Mergers & Acquisitions

Jurisdictional comparisons **First edition 2012**

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1. MARKET OVERVIEW

1.1 Please give a brief overview of the public M&A market in your jurisdiction

In 2010, public M&A activities strongly decreased in Switzerland. While in 2009 10 public M&A deals amounting to a total transaction volume of CHF 2,179 million took place, activities in 2010 dropped to three deals with a transaction volume of only CHF 635 million. All three deals in 2010 were friendly and voluntary offers, compared with three mandatory offers and seven voluntary bids, including one unfriendly, in 2009. A look at 2011 suggests that public M&A activities are increasing again with three mandatory and nine voluntary offers, all being friendly offers.

1.2 What are the main laws and regulations which govern the conduct of public M&A activity in your jurisdiction?

Public tender offers by way of cash or securities or a combination thereof are governed by the Federal Act on Stock Exchanges and Securities Trading (SESTA) and its associated ordinances, the Takeover Ordinance (TOO), the Stock Exchange Ordinance (SESTO) and the Ordinance of FINMA on Stock Exchanges and Securities Trading (SESTO-FINMA). SESTA regulates all types of public tender offers and is governed by the principles of transparency, equal treatment of investors and fairness to ensure the competitiveness of the Swiss takeover market. Within this framework, the SIX Swiss Exchange (SIX) is responsible for issuing regulations regarding the admission of securities to listing as well as all provisions on the continued fulfilment of the listing requirements. The regulations issued by SIX and by the Swiss Takeover Board (Takeover Board) must be approved by the Swiss Financial Market Supervisory Authority FINMA (FINMA).

Takeovers of Swiss public companies by way of statutory mergers are governed by the Federal Act on Merger, Demerger, Transformation and Transfer of Assets (Merger Act). Such statutory mergers generally only happen if both involved companies are Swiss, which was the case in the far largest transaction (Novartis-Alcon) of 2011 as well as in a merger of two regional banks which now form acrevis, also in 2011.

1.2.1 What entities are covered?

Swiss takeover regulation applies if the target company has its registered office in Switzerland and at least one class of equity securities listed on a Swiss stock exchange. The rules do not apply to companies whose equity securities are exclusively listed on a foreign exchange, irrespective of where their registered offices and headquarters are located or where their shareholder base resides. In the case of TAG Heuer International SA, the Takeover Board has exceptionally applied the takeover rules to a company listed in Switzerland with its registered seat abroad but its *de facto* headquarters in Switzerland. In specific situations, the takeover rules have been applied to companies without any listing in Switzerland, eg, where the target company had been spun off from a Swiss public company shortly prior to the transaction (eg, Clair Finanz Holding AG).

Within the planned revision of SESTA (see section 14 below), the takeover regulation shall become applicable to target companies with registered offices abroad, holding a main listing of some or all of their equity securities in Switzerland.

1.2.2 Who is the regulator?

The Takeover Board and its supervisory authority FINMA are competent to ensure compliance of Swiss public tender offers with the applicable regulation. The decisions of the Takeover Board may be appealed to FINMA by any party affected by it (ie, the bidder, the target company and any qualified shareholder of the target company). The right of qualified shareholders to join the takeover procedure as a party and appeal against decisions is currently granted to shareholders of the target company holding at least two per cent of the voting rights in the target company. Within the planned revision of the SESTA, the threshold is to be increased from two per cent to three per cent.

The decisions of FINMA can then be brought before the Swiss Federal Administrative Court. The decisions of all instances are immediately published on *www.takeover.ch.*

1.3 Other than in relation to anti-trust, are there other applicable regulations such as exchange and investment controls?

Besides the above-mentioned regulations (see section 1.2 above), there are a number of other applicable regulations in the context of public tender offers:

(i) Swiss general corporate law (Swiss Code of Obligations), which governs shareholders' rights and directors' fiduciary duties;
(ii) the Swiss Criminal Code, which stipulates the crimes of insider trading and market manipulation (within the planned revision of SESTA, these two crimes are to be revised and transferred from the Criminal Code into SESTA);
(iii) the listing rules of SIX, which define *ad hoc* disclosure requirements in relation to price-sensitive information, and regulate the listing and delisting of shares; and
(iv) the Federal Act on the Acquisition of Real Estate by Persons Abroad (*Lex Koller*), which restricts the direct or indirect acquisition of residential property or land by foreign persons, or foreign-controlled companies.

Further, specific regulations apply to certain industries such as the financial sector (regulated by FINMA), the telecommunications sector (regulated by the Competition Commission) and the energy sector (regulated by the Swiss Federal Office of Energy).

2. PREPARATION AND PRE-ANNOUNCEMENT

2.1 What are the main structural means of obtaining control of a public company? If there is more than one, what are the key advantages and disadvantages of each route? Is one route more commonly used than others?

The two main structural means of obtaining control of a Swiss public company are public takeover offer and statutory merger.

Public takeover offer

The most common form is the launch of a public tender offer for all publicly held shares in the target company. Such an offer may involve an offer for cash, an exchange offer for securities (in case of a mandatory offer, the bidder is obliged to alternatively offer cash), or a combination thereof.

Swiss takeover law distinguishes between voluntary and mandatory offers. A bidder is obliged to publish a public tender offer for all listed equity securities of the target company if the bidder passes the threshold of 33.33 per cent of the voting rights (whether exercisable or not) of the target company ('mandatory offer obligation'). By way of amendment of their articles of association, public companies may increase the triggering threshold to up to 49 per cent of the voting rights ('opting up') or completely waive the mandatory offer obligation ('opting out'). Furthermore, the Takeover Board may grant exemptions from the obligation to make an offer in certain circumstances.

Mandatory offers must be made either for cash or include a cash alternative when making an exchange offer. Mandatory and voluntary offers for a number of shares exceeding the threshold triggering the mandatory offer obligation are subject to the minimum price rule. The offer price must equal to at least the higher of: (i) the market price (ie, 60 trading days VWAP); or (ii) 75 per cent of the highest price paid by the bidder for equity securities of the target company in the preceding 12 months (component allowing control premium). In the event that the target company's shares are deemed illiquid according to the Takeover Board's Circular no. 2, the market price component of (i) above must be replaced by a valuation to be performed by the so-called review body (see section 4.1 below).

The 75 per cent rule allowing for the payment of a control premium for shares acquired prior to the launch of the offer is planned to be abolished within the pending revision of SESTA. In the event that the revision is passed, the minimum offer price will have to equal the highest price paid by the bidder for equity securities of the target company in the 12 months preceding the launch of the offer.

Statutory merger

The second form to obtain control of a Swiss public company is a statutory merger. Statutory mergers are typically structured either by: (i) one company being dissolved and merged into another (absorption); or

(ii) two companies being dissolved into a newly incorporated company (combination). The assets and liabilities of the dissolved company are automatically transferred to the absorbing company. The merger structure is typically chosen if both companies involved are Swiss. Mergers are less frequent than public tender offers.

In order to complete a statutory merger, the following documentation must be prepared:

(i) a merger agreement between the merging companies;
(ii) a joint or separate report of the boards of directors outlining, *inter alia*, the rationale and the valuation of the two entities;
(iii) a qualified auditors' report on, *inter alia*, the valuation of the entities and the applied methods; and
(iv) resolutions by both company's boards and shareholders' meetings (at least 66.66 per cent of the votes represented and 50 per cent of the capital represented) approving the merger.

The merger must be registered with the commercial register.

For a period of 30 days prior to the shareholders' meeting, shareholders are granted the right to inspect the merger documentation and employees' representatives must be informed and consulted.

2.2 What secrecy and disclosure obligations are placed on bidders and target companies ahead of any formal announcement of a bid?

Obligation to notify

Whoever directly, indirectly or in concert with other parties purchases or sells equity securities or rights in a company with registered offices in Switzerland and some or all equity securities classes listed on a Swiss stock exchange and as a result reaches, exceeds or falls below any of the thresholds of three, five, 10, 15, 20, 25, 33.33, 50 and 66.66 per cent of the voting rights (whether exercisable or not), is obliged to notify this fact within four trading days to the company and the disclosure office of the stock exchange. Sanctions for breaching disclosure obligations are a fine or the suspension of the voting rights for up to five years.

Disclosure of price-sensitive facts

Pursuant to the listing rules of SIX, issuers are generally required to promptly disclose price-sensitive, non-public information relating to their business activities. An unsolicited approach by a bidder is deemed such a price-sensitive fact. However, the listing rules allow issuers to postpone disclosure during the negotiation and evaluation period of significant transactions such as takeovers for as long as confidentiality is strictly maintained. When a leak occurs, SIX and the public must be immediately informed.

Management transactions

The SIX listing rules include disclosure obligations for management transactions. Issuers must report transactions concluded by members of its board of directors and management in its equity securities, convertible and purchase rights and any financial instrument with the company's equity securities as underlying. The deadline for directors and managers to report their transactions to the company is two trading days, whereas the deadline of the issuer to report to SIX is another three trading days. SIX then publishes the transactions and the transacting individuals' functions on its website. This is relevant in case the bidder purchases shares from the management ahead of announcing the offer to the public.

Potential offer

If a potential bidder announces that it considers to make a bid for a target company (without making a formal pre-announcement), the Takeover Board may set the potential bidder a deadline to either 'put up' by making a formal offer or 'shut up' by confirming that it will refrain from launching a takeover offer for a period of six months ('put up or shut up rule'). This six-month period can be waived by the Takeover Board under certain circumstances (eg, if a third party makes an offer for the target company).

The 'put up or shut up rule' aims at liberating the target company from the destabilising consequences which a potential offer typically creates.

The violation of the rule leads to any subsequent formal offer made by the potential bidder being subject to the best price rule and the minimum price rule (see section 7.1 below) from the date of the announcement of the potential offer.

2.3 Are there any constraints over the ability of a bidder to carry out due diligence on the target?

There exists no general obligation for a target company to grant access to due diligence. The target company's board must decide within its fiduciary duties whether it is in the interest of the company and its shareholders to allow for a due diligence or not. If a target company grants access to due diligence to a (potential) bidder, any other bidder, whether friendly or hostile, has the right to access the same information that has been disclosed to the first bidder. In public tender offer situations, it is customary to limit access to high level due diligence. In a friendly scenario, the bidder will enter into a confidentiality agreement with the target company prior to obtaining access to due diligence.

2.4 Is it possible for a target company to grant a bidder exclusivity and/or a break fee? Are there any other steps which can be taken to provide greater certainty to a bidder that its bid will be successful?

The possibilities to protect a transaction or to grant a bidder exclusivity and/or agree on a break fee are limited. Break fees are permitted to the extent that they neither result in coercing shareholders to accept the offer nor in deterring a potential competing bidder from launching a competing bid. So far, this has meant that break fees must be structured as compensation for costs and expenses incurred by the bidder in connection with the offer.
Yet, no court has ruled on whether break fees of a nature to frustrate competing bids violate takeover law. In the past, break fees have ranged from CHF 800,000 (Forbo Holding AG in 2003) to CHF 20 million (Centerpulse

AG/Smith & Nephew Group Plc 2003). Break fees must be disclosed in the offer documents.

In order to comply with its fiduciary duties, the target company's board will generally refrain from granting exclusivity to a bidder. Besides offering a high price, the best protection for a bidder is to build up a significant stake prior to the launch of the offer (with the already described disadvantage of having to disclose the crossing of certain disclosure thresholds).

2.5 Are there any restrictions on a bidder obtaining commitments from a target company's shareholders ahead of the announcement of a bid?

Bidders may collect irrevocable tender commitments from shareholders or they may enter into share purchase agreements (SPA) with them prior to the offer. Takeover law allows, however, shareholders to revoke their (irrevocable) tender commitments if a competing offer is announced. On the other hand, SPAs which are not conditional upon the success of the tender offer may not be cancelled if a higher competing offer is launched. Block trades prior to the announcement of the bid may provide effective protection against a competing bid.

Depending on the extent to which the agreement is linked to the public tender offer, the shareholders may be deemed as acting in concert with the bidder. Parties acting in concert with the bidder are subject to the best price rule, among other obligations.

The bidder has to disclose the content of any agreement entered into with shareholders during the 12 months preceding the announcement of the offer in the offer prospectus. Transactions with shareholders of the target company, which have been entered into during the 12 months preceding the announcement of the offer, affect only the minimum price if they are not conditional upon the tender offer. They are subject to the best price rule if they are directly or indirectly linked to the success of the offer.

2.6 Are the directors of the target company under any particular obligations or duties in the period leading up to a bid?

In the period leading up to a bid, the directors have to consider the *ad hoc* publicity rules (see section 3.1 below).

Within its fiduciary duties, the board of the target company has to decide whether a public tender offer is in the best interest of the company and its shareholders. If so, it will generally try to maximise the price offered per share prior to granting access to due diligence and secure other important elements of a possible transaction within the negotiation of a transaction agreement with the bidder. Having said this, there is no obligation of the directors to go for the highest price – directors may, for example, also value strategic benefits (or the fact that no restructuring is planned by a bidder) and thus interests of the company and its stakeholders (rather than concentrating only on the exit price of the shareholders) and therefore prefer a bidder who does not offer the best price.

If the board of the target company decides that a transaction with a bidder is not in the interest of the company, it may refuse access to due diligence and take defensive measures, such as publishing the fact that it has been approached by a bidder, is searching for a white knight, or intends to apply transfer and voting restrictions to the bidder, if such restrictions are foreseen in the articles of association of the target.

In all its actions, the board of the target company is bound by the principle of equal treatment of its shareholders of which it may deviate for cause, ie, if such deviation is in the best interest of the company.

3. ANNOUNCEMENT OF A BID

3.1 At what stage does a bid have to be announced?

Once agreements (if any) relating to the public tender offer are signed, the transaction must be disclosed by way of *ad hoc* publication by the target company prior to the start of trading on the following day. In order to lock in the minimum price, the bidder will typically pre-announce the offer simultaneously (see section 3.2 below, for effect of pre-announcement). The bidder may either publish a pre-announcement or directly publish the offer prospectus. A pre-announcement gives the bidder up to six weeks time to publish the offer prospectus.

If the bidder has entered into any agreement with shareholders or if in case of a transaction agreement the target company holds treasury shares, the bidder will be deemed acting in concert with such shareholders or the target company respectively. The respective aggregated shareholdings must be disclosed within four trading days (see under 'Obligation to notify' at section 2.2 above, for triggering thresholds).

3.2 Briefly summarise the information which needs to be announced at this stage

The pre-announcement must contain:

(i) the bidder's name and registered office;
(ii) the target company's name and registered office;
(iii) the equity securities to which the offer extends;
(iv) the offer price (including the securities offered in exchange, if applicable);
(v) conditions attached to the offer; and
(vi) the expected date of publication of the offer and its duration.

In the offer prospectus, the content of the pre-announcement may only be modified if such changes are to the advantage of the recipients of the offer.

If a pre-announcement is made, the main consequences are that the date of the pre-announcement rather than the date of publication of the offer is considered as the triggering date as from which:

(i) the minimum offer price is determined in the event the offer is subject to the minimum price rule;
(ii) special notification duties of the parties to the procedure start applying;
(iii) certain defensive measures are prohibited for the target company;
(iv) the duty of the bidder to comply with the best price rule starts; and
(v) the calculation of the 12 months in relation to share purchases by the bidder for the purpose of the minimum price rule begins.

The notification duties applying from the date of announcement are the following: the bidder, the persons acting in concert with the bidder, the target company, the qualified shareholders who have requested to become a party to the takeover procedure, and, upon a specific request by the Takeover Board, other qualified shareholders of the target company must notify the Takeover Board's and SIX's disclosure office within one trading day of any purchases or sales in equity securities of target company or in the securities offered in exchange.

4. BID TIMETABLE

4.1 Please provide a brief overview of the bid timetable, assuming that the bid is recommended by the board of directors of the target

Once an offer has been pre-announced, the bidder must publish the prospectus within six weeks. If the bidder must obtain clearances from competition authorities or other regulatory authorities prior to the publication of the offer, the Takeover Board may extend the six-week period.

Prior to publishing the offer, the bidder must appoint a review body to review the offer and issue a report as to whether the offer complies with takeover law. Audit firms which are admitted by FINMA to audit securities dealers or FINMA regulated securities dealers may act as review body. The review body must be independent from both the bidder and the target company.

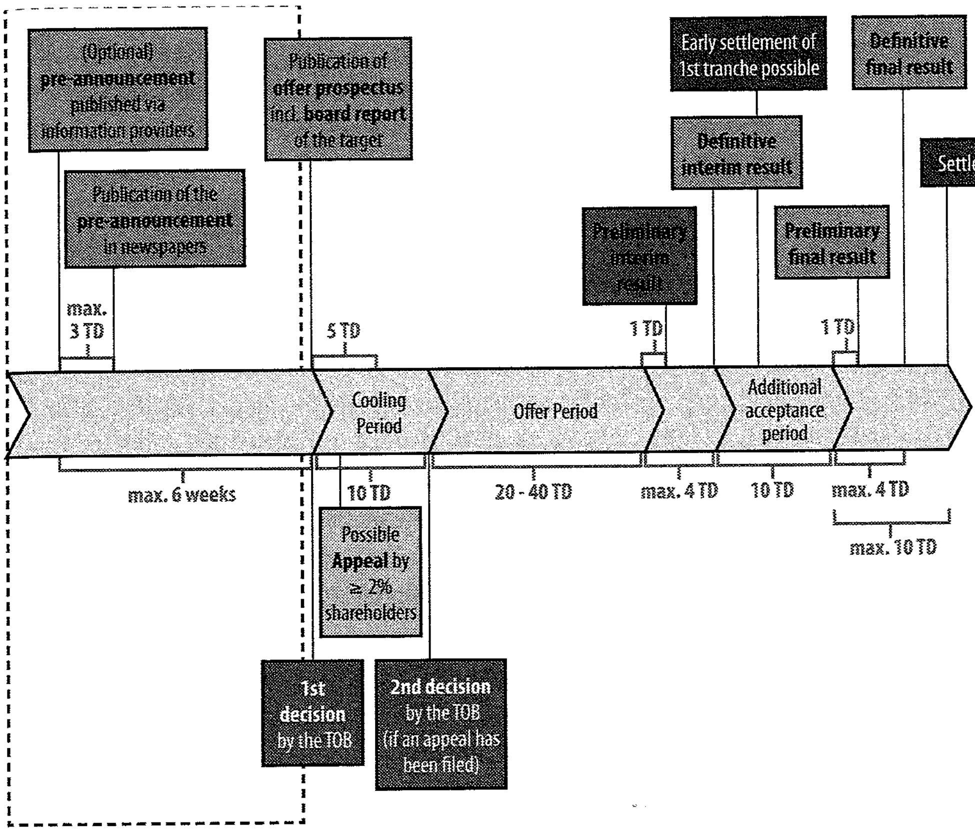
The prospectus will include the report on the offer of the target company's board. The Takeover Board will publish its decision regarding the compliance of the offer on the date of the publication of the prospectus. Following the publication of the prospectus, a cooling-off period of generally 10 trading days applies during which a qualified shareholder, holding at least two per cent of the target company's voting rights (an increase to three per cent is planned in the pending revision of SESTA), may join the takeover proceedings as a party and appeal the decision of the Takeover Board.

The main offer period lasts between 20 and 40 trading days and may be extended or shortened in specific situations by the Takeover Board. It may be reduced to 10 trading days if: (i) prior to the offer, the bidder holds the majority of the voting rights in the target company; and (ii) the report of the target company's board has been included in the prospectus.

On the trading day following the end of the offer period, the bidder must publish the provisional interim result of the offer, disclosing the number of shares tendered under the offer and the number of shares held by the bidder, and must specify whether the conditions of the offer have been met. The definitive interim result must be published no later than four trading days following the end of the offer period.

If the offer has been successful (ie, if the offer conditions have been met or if the bidder has waived all non-fulfilled conditions), the offer must be open for acceptance during an additional acceptance period of 10 trading days after publication of the definitive interim result. The final results of the offer must be published again, on a provisional basis on the trading day following the end of the additional acceptance period and in final form no later than four trading days following the end of this period.

The chart below summarises the takeover procedure in a friendly scenario:



4.2 Are there any material differences if the bid is hostile (ie, unsolicited) and/or if there are competing bidders?

If the bid is hostile, the main difference compared with a friendly bid is that the report of the board of directors of the target company will not be included in the offer prospectus but must be published no later than 15 days following the publication of the offer prospectus. Typically, the target company's board will not sign a transaction agreement with the bidder and will recommend its shareholders not to accept the offer. If the target company's stock is illiquid, the bidder may be forced to provide a valuation of the target company based on publicly available information. Except for any appeal procedures, which may be initiated by the target company and which may prolong the cooling-off period, the timetable of the offer does, in principle, not change.

If a competing bid is made, the timetable set by the Takeover Board will take into account that the shareholders must be in a position to choose between the competing bids. A competing bid must be published no later than on the last trading day of the offer period of the first offer and must remain open for 10 trading days. Upon publication of the competing bid, the offer period for the first offer is extended in order for all offers to close at the same time. Shares tendered into the first bid can be tendered into the competing bid.

4.3 What are the key documents which the shareholders of a target company would typically receive on a bid?

The following key documents aim at allowing the shareholders of a target company to make an informed decision on whether or not to accept the offer.

Pre-announcement: in the event that the offer is pre-announced, the bidder must disclose key parameters of the offer, such as the offer price, any conditions of the offer and the envisaged timetable.

Offer prospectus: on the date the offer is made, the bidder must publish a prospectus detailing the terms and circumstances of the offer. Besides the information which must also be disclosed in a pre-announcement, the prospectus mainly contains:

(i) information on the bidder (including parties acting in concert with the bidder);
(ii) information on the target company (including a statement confirming that the bidder has not received any material non-public information which could influence the decision of the shareholders to accept the offer);
(iii) the bidder's intention as to the future of the target company (eg, squeeze-out, de-listing);
(iv) a description of any material agreements with the target company (eg, transaction agreement) or its shareholders;
(v) a description of purchases of target shares during the 12 months preceding the offer; and
(vi) information on the sources of the funds for financing the offer.

The offer prospectus must contain a report of the review body confirming the completeness and accuracy of the prospectus, the compliance with the principle of equal treatment and the availability of funds (including the availability of any securities offered in exchange, if applicable).

Target company's board report: within 15 trading days of the publication of the offer, the board of the target company must publish a report outlining its position on the offer and recommend either the acceptance or non-acceptance of the offer to the shareholders, ie, the recipients of the offer. Instead of making a recommendation, the board may merely enumerate advantages and disadvantages of the offer. When assessing the offer, the directors are bound by their fiduciary duty. In practice, the board of the target company will base its recommendation on a fairness opinion provided by an independent and qualified expert (audit firm or investment bank). A fairness opinion is mandatory if less than two board members are deemed independent.

The board's report aims at advising the recipients of the offer to make an informed decision. The published information must be accurate and complete. In particular, the report must disclose the known intentions of the shareholders owning more than three per cent of the voting rights, any intention of the board with respect to defensive measures, potential conflicts of interests involving directors and senior managers and a description of the measures taken to prevent these conflicts from negatively impacting the recipients of the offer (provision of a fairness opinion, formation of an independent committee, etc.). The report has to describe significant changes with respect to the last published results and any changes in the business outlook of the company. If the board report intentionally contains untrue and incomplete information or if the board fails to submit or publish such a report, the board members can be sanctioned with a fine of up to CHF 500,000. The Takeover Board requests that in the case that at the end of the offer period the closing date of the last full or interim financial statements of the target company dates back more than six months, interim financial statements must be established. Such interim financial statements are part of the target company's board report but may be included by reference.

Decision of the Takeover Board: after reviewing the offer (if not already occurred before the pre-announcement), the Takeover Board issues a decision which examines the compliance of the offer with takeover law.

5. FUNDING AND CONSIDERATION

5.1 At what stage does a bidder need to have funding in place? Are there any legal or regulatory requirements which the bidder must satisfy to show that its funding is sufficient?

The offer prospectus has to contain limited information on the funding of the offer. More importantly, the review body must confirm in its report (which is included in the prospectus) that funding is in place or that the bidder has taken all necessary steps to ensure that the shares offered in exchange will be available on the date of settlement. During its review, the review body requires the bidder to disclose the financing agreements. In practice, the bidder will not pre-announce the offer unless it has at least an informal approval of the review body that it will confirm certainty of funding in its report. The reason is that with the pre-announcement the bidder is obliged to follow through with the offer (see section 3.1 above). The Takeover Board applies a rigid standard to the requirement of availability of funds.

5.2 Can the consideration offered by a bidder take any form? Are there any special requirements the bidder must satisfy if the consideration is otherwise than in cash?

As a consideration a bidder can offer cash, (listed and non-listed) equity securities as well as non-equity securities including securities issued by a foreign company or a combination thereof. If the securities offered in exchange are not listed or if their market is illiquid, a valuation by the review body is required. The offer prospectus must include detailed information about the bidder, its operations and results, as well as information on the securities offered in exchange. If the bidder intends to list the securities offered in exchange on the SIX, a listing prospectus must also be prepared.

6. CONDITIONS

6.1 Can a bid be made subject to the satisfaction of any pre-conditions? If so, is there any restriction on the content of any such pre-conditions?

With respect to the permissibility of any condition to the offer, voluntary

and mandatory offers need to be distinguished. In the context of voluntary offers, conditions are generally permissible if:
(i) their satisfaction is outside the bidder's control;
(ii) they are stated clearly and in an objective and transparent way; and
(iii) they do not require any actions from the target company that could be held as unlawful (in particular a violation of the board's fiduciary duties).

In addition, the Takeover Board may reject conditions which allow the bidder to drop its bid. If the bidder's participation is required to satisfy the conditions, the bidder must take all reasonable steps to ensure that they are met.

The bidder may and usually does reserve the right to waive certain conditions upon lapsing of the offer period. When publishing the interim results, the bidder must declare whether the conditions have been met, and if not, whether it waives them. If the bidder demonstrates an overriding interest (eg, outstanding regulatory approvals), the decision as to whether certain conditions are satisfied may be postponed until settlement of the offer.

In mandatory offers, only very few conditions are accepted by the Takeover Board.

6.2 What conditions are usually attached to a bid itself? Other than as a result of law and regulation specific to particular sectors and/or bidders are there any conditions which are mandatory?

In voluntary offers, typical conditions are:
(i) a minimum acceptance threshold;
(ii) a MAC relating to the target company;
(iii) the registration of the bidder in the share register in case of registered shares or alternatively the cancelation of transfer restrictions in the target company's articles;
(iv) regulatory approvals;
(v) replacement of the board; and
(vi) no injunction.

In mandatory offers, conditions are typically limited to:
(i) regulatory approvals;
(ii) no injunction; and
(iii) the cancellation of any transfer restrictions in the target company's articles (if applicable).

No mandatory conditions exist.

6.3 Is the bidder able to rely on the fact that a condition is not satisfied as a means of not proceeding with the bid?

The bidder is not obliged to close its offer in the event that one or more conditions are not met. Except for situations of competing bids, it is, however, extremely rare that an offer does not close in Switzerland.

7. STAKEBUILDING

7.1 Is a bidder free to buy shares in the target in the period leading up to a bid and subsequently? If so, what are the disclosure requirements? Are there any material consequences for the bidder or target if stakebuilding does take place?

In principle, the bidder is free to purchase target securities prior to the announcement of the offer. However, in order to comply with the minimum price rule for a period of 12 months prior to the announcement of the offer, the highest price the bidder may pay is 133.33 per cent of the price offered in the subsequent tender offer.

The disclosure obligations of SESTA require a bidder to notify the reaching and passing of a number of thresholds, starting at three per cent (see under 'Obligation to notify' in section 2.2 above). Therefore, stakebuilding does not go unnoticed.

Once the bid has been announced, the best price rule requires equal treatment of all shareholders. If the bidder pays a price higher than the offer price to any shareholder (on or off exchange), all recipients of the offer are entitled to the same higher price. The best price rule applies from the date of the pre-announcement or, if no pre-announcement is made, the publication of the prospectus until six months following the expiration of the additional acceptance period. Stakebuilding to prepare for a subsequent takeover offer is not generally thought to breach insider dealing rules, provided that the bidder does not possess any price-sensitive information other than the plan to launch a tender offer.

8. RECOMMENDED BIDS

8.1 Where a bid is recommended, does the target board require a 'fiduciary out' (ie, the ability to withdraw its recommendation)? If so, what is typically the scope of this right and what are the consequences for the bid?

If a bid is recommended, the bidder and the target company will usually have previously entered into a transaction agreement. This agreement typically sets out:

(i) the terms and conditions of the offer;
(ii) the target company's duty to support the bid and recommend it to its shareholders;
(iii) the target company's future management structure; and
(iv) how the target company shall conduct its business until completion of the transaction.

A transaction agreement leads the target company to act in concert with the bidder (for the disclosure in the prospectus, see section 4.3 above).

An undertaking of the target company to not (actively) solicit other offers (no-shop undertakings) are generally allowed because such undertaking facilitates negotiations without preventing any competing bids (a 'no-talk' clause would not be too restrictive as negotiation with unsolicited rival bidders must remain possible). Swiss law does not stipulate a general duty to auction the company once it has become a target company in a friendly tender offer situation. Moreover, the target company may not commit to any exclusivity which would prevent it from providing equal access to information to all bidders (the equal due diligence rule, see section 2.3 above). Also, the board of the target company must ensure that it is free to advise its shareholders on the merits of any potential competing bid, which includes that they must be free to alter their recommendation over time to comply with their fiduciary duty ('fiduciary out').

9. HOSTILE BIDS

9.1 How can a target company defend a hostile bid?

Ways to defend a hostile bid depend on whether defensive measures are decided before or after the announcement of the offer. Prior to the announcement of any offer, the target company's board is free to adopt a defence strategy within the framework of the board's fiduciary duty and obligation to act in the best interest of the company as well as the principle of equal treatment of shareholders. The following defence methods are generally permitted:

- restriction of the transferability and of voting rights of registered shares: the articles of association can include a provision limiting the shareholding with voting rights to a percentage of the outstanding share capital (often between three per cent to 10 per cent) any one person may represent in a shareholders' meeting. However, a company cannot prevent a shareholder from purchasing shares beyond this threshold and benefiting from the dividend and other economic rights attached to those shares. With respect to the participation exceeding the restricting percentage, the shareholder will be entered in the share register as a shareholder without voting rights. The articles of association may also limit the number of shares any one person may represent in the shareholders' meeting. Depending on the wording in the respective provisions, the board may grant exemptions from the restrictions (there must, however, be a valid reason for such exemptions). These limitations have proven to be an effective defence tool;
- share buybacks: the target company may buy back up to 10 per cent of the outstanding share capital. The Takeover Board has outlined the rules to be followed in the event of a publicly announced buy back in its Circular no.1. Shares held by the target company or by its subsidiaries cannot, however, be voted;
- staggered boards: boards are structured in a way that each year some of the directors are subject to (re-)election. The still popular staggered boards are, however, not a very effective anti-takeover instrument because board members may be forced to step down by an extraordinary shareholders' meeting at any time. At least staggered boards make an election of a majority of directors at a meeting without having an agenda item on laying off current directors almost impossible;
- change of control provisions: most companies' financing documentation contains change of control provisions. Such provisions may also be included in other material agreements which, if triggered,

would seriously harm the target company's business. Change of control provisions are effective defence measures; and

- super voting shares: the creation of super voting shares requires the approval of a qualified majority at the shareholders' meeting. Once in place, it is an effective defence instrument, particularly if it leads to a controlling shareholder who shares the board's strategy. The board's effort to place shares with 'friendly' parties may be facilitated if super voting rights are offered. The search for an anchor shareholder, who enters into a lock-up agreement in relation to his stake, is possible for valid reasons. In such case the withdrawal of pre-emptive rights (which also requires a qualified majority) is permitted.

Poison pills in the form of options or subscription rights, which have a dilutive effect if exercised in case of a hostile takeover, are generally not permitted.

Once a hostile offer is announced, the following defensive measures are subject to the shareholders' approval:

- scorched earth policy: the sale or acquisition of business assets the value or price of which exceeds 10 per cent of the balance sheet total or contributes more than 10 per cent of the earnings of the company;
- crown jewel option: granting a third party the right to acquire a part of the company's core business assets or intangibles if these have been specified as crown jewels by the bidder (irrespective of the value);
- golden parachutes: entering into agreements between the target company and its directors or senior managers which provide for unusually generous severance payments, which are triggered upon such individual's resignation;
- issuance of new shares or bonds with conversion or option rights based on authorised or contingent share capital without pre-emption rights: such issuance remains, however, permitted if the shareholders' meeting, which created the authorised or contingent share capital, expressly resolved that the board would be entitled to issue new shares without pre-emptive rights in the event of a tender offer;
- transactions in target securities and securities offered in exchange: the target company may not acquire or sell its own shares or securities of the company, whose securities are being offered in exchange, or any related financial instruments except if such transactions are part of an employee participation plan; and
- the issuance or grant of rights to acquire shares of the target company: such prohibition relates particularly to conversion or option rights. Pre-existing rights and obligations under an employee or board participation plan are exempt from the prohibition and remain valid.

Certain post-offer measures remain permissible, provided that they do not substantially affect the company's assets (less than 10 per cent), such as:

- defensive lawsuits against the bidder;
- finding a white knight willing to acquire the company and to enter into a competing bidding process (under the assumption that all bidders are treated equally); one such possibility being a management buyout;

- increase the company's short-term value to the shareholders, for instance by leveraging the company and paying out generous dividends; and
- 'Pac Man' defences, ie, a bid launched by the target company to acquire the hostile bidder.

10. COMPULSORY ACQUISITION OF SHARES

10.1 Briefly describe any compulsory acquisition or 'squeeze-out' provisions a bidder may be able to take advantage of in order to acquire the shares of non-accepting shareholders

A bidder holding more than 98 per cent of the voting rights of the target company following the completion of a successful public tender offer is entitled to request the cancellation of the remaining shares against payment of the offer price by way of a statutory squeeze-out according to SESTA. The statutory squeeze-out procedure is a court procedure. The respective action must be filed within three months following the end of the additional acceptance period. The duration of the statutory squeeze-out procedure varies between four and six months. Shareholder rights to challenge the statutory squeeze out are limited to certain formal requirements and do not allow for any claim to an increased compensation (there may be an exemption if the bidder already held 98 per cent at the time it launched the bid).

In the event that following the completion of the public tender offer, the bidder holds more than 90 per cent of the voting rights outstanding but does not reach the 98 per cent threshold, minority shareholders may be forced out of their participation by way of a squeeze-out merger. In a squeeze-out merger, the target company is merged into a (often newly created) company and the target shareholders may be forced to accept a cash compensation or any other form of consideration at the choice of the bidder (eg, the bidder company's shares), provided that the value equals the value of the target shares. Shareholders squeezed out in this manner may challenge the merger and/or the compensation in court within two months from the shareholder's meeting approving the merger. Appraisal claims are rather common in Switzerland.

11. DE-LISTING

11.1 What are the requirements for de-listing a target company's shares following a successful bid?

In principle, public companies may apply for its securities to be de-listed at any time and do not require the shareholders' approval to do so. The de-listing must be in the best interest of the company. In the event of a successful bid followed by a merger or statutory squeeze-out, and in the event that the intention to de-list the target company's securities has been announced in the offer prospectus, the requirements for a de-listing are a mere formality and the timetable is very compact (no post-de-listing trading required).

An application including any relevant documentation must be filed with the Regulatory Board of SIX at least one month prior to the announcement of the de-listing. The Regulatory Board decides on the timetable of the de-listing, ie, it sets the date of the announcement of the de-listing, the last trading day and the date of de-listing.

12. TRANSFER TAXES

12.1 Are there any transfer taxes which are payable on a bid for a target company incorporated in your jurisdiction, under the various routes described above?

The purchase or sale of shares, whether by a resident or non-resident of Switzerland (provided that the non-resident is represented by a Swiss broker), is subject to Federal stamp taxes on the transfer of securities that amount to 0.15 per cent of the consideration for shares issued by a Swiss domiciled issuer and to 0.3 per cent of the consideration for a non-Swiss domiciled issuer. Stamp taxes are usually borne by the bidder.

13. EMPLOYEE ISSUES

13.1 Are there any employee notification or consultation requirements on a bid?

In the context of a public tender offer, the target company's board is not required to inform or consult its employees. In the event of a statutory merger (ordinary or squeeze-out), the employees' representatives of both the absorbing and the absorbed entities must be informed or consulted prior to any decision on the merger by the respective shareholders' meetings. The requirement to inform and consult employees is, however, not burdensome.

14. CURRENT TOPICAL ISSUES AND TRENDS

14.1 Please summarise any current issues or trends relating to public M&A activity in your jurisdiction

Public M&A activities in Switzerland have increased in 2011 compared with the preceding two years. In September 2011, the Federal Council has published a draft for a revised SESTA. Within this revision it is, *inter alia*, planned to abolish the right to pay a control premium of up to 33.33 per cent of the offer price prior to the announcement of the offer. Other significant changes are the introduction of the applicability of Swiss takeover law to foreign target companies with a SIX listing, the introduction of a fine of up to CHF 10 million if the mandatory bid obligation is violated and the increase of the threshold required to be deemed a qualified shareholder with the right to join the takeover procedure from two per cent to three per cent of the outstanding shares of the target company.

The revision of SESTA is subject to approval by the Swiss Parliament. Its entering into force, if passed, cannot be expected prior to 2013.