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Chapter 54

Switzerland

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Swiss M&A transactions related to public companies are mainly governed by the Swiss Federal Act on Stock Exchanges and Securities Trading ("**SESTA**"; including its implementing ordinances and the Swiss Federal Merger Act ("**MA**"). Block trades in public M&A transactions are in addition governed by the Swiss Code of Obligations ("**CO**").

The SESTA includes the Swiss public takeover rules which are implemented by the Takeover Board ("**TOB**"). Decisions of the TOB can be challenged before the Swiss Financial Market Supervisory Authority ("**FINMA**") and, finally, the Swiss Federal Administrative Court.

Besides the specific SESTA tender offer regime, a number of other laws apply in the context of public tender offers, including the Federal Antitrust Act as well as the Federal Act on the Acquisition of Real Estate by Foreigners ("Lex Koller").

1.2 Are there different rules for different types of company?

The SESTA and the takeover rules only apply if (i) the target has its seat in Switzerland and its shares fully or partly listed on a Swiss stock exchange, or (ii) the target has its seat outside of Switzerland but the main listing of all or part of its shares is on a Swiss stock exchange.

In principle, the takeover rules do not apply to companies whose shares are exclusively listed on a stock exchange outside of Switzerland or not listed on a stock exchange. However, the TOB has held that the takeover rules also apply to a company not listed on a stock exchange if, shortly prior to the transaction, either the shares were delisted to prevent the applicability of the takeover rules or the target was demerged from a listed company.

1.3 Are there special rules for foreign buyers?

In principle, Swiss law does not set any restrictions on foreign investments.

There is, however, one important exception: pursuant to the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (the so-called *Lex Koller*), foreign buyers (i.e., a foreigner, a foreign corporation or a Swiss corporation controlled by foreigners) 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. Further requirements and/or limitations exist in certain regulated sectors.

The Swiss tender offer regime applies to both Swiss and foreign bidders.

A cross-border merger of a Swiss listed company into a foreign company as the surviving entity is only permissible if the Swiss company proves that as a result of the emigration merger, its assets and liabilities will transfer to the foreign company and the equity or membership rights will continue to be adequately safeguarded in the foreign company. Such cross-border emigration mergers of listed Swiss companies are in many instances subject to negative Swiss tax consequences and hence rare in practice.

1.4 Are there any special sector-related rules?

Special sector-related rules apply in regulated industries such as banking and securities trading, insurance, healthcare and pharma, media and telecommunications.

In general, the acquisition by a foreign acquirer of control of a company holding a banking, securities trading, insurance, healthcare, pharma or a radio or television broadcasting licence is subject to prior authorisation by the competent regulator. In most of these industries, the acquisition of minority stakes is subject to additional notification or consent requirements.

1.5 What are the principal sources of liability?

The principal sources of liability of a bidder launching a public tender offer in Switzerland are the public tender offer regime, the significant shareholding disclosure obligations and the laws penalising infringements such as insider trading and market manipulation.

Regarding the public tender offer regime, non-compliance to a number of provisions may lead to a liability of a bidder, e.g. the best price rule (see question 5.4) or the mandatory offer rules (see question 2.5). A source of prospectus liability is the publication of the offer documents. Non-compliance to the significant shareholding disclosure obligations (see question 5.3) or violation of the mandatory bid obligation may also lead to a fine of up to CHF 10 million. Under Swiss insider trading rules, any person with inside information acts unlawfully if it exploits such information to acquire or dispose of Swiss listed securities, communicate such information to another person or exploits such information to make a recommendation to another person. Under the SESTA price and market manipulation are also a punishable offence, more precisely, the wilful dissemination of misleading information and the execution of any buy or sale orders that give false or misleading signals in relation to listed securities.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The classic method of acquiring a Swiss public company is a public tender offer by a Swiss or foreign company for the purpose of acquiring equity capital of the target. In exchange for the target shares, the bidder can offer shares, cash, or a combination thereof.

Alternatively, control over a Swiss company may also be obtained (i) by purchasing a controlling block of shares from the previous shareholder(s), (ii) by acquiring a business (assets and liabilities) or by a transfer of assets according to the MA, (iii) by participating in a major share capital increase, or (iv) by a merger. In this country chapter, only public tender offers are specifically discussed.

2.2 What advisers do the parties need?

Both the purchaser and the seller are usually accompanied by legal, financial, accounting and tax advisers, often also communications advisers. Specialised law firms regularly draft the acquisition documents and liaise (in a public takeover scenario) with the TOB while financial advisers (such as major Swiss banks and a number of specialised finance and audit firms) perform, among others, corporate services or deliver fairness opinions and other valuations.

2.3 How long does it take?

The time schedule for public M&A transactions is regulated to a large extent. Once an offer has been pre-announced, the offeror must publish the offer prospectus within six weeks. If the offeror must obtain clearances from competition or other regulatory authorities prior to the formal publication of the offer, the Takeover Board may extend the six-week period. Prior to announcing the offer, the offeror must appoint a review body to assess the offer and issue a report as to whether the offer complies with takeover law. The Takeover Board will publish its decision regarding the compliance of the offer typically on the date of publication of the prospectus. Following the publication of the offer prospectus, a cooling-off period of generally 10 trading days applies during which a qualified shareholder may join the takeover proceedings as a party and appeal against the decision of the Takeover Board (first before the Takeover Board and thereafter the FINMA and the Federal Administrative Court). The main offer period lasts between 20 and 40 trading days and may be extended in specific situations with the consent of the Takeover Board. On the trading day following the end of the offer period, the bidder must publish the provisional interim results of the offer. The definitive interim result must be published no later than four trading days following the end of the offer period, and must specify whether the conditions of the offer have been met or waived. If the offer has been successful, 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 result 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 the additional acceptance period.

2.4 What are the main hurdles?

The main hurdles for execution of a public tender offer are (i) the execution of a confidentiality and stand-still agreement between the potential bidder and the target company, (ii) the due diligence process, (iii) the approach of the main shareholders of the target company to purchase shares or obtain irrevocables prior to the offer, (iv) the execution of a transaction agreement between the bidder and the target company, as well as (v) the pre-announcement and the publication of the prospectus (see question 2.3).

2.5 How much flexibility is there over deal terms and price?

Voluntary tender offers may be made for any securities of the target company subject to various conditions (see question 7.1). However, in case a voluntary tender offer would – if successful – result in a change of control offer, i.e. the offeror passes the threshold for a mandatory offer, the offer must be extended to all listed shares of the target company and comply with the minimum and best price rules (see question 5.4). According to the mandatory offer regime, anyone who acquires more than one third of the voting rights of a Swiss listed company is obliged to make an offer for all the listed shares of the company, barring specific ad hoc exceptions granted by the Takeover Board. Thereby, the consideration must consist of cash or contain an all-cash alternative (see question 2.6) and the offer price must comply with the best price rule (see question 5.4). However, the target entity may have opted out of the mandatory offer regime (opting-out), or increased the threshold to up to 49 per cent of its voting rights (opting-up). Partial tender offers are not subject to minimum price rules but must respect the best price rule (see question 5.4).

2.6 What differences are there between offering cash and other consideration?

As consideration, an offeror may offer cash or listed or non-listed equity securities or a combination thereof. If the securities offered in exchange are not listed or if the market is illiquid, a valuation must be prepared by the review body so as to allow an assessment whether or not the minimum price rule is adhered to (see question 2.2). In case of an exchange offer, the prospectus includes more information about the offeror, its operations and results, as well as details about the shares offered in exchange. In mandatory offers, an all-cash alternative must always be offered. With respect to change of control offers, an all-cash alternative must be offered if the offeror has purchased at least 10 per cent of the target shares for cash during the 12-month period preceding the announcement of the exchange offer. If the offeror acquires any target shares for cash during the period between the announcement of the offer and the settlement of the offer, the offeror must provide for an all-cash alternative for all recipients of the offer. However, the all-cash alternative may be less valuable than the share offer provided that both considerations fulfil the minimum price rule (see question 5.4). Once the offer is settled, the offeror may purchase target shares for cash within the limits of the best price rule (see question 5.4).

2.7 Do the same terms have to be offered to all shareholders?

The offeror must treat all shareholders of the target company equally. While the offer price may be fixed at the discretion of the offeror (barring the minimum price rule (see question 5.4), if applicable), the principle of equal treatment requires that all shareholders of the target company are entitled to get the best price paid (see question 5.4). Furthermore, equal treatment extends to different classes of equity instruments in that the offer must cover all classes of listed shares of the target company with the exception of financial instruments. Prices offered for different classes of shares and financial instruments must preserve an equitable ratio. If a partial offer is made, the tendered shares must be taken into account on a pro rata basis.

2.8 Are there obligations to purchase other classes of target securities?

In the event of a mandatory offer, the offeror must make an offer for all listed securities of the target company. Thereby, all classes of listed securities must be treated equally (see question 2.7).

2.9 Are there any limits on agreeing terms with employees?

According to the ordinance against excessive compensation in listed stock companies, severance payment agreements concluded with the company's board and top executives may be inadmissible and even result in criminal liability. Moreover, transaction premiums, i.e. certain commissions to the top executives in connection with M&A transactions, are equally regarded as illegal by law and board and top executive compensation is subject to shareholders' approval.

If the public tender offer is successful, selected employments may be perpetuated provided that both the bidder as well as the employee agree. The main terms of such agreements must be disclosed in the target's board report related to the offer. Moreover, if the employees hold shares of the target company, the employment terms should be scrutinised to ensure there is no hidden share premium. It is also worth noting that the best price rule (see question 5.4) is also applicable in connection with employee shares or stock option plans.

2.10 What role do employees, pension trustees and other stakeholders play?

In M&A transactions, employees, pension trustees and other stakeholders do not have to approve. There is, however, an obligation to inform/consult employees in case of an asset deal qualifying as business (or business unit) transfer, where employees are granted the right to refuse being transferred to the acquirer. If they do not refuse, their employment agreements are automatically transferred to the acquirer. Should they refuse, their employments will automatically end upon lapse of the statutory notice period. Moreover, in case of mass redundancies, the employees must also be given the opportunity to formulate proposals to avoid or minimise such consequences, and, under certain circumstances, to negotiate a social plan.

2.11 What documentation is needed?

Before granting access to due diligence materials, the offeror and the target company normally conclude a confidentiality (and stand-still) agreement. Subsequently, a transaction agreement is concluded preceding the announcement of the offer. Prior to the offer, the offeror may seek irrevocable tender commitments from or conclude share purchase agreements with significant shareholders.

Under the Swiss takeover rules, the offeror may inform the market of its intention to launch a tender offer in a pre-announcement before the offer is actually made. This announcement must contain information about the offeror and the target company, the target equity securities, the offer price, the expected date of publication of the offer and its duration and conditions attached to the offer. The offer prospectus contains additional information on the offeror, the financing, the offer price, the target securities and the target company. In friendly takeovers, the prospectus usually includes the report on the offer of the target company's board of directors, often supported by a fairness opinion by an independent provider. In hostile tender offers, this report is not included in the offer prospectus but must be published no later than 15 trading days following the publication of the offer prospectus. The interim and final results of the public tender offer must be published. All offer documents must be drafted in German and French.

2.12 Are there any special disclosure requirements?

Specific disclosure requirements exist for both the pre-announcement and the offer prospectus (see question 2.11). Upon release of the pre-announcement, the offer prospectus must be published within six weeks, both electronically and in a major newspaper in German or French and on bidder's webpage. In case the closing date of the latest financial statements of the target dates back more than six months at the end of the offer period, the target board's report on the offer must include interim financial statements. In addition, the target board must confirm that there have been no material changes in the financial situation of the company since the closing date of the last published financial statements.

The bidder must confirm in the offer prospectus that it has received no information about the target company, either directly or indirectly, from the latter that is not in the public domain and which might have a critical influence on the decision of the recipients of the offer.

2.13 What are the key costs?

A public tender offer entails printing and publication costs (roughly CHF 80,000 and more), fees of the review body (CHF 70,000 to up to CHF 180,000 assuming no valuation is required), a fee of the Takeover Board (between CHF 25,000 and CHF 375,000), a commission per tendered share payable to the depository banks and fees payable to the provider of a fairness opinion. In addition, advisors' fees and the Swiss transfer stamp duty of 0.15 per cent will arise.

2.14 What consents are needed?

Besides clearance from competition or other regulatory authorities prior to launching the offer, approval of the offer prospectus and the reports of the target's board of directors by the Takeover Board is required. The offeror normally provides the Takeover Board with a draft as early as possible to prevent it from asking for amendments after publication, which would need to be published again. The Takeover Board will typically publish its decision regarding the compliance of the offer on the date of publication of the prospectus.

2.15 What levels of approval or acceptance are needed?

The Swiss rules on public tender offers do not require a specific level of acceptance. Except in mandatory offers, the bidder may however make the offer conditional upon a minimum acceptance threshold. There is also no requirement for a shareholder approval under the Swiss public tender offer regime. However, public takeovers by way of exchange offers require the shareholders of the offeror to increase the share capital of the company in order to issue the shares offered as consideration. Furthermore, the articles of association of the target company may contain defensive measures such as transfer restrictions. In this case, the offeror will normally make its offer conditional upon the abrogation of such provisions by the shareholders' meeting.

2.16 When does cash consideration need to be committed and available?

Upon expiration of the additional acceptance period, a public tender offer must be settled within 10 trading days, unless the settlement is subject to certain unfulfilled conditions that have not been waived (see question 7.1). The cash consideration needs to be available at the settlement date. In the offer prospectus, the offeror must demonstrate that all required steps to ensure the availability of the cash consideration at the settlement date have been taken and the review body must confirm availability of funds. Consequently, any debt funding must be firmly committed prior to the release date of the offer prospectus. In practice, the offeror will typically already be seeking a firm commitment at the date of the pre-announcement of the offer.

3 Friendly or Hostile

3.1 Is there a choice?

The offeror is not obliged to notify either the Takeover Board or the target board of an offer prior to the public announcement. An offer that is supported by the target board is referred to as a friendly offer, whereas an offer which does not carry the recommendation of the board is labelled hostile. The SESTA regulates public takeovers irrespective of this categorisation.

3.2 Are there rules about an approach to the target?

In principal, there are no rules about the approach to the target company. As long as the threshold of 33⅓ per cent – triggering a mandatory public tender offer – is not passed, creeping tender offers, where a stake is steadily built up, do not fall within the ambit of the Swiss takeover rules. However, such tactic is difficult to pursue due to the disclosure obligations of significant shareholdings (see question 5.3).

3.3 How relevant is the target board?

The view of the target board determines the categorisation of the offer as friendly or hostile (see question 3.1). First of all, the support of the target board is required in order to conduct a due diligence process prior to launching an offer. However, target board support is not essential for success, but a recommended bid is more likely to succeed all other terms being equal. During the course of an offer, the target board may not take defence measures (see question 7.2). In this context, it should however be noted that there are still permissible manoeuvres to defeat a hostile bidder – e.g. by searching for a white knight – especially if they are put into place before a bid surfaces. In addition, the report of the target board (see question 2.11) serves as guidance for the shareholders of the target company regarding the acceptance of the offer.

3.4 Does the choice affect process?

The principal distinction between a friendly and a hostile transaction is that in hostile tender offers, no access to due diligence is granted and the report of the target board is not included in the offer prospectus but must be published no later than 15 trading days following the publication of the offer prospectus (see question 2.11). Consequently, the review of the offer documents by the Takeover Board takes longer in hostile situations. Furthermore, hostile takeovers may envisage defensive measures of the target company as main hurdles of the transaction.

4 Information

4.1 What information is available to a buyer?

Assuming no access to information is provided by the target company in a due diligence process, certain information is still available in favour of a potential purchaser. First of all, the Commercial Register provides for elementary public accessible details of each registered company, especially the company's articles of association and any documentation relating to the registration. Notices of significant shareholdings (see question 5.3) are published on the internet platform of the concerned stock exchange. The annual reports – including financial statements and the auditor's report – are publicly available. According to the listing rules of the SIX (see question 1.1), issuers are required to include a corporate governance report in their annual report and to publish price-sensitive information by means of press releases (see question 4.2) which are meant to be published on the websites of the respective issuer and the SIX. Further information is available in the patent, trademark, tax, land and debt enforcement proceedings registers, partly subject to certain restrictions. Finally, in case the target has granted due diligence materials to competing bidders, reasonable access to this information must also be provided to any other bidder.

4.2 Is negotiation confidential and is access restricted?

According to the listing rules of the SIX, listed companies are in principal required to promptly disclose price-sensitive, non-public information relating to their business activities. However, the listing rules grant exemptions and allow the companies to postpone disclosure in takeover negotiations provided that confidentiality is strictly maintained. In the event of an information leak, the market must be immediately informed. In the absence of such a leak, the target board is not obliged to disclose the intention of the potential offeror to launch an offer. Furthermore, potential bidders are allowed to contact target shareholders prior to the offer announcement, provided that a disclaimer indicates that insider information is not abused. Corresponding disclosures and the disclaimer must be documented by the person giving the information. Usually, the target shareholders are thereby asked to enter into confidentiality agreements in advance.

4.3 When is an announcement required and what will become public?

In the absence of a leak, the target board is not obliged to disclose the intention of the potential offeror to launch an offer. Thereby, the takeover parties are free to negotiate the terms of the transaction without any disclosure obligations. In the event of an information leak, i.e. in case the intended transaction becomes public, the market must be immediately informed. Disclosure must be made so as to ensure the equal treatment of all market participants. Depending on the content of the leak the disclosure must be sufficient to deal with the leaked information. Updates may be required in case of further leaks.

4.4 What if the information is wrong or changes?

The Swiss takeover regime requires the offeror and the target company to disclose truthful and thorough information regarding the public tender offer in the offer prospectus respectively in the target board's report. It also imposes an ongoing obligation to supplement the offer documents until expiration of the acceptance period. Once announced, the offeror is generally not entitled to withdraw or amend the offer to the detriment of the target shareholders. However, the Takeover Board allows, under certain conditions, to make the offer conditional upon the absence of material adverse changes in the target's business (see question 7.1).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

It is possible to buy shares outside the public tender offer process prior and after the launch of the offer. However, cash purchases outside the offer process may result in an obligation of the offeror to add a cash alternative to a voluntary exchange offer and affect the offer price in reference to the best and minimum price rules (see question 5.4).

5.2 Can derivatives be bought outside the offer process?

It is possible to buy derivatives outside the public tender offer process. In particular, employee options or similar instruments may be acquired. Again, such purchases are subject to the minimum and best price rules (see question 5.4).

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

According to the SESTA, any person who reaches, exceeds or falls below 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔ per cent of the voting rights of the target must notify the relevant company and stock exchange. Shares, acquisition positions and sale positions build separate disclosure units. This regime also covers financial instruments which provide for cash settlement and applies to acting in concert and indirect purchases. Consequently, it is impossible to build up or accumulate a substantial hidden stake prior to an offer in a lawful manner.

From publication of the pre-announcement, if any, or the offer prospectus until expiry of the additional acceptance period, all parties in a takeover proceeding, qualified shareholders (i.e. shareholders holding at least three per cent in the target company) must disclose individually and on a daily basis all transactions in securities relating to the offer to the Takeover Board and the Disclosure Office of the SIX Swiss Exchange.

5.4 What are the limitations and consequences?

Generally, the offeror is obliged to offer a price that equals at least to the price paid for securities of the target company between the announcement of the offer and the date that is six months from the expiration of the additional acceptance period (best price rule). In mandatory offers, the offer price must be at least equal to the 60 days VWAP (if the stock is liquid) or the highest price paid for securities of the target company by the offeror in the last 12 months preceding the offer, whichever is higher (minimum price rule). Consequently, in case the bidder pays a higher price before or outside the offer, it is required to equally offer such higher price in its public tender offer.

6 Deal Protection

6.1 Are break fees available?

Both takeover parties can agree on break fees, unless they will result in coercing shareholders to accept the offer. As a rough guide, they should not exceed the costs in connection with the offer (see question 2.13). The parties must also disclose such agreements in the offer documents.

6.2 Can the target agree not to shop the company or its assets?

The target board may lawfully agree to refrain from soliciting offers in competition with a recommended offer (no shop). However, the right to react to unsolicited offers must be retained to the extent required by the board's fiduciary duties, including the disclosure of non-public information to, or negotiate with, the unsolicited offeror.

6.3 Can the target agree to issue shares or sell assets?

Both the Swiss takeover rules and the board's fiduciary duties limit undertakings by which the target board prejudices potential competing offers. In particular, the target board is not entitled to issue listed securities on the ground of an authorised capital increase under exclusion of subscription rights, unless the articles of association explicitly provide such a capital increase in case of a public tender offer or the shareholders approve such issuance during the offer.

6.4 What commitments are available to tie up a deal?

Swiss law limits the ability of an offeror to protect the envisaged takeover transaction. Generally, the target board is restricted from undertaking defensive actions regarding the public tender offer of an unsolicited offeror without shareholders' approval (see question 8.2). Shareholders accepting an offer can revoke their commitment in the event of a competing offer. The same applies to "irrevocables". The ability of the target board to pay break up fees is also limited (see question 6.1). In order to discourage potential competitors, the offeror may build up a stake in the target company prior to the offer.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Certain conditions may be attached to the offer. In the context of voluntary offers – i.e. change of control offers and purely voluntary offers – conditions are generally permissible if: (i) their satisfaction is outside the offeror's control; (ii) they are stated clearly, objectively and in a transparent way in the offer documents; and (iii) they do not require any actions from the target company that could be unlawful (e.g. a violation of the board's duties). If the offeror's participation is required to satisfy the conditions, the offeror must take all reasonable steps to ensure that they are met.

In mandatory offers, only a very limited number of conditions are accepted by the Takeover Board. Conditions are typically limited to: (i) regulatory approvals; (ii) no injunction or court decision; and (iii) the cancellation of any transfer or voting restriction in the target company's articles of association.

The offeror is not obliged to close the offer in the event that a condition is not met. In such a case, the offer can be withdrawn. However, the offeror may and usually does reserve the right to waive certain conditions upon lapsing of the offer period.

7.2 What control does the bidder have over the target during the process?

In a transaction agreement the bidder may request the target company to conduct its business according to its ordinary course and any deviations may be subject to the bidder's consent. The ability of the target board to frustrate the public tender offer during the offer period is restricted by law (see question 8.2). During the course of an offer, the target board may not enter into transactions which would have the effect of significantly altering the target's assets, liabilities or earning power without the prior approval of a shareholders' meeting. Especially specific assets defined as crown jewels by the bidder cannot be disposed of or encumbered without shareholder approval. The offer may also be made subject to the absence of specific material adverse changes in the target company's business. In friendly settings, such defensive measures are scarcely relevant.

7.3 When does control pass to the bidder?

In public tender offers, the effective control passes to the offeror upon settlement of the offer.

7.4 How can the bidder get 100% control?

In situations where the offeror holds more than 98 per cent of the voting rights of the target company following the completion of a successful public tender offer, the offeror 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 the 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. It has been accepted by several cantonal courts that during such a three-month period, the offeror may continue to purchase additional target shares in order to reach the 98 per cent hurdle. The duration of the statutory squeeze out procedure varies between four and six months.

In the event that following the completion of the public tender offer, the offeror holds more than 90 per cent of the outstanding voting rights, but does not reach the 98 per cent threshold, minority shareholders may be forced out by way of a squeeze-out merger pursuant to the MA. In a squeeze out merger, the target company is merged into an (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 offeror, provided that the value is equal to the value of the target shares. Contrary to the situation in a statutory squeeze out under the SESTA, the shareholders of the target company have an appraisal right in the event of a squeeze out merger.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

In case of an approach by a potential bidder, Swiss corporate law requires the target board to act in the best interest of the company. Depending on the interest of the company, offers must be examined. Typically, the board will not publicise any offers, but may determine to do so depending on the specific circumstances.

According to the SIX listing rules, the publication of non-public price-relevant information on a potential transaction may be suspended unless a leak occurs (see questions 4.2 and 4.3).

8.2 What can the target do to resist change of control?

Generally, the target company is entitled to implement voting restrictions in its articles of association or limits regarding the composition of the board of directors. However, a hostile offer can be made subject to a condition requiring the abolition of such provisions. During the course of a public tender offer, the target board may not take any frustrating action by employing defensive tactics intended to significantly alter the assets, liabilities or earning power of the target company without the shareholders' approval. In particular, frustrating actions include the sale of corporate assets representing more than 10 per cent of the latest annual balance sheet total or which contribute by more than 10 per cent to the target company's profitability, the sale or encumbrance of any part of the company's crown jewels (see question 7.2), the conclusion of agreements with the target executives providing for unusually high severance payments, the issuance of new equity securities without pre-emptive rights or the repurchase of own shares. In addition, the Swiss takeover regime prohibits defensive measures which are considered to be in manifest violation of Swiss general corporate law.

8.3 Is it a fair fight?

In principle, the Swiss takeover regime requires equal treatment of all bidders by the target, especially regarding their equal access to information, in particular regarding due diligence. This jurisdiction restricts the target's efforts to predestine a white knight since providing due diligence material to the preferred bidder obliges the target company to provide the same material to the unsolicited competing bidder.

Also, especially by protecting minority shareholders and limiting the ability to take frustrating actions (see question 8.2), by allowing to pay break fees (see question 6.1) as well as to obtain irrevocable tender commitments, the Swiss takeover regime and the Takeover

Board seek to create a level playing field in the market for corporate control. The shareholders of the target company must have free choice between competing tender offers.

Prior to the launch of a public tender offer, it is however possible to grant a period of exclusivity to a preferred bidder.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Key to a successful M&A transaction is a clear business objective and measurable targets when making a strategic plan to acquire another entity or to merge. Factors such as timing, sound knowledge of the legal framework and pitfalls (due diligence) and clear and open communication to address the concerns of the shareholders are also crucial.

Potential buyers need to pay particular attention to shareholders holding more than 10 per cent of the target's shares. Such shareholders may prevent any subsequent squeeze-out merger pursuant to the MA or shareholders holding 3 per cent as they may challenge any decision of the TOB or FINMA.

9.2 What happens if it fails?

To gain effective control over a Swiss company, it is generally required to acquire more than 50 per cent of the voting rights represented at the company's general meeting. However, to pass certain important resolutions (e.g. restricting the transferability of registered shares, creating authorised or contingent share capital, increasing the share capital by way of capitalisation of reserves or against contributions in kind, restricting or cancelling shareholders' subscription rights, merging the company into another entity), at least 66⅔ of the voting rights and the majority of the share capital represented at the company's general meeting are required.

If the buyer does not itself meet the requirements of such non-qualified or, if required, qualified decision-making quorum, the buyer will need to liaise with other shareholders to pass resolutions. If the offer conditions contain a minimum acceptance threshold, the bidder is not required to close the offer if the conditions are not met. He may therefore walk away from the deal.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Switzerland.

On 1 January 2014, the 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. Furthermore, in Swiss politics, certain efforts are underway to abolish the statutory possibility of an opting-out regarding mandatory tender offers (see question 2.5).

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