



M&A IN SWITZERLAND

Christoph Neeracher is a partner at Bär & Karrer and co-head of the private M&A and private equity practice group. He is recognised as one of the preeminent private M&A and private equity attorneys at law in Switzerland and a leading lawyer in financial and corporate law by *IFLR 1000* (2011–2016), *Chambers Europe* and *Chambers Global* (2010–2016), and *The Legal 500* (2012–2016), among others.

Christoph is experienced in a broad range of domestic and international transactions, both sell side and buy side (including corporate auction processes). He advises clients on general corporate matters and corporate restructurings as well as on transaction finance and general contract matters, relocation and migration projects, and all directly related areas such as employment matters for key employees

(eg, employee participation and incentive agreements). In his core fields of activity he represents clients in litigation proceedings.

Philippe Seiler has a broad experience in M&A transactions in various industries, including manufacturing and engineering, IT, watch, real estate, logistics, and pharmaceutical and biotechnology. Mr Seiler does not only cover large transactions and takeovers, but also focuses on small and medium-sized M&A transactions, private equity transactions, management buyouts and outsourcing projects. In addition, Philippe focuses on reorganisations and restructurings, general contract and commercial law, real estate transactions as well as data protection and unfair competition.

What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

Christoph Neeracher & Philippe Seiler: 2015 proved to be a year with a certain cautious tendency owing to the decision of the Swiss National Bank (SNB) to discontinue the exchange rate fixation that had so far set the exchange rate at a stable 1.20 Swiss francs per euro. While 2015 was characterised by rather low M&A activity levels (compared to 2014, the amount of transactions decreased by 17 per cent), 2016 has been very active.

Although levels of M&A activity were low in the first quarter of 2016 (which seemed to be a continuation of 2015's modest activity), the second quarter saw a distinct increase of 38 per cent. The transaction volume of the second quarter also surpassed the volume of the first quarter with, apart from the mega deal involving Syngenta in the first quarter, generally bigger transactions.

In total, the number of transactions concluded in the first six months of 2016 amounts to 164 with a transaction volume of US\$74.2 billion (owing to the announced takeover of Syngenta)

Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

CN & PS: Transactions involving industrial and consumer goods companies have been particularly frequent. Other active sectors include technology, media and telecommunications. However, in comparison to the worldwide trend in TMT activity, the Swiss market is falling behind with the number of transactions in this sector. However, the agrochemicals market is expected to grow, with the Syngenta takeover leading the way.

2015 was a strong year for the financial services sector as well, with a deal value increase of 467 per cent compared to 2014, notwithstanding the 16 per cent decrease in deal numbers compared to 2014. The industrial market sector had to deal with high export prices in the aftermath of the SNB's decision to remove the Swiss franc/euro minimum exchange rate at the beginning of 2015. However, after the initial shock, stability is now returning, and activity is expected to increase slowly, with investors still being cautious. Activity in the power and utilities market has been stagnant, a phenomenon that may be explained by the ongoing insecurity about the regulatory and political developments expected in this sector.

“[The Syngenta takeover] reflects the growing trend of Chinese acquisitions and is a sign of the strengthening public M&A market in Switzerland.”

What were the recent keynote deals? What made them so significant?

CN & PS: The biggest transaction with Swiss involvement in 2015 was the merger of Chubb Corporation and Switzerland-based ACE Limited with a volume of approximately US\$28.3 billion. The result of the merger was the creation of one of the leading global insurance groups.

Another keynote deal in 2015 with a volume of US\$7.2 billion was the sale of certain assets from Lafarge SA and Holcim Ltd to CRH Plc. The cement factories were sold to CRH in order to comply with conditions of the competition regulators.

The acquisition of World Duty Free SpA by Dufry AG was yet another notable deal with an overall volume of approximately US\$4 billion.

The most important transaction of 2016 so far is arguably the US\$43.8 billion Syngenta takeover, announced in February. China National Chemical Corporation (ChemChina) will purchase the Swiss agribusiness company in an all-cash deal after the bid made by Monsanto for Syngenta ended unsuccessfully. This deal will not only represent the essential part of 2016's transaction volume, but also reflects the growing trend of Chinese acquisitions and is a sign of the strengthening public M&A market in Switzerland. The transaction would, in fact, be the biggest overseas acquisition by a Chinese firm to date. ChemChina's goal is to complete the transaction by the end of 2016; however, some of the (regulatory) approvals necessary for the conclusion of the deal are still pending.

In the same month, the US\$1.4 billion takeover of Kuoni Travel Holding Ltd by Swedish private equity firm EQT Partners AB was announced; the offer was settled on 19 May 2016. This was the third Kuoni transaction in succession, as two other Kuoni sales had taken place in 2015 already.



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Two other main transactions this year are the US\$2.5 billion purchase of a significant strategic stake of Glencore Agricultural Products (Glencore Agri) from Glencore plc by Canada Pension Plan Investment Board and the US\$1.5 billion takeover of gategroup Holding AG by Chinese buyer HNA Group Co Ltd.

In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

CN & PS: Generally speaking, consideration may either consist of cash, shares, securities or a combination thereof. Cash settlements tend to be more frequent, as share deals are normally only accepted by the seller if the shares given as consideration are readily marketable, as is the case especially for publicly listed companies. Tax considerations typically also play an important role in determining the type of consideration agreed upon.

The type of consideration accepted in each case depends largely, of course, on the implied shareholders and their intentions, as well as on the specific transaction type and process.

How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

CN & PS: In recent years, regulatory initiatives have increased in number and in complexity. While this is partly because of a certain tendency in Swiss politics to increase regulatory density, Switzerland has also been strongly influenced by the European Union and its directives. With the growing regulatory framework, requirements and costs of market participants subjected to the regulations increase, and it becomes crucial to find pragmatic, efficient solutions to comply with the new rules.

One of the more recent regulatory developments has been the enactment of the Financial Market Infrastructure Act (FinMIA) on 1 January 2016, which provides for improvements in the provision of financial services and financial instruments in Switzerland, and has been drafted in conformity with the respective European provisions and international standards. It contains rules regarding the financial markets infrastructure and the trade in derivatives, such as provisions for operators of an organised trading system regarding organisation and transparency of trade. Furthermore, the FinMIA contains a set of 'market rules of conduct', which regulate the financial market participants' activities in



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relation to securities and derivatives trading. These include the provisions on the disclosure of shareholdings, public takeover offers, insider trading and market manipulation that were formerly included in the Stock Exchange Act, as well as the new regulations for derivatives trading, which are in line with international standards.

On 1 July 2015, a new law regarding stricter registration obligations for formal shareholders has entered into force, which is meant to prevent money laundering and tax evasion. With this new law, even beneficial owners of shares now have to disclose their identity towards the company. For the holders of bearer shares, the new law means that they cannot keep their previous anonymity, but have to register with the company. These disclosure and registration obligations apply equally to any beneficial owner of shares who is holding, alone or as a group, 25 per cent or more of the voting or capital rights of a non-listed Swiss company.

Another regulatory development, although not quite as recent, has significantly changed Switzerland's legal landscape: the new regulation regarding fat cat salaries. After the Swiss voting population had approved a respective initiative in 2013, a new article was added to the Swiss constitution, which was then implemented by the Ordinance Against Excessive Compensation in Listed Companies on 1 January 2014. The new law, which applies to all publicly listed companies on a Swiss stock exchange, provides mandatory rules regarding transparency and compensation, and forbids a certain range of payments to directors or

senior managers, including severance payments, advance payments and other extraordinary payments. Under the new law, shareholders now have the power to approve the aggregate compensation of the board and the senior management.

Describe recent developments in the commercial landscape. Are buyers from outside your country common?

CN & PS: Buyers from abroad have always been very active on the international Swiss M&A market and this tendency seems to persist.

Swiss small and medium-sized enterprises (SMEs), in particular, are attractive targets for foreign investors. In fact, according to a study executed by Deloitte, SMEs are the key driving factor for Swiss M&A activity: SMEs were involved in 86 per cent of the majority of transactions with a Swiss target (inbound and domestic transactions). Notwithstanding the negative impact of the strong Swiss franc, inbound transactions involving Swiss SMEs have even increased 20 per cent in comparison to the previous year. The most active country in these transactions was France, followed by the UK, Germany and the US. Asia as a region was also very active. The most favoured targets belong to the corporate services, consumer services and TMT sectors, a fact that shows the high service quality and the strong focus on technological innovations of Swiss SMEs.

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

The positive business climate and the stability of economy, the highly developed regulatory framework as well as a low levels of taxation and bureaucracy, the liberal investment policy and Switzerland's unique position as a neutral yet Europe-oriented, internationally connected country.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Competence, experience and accessibility are all crucial for successfully completing complex transactions.

What is the most interesting or unusual matter you have recently worked on, and why?

Every deal raises interesting and unique questions. Of particular interest were the two acquisitions we made for Chinese buyers in 2016: the acquisition of SR Technics and the acquisition of KrausMaffei. The sale by Valora of its Naville logistics and distribution business has also been a challenging transaction since the transaction perimeter, as well as the transition services, had to be carefully defined.

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Specific restrictions that apply only to foreign buyers are limited. One such restriction is the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (Lex Koller), which states that a special permit is needed whenever a foreign citizen acquires, directly or indirectly (ie, by purchasing shares of a company) real property, without using said property as a permanent business establishment.

Are shareholder activists part of the corporate scene? How have they influenced M&A?

CN & PS: Traditionally, shareholder activism was not part of Switzerland's corporate scene, as the rights of minority shareholders are quite limited.

However, recent years have seen a growing trend towards shareholder activism in Switzerland, as has been the case globally and especially, more recently, in Europe. Examples include the involvement in the ultimately rejected Monsanto bid for Syngenta, the replacement of several board members of Gategroup by RBR Capital Advisors AG or the challenge of the merger between Holcim and Lafarge.

To sum up, shareholder activism is still a rather new phenomenon in Switzerland, with numerous barriers posed by Swiss regulation. Companies

that are at risk of being a target may nevertheless be well advised to implement a number of structural defences.

Take us through the typical stages of a transaction in your jurisdiction.

CN & PS: The general procedure as well as its different stages vary substantially from one case to another, depending on, inter alia, the seller, the purchaser and the legal form of transaction envisaged (share deal, asset deal, mixed share and asset deal or statutory merger).

Generally speaking, however, a typical Swiss M&A transaction consists of the following stages. In the first stage, the preparation phase, the seller and its advisers prepare the sales documentation as well as the marketing material.

In the next phase, the marketing phase, the executive management or, more often, a professional financial intermediary, instigates the first contact with potentially interested parties. The potential bidders are required to sign a non-disclosure agreement and receive an information memorandum containing key information. Based on this information, the bidders might decide to make a non-binding offer to the seller.

In the third phase (due diligence phase), after any questions regarding the offers have been clarified, due diligence and management visits take place and Q&A sessions are organised.

The parties then finalise and negotiate the transaction agreement, which is normally drafted according to international standards, in a fourth phase (negotiation, signing and closing phase). Upon completion of this process, the parties sign the transaction agreement. As the closing of a Swiss transaction agreement depends, among other things, on the presence of the necessary governmental approvals and consent of third parties, a certain lapse of time normally passes between signing and closing, during which the parties have to fulfil certain obligations and follow specific rules of conduct as set out in the agreement. The form of the closing itself varies depending on the legal form of the target business and the form of the respective transaction.

Concerning the last phase, the post closing-phase, parties may have agreed on non-competes for the seller or certain obligations, such as continuation of the business, of the purchaser.

Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

CN & PS: A much anticipated legislative development is the Corporate Tax Reform III, which will align Swiss tax law with European and international standards by modifying a number of federal tax practices and abolishing cantonal



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“Swiss SMEs, in particular, are attractive targets for foreign investors.”

tax regimes, replacing them with modern, innovative rules and thus increasing Switzerland’s attractiveness as a business place. Innovations include a ‘patent box’, a notional interest deduction, a corporate tax rate decrease as well as different measures to improve tax systematics.

A further anticipated major change is the revision of Swiss company law. The revision will serve to improve corporate governance for listed as well as non-listed companies, will introduce more flexibility with regards to company foundation and capital, and will adapt the rules on companies limited by shares to the new accounting legislation. Furthermore, provisions regulating transparency of economically significant companies active in the extractive industries may be introduced.

What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

CN & PS: It is expected that in the second half of 2016, activity levels will continue to rise. Factors that will have a positive impact on M&A activity are the low interest rates and the high cash levels that enable companies to improve their market position. Swiss SMEs may be attractive targets for such acquisitions.

Sectors expected to remain active and show high deal activity include, in particular, pharmaceuticals, biotechnology and life sciences, and generally sectors strongly characterised by transformation, such as TMT. For other sectors, activity levels will probably stagnate or increase slightly. Certain sectors, namely industry, retail business and especially tourism, still feel the consequences of the discontinuation of the SNB’s exchange rate policy and the strong Swiss franc. The pressure on companies in this sector to adapt their structures to deal with these consequences will continue to grow and will push them towards further restructuring measures, including mergers, purchases and sales.