Switzerland

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Overview

Statutory and regulatory M&A framework in Switzerland

The purchase and sale of corporate entities, and of their assets and liabilities, are mainly governed by the Swiss Code of Obligations (which includes corporate law and the statutory provisions on the purchase and sale of goods). In addition, the Swiss Merger Act establishes a comprehensive set of rules for corporate restructuring such as mergers and demergers.

Public takeovers by way of cash or exchange (or a combination thereof) offers are governed by the Financial Markets Infrastructure Act (FMIA), which came into force on 1 January 2016 and replaced the respective provisions in the Federal Act on Stock Exchanges and Securities Trading (SESTA) and a number of implementing ordinances. Within this framework, the SIX Swiss Exchange (SIX) is responsible for issuing regulations regarding the admission of securities to listing as well as the continued fulfilment of the listing requirements. The Federal Takeover Board (TOB) and the Swiss Financial Market Supervisory Authority (FINMA) are responsible to ensure the compliance of market participants with the Swiss takeover regime. Decisions of the TOB may be challenged before the FINMA and, finally, the Swiss Federal Administrative Court.

If a transaction exceeds a certain turnover threshold or if a restructuring has an effect on the Swiss market, the regulations of the Federal Act on Cartels and other Restraints of Competition also need to be considered. Any planned combination of businesses has to be notified to the Competition Commission (ComCo) before closing of the transaction in case certain thresholds regarding the involved parties' turnovers are met or in case one of the involved parties is dominant in a Swiss market and the concentration concerns that market, an adjacent market or a market that is up- or downstream thereof. The ComCo may prohibit a concentration or authorise it only under certain conditions and obligations. The ComCo's decision may be challenged before the Swiss Federal Administrative Court and, finally, before the Swiss Supreme Court.

Beyond, foreign buyers (i.e., foreigners, foreign corporations or Swiss corporations controlled by foreigners) need to consider the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (the so-called *Lex Koller*). They have to obtain a special permit from cantonal authorities in order to purchase real property or shares in companies or businesses owning real property, unless the property is used as a permanent business establishment. On 1 July 2015, a new Swiss law entered into force with the aim to prevent money laundering and tax evasion. Among other things, the new legislation states that entities acquiring (alone or in concert with third parties) bearer or registered shares representing at least 25% of the share capital or voting rights in a non-listed Swiss stock corporation must disclose their beneficial owner to the target company. Also, each acquisition of bearer shares in a non-listed Swiss stock corporation has to be reported to the company, regardless of the amount of acquired bearer shares.

Overview of M&A activity in 2015

After a very successful M&A market in 2014, the year 2015 started modestly with 65 transactions (-38%) and a total volume of US$ 21bn (-18%) in the first quarter. The main reason for this tendency was the Swiss National Bank's decision to discontinue the minimum exchange rate of CHF 1.20 per EUR[1] which took the markets by surprise. The resulting strength of the Swiss Franc was an important factor for a decrease in business creations, an increase in bankruptcies and a lack of interest for Swiss targets.[2] With 130 deals (-32.6%) and a transaction volume of US$ 25.8bn (-77.2%), the first six months ranged clearly behind the strong period of the previous year, also due to the lack of mega deals.[3] With 56 transactions and a total volume of US$ 36bn, the third quarter of 2015 developed moderately as well.[4] Overall, there was significantly less M&A activity in Switzerland in 2015 than in previous years: compared to 2014, the number of transactions decreased by 17% (from 420 to 350 transactions) and the total volume of mergers and acquisitions with Swiss involvement decreased by 55% and amounted US$ 84.9bn.

Significant deals and highlights[5]

Chubb Corporation / ACE Limited

The merger of Chubb and ACE to one of the leading global insurance groups, with a volume of approximately US$ 28.3bn, was the largest transaction with Swiss involvement. The US insurance company ACE bought Chubb in order to become more independent from the section 'catastrophic loss', where the profit margin decreased due to increased competition.

Novartis portfolio transformation

A highlight – both in terms of volume and complexity – was the Novartis portfolio transformation. As part of the US$ 28bn transaction:

- Novartis acquired GlaxoSmithKline's (GSK) oncology products and divested its vaccines business (excluding flu) to GSK;
- Novartis and GSK combined Novartis' OTC and GSK's consumer health businesses in a joint venture; and
- Novartis divested its animal health business to Eli Lilly and its flu business to CLS.

The transaction was a combination of carve-outs, share deals, ordinary asset deals as well as statutory asset deals, i.e.:

- a straight acquisition of GSK oncology products;
- a joint venture for the OTC business with GSK;
- a divestiture of the vaccines business (excluding flu) to GSK;
- a divestiture of the flu business to CSL; and
- a divestiture of the animal health business to Eli Lilly.

On 31 December 2014, the divestment of the animal health business to Eli Lilly took place and on 2 March 2015, all transactions with GSK were successfully completed.

Lafarge S.A. and Holcim Ltd. / CRH Plc

Among the largest transactions in 2015, with a volume of US$ 7.2bn, was the sale of certain assets from Lafarge and Holcim to CRH.

By selling cement factories to CRH, the merger partners Lafarge and Holcim complied with conditions imposed by competition authorities.

World Duty Free S.p.A. / Dufry AG

Another notable deal was the acquisition of World Duty Free by Dufry with an overall volume of approximately US$ 4bn. With the acquisition, Dufry strengthened its position in the travel retail industry.

Guardian Financial Services Limited / Swiss Re (Admin Re UK Limited)

The acquisition of Guardian Financial Services by the Swiss Re business unit Admin Re with a volume of approximately US$ 2.4bn was also among the M&A highlights of 2015. With this transaction, Swiss Re expanded its business in the UK regarding life and health insurance and strengthened the position of the business unit Admin Re as a provider of closed life insurance portfolio.

Key developments

On 1 July 2015, a new Swiss law entered into force with the aim to prevent money laundering and tax evasion. Among other things the new legislation states that entities acquiring (alone or in concert with third parties) bearer or registered shares representing at least 25% of the share capital or voting rights in a non-listed Swiss stock corporation must disclose their beneficial owner to the target company. Also, each acquisition of bearer shares in a non-listed Swiss stock corporation has to be reported to the company, regardless of the amount of acquired bearer shares. Besides, there are new provisions in the Swiss Money Laundering Act and the Swiss Debt Enforcement and Bankruptcy Act regarding cash purchases.

The major projects of recent years to revise Swiss corporate law are still ongoing and continue to occupy market participants. One of the most prominent revisions concerns the implementation of the Federal popular initiative of March 3, 2013 against "fat cat" salaries. This led to a handful of significant changes in Swiss company law. In January 2014, the implementing ordinance against excessive compensation in listed joint stock companies entered into force, providing far-reaching new rules on the corporate governance of Swiss public companies. In particular, the ordinance prohibits severance payment and takeover premium agreements concluded with the company's executives. 'Golden parachutes' or the like may even result in criminal liability. In addition, shareholders must annually approve the aggregate amount of compensation of the members of the board of directors and the executive management. However, the rules only apply to Swiss public companies listed on a domestic or foreign stock exchange. In order to avoid the applicability of those rules, smaller listed companies may consider a delisting.

Industry sector focus

Last year's trend regarding high health-care related activity continued in the first quarter of 2015, where 30% of the ten biggest deals took place in the pharmaceutical industry.[6] With 26% of the transactions and a dominant position in Switzerland's large transaction market, the sector of Technology, Media & Telecommunication started strong in the first quarter[7] and remained the most active sector in the second quarter with 21% of all transactions.[8] The Technology, Media & Telecommunication sector was the most active sector in 2015 with a total of 19% (65 transactions) of all transactions. Other sectors with a lot of activity were: Consumer Markets (17%); Industrial Markets (14%); Financial Services (11%); and Pharmaceuticals & Life Sciences (9%). In the national and international tourism sector there is and there will be ongoing M&A activity, as the tourism industry is under pressure for change, which leads to increased M&A activity. Regarding the transaction volume, the

Financial Services sector has the lead with US$ 34bn, essentially by means of the transaction Chubb / ACE with a volume of US$28.3bn.[9] Generally, the biggest transactions occurred in the insurance sector (e.g. Chubb / ACE; Guardian / Swiss Re).[10]

The year ahead

There is a two-sided picture of the corporate landscape, after the Swiss National Bank abolished the minimum exchange rate of CHF 1.20 per EUR. On the one hand, especially export-oriented companies have to fight for their market position. Their profitability figures are negatively affected by the strong Swiss Franc and liquidity problems occur. But the strong Swiss Franc also offers chances in the area of M&A; there could be more activity regarding the sale of companies with liquidity shortage and furthermore the strong Swiss Franc increases the purchase power of Swiss companies and makes potential acquisition targets in the eurozone more attractive. On the other hand, there are many companies that adapted and optimised their growth strategy and business models in 2015. These companies are ready for future acquisitions both inland and abroad. Patrik Kerler, Leader of M&A KPMG Switzerland, says: "Many Swiss companies are very well-positioned, despite all the adversities. The last year can be seen as transition period. We expect that many companies are getting ready for new strategic transactions in the following months, which will lead to an increased M&A activity in the following year."[11]

Many companies have a lot of cash reserves that can be used for growth and yield enhancement, especially through M&A transactions. Further, the Swiss State Secretary for Economic Affairs (SECO) published its growth forecast for the Swiss economy, predicting a positive development (1.5%).[12] Due to a generally positive environment, the chances are good for more and greater M&A transactions in 2016.[13] Many companies expect stable or rising M&A activity, especially regarding restructuring and realisation of new growth strategies.[14]

In 2016, especially sectors that are characterised by transformation (e.g. Technology, Pharmaceuticals/Biotechnology, Healthcare Providers, and Media/Telecom) are expected to have the most deal activity.[15]

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Endnotes

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