

market intelligence

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GETTING THE
DEAL THROUGH 

M&A

Global interview panel covering key
economies led by Alan Klein

Energy and power fuels
“staggering growth”

Activity levels • Keynote deals • Shareholder activism • 2016 forecast
Europe • The Americas • Asia-Pacific • Africa

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GETTING THE
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market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing on global M&A markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at
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Christoph Neeracher

M&A IN SWITZERLAND

Christoph Neeracher specialises in international and domestic M&A transactions (focusing on private M&A and private equity transactions, including secondary buyouts, public to private transactions and distressed equity), transaction finance, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders agreements) and all directly related areas such as employment matters for key employees (eg, employee participation and incentive agreements).

He is experienced in a broad range of national and international transactions both sell and buy side (including

corporate auction processes) and the assistance of clients in their ongoing corporate and commercial activities. Additionally, Christoph represents clients in litigation proceedings relating to his specialisation.

Chambers Europe ranks Christoph as a leader in the field of M&A (2010–2015) and *The International Who's Who of M&A Lawyers 2015* lists him as one of the world's leading M&A lawyers. *The Legal 500* (2012–2015) describes him as 'extremely experienced in M&A matters and very strong in negotiations'.



“Several industries, in particular pharma and health care, as well as IT and telecoms, are expected to remain attractive sectors for transactions.”

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

Christoph Neeracher: With an impressive number of large, strategically orientated transactions, 2014 was a very active M&A year, both in Switzerland and worldwide. However, the euphoria of last year has subsided. From the strong showing in the previous year, Swiss M&A activity has been characterised by a declining number of transactions and a lower transaction volume in the first half-year. According to a market survey by Ernst & Young, a total of 137 transactions were recorded in the first quarter of 2015, 13 per cent less than in the fourth quarter of 2014. The decrease of transaction volume may indicate the end of mega deals. In the first half-year, six transactions were valued at over 1 billion Swiss francs and the merger between Holcim and Lafarge was the only mega deal to be valued at over 1 billion Swiss francs (the total was 6.8 billion Swiss francs). Overall, the first two quarters of 2015 resulted in 264 deals and a total deal volume of 25.7 billion Swiss francs. The means the number of transactions fell by 6 per cent against the previous year.

Broadly speaking, the Swiss private equity market faced (in line with the European market) a cool-down in 2015. The main reasons for the declining number of transactions are the worsening geopolitical development, the ongoing monetary instability in the eurozone and, in Switzerland, the strong Swiss franc, which

puts pressure on the Swiss export industry and makes potential targets more expensive for foreign investors. However, several industries, in particular pharma and health care, as well as IT and telecoms, are expected to remain attractive sectors for transactions. Also, many privately held Swiss SMEs have to find a solution for succession in their ownership and management, which leads to interesting investment opportunities in various sectors, such as industrial goods and services.

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

CN: According to a market survey by Ernst & Young, the highest performing sector in the second quarter of 2015 was TMT with 27 transactions (ie, 21 per cent of the total 128 deals announced). This brisk activity correlates with the relative stock performance of this segment in the last twelve months. Despite the turbulence after the Swiss National Banks' announcement to abandon the Swiss franc to euro floor, the industrial goods and services sector continued to have robust M&A activity in 2015, and is the second most active industry. The reason for this high level of activity is the fact that Switzerland has historically always had a strong industrial sector with many SMEs, which are currently looking for succession in their ownership and management.

“Generally, there are very few restrictions on foreign investors acquiring companies in Switzerland.”

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

CN: In the beginning of 2015, French NJJ Capital, the private holding company owned by Xavier Niel (one of France’s best known entrepreneurs in the communications sector), agreed to buy Orange Switzerland from Apax Partners in a deal worth €2.3 billion, which allowed Niel to expand his telecoms assets across Europe. Apax, one of the world’s leading private equity firms, held Orange Switzerland for roughly two years.

Another recent deal worth mentioning is the intended sale of Swissport by the European private equity firm PAI Partners to the owner of Hainan Airlines of China for 2.7 billion Swiss francs. Closing is expected to take place by the end of 2015. Swissport International, based in Zurich, provides cargo and ground services at airports in 48 countries and employs about 60,000 people. PAI Partners agreed in 2010 to acquire Swissport International from Ferrovial of Spain for €654 million (about 722 million Swiss francs).

On 10 February 2015, Tamedia announced the acquisition of ricardo.ch from Naspers. The acquisition is in line with Tamedia’s strategy to strengthen its position in the Swiss online market and expand its digital portfolio. The company plans to increase the EBITDA contribution of its digital business to 50 per cent, compared to less than 30 per cent in 2014, by growing organically and through acquisitions over the next two to three years.

GTDT: 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: This mainly depends on the intentions of the selling shareholders and the acquisition type. A large number of acquisitions in Switzerland are settled in cash. If a purchaser offers shares, sellers usually accept such consideration only if the shares are readily marketable (possibly after a lock-up period). The necessity of the shares being marketable rules out share-for-share deals involving private companies as buyers. Parties are, however, free to combine cash, share and other purchase price components. In public transactions, mandatory offers have to be made in cash or must at least include a cash alternative when making an exchange offer.

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

CN: Since 1 July 2015, the holders of bearer shares have the obligation to report the acquisition, as well as the name and address of the acquirer, to the company within a period of one month from the acquisition or, if acquired prior to July 2015, by 31 December 2015. Furthermore, whoever acquires (bearer or registered) shares in a company, and thereby attains or exceeds the threshold of 25 per cent of the share capital or voting rights, must notify the company within a period of one month (the beneficial ownership is relevant). With this revision, the companies’ housekeeping work and expenses will increase and there are sanctions for non-compliant shareholders. In addition, the board of directors will become liable vis-à-vis its shareholders if it does not take appropriate measures to ensure compliance with the new disclosure obligations.

On 1 May 2013 an important amendment to the Federal Act on Stock Exchanges and Securities Trading (SESTA) entered into force and introduced changes to both takeover law as well as market abuse and insider dealing rules. The amendment, among other things, prohibits the payment of control premiums to

THE INSIDE TRACK

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

Switzerland's stable political system, liberal economy, highly educated workforce, reliable banking system, sophisticated and efficient legal environment and traditionally mild tax regime all contribute to an excellent environment not only for private equity, but also for business in general.

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

The most important thing without a doubt is deal experience, followed by industry knowledge and availability.

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

Every deal raises interesting and unique questions. One of the most interesting and challenging deals we worked on over the past few months was the acquisition of BASF's textile chemicals business by Archroma, a portfolio company of SK Capital Partners. The deal raised questions in every field of law and in various jurisdictions.

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the main shareholders in public takeover offers. Additionally, the amendment aims at closing regulatory gaps and harmonising Swiss law with international standards. The scope of application of SESTA has been extended regarding the disclosure duties of share ownership and public offers for companies with offices in foreign countries, which have their shares primarily listed in Switzerland. Furthermore, the reorganised procedural responsibilities allow officials to act more effectively against insider trading. Insiders may now be punished with up to five years imprisonment as well as fines of up to 1 million Swiss francs. The intentional breach of disclosure duties may be sanctioned by fines of up to 10 million Swiss francs.

Furthermore, Swiss voters approved a new law against 'fat cat' salaries, which is only applicable to companies listed in Switzerland. It calls for extensive new mandatory rules on transparency and compensation of board members and senior management. The new law, among other things, prohibits severance payments, advance payments and similar extraordinary payments to directors or senior managers. Additionally, as of 2015, the annual general meeting of shareholders' must approve the aggregate compensation of the board of directors and the senior management. On top of that, listed companies' articles of association will have to include rules for directors and senior managers on loans, retirement benefits, incentive and participation plans and the number of mandates outside the group. Furthermore, the institutional voting representation by governing

bodies of the company itself or custodians is henceforth abolished, which will strengthen the role of the independent proxy. As a consequence of this new law, some smaller listed companies may consider a delisting in order to avoid the new regulations and related legal and compliance costs. As witnessed in the course of last year, a public Swiss company (Acino Holding) was taken private.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country com-mon?

CN: The Swiss economy is traditionally very export oriented. In 2014, the Swiss Federal Statistic Office registered exports of more than 285 billion Swiss francs, nearly 50 per cent of which had their destination in Europe. The discontinuation of the minimum Swiss franc to euro exchange rate by the Swiss National Bank in the beginning of 2015, which made the Swiss franc more expensive compared to the euro, had a very negative effect on the Swiss export industry and therefore the economy as a whole. There is also growing uncertainty surrounding the Swiss commercial landscape in relation to new regulations and laws. Many Swiss banks are still in negotiations with the US regarding potential violation of US tax laws. Additionally, the Swiss unexpectedly voted for the 'fat cat' initiative and the initiative against mass immigration – both of which are (at least according to some analysts) not at all in the best interests of the Swiss commercial

landscape. However, the Swiss market is still very attractive for foreign investors. Generally, there are very few restrictions on foreign investors acquiring companies in Switzerland.

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

CN: There has been a significant increase of shareholder activism in recent years. Compared to other jurisdictions, shareholders of Swiss companies cannot use the channels of the company to communicate with other shareholders and have no right of access to the share register. This means that the communication between activists and the target's shareholders is very limited. The recently adopted Ordinance Against Excessive Compensation might lead to more interaction in the future because it stipulates the duty for pension funds to vote in general meetings of companies in the interest of their insured persons. Therefore, pension funds will probably more frequently take advantage of the advice of proxy advisers such as ISS, Glass Lewis, Ethos, Swipra or zCapital. Consequently, it is very likely that such movements will become more important especially regarding the approval of management compensation in the near future.

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

CN: Every M&A transaction is different and must be individually structured to take into consideration the specific needs of the purchaser and the seller as well as the target business. The features of an M&A transaction depend mainly on the legal form of the target business (share corporation, limited liability company or others), the purchaser and seller (both foreign or domestic, public or private), the legal form for the transaction (asset deal, share deal, mixture of asset and share deal or statutory merger) as well as tax considerations. A common private M&A deal could consist of the following phases: during the first phase (the preparation phase) the sales documentation and marketing material, etc, need to be prepared by the seller and its advisers. In the marketing phase, the first contact with the potential bidders is initiated. This can happen through intermediaries or the executive management. However, the larger the deal size and the more complex the deal structure, the more common it is to use professional financial advisers. In the second phase, interested bidders that signed a non-disclosure agreement are provided with an information memorandum

based on which a non-binding offer is provided to the seller. In auction processes that aren't competitive, the seller might consider entering into exclusive negotiations with one potential buyer. In the third phase (the marketing and due diligence phase) management visits take place and the clarification of offers can be conducted. Then the due diligence starts, Q&A sessions are held and the transaction agreement can be revised. In the fourth phase (the negotiation, signing and closing phase) the transaction agreement is negotiated. The parties can then proceed to the signing and closing. The parties are, of course, free to structure the process in their own best interests. As is common practice in some other jurisdictions, parties sometimes decide to sign the share purchase agreement prior to conducting a due diligence, which will have a major impact on the share purchase agreement.

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

CN: Because of the direct democracy in Switzerland, public opinion has a big influence on the legal and commercial landscape. Historically, the Swiss have been very liberal, both with respect to economic as well as social topics. However, after the 2008 crisis, public opinion in Switzerland with respect to big companies – in particular the finance industry – was fairly negative and certain regulations were made that are untypical for Switzerland (such as the regulation against 'fat-cat' salaries). However, it seems that public opinion is shifting back to a more pro-business approach. We therefore do not expect any legal or commercial changes in the near future that will negatively impact practice or activity in Switzerland.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

CN: We are fairly optimistic looking ahead. The economics in the United States and many parts of Europe, including Switzerland, are still going strong and leveraged financing is ensured. In addition, many industries in Switzerland remain very attractive for transactions. On the other hand, the factors that impeded further growth in inbound M&A activities (a strong Swiss franc, uncertainty regarding the competitiveness of Swiss companies due to higher production costs and certain pieces of legislation in Switzerland) will most likely be reduced in the short term.

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