiss relationship. This agreement, that has been negotiated but not yet enacted, can already now be seen as a major breakthrough, as Switzerland will likely be both the first continental European country and the first country among the world's 20 largest economies to have such free trade agreement with China, as Li Keqiang, the current Premier of China, told the *Neue Zürcher Zeitung*, a Swiss newspaper. While the exact contents of the agreement have not yet been made public, it is nevertheless expected to further expand the bilateral trade relations as, according to a Chinese official involved in the negotiations, 99.7 per cent of Chinese exports to Switzerland will then be duty free.

Selected Swiss Industries

Watch industry

The Swiss watch industry has emerged from the crisis year 2008 in a vigorous condition, with exports hitting a record 19.3 billion Swiss francs (CHF) in 2011 and a monthly record of CHF 1.97 billion in July 2012. This represents a global market share of over 50 per cent in terms of value. In the high-end sector, the Swiss predominance is even more impressive. Indeed, around 95 per cent of the watches sold with a price tag of over CHF 1,000 are made in Switzerland. The "Swiss made" label is expected to be strenghened further as a new legislation defining the conditions for its use is currently being debated in parliament. The legislation will likely provide that a certain percentage of the production costs has to be incurred in Switzerland. At this stage, it is not yet clear if this percentage will be as high as 60 per cent (or even 80 per cent) as requested by many players in the Swiss watch industry.

During the past years, one of the main success drivers was the growing Asian (and particularly Chinese) demand for Swiss luxury watches. Chinese buyers now account for about a third of watch exports according to the Deloitte Swiss Watch Industry Study 2012. If sales to Chinese tourists abroad (including Hong Kong) are taken into account, this number is even significantly higher.

The appetite of Asian buyers is not limited to individual Swiss watches anymore but has lately expanded to several companies active in the watch sector. A stand-out example is the acquisition of Prothor Holdings SA and its subsidiaries La Joux-Perret SA, a leading manufacturer of mechanical movements, and high-end watch brand Arnold & Son, by the Japanese Citizen Holdings Co Ltd in March 2012. Further examples include the acquisition of Eterna and Corum, two Swiss luxury watch companies, by the Chinese company China Haidian in 2011 and 2013, respectively.

Mechanical and electrical engineering industry

The Swiss mechanical and electrical engineering industry experienced slightly more difficulties than the watch industry mainly as it is under considerable pressure due to the ongoing sovereign debt crisis and the strength of the Swiss franc. While in 2010, the respective exports rose by 8 per cent, 2011 already indicated the beginning of a downward trend with a moderate 1.2 per cent growth and 2012 saw a decline of 9.7 per cent. Exports to China (including Hong Kong) performed particularly badly with a decrease of 36 per cent.

As opposed to the high margins in the watch industry, margins in the Swiss mechanical and electrical engineering industry were already quite low before the crisis and continued to decline during the last years. The appreciation of the Swiss franc therefore led to an increased pressure on firms active in this sector prompting some of these firms to divest parts not seen as key to their business in order to further concentrate on their main strengths. One example is the Swiss company OC Oerlikon, a world leader in machine and plant engineering, divesting its natural fibers and textile components business units to the Chinese Jinsheng Group. The transaction was signed in December 2012 and closing is expected in the second quarter of 2013, subject to the merger control approval by the Chinese Ministry of Commerce (MOFCOM).

Chemical and pharmaceutical industry

Switzerland's chemical and pharmaceutical industry has a global market share of around five per cent, making the country one of the leading nations worldwide in this sector, which is remarkable given Switzerland's size and population of only about eight million inhabitants. In terms of turnover, the Swiss company Novartis is currently the largest pharmaceutical company in the world and Roche, it's domestic rival, the fifth largest.

Although the respective exports to China (including Hong Kong) are gathering momentum with +22 per cent in 2012, their share in the global Swiss exports currently accounts for only three per cent. Overall, exports remained very stable and were only slightly affected by the current difficult economic conditions.

With increasing global competition, companies active in the sector have continued to focus on their core competencies, leading to ongoing regrouping and restructuring in the industry. Highly specialised companies have emerged out of formerly diversified companies with broad product offerings.

Clariant, for example, a Swiss specialty chemicals company, recently sold its textile chemicals, paper, specialties and emulsions businesses to the United States-based private investment firm SK Capital Partners.

M&A – Outlook 2013

According to the accounting firm Ernst & Young, the fourth quarter of 2012 showed an increase of 16 per cent in deal numbers and almost 86 per cent in deal volume as compared to the third quarter. The year 2012 saw an increase of 11 per cent in the number of transactions and of 56 per cent in the total transaction volume, compared to the previous year. Although US or European counterparties were still involved in most deals with a Swiss buyer or seller, the relative importance of Asian-Pacific counterparties has continued to rise at a fast pace.

The Swiss M&A market is expected to stay stable at the moderate level of 2012 or to slightly increase; the outlook is still uncertain and will in particular depend on the further development of the Euro zone.

Mainly due to large cash reserves and the relative strength of the Swiss franc, Swiss firms act more often as buyers than as sellers. In 2012, 71 per cent of the M&A transactions with a Swiss participant involved a Swiss buyer according to a study by KPMG.

Further deals are expected in the commodities and financial services sectors. Particularly in the private banking sector, many small players have come under considerable margin pressure, which is expected to lead to further consolidation. Continuing margin pressure is also expected regarding export-orientated Swiss companies, leading to further disposals of non-core businesses. This might encourage potential buyers from Asia to invest in European targets with low valuation.

Swiss Legal Environment

In General

In Switzerland, there is no general set of rules and regulations dealing with foreign investments. Rather, the regulatory framework depends on the type of business the target company is active in. The Swiss Federal Constitution guarantees freedom of trade and industry throughout Switzerland. This allows anyone, including foreign nationals, to found or hold an interest in a company and to operate a business in Switzerland. For most commercial undertakings, neither an approval, registration or licence by the authorities, nor a membership of a professional association are required.

Sectors for which registration or the approval from a government authority is necessary are, for example, banking, insurance, investment funds, gambling houses, as well as the manufacturing and trading of certain arms. Other types of businesses or professions that may need some sort of either a federal or cantonal approval or licence are, for example, broadcasting companies, schools, hotels and restaurants (only in certain cantons), physicians, dentists, pharmacists and attorneys.

Corporate Structures

Swiss corporate law provides different forms of business organisations to set up a company and do business in Switzerland. The appropriate form of a business entity depends on many factors such as the size of the company and the nature of the business. Tax issues may play an important role in choosing the right business entity as well. Companies and private individuals from foreign countries are free to choose the legal form that best fits their business.

Swiss law distinguishes between the partnership-type unincorporated companies (sole proprietorship) and capital based incorporated companies (company limited by shares and limited liability company).

Company limited by shares

The most popular and widespread type of business association under Swiss law is the company limited by shares (AG). An enterprise constituted in this form has its own name, its own legal personality separate from its members and a fixed nominal capital divided into shares.

This type is often chosen by foreign companies as the legal form for their Swiss subsidiaries. The legal form of a company limited by shares may be used for very big companies as well as medium- and small-sized companies. A company limited by shares may be found by one or more individuals who do not need to be Swiss citizens or residents in Switzerland. However, it must be represented by at least one person residing in Switzerland. The share capital must be at least 100,000 Swiss francs. In the case of registered shares, a contribution of at least 20 per cent of the par value of each share shall be made. In all cases the contribution of registered share capital shall be at least 50,000 Swiss Francs which have to be paid in upon incorporation (in cash or in kind). Bearer shares must be fully paid up before they can be issued. The supreme body is the board of directors that represents the company externally.

Limited liability company

The limited liability Company, GmbH, is a good alternative to the company limited by shares for smaller businesses. GmbH as well has its own legal personality separate from its members. The company's liability is limited to its assets only. The nominal capital that must be paid in is 20,000 Swiss francs. Unlike the company limited by shares, no board of directors is required and the management lies with the managing directors.

Setting up a company

Setting up a Swiss company is a very straightforward process that generally takes two to four weeks from the submission of the required documents to the date the company is considered legally established. The timeframe depends on the nature of the company and the location in Switzerland.

Purchasing a business or a company

When purchasing a business, an acquirer can choose between an asset deal or a share deal. While share deals are generally more common, the decision should be carefully assessed and will namely depend on whether or not:

1. The target is organised as a corporation;
2. The acquirer wants to purchase the entire business;
3. There is a risk of hidden liabilities;
4. The assets are easily transferable;
5. Tax and accounting considerations favour one approach over the other;
6. Assets must be pledged in order to finance the transaction.

M&A transactions relating to privately held Swiss businesses or companies are not governed by a specific statute. Instead, the general rules applying to the sale of goods basically apply, as specified by case law. Where deals are handled by professional parties, detailed contractual documentation concretises the relatively rudimentary legal basis.

Reorganisations

Apart from setting up a new company or purchasing an existing business or company, other options are available for investing and/or establishing a company in Switzerland, such as setting up a branch office, the formation of a joint venture or the undertaking of a cross-border merger. The most common choices for a foreign company located in Switzerland are subsidiaries (in the form of companies limited by shares or limited liability) and branch offices.

Mergers, de-mergers and transfers of assets between companies and transformations are regulated by the Swiss Code of Obligations and the Swiss Merger Act. In case of (cross-border) mergers, the provisions of Swiss Antitrust Law have to be observed.

Management and Leveraged Buyouts

A management buyout is a transaction by which the

target's managers and additional equity and debt investors, such as banks or private equity funds, jointly acquire the shares of the target company. The main difference towards leveraged buyouts is that the initiative for the buyout is taken by debt and equity investors.

Formal purchaser in both cases will usually be a newly formed acquisition company which purchases the shares and is merged into the target after a certain period of time, subject to tax rulings (if relevant). The acquisition is normally financed through the company's assets and the future earnings which service the company's loans. Where a bank is involved in financing an acquisition, usually the share of the target (or the acquisition company) will be pledged as a security. While debt investors expect a regular interest payment and a (partial) repayment of the loans and sometimes an option to purchase shares (in the event of mezzanine facilities), equity investors hope to achieve an appropriate return in view of the company's expected development and the prospects of an exit in the form of a share sale.

In 2009, during the financial crisis, the buyout market came to a near standstill due to the lack of leverage possibilities but has slowly recovered since then.

Private Equity

The structure most commonly used for private equity in Switzerland is that of an offshore (regularly a Jersey or Guernsey) limited partnership with its investment advisor, and possibly also its key limited partners located in Switzerland. While new company forms for collective investment schemes have been introduced in Switzerland by the Swiss Collective Investment Schemes Act of 2006, in particular the limited partnership for collective investment intended to be the Swiss equivalent of the common law limited partnership, these legal vehicles have had very limited success as of today mainly due to the lack of the Swiss Financial Market Supervisory Authority (FINMA)'s respective approval practice and uncertainties with regard to the taxation of the carried interest.

Joint Ventures

Companies can be combined not only by an acquisition or merger but also by a joint venture, either formed as partnership or, more commonly, organised as corporation. It is noteworthy that a Swiss joint venture corporation (JVC) cannot legally bind itself by entering into a contractual agreement when it comes to subject matters falling within the competency of the shareholders' meeting (like a share capital increase) or the board of directors (eg with respect to board majority requirements, delegation of business to management or approval of share transfers). In consequence, a Swiss corporation should normally abstain from executing a joint venture agreement, except with regard to a specified list of rights and obligations involving non-corporate issues, such as the entering into of a licence, loan, lease or purchase agreement with one of the joint venture partners acting as a counter-party.

In instances related to corporate matters, only the (future) shareholders can assume contractual obligations in the joint venture agreement where they will usually agree that necessary steps must be taken to implement the contractual arrangements at the corporate level, eg by exercising shareholders' rights or to instruct the board members to draft internal rules of organisation containing the agreed arrangements or to appoint specific managers, and so on.

Where the contractual arrangements are not or cannot be translated into the corporate documents, each joint venture partner still has the possibility of suing the other party for specific performance. For instance, a party can be sued in its capacity as a shareholder of the JVC, to exercise its voting right in a manner consistent with its contractual obligations. The same is true for board resolutions

provided a shareholder is in a position to instruct a board member how to vote, given that a director is subject to non-transferable and inalienable fiduciary duties. If specific performance is impossible, the party who breached the joint venture agreement will be liable for damages.

Selected Recent Legal Developments

Amendment to the Cartel Act (CartA)

The Swiss Federal Council submitted its proposal concerning an amendment to the CartA to the Parliament in February 2012. The amended text aims to ban all forms of horizontal price, output and territorial agreements, as well as vertical price and territorial agreements.

Currently, the Swiss Competition Commission (ComCo) has to prove that an agreement does have an effect on competition, ie that the respective agreement restricts competition significantly. Under the proposed amendment, no such prove would be required anymore in case of horizontal price, output and territorial agreements as well as vertical price and territorial agreements. Such agreements would be prohibited and subject to fines even if they intensify competition or if they have not been implemented unless the involved companies could establish that there is a justification for reasons of economic efficiency. This change would bring a shift from an effects based to a very formal object box approach. This shift would especially affect horizontal co-operation, eg purchasing co-operation, production and joint venture agreements where the parties would have to establish clear benefits of their co-operation for the customers. Also, in the area of vertical restraints, it can be expected that the ComCo would step up its already very formal approach.

The envisaged change to the CartA would also introduce the Significant Impediment to Efficient Competition (SIEC) in merger control cases which is already used by the European Commission and other authorities. Against the dominance test currently used in Switzerland, the SIEC would lower the threshold for prohibiting mergers. However, in some cases, the ComCo has interpreted the current dominance test in a very extensive way. For this reason, the change to the SIEC test would not be expected to bring too much of a shift in practice.

Furthermore, the amendment aims to strengthen the rule of law through an institutional reform. It is intended to create a court that would decide over behavioural cases while the current ComCo would become a prosecutor with no own decision making power except in merger control cases. The competition authority would conduct the investigation and move for motion to the competition court (a new specialised antitrust chamber within the Federal Administrative Court).

Amendment to the Collective Investment Schemes Act

An amendment to the Collective Investment Schemes Act (CISA) has come into effect in March 2013. It aims at further adapting the Swiss regulation to international standards, especially to the Alternative Investment Funds Managers Directive (AFIMD), an European Union directive expected to come into force by mid-2013 and hence to guarantee a discrimination-free access of Swiss financial service providers to European financial markets.

The new EU directive will introduce a common regulation for alternative investment fund (AIF) managers at EU level, which brings far reaching regulatory changes for asset managers of alternative investment funds such as hedge funds and private equity funds. AIF managers which are domiciled or managed in the EU or distribute their shares to professional investors in the EU shall be required to obtain an authorisation and be supervised. The AIFMD will be applied on all EU investment advisors of collective investment schemes, who

are not already subject to the Undertakings for Collective Investment in Transferable Securities (UCITS IV) Directive. The management of collective investment schemes can no longer be delegated to investment advisors domiciled in non-EU states which are not subject to an equivalent supervision. It is not yet clear which conditions third-country AIF managers will have to meet in order to obtain a permission to manage EU AIF and to distribute AIF shares in EU member states. The current amendment to the CISA tries to increase the probability of securing the delegation of asset management to Swiss asset managers after 2013 and to obtain an EU permission by aligning the management, safekeeping and distribution rules with the AIFMD.

The partial revision of the CISA has made it mandatory for Swiss asset managers to hold a licence from the Swiss Financial Market Supervisory Authority (FINMA) in order to manage foreign collective investment schemes, generating additional administrative costs for these AIF, which might become an issue, especially for small- and mid-sized companies. It could, furthermore, keep hedge fund managers from relocating to Switzerland.

Popular Initiative "Against Fat-Cat-Salaries"

In March 2013, a popular initiative "against fat-cat salaries" ("*Abzockerinitiative*") has been approved by the Swiss voters. This initiative, applying only to Swiss public companies, calls for extensive new mandatory rules on transparency and compensation of board members and senior management:

1. The aggregate compensation of the board of directors and the senior management will be subject to the approval of the general meeting of shareholders;
2. Severance payments (golden parachutes), advance payments and similar extraordinary payments to directors or senior managers, as well as multiple contracts between directors and senior managers and group companies will be prohibited;
3. The articles of association will have to include rules for directors and senior managers on loans, retirement benefits, incentive and participations plans, and the number of positions outside the group;
4. The Chairman of the board, the board members, the members of the board's compensation committee, as well as the independent proxy will have to be elected annually by the general meeting of shareholders; and
5. Companies will no longer be allowed to act as corporate proxies but will need to allow shareholders to cast their votes electronically from a remote location.

The implementation of the popular initiative into Swiss law, in particular the Swiss Code of Obligations, is currently being prepared. Therefore, it is yet not possible to assess what effects these future regulations will have on the market; especially the harsh penal provisions of the initiative are, however, expected to have a negative impact on the competitiveness of the Swiss economy, should they actually be imposed. The against fat-cat salaries initiative could also have adverse effects on private equity in particular: private equity firms routinely grant compensations to the management of their portfolio companies if these companies can be sold with a benefit. As the initiative text prohibits sale and purchase incentives, this practice would most certainly no longer be possible, stripping private equity firms of an incentive tool to improve the performance of their portfolio companies.

Capital Contribution Principle Replacing the Nominal Value Principle

As from 1 January 2011, any repayment of capital contribution reserves contributions by a company to its shareholders (including share premium and

capital contributions) after 31 December 1996 is treated in the same way as the repayment of nominal share capital. Such repayments are not subject to income tax in the hands of Swiss-resident private individuals and are exempt from federal dividend withholding tax according to Swiss law.

In order to qualify for tax-free repayment or distribution, the reserves must originate from contributions made by the shareholders. The tax-free distribution of such reserves requires that the reserve is reflected in a separate reserve account in the balance sheet, and further, that any fluctuations are regularly reported to the Swiss Federal Tax Administration (SFTA).

The capital contribution principle is currently being discussed in the Swiss parliament. It is currently rather uncertain whether new rules will be implemented to restrict repayments of capital contribution reserves or not.

Revision of the Federal Act on Stock Exchanges and Securities Dealers

A revisions of the federal act on stock exchanges and securities dealers entered into force on 1 May 2013, according to which, insider dealing and manipulation of exchange rates will henceforth qualify as possible basis for incriminated money laundering.

Revised Swiss Takeover Regime

On 1 May 2013, the revised Swiss takeover regime has come into force. The most relevant changes are the abolishment of the control premium and the obligation to offer an all-cash alternative in a number of situations where such obligation previously did not exist. With respect to the structuring of public tender offers, bidders need to consider the implications of the revised regime and explore novel approaches.

Pre-tender Offer Stake Building

Stake building prior to the launch of a public tender offer allows the bidder to increase the chances of success of its public tender offer because a significant stake at launch reduces the likelihood of a competing bid. If a competing bid is launched, the initial bidder is likely to make an attractive return on investment on the stake it tenders into the competing bid.

Under the revised Swiss takeover regime of 1 May 2013, pre-offer stake building has become more complex: according to the minimum price rule, the offer price in the public tender offer must be at least equal to:

1. The highest price that the bidder has paid for target shares in the 12 months preceding the publication of the public tender offer; and
2. The 60 trading days volume weighed average price (or based on a valuation if the target shares are deemed illiquid).

The minimum price rule applies to mandatory offers and change-of-control offers, ie offers which extend to shares whose acquisition would entail a mandatory offer obligation. The rule does not apply to purely voluntary offers, including partial tender offers and offers for any portion of shares of a target which has a valid opting out provision in its articles of association.

The abolishment of the control premium means that in down markets, or when a specific target's share price plummets due to a target specific negative event, a bidder's purchases of target shares in the 12 months preceding the launch of the offer and, in particular, the ones prior to the fall of the target's share price, will set the floor for the subsequent tender offer price.

Under the revised minimum price rule, a bidder will have to carefully weigh the advantages of pre-launch stake building against the risk of setting the minimum offer price at a level which may proof unnecessarily high.

Another new restriction on pre-launch stake building applies to exchange offers. An all-cash alternative must be offered to all recipients of a change-of-control offer if the bidder (or persons acting in concert with the bidder) has purchased 10 per cent or more of the target shares for cash during the 12-month period preceding the announcement of the exchange offer.

Opting Out to Ensure Flexibility?

The only way to avoid the applicability of the revised minimum price rule (and the obligation to offer a cash alternative in exchange offers where the bidder purchases 10 per cent or more target shares for cash prior to the offer) is to introduce a valid opting out provision in the articles of association of the potential target company.

According to the revised practice of the Takeover Board, the shareholders' resolution on the introduction of an opting out is presumed to be in the interest of the target company or its shareholders, if a majority of votes is reached both by counting the votes of all shareholders represented and by counting the votes of only such shareholders who have an interest in introducing the opting out provision.

Even if these requirements are fulfilled, the Takeover Board may in exceptional circumstances hold that the presumption proves wrong. If the shareholders' resolution does not fulfill the requirements of the double counting of the votes, the Takeover Board presumes that the opting out is to the disadvantage of the minority shareholders and, therefore, not validly introduced.

All-cash Alternative During Exchange Offers

The rules on cash alternatives in exchange offers have not only been tightened with respect to pre-offer stake building, the Takeover Board has also acknowledged that during the period following the settlement of the offer, there should no longer be any restrictions on the bidder with respect to purchases of target shares for cash. A bidder in an exchange offer may, therefore, acquire target shares for cash following the settlement of the offer for as long as the best price rule is respected (ie for six months after the end of the additional acceptance period, the price paid may not be higher than the value of the shares offered in exchange).

Another accentuation of the revised regime on exchange offers relates to the period from the publication of the offer until the settlement. It extends to all types of offers, including partial offers and offers where the target company disposes of a valid opting out provision in its articles of association. In the event that during this period the bidder (or any person acting in concert) purchases any amount of equity securities of the target for cash, the bidder must extend an all-cash alternative to all recipients of the exchange offer.

With respect to all situations where a cash alternative must be offered, the cash alternative and the shares offered in exchange may differ in their respective values. According to the Takeover Board, both types of considerations must comply with the minimum price rule.

The new rules are increasingly restrictive on the bidder and will increase his financing costs.

ABOUT THE AUTHOR

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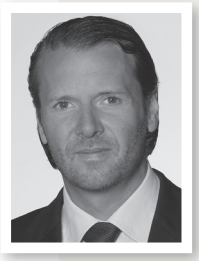

Christoph Neeracher is a partner at Bär & Karrer AG, a leading Swiss law firm in Zurich, Switzerland. As a co-head of the practice group private M&A he specializes in international and domestic M&A transactions (focusing on private M&A and private equity transactions, including secondary buy-outs and distressed equity), transaction finance, corporate restructurings, corporate law, general contract matters (e.g. joint ventures, partnerships and shareholders agreements) and related areas such as incentive agreements for key employees. He also represents clients in litigation proceedings relating to his specialization.

Besides a Master's and doctorate from the University of Zurich he earned a Master of Laws (LL.M.) from New York University School of Law.

Recent transactions include the acquisition of OC Oerlikon's textile business units by the Chinese Jinsheng Group, the acquisition of Clariant's Textile Chemicals, Paper Chemicals and Emulsions business by SK Capital, and the acquisition of SENIOcare Group by Waterland Private Equity.

The International Who's Who of M&A Lawyers 2012 lists Christoph Neeracher as one of the world's leading M&A lawyers, "who is extremely experienced in M&A matters and very strong in negotiations" (The Legal 500 2012).Chambers Europe ranks him as a leader in the field of M&A (2010-2013).

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亚洲业务增长展望

Bär & Karrer AG

瑞士的营商环境

整体状况

尽管市况艰难，目前瑞士经济仍可成功保持相对良好的状态。据瑞士联邦政府经济事务司(SECO)的统计显示，2012年国内生产总值的增长率估计为1.0%，预计2013年国内生产总值的增长率为1.3%，到2014年则为2.1%。与此同时，2012年瑞士市场指数(SMI)（即瑞士蓝筹股市场指数）升幅可观，达14.9%。2013年头5个月，瑞士市场指数再升16%。

瑞士经济表现如此稳健，很大程度上归功于瑞士出口至亚洲国家稳步上扬－由于周边国家的经济前景依然黯淡，瑞士公司日渐转向亚洲地区寻找增长机会。瑞士对亚洲出口经历多年来非常强劲的增长（2010年为+13.4%；2011年为+9.8%）。此后，瑞士对亚洲出口于2012年有所降温（+2.2%），但在很大程度上表现尤胜于出口至欧洲（2011年为-0.2%；2012年为-0.6%）。

虽然对中国（包括香港）的出口于2010年和2011年创出新高，增长率分别为28%和20%，但2012年则略为下降4%。同时，从中国（包括香港）进口目前占其总进口量6.5%左右，于2012年依然录得50%的强劲增幅。正因如此，瑞士（依然）是与中国保持贸易顺差的极少数西欧国家之一。

中国与瑞士签订自由贸易协定预计会进一步提升中瑞关系。该协定已通过协商，虽尚未签订，但目前已可视为一项重大突破，正如现任中国总理李克强接受瑞士报章《新苏黎世报》采访时指出的那样，瑞士很可能是与中国签订此类自由贸易协定的首个欧洲大陆国家及首个世界20大经济体国家。虽然协定的确切内容尚未公布，但人们预计此举会进一步扩大双边贸易关系，正如参与谈判的一名中方官员所言，届时99.7%中国出口瑞士的商品将免税。

选定的瑞士产业

钟表业

瑞士钟表业已摆脱2008年的危机，状态回勇，而2011年的出口额达到创纪录的193亿瑞士法郎（下称「瑞郎」），而2012年7月的单月出口额亦创下19.7亿瑞郎的纪录。就出口额而言，这已占全球市场份额的50%以上。在高端领域，瑞士的主导地位更形显著。事实上，售价1,000瑞郎以上的腕表中，约95%为瑞士制造。目前，瑞士议会正在讨论新法，确定「瑞士制造」标签的使用条件，预期这将进一步强化「瑞士制造」的地位。该法例很可能规定，必须有一定比例的生产成本在瑞士产生。但该比例会否高达60%（甚或80%），以满足瑞士钟表业众多厂商提出的要求，现阶段尚未清楚。

过去数年，亚洲（尤其是中国）市场对瑞士奢侈表需求日增，是钟表业取得成功的主要因素之一。德勤于2012年发表的瑞士钟表业研究指出，约三分之一的腕表出口至中国客户。如果顾及对中国游客的境外（包括香港在内）销售额，这个比例显然还要更高。

亚洲买家的欲望已不再局限于个别瑞士腕表，最近亦扩大至数家从事腕表行业的公司。一个鲜明例子便是日本西铁城控股株式会社于2012年3月收购Prothor Holdings SA及其附属公司La Joux-Perret SA（一间领先的机械表芯制造商）及高级腕表品牌亚诺。其他例子还包括中资公司中国海淀分别于2011年和2013年收购两家瑞士奢侈腕表公司－绮年华和昆仑表。

机械和电气工程行业

瑞士机械和电气工程行业比钟表行业面对更大的困难，主要原因是持续不断的主权债务危机和瑞郎强势使其承受颇多压力。尽管2010年的相应出口额增长8%，但2011年已初现颓势，仅温和增长

1.2%，而2012年更下滑了9.7%。对中国（包括香港在内）的出口表现尤见不济，下跌了36%。

相对于钟表行业录得的高利润，瑞士机械和电气工程行业的利润率在危机前已相当微薄，并在过去数年持续下降。因此，瑞郎升值为积极从事该行业的公司增加压力，促使其中一些公司剥离被视为非核心的部分业务，以便更专注于自身的主要优势。瑞士的OC　Oerlikon公司便是其中一例。该公司是机器和设备工程领域的全球领先者，将其天然纤维及纺织品业务部门分拆出售予中国金盛集团。该项交易于2012年12月签署，预计在2013年第二季度完成，并须经中国商务部（下称「商务部」）的合并控制批准。

化学和制药行业

鉴于瑞士国土面积不大，仅约800万人居住，瑞士的化学和制药行业占全球约5%的市场份额，使其成为该行业的世界领先国家之一，可谓成就卓越。就销售额而言，瑞士的诺华公司目前是全球最大的制药公司，而其国内竞争对手罗氏则位列全球第五。

尽管对中国（包括香港）的相应出口处于增长势头，2012年的增幅达+22%，但目前仅占瑞士全球出口总额比例的3%。总体来说，出口保持非常稳定，受当前严峻的经济环境影响不大。

随著全球竞争加剧，从事该行业的公司继续专注于自身的核心能力，导致行业出现持续不断的重组和改组。高度专门化企业从原先提供广泛产品的多元化公司中脱胎而出。

举例说，瑞士的特种化学品企业科莱恩公司近期将自身的纺织化工、造纸、特种化工及乳胶业务售予位于美国的私人投资机构SK Capital Partners。

并购活动－2013年的展望

安永会计师事务所指出，与2012年第三季度相比，第四季度的交易数量增加16%，交易额亦增长近86%。与上一年相比，2012年的交易数量增加11%，交易总额亦增长56%。虽然与瑞士买方或卖方的大部分交易仍有美国或欧洲对手方参与，但亚太区对手方的相对重要性正持续急速上升。

瑞士的并购市场预计会稳定保持在2012年的温和水平或有轻微增长；前景依然不明朗，特别受欧元区的进一步动向影响。

由于瑞士公司拥有大量现金储备，加上瑞郎呈强势，瑞士公司通常会是买方而非卖方身份。毕马威进行的一项研究显示，2012年瑞士参与者所涉的并购交易中，占71%是以瑞士买家身份进行交易。

商品和金融服务业料会进行更多交易，尤其在私人银行业方面，许多小型业者已承受相当大的利润压力，料会导致进一步合并。预料出口导向的瑞士公司亦会持续承受利润压力，促使其进一步出售非核心业务。这可能会鼓励亚洲的潜在买家向低估值的欧洲目标公司进行投资。

瑞士的法律环境

整体状况

瑞士没有全套法律法规处理境外投资，监管框架反而取决于目标公司所从事的业务类型。《瑞士联邦宪法》在整个瑞士境内保障贸易和工商自由，使得任何人（包括外国公民）在瑞士均可成立公司或持有公司权益和经营业务。大部分商业企业均无须获政府部门的批准、登记或许可，亦无须加入成为专业协会的成员。

但部分行业须获得政府部门登记或批准，譬如银行、保险、投资基金、赌场以及某些军火的制造和贸易等。还有其他业务或专业可能需要联邦或州政府的某类批准或许可，例如广播公司、学校、酒店餐馆（仅在某些州）、医生、牙医、药剂师和律师等。

公司结构

瑞士的公司法规定可在瑞士以不同的业务组织形式设立公司和开展业务。哪一种业务实体合适视乎多项因素，譬如公司规模和业务性质。税务事宜亦可能是选择合适业务实体一个重要的考虑因素。外国的公司及个体可自行选择最适合自身业务的法律形式。

瑞士法律对非以有限公司形式经营业务的合夥型公司（独资经营）与资本型法团公司（股份有限公司和有限责任公司）加以区分。

股份有限公司

依照瑞士法律，最常见和最普遍的业务组织类型是股份有限公司。以这种形式成立的企业有自身的名称、独立于其成员的自身法人地位，以及分割成股份的固定名义资本。

境外公司往往选择这种类型作为其瑞士附属机构的法律形式。无论是规模非常大的公司还是中小型公司均可采用股份有限公司的法律形式。股份有限公司可以由一人或多名个别人士成立，他们不一定是瑞士公民或瑞士居民。但是，该公司必须至少由一名居于瑞士的人士代表。股本必须至少10万瑞郎。在记名股票的情形中，出资额至少为每股票面值的20%。无论何种情形，注册股本的出资额须至少5万瑞郎，而且必须在成立时缴付（现金或实物）。不记名股票必须全额实付后方可发行。最高权力机构为董事会，在外代表公司。

有限责任公司

对于规模较小的业务，以有限责任公司（GmbH）代替股份有限公司亦是上佳之选。GmbH同样拥有独立于其成员的自身法人地位。公司的法律责任以其资产为限，而须缴付的名义资本为2万瑞郎。与股份有限公司不同，有限责任公司无须设置董事会，而常务董事负有管理责任。

设立公司

设立瑞士公司的过程非常简单直接，一般从递交所需文件到公司视为在法律上成立的日期仅需两至四周时间。具体时间视乎公司的性质以及在瑞士的位置。

购入业务或公司

倘若是购入业务，收购人可以选择资产交易或股份交易。尽管股份交易一般较为常见，但应视乎下列事宜对决策作出认真评估：

1. 目标是否采取法团形式；
2. 收购人是否想要购入整个业务；
3. 是否存在隐含的负债风险；
4. 资产是否易于转让；
5. 税务和会计考虑因素是否更有利于某种业务组织形式；
6. 资产是否须质押，以便为交易提供资金。

与私人持有瑞士业务或公司相关的并购交易并不受某特定法规管辖，反而基本上适用由判例法所指的销售货品一般规则。倘若由专业机构处理交易，可通过详尽的合约文件落实相对简略的法律规定。

重组

除了设立新公司或购入现存的业务或公司，还可选择其他途径在瑞士投资及/ 或成立公司，譬如设立分支机构，组成合营企业或进行跨境合并。位于瑞士的境外公司最常选择的途径是成立附属公司（采取股份有限公司或有限责任公司形式）和分支机构。

公司之间的合并、拆分和资产转移及转型受《瑞士义务法典》和《瑞士合并法》规管。在（跨境）合并情形中，《瑞士反托拉斯法》的条文亦须予以遵循。

管理层收购和杠杆收购

管理层收购指目标公司的管理人员和另外的股权和债务投资者（如银行或私募股权基金）联合收购目标公司股份的交易。跟杠杆收购的主要差别在于，管理层收购由债务和股权投资者主动提出。

在上述两种情形中，正式的购买人通常会是一家新成立的收购公司，该公司购入股份，并在某段期间后并入目标公司，但须受税务裁定（如相关）管辖。收购通常透过公司的资产及偿还公司贷款的未来盈利进行融资。倘若有银行给收购融资，通常会质押目标公司（或收购公司）的股份作为担保。尽管债务投资者期望获付定期利息及（部分）偿还贷款，有时亦期望可选择买入股份（中间贷款融通的情形），但股权投资者考虑到公司的预期发展及以股份出售形式撤资的前景，期望从中获得适当的回报。

在2009年金融危机期间，由于缺乏杠杆机会，收购市场几乎陷于停顿，但此后已缓慢复苏。

私募股权

在瑞士，最常用的私募股权结构为离岸（通常为泽西或根西）有限责任合夥企业，而其投资顾问（亦可能是其关键有限责任合夥人）则居于瑞士。虽然《2006年瑞士联邦集体投资计划法》在瑞士引入了集体投资计划的新公司形式，尤其是集体投资的有限责任合夥意欲成为普通法有限责任合夥的瑞士翻版，但这法律工具至今成效不大，主要原因来自于缺乏瑞士金融市场监督管理局的相应审批做法，以及附带利益在税务方面含不确定因素。

合营企业

除并购方式外，还可以通过合营企业方式实现公司合并，而合营企业可以采用合夥形式，但更常见的是组成法团。值得注意的是，倘若涉及属于股东会议职权（如股本增加）或董事会职权（如涉及董事会大多数批准要求；将业务授予管理层或批准股份转让）等标的事项，瑞士合营企业无法通过签订合约协议对自身构成法律约束。因此，瑞士企业一般应避免签立合营协议，除非是涉及非法团事宜的一系列指定权利和义务，譬如与作为对手方的某一合营夥伴订立许可、贷款、租赁或采购方面的协议。

在涉及法团事宜的情形中，惟有（未来）股东可以承担合营企业协议中的合约义务。在该等协议中，他们通常会议定须采取的必要步骤，在法团层面实施合约安排，譬如行使股东权利或指示董事会成员拟定内部组织规章，当中包含商定的安排或委任特定管理人员等等。

倘若合约安排没有或无法转变成法团文件，各合营企业合夥人仍可能起诉对方强制履约。例如，可以按合营企业股东的身份起诉一方，要求其以合乎合约义务的方式行使投票权。董事会决议同样如此，但由于董事须遵守不可转让、不可分割的受信责任，股东须指示董事会成员如何表决。如果无法强制履约，违反合营协议的一方则须负上损害赔偿的法律责任。

近期法律动向摘录

修订《卡特尔法》

2012年2月，瑞士联邦委员会向议会提交关于修订《卡特尔法》的提案。修订内容旨在禁止所有形式的横向价格、产量和领地协议，以及纵向价格和领地协议。

目前，瑞士竞争委员会（下称「竞委会」）必须证明协议确实对竞争造成影响，即相应协议明显限制竞争。根据拟议修订，倘若签订横向价格、产量和领地协议及纵向价格和领地协议，则无需上述证明。即使该等协议加剧竞争或尚未实施，除非相关公司可以证明出于经济效率而如此行事，否则该等协议将被禁止，并被判以罚款。这项转变将会让基于成果的判断法转变成非常形式化的客观判断法。这项转变尤其会影响到横向协作，譬如采购协作、生产及合营协议。在此类协议中，双方必须证明该等合作给顾客带来明确好处。在限制纵向协议方面，预期竞委会将加强已经非常形式化的做法。

另外，预期对《卡特尔法》的变更会是在合并控制案件中引入「严重妨碍有效竞争」（SIEC)的概念，而这一概念早在欧洲委员会及其他机关予以采用。与瑞士目前采用的市场主导测试相比，「严重妨碍有效竞争」概念会降低禁止合并的门槛。但在某些情形中，竞委会以非常宽泛的方式解释现行的市场主导测试。因此，预期「严重妨碍有效竞争」测试的变更实际上不会造成太大变化。

再者，该项修订旨在通过制度改革加强法治，旨在创建一个对行为案件进行裁决的法庭，而现行的竞委会则会成为自身没有决定权的检控机构（合并控制案件除外）。该竞争管理部门将开展调查，并向竞争法庭（联邦行政法院内新设的反托拉斯专门法庭）提出动议。

修订《集体投资计划法》

《集体投资计划法》的修订于2013年3月生效，旨在进一步调整瑞士的监管方式，使其合乎国际标准，特别是《另类投资基金管理人指令》。此项欧盟指令预期于2013年中生效，以确保瑞士金融服务提供商不受歧视地进入欧洲金融市场。

这项新的欧盟指令将在欧盟层面对另类投资基金管理人引入相同规例，给另类投资基金（如对冲基金和私募股权基金）的资产管理人带来影响深远的监管变动。居于或所管理的资产位于欧盟地区，或者向位于欧盟的专业投资者发行股份的另类投资基金管理人必须取得授权和接受监管。《另类投资基金管理人指令》将适用于集体投资计划中的所有欧盟投资顾问，而他们尚无须遵守《可转让证券集体投资企业指令》（UCITS IV）。集体投资计划的管理不再转授予居于非欧盟国家的投资顾问，因为这些国家无须遵守同样的监管。第三国家的另类投资基金管理人要满足哪些条件才能获准管理欧盟另类投资基金，并在欧盟成员国分发另类投资基金股份，仍需拭目以待。目前对《集体投资计划法》的修订旨在增加2013年后的资产管理确实授予瑞士资产管理人的几率，并将管理、保管与发行规则与《另类投资基金管理人指令》接轨，以取得欧盟的许可。

《集体投资计划法》的部分修订使得瑞士资产管理人必须持有瑞士金融市场监督管理局的牌照，方可管理境外集体投资计划，给上述另类投资基金增加额外的行政成本，而这可能特别对中小企造成问题。另外，这可能令对冲基金管理人不会迁移至瑞士。

「反不当高薪」的全民倡议

2013年3月，瑞士选民认可「反不当高薪」(Against Fat-Cat Salaries)的全民倡议（德文为「*Abzockerinitiative*」）。这项举措仅适用于瑞士的公众公司，要求对董事会成员和高级管理层的透明度和薪酬制定广泛的强制性规则：

1. 董事会和高级管理人员的薪酬总额必须得到股东大会批准；
2. 禁止向董事或高级管理人员支付遣散费（金色降落伞）、预付薪酬及类似的非经常性薪酬，以及禁止董事和高级管理人员与集团公司签订多份合约；
3. 公司章程必须包含对董事和高级管理人员在贷款、退休待遇、激励及参与计划，以及集团外任职数量方面的规定；
4. 股东大会每年均须选出董事会主席、董事会成员、董事会的薪酬委员会成员，以及独立代理人；以及
5. 公司将不再被允许担当法团代表人，但须允许位处偏远的股东以电子方式投票。

目前正在准备将这项全民倡议纳入瑞士法律，尤其是《瑞士义务法典》。因此，这项日后推出的规例将会对市场带来什么影响尚无法评估；不过，倘若倡议中的严厉罚则真的予以实施，料会对瑞士经济竞争力造成负面影响。具体来说，「反不当高薪」倡议还可能特别对私募股权产生不利影响：如果能够出售这些公司获利，私募股权机构一般会向其投资组合公司的管理层给予补偿。由于该项倡议内容禁止买卖激励措施，此类激励做法几乎肯定不再可行，因而剥夺了私募股权机构透过激励手段改善自身投资组合公司的业绩。

资本分摊原则代替面值原则

自2011年1月1日开始，公司在1996年12月31日后向股东（包括股票溢价和出资）偿还任何资本分摊存馀均同样被视为偿还名义股本。根据瑞士法律，作为瑞士居民的个人，对该等偿还款项无须缴纳所得税，亦无须缴纳联邦股息预扣税。

要符合免税偿还或分发的条件，该存馀款额必须源自股东的出资。若要免税分发该等存馀款额，资产负债表内必须有独立存馀账户反映该项存馀款额，而且任何波动须定期向瑞士联邦税务局汇报。

目前，瑞士议会正在讨论资本分摊原则，新规则会否实施以限制偿还资本分摊存馀，目前仍相当不明朗。

修订《联邦证券交易所和证券商法》

关于证券交易所和证券商的联邦法律修订已于2013年5月1日生效。根据该项修订，内幕交易和操纵兑换率此后将可能构成清洗黑钱的控罪依据。

经修订的瑞士收购制度

在2013年5月1日，经修订的瑞士收购制度已经生效。最相关的变更是取消了控制权溢价，并规定在若干情形中须提供纯现金收购方案，而此举先前并不存在。就构建公开收购要约而言，出价人需考虑经修订制度所产生的影响，并探索新颖的方法。

收购要约前增股

在启动公开收购要约前增股，使得出价人可以提高其公开收购要约的成功机会，因为在启动收购时持有重大股份可减少出现竞争性收购的可能。如果启动竞争性收购，初始出价人很可能从竞争性收购中投标股份而取得可观的投资回报。

根据2013年5月1日后经修订的瑞士收购制度，要约前增股变得愈加复杂：根据最低价格规则，公开收购要约中的要约价必须至少等同于：

1. 出价人在公开收购要约公布前12个月购买目标股份所支付的最高价格；及
2. 60个交易日交易量加权平均价格（又或是如果目标股份被认为缺乏流动性，则基于估价）。

最低价格规则适用于强制性要约和控制权出现变动的要约－这些要约涉及的股份一旦被收购，将带来强制性要约义务。该规则不适用于纯粹的自愿要约，包括部分要约收购和对目标公司任何股份部分的要约，而该公司在其公司章程中载有有效的「选择拒绝」条文。

取消控制权溢价意味著在跌市或者当特定目标的股价因针对目标的负面事件而出现股价暴跌时，出价人在启动要约前12个月内买入的目标公司股份，尤其是目标公司股价下跌前买入的股份将为其后要约收购价格设定底价。

根据经修订的最低价格规则，出价人必须细心权衡提出收购前增股的好处与设定最低要约价的风险，因事实可能证明价格水平本不必如此之高。

启动收购前增股的另一项新限制适用于换股要约。如果出价人（或与出价人采取一致行动的人士）在换股要约公布前12个月内已经现金收购10%或以上的目标股份，则须向控制权出现变动的各要约接收人提出纯现金收购方案。

通过选择拒绝确保灵活度？

为避免适用经修订的最低价格规则（以及出价人在要约前以现金买入10%或以上目标股份的情况，则在换股要约中有责任提出现金收购方案），唯一办法是在潜在目标公司的公司章程中引入有效的「选择拒绝」条文。

根据瑞士收购委员会已修订的做法，倘计算全体代表股东的表决数及仅计算引入「选择拒绝」条文对其有利害关系的股东的表决数，两者皆达过半数票，则假定引入「选择拒绝」的股东决议符合目标公司或其股东利益。

即使符合上述要求，收购委员会仍可在例外情形中认为推定证明有误。如果股东决议不符合双点票的要求，收购委员会则推断「选择拒绝」对少数股东不利，因而并非有效地引入。

换股要约中的纯现金方案

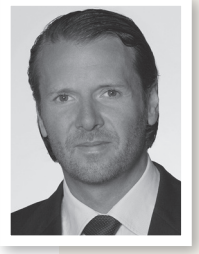
就要约前增股而言，收购委员会不仅收紧了换股要约中的现金方案规则，而且确认在要约结算后期间，出价人以现金购入目标股份不应当再受任何限制。因此，只要遵守最佳价格规则，换股收购中的出价人可以在要约结算后以现金收购目标股份（即在附加接受期结束后6个月内，所支付的价格不得高于换股中提供的股份价值）。

经修订换股要约制度的另一重点涉及要约公布至结算的一段时间。该段时间扩大至适用于各类要约，包括局部要约，以及目标公司在其公司章程中处理有效「选择拒绝」条文的要约。倘若在此期间出价人（或采取一致行动的任何人士）现金买入目标公司中任何数量的有价证券，出价人须向各换股要约接收人提出纯现金收购方案。

对于须提出现金方案的各种情形，现金方案和提出股份交换的相应价值可能有差异。收购委员会规定，上述两类对价均须遵守最低价格规则。

新规则对出价人的限制增加，并将增加其融资成本。

关于作者



Christoph Neeracher是位于瑞士苏黎世一家领先的瑞士法律事务所Bär & Karrer AG的合夥人。作为私营兼并业务组的联席主管，他擅长于国际和国内兼并交易（特别是二级收购和受压股票等私营兼并及私募权交易）、交易融资、企业重组、公司法、一般合同事宜（包括合营企业、合夥和股东协议），以及对关键员工的激励协议等相关领域。他亦以其专业在诉讼程序中代表客户。

除了在苏黎世大学取得硕士学位和博士学位外，他亦在纽约大学法学院取得法学硕士荣衔。

他近期参与的交易包括中国金盛集团收购OC Oerlikon的纺织业务部门、SK Capital收购Clariant的纺织化学品、造纸化学品和乳胶业务，以及Waterland Private Equity收购SENIOcare Group等。

《2012年并购律师国际名人录》(International Who's Who of M&A Lawyers 2012)将Christoph Neeracher列为全世界最重要的兼并律师之一，称许他「在兼并方面有著丰富经验，并具备很强的谈判能力」（The Legal 500 2012）。Chambers Europe亦将他列为兼并领域的领导者(2010-2013年)。

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