gli
Global Legal Insights

Mergers & Acquisitions

2019

Eighth Edition

Editors:
Scott V. Simpson & Scott C. Hopkins

glg global legal group

CONTENTS

Switzerland

Dr. Mariel Hoch & Dr. Christoph Neeracher
Bär & Karrer Ltd.

Overview

Statutory and regulatory M&A framework in Switzerland

The regulatory environment in Switzerland is still very investor-friendly for the following three main reasons: limited investment restrictions (a notable exception being the so-called *Lex Koller*; see below); vast flexibility of the parties in the asset or share purchase agreement (*e.g.* with regards to the R&W, indemnities, disclosure concept, cap, etc.); and low bureaucracy. Below, please find a brief overview of regulations which may be relevant.

Public takeovers by way of cash or exchange offers (or a combination thereof) 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 (turnover thresholds are rather high compared to other European countries: (a) the undertakings concerned together report a turnover of at least CHF 2 billion, or a turnover in Switzerland of at least CHF 500 million; and (b) at least two of the undertakings concerned each report a turnover in Switzerland of at least CHF 100 million) 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 (a) certain thresholds regarding the involved parties' turnovers are met, or (b) 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.

Further, 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 January 2020, two new acts are expected to enter into force (the exact date of entry into force is unclear): the Financial Services Act (FinSA); and the Financial Institutions Act. Although primarily addressing the financial services industry, in particular the FinSA could become relevant in the context of (public) M&A transactions – subject also to the provisions of the implementing ordinance, which has recently been under consultation by the Federal Finance Department and is therefore subject to change. The FinSA contains rules regarding the duty to publish an issuance prospectus in case of a public offering of securities. It sets out the required content of prospectuses, bringing the requirements in line with international standards and those already applied by SIX Swiss Exchange for listing prospectuses, and replacing the outdated rules of the Swiss Code of Obligations which only require very limited disclosure.

Overview of M&A activity in 2018

After a very active 2017, M&A activities further increased in 2018 with a new all-time high of 493 recorded transactions involving Swiss corporations which corresponds to an increase of approx. 20% compared to 2017. The transaction volume increased by approx. 30% compared to 2017 which is – due to the lack of mega-deals – slightly lower than in the record year, 2014. The number of outbound deals was approximately twice as high as the number of inbound deals. The most attractive sectors were the industry sector as well as the pharmaceuticals & life sciences sector.

Private equity firms have been very active in Switzerland in 2018 with 160 recorded deals, which corresponds to an increase of approximately 97% compared to 2017 (according to the KPMG M&A Report 2018 for Switzerland). Swiss private equity firms have expanded their presence, both in Switzerland and abroad.

Significant deals and highlights

Noteworthy is the sale of a majority stake in Variosystems (a leader in electronics manufacturing services with facilities in various countries) by its founders to Capvis, a Swiss private equity firm. The transaction shows that there are still attractive targets in Switzerland; in particular in the industry sector, and it serves as an example of the trend of private equity firms doing larger transactions.

In March 2018, Novartis AG sold its stake in a consumer healthcare joint venture with GlaxoSmithKline Plc to the latter for approximately $13.039m, which was the largest Swiss M&A transaction in 2018. In addition, in April 2018, Novartis AG announced its takeover of the US stock exchange listed company AveXis Inc. for approximately $8.7m. Those transactions are exemplary of the continuing high M&A activity in the pharmaceutical & life sciences sector.

In February 2018, the publication of the public tender offer of Tamedia AG for Goldbach Group AG marked a further step in the consolidation of the Swiss media and advertising landscape.

In August 2018, the launch of the public tender offer for Bank Cler AG by Basler Kantonalbank can be seen as a sign that the consolidation in the banking sector is continuing.

Key developments

Broadly speaking, the Swiss M&A market and, in particular, the private equity market, seem to be in good shape, in spite of some geopolitical uncertainties (such as Brexit, trade disputes between the US and China, etc.) which have emerged in the recent past. The following key factors can be identified for this continuing positive trend.

First, although interest rates began to climb in the US and across the EU, they continue to be low and the borrowing conditions remain generous, which promotes fundraising and puts pressure on investors to invest. Private equity investors, who tend to be highly leveraged, are benefiting from this environment in particular.

Second, Switzerland remains attractive for investors, with various investment opportunities – notably small and medium-sized enterprises, which will need to deal with succession planning in the coming years (estimated to be approximately 80,000) are particularly attractive targets for (private equity) investors.

Third, Swiss companies continue to transform and reshape their portfolio through M&A transactions (e.g. by strengthening digital capabilities or focusing on the core business).

Finally, in the field of public M&A, shareholder activists continue to engage in Swiss targets. However, compared to 2017, only a few new campaigns were commenced in 2018 (e.g. Comet Holding Ltd.) with several campaigns launched in 2017 still running. Another recent trend is anchor shareholders in listed companies (e.g. Swiss transport and logistic company CEVA Logistics AG, which has been listed on SIX Swiss Exchange in 2018).

Industry sector focus

In Switzerland, various sectors (media, banking) are facing a consolidation wave, which increases M&A activity. Industry consolidation in particular concerns the healthcare sector, where we see a high level of M&A activity including private equity investors having dedicated healthcare desks for such investments. Tech targets such as payment systems and internet platforms continue to be in high demand.

The year ahead

Despite some uncertainties such as potential trade disputes between the US and China, (minor) increases of interest rates or high valuations, etc., we are fairly positive that the Swiss M&A market will continue to be strong in 2019 as the key drivers which made 2018 a record year will in our view continue to be relevant in 2019. Given Switzerland's emergence as one of the predominant crypto hubs of the world, we also see a potential rise in M&A activity involving companies in the blockchain industry.

Dr. Mariel Hoch
Tel: +41 58 261 50 00 / Email: mariel.hoch@baerkarrer.ch
Mariel Hoch is a partner in the corporate and M&A department at Bär & Karrer. Her practice focuses on domestic and cross-border public tender offers and mergers, general corporate and securities matters, including proxy fights, hostile defence matters and corporate governance. She also represents clients in M&A-related litigations. She has advised a broad range of public and private companies and individuals in Switzerland and abroad in a variety of industries including healthcare, pharmaceuticals, technology, financial services, retail, transportation and industrials.

Dr. Christoph Neeracher
Tel: +41 58 261 50 00 / Email: christoph.neeracher@baerkarrer.ch
Christoph Neeracher is a partner at Bär & Karrer and head of the Practice Group Private M&A and Private Equity. He is recognised as one of the preeminent private M&A and private equity attorneys at law in Switzerland and as a leading lawyer in financial and corporate law. Christoph Neeracher is experienced in a broad range of domestic and international transactions, both sell- and buy-side (including corporate auction processes), and specialises in private M&A, private equity and venture capital transactions. He furthermore advises clients on general corporate matters, corporate restructurings as well as on transaction finance and general contract matters (e.g. joint ventures, partnerships and shareholders' agreements), relocation and migration projects, and all directly related areas such as employment matters for key employees (e.g. employee participation and incentive agreements). In his core fields of activity, he represents clients in litigation proceedings.

Bär & Karrer Ltd.

Brandschenkestrasse 90, 8027 Zurich, Switzerland
Tel: +41 58 261 50 00 / Fax: +41 58 261 50 01 / URL: www.baerkarrer.ch