



ICLG

The International Comparative Legal Guide to: **Mergers & Acquisitions 2019**

13th Edition

A practical cross-border insight into mergers and acquisitions

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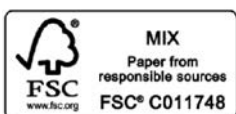
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General Chapters:

1	Global M&A Trends in 2019 – Scott Hopkins & Adam Howard, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	The MAC is Back: Material Adverse Change Provisions After Akorn – Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz	4
3	The Dutch ‘Stichting’ – A Useful Tool in International Takeover Defences – Alexander J. Kaarls & Willem J.T. Liedenbaum, Houthoff	10

Country Question and Answer Chapters:

4	Albania	Gjika & Associates: Gjergji Gjika & Evis Jani	14
5	Angola	Vieira de Almeida: Vanusa Gomes & Paulo Trindade Costa	21
6	Australia	Atanaskovic Hartnell: Jon Skene & Lawson Jepps	27
7	Austria	Schoenherr: Christian Herbst & Sascha Hödl	34
8	Belgium	Loyens & Loeff: Wim Vande Velde & Mathias Hendrickx	45
9	Bermuda	MJM Limited: Jeremy Leese & Brian Holdipp	55
10	Botswana	Kelobang Godisang Attorneys: Seilaneng Godisang & Laone Queen Moreki	62
11	Brazil	Motta Fernandes Advogados: Cecilia Vidígal Monteiro de Barros	67
12	British Virgin Islands	Maples Group: Richard May & Matthew Gilbert	75
13	Bulgaria	Schoenherr: Ilko Stoyanov & Katerina Kaloyanova	82
14	Cameroon	D. MOUKOURI AND PARTNERS: Danielle Moukouri Djengue & Franklin Ngabe	91
15	Cayman Islands	Maples Group: Nick Evans & Suzanne Correy	96
16	China	Zhong Lun Law Firm: Lefan Gong	103
17	Croatia	Law firm Vukić and Partners: Zoran Vukić & Ana Bukša	110
18	Cyprus	E&G Economides LLC: Marinella Kilikitas & George Economides	117
19	Czech Republic	HAVEL & PARTNERS s.r.o.: Jaroslav Havel & Jan Koval	124
20	Denmark	Bech-Bruun: Steen Jensen & David Moalem	131
21	Finland	Dittmar & Indrenius: Anders Carlberg & Jan Ollila	138
22	France	Villey Girard Grolleaud: Frédéric Grillier & Daniel Villey	146
23	Germany	SZA Schilling, Zutt & Anschutz Rechtsanwalts-gesellschaft mbH: Dr. Marc Löbbe & Dr. Michaela Balke	153
24	Hong Kong	Ashurst Hong Kong: Joshua Cole & Chin Yeoh	161
25	Hungary	Oppenheim Law Firm: József Bulcsú Fenyvesi & Mihály Barcza	168
26	Iceland	BBA: Baldvin Björn Haraldsson & Stefán Reykjalin	174
27	India	Shardul Amarchand Mangaldas & Co.: Iqbal Khan & Faraz Khan	181
28	Indonesia	Walalangi & Partners (in association with Nishimura & Asahi): Luky I. Walalangi & Siti Kemala Nuraida	188
29	Ireland	Matheson: Fergus A. Bolster & Brian McCloskey	193
30	Italy	NUNZIANTE MAGRONE: Fiorella Alvino & Fabio Liguori	202
31	Japan	Nishimura & Asahi: Tomohiro Takagi & Kei Takeda	208
32	Korea	SEUM Law: Steve Kim & Hyemi Kang	217
33	Luxembourg	GSK Stockmann: Marcus Peter & Kate Yu Rao	225
34	Macedonia	Debarliev Dameski & Kelesoska Attorneys at Law: Emilija Kelesoska Sholjakovska & Ljupco Cvetkovski	231
35	Malta	WH Partners: James Scicluna & Rachel Vella Baldacchino	238
36	Mexico	Nader, Hayaux & Goebel: Yves Hayaux-du-Tilly Laborde & Eduardo Villanueva Ortiz	245
37	Montenegro	Moravčević Vojnović and Partners in cooperation with Schoenherr: Slaven Moravčević & Miloš Laković	252

Continued Overleaf →

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Country Question and Answer Chapters:

38	Mozambique	Vieira de Almeida: Guilherme Daniel & Paulo Trindade Costa	259
39	Netherlands	Houthoff: Alexander J. Kaarls & Willem J.T. Liedenaum	266
40	Norway	Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen & Gard A. Skogstrøm	275
41	Poland	WBW Weremczuk Bobel & Partners Attorneys at Law: Łukasz Bobel	289
42	Portugal	Vieira de Almeida: Jorge Bleck & António Vieira de Almeida	296
43	Puerto Rico	Ferraiuoli LLC: Fernando J. Rovira-Rullán & María del Rosario Fernández-Ginorio	302
44	Romania	Popovici Nițu Stoica & Asociații: Teodora Cazan	309
45	Saudi Arabia	Alexander & Partner Rechtsanwalte mbB: Dr. Nicolas Bremer	315
46	Serbia	Moravčević Vojnović and Partners in cooperation with Schoenherr: Matija Vojnović & Vojimir Kurtić	322
47	Slovakia	Škubla & Partneri s. r. o.: Martin Fábry & Marián Šulík	331
48	Slovenia	Schoenherr: Vid Kobe & Bojan Brežan	337
49	South Africa	ENSafrica: Professor Michael Katz & Matthew Morrison	348
50	Spain	Ramón y Cajal Abogados: Andrés Mas Abad & Lucía García Clavería	357
51	Sweden	Advokatfirman Törngren Magnell: Johan Wigh & Sebastian Hellesnes	364
52	Switzerland	Bär & Karrer Ltd.: Dr. Mariel Hoch	370
53	Turkey	Kılınç Law & Consulting: Levent Lezgin Kılınç & Seray Özsoy	378
54	Ukraine	Nobles: Volodymyr Yakubovskyy & Tatiana Iurkovska	384
55	United Arab Emirates	Alexander & Partner Rechtsanwalte mbB: Dr. Nicolas Bremer	392
56	United Kingdom	White & Case LLP: Philip Broke & Patrick Sarch	400
57	USA	Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thomas H. Kennedy	408

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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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 Financial Market Infrastructure Act (“FMIA”; including its implementing ordinances) and the Swiss Federal Merger Act (“MA”). In addition, block trades in public M&A transactions are governed by the Swiss Code of Obligations (“CO”). The FMIA includes the Swiss public takeover rules which are enforced by the Takeover Board (“TOB”). Decisions of the TOB may be challenged before the Swiss Financial Market Supervisory Authority (“FINMA”) and, finally, the Swiss Federal Administrative Court.

Apart from the specific FMIA tender offer regime, a number of other laws apply in the context of public tender offers, including the Federal Antitrust Act and 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 FMIA and the takeover rules only apply if: (i) the target is domiciled in Switzerland and its shares are fully or partly listed on a Swiss stock exchange; or (ii) the target is domiciled 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 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 of the shareholders of the Swiss company 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 are therefore 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 pharmaceuticals, and media and telecommunications.

In general, the acquisition by a foreign acquirer of control of a company holding a banking, securities trading, insurance, healthcare, pharmaceutical 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 with 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). Prospectus liability may be triggered by the publication of the offer documents. Non-compliance with 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. The target company may be subject to a fine of up to CHF 500,000 if its board violates its obligations relating to its report on the offer. Under Swiss insider trading rules, any person with inside information acts unlawfully if he or she exploits such information to acquire or dispose of Swiss listed securities,

communicates such information to another person without justification or exploits such information to make a recommendation to another person. Under the FMIA, 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) (subject to an opting-out from the mandatory bid obligation); (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 (again, subject to an exemption or opting out from the mandatory bid obligation); 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, and often also communications advisers. Specialised law firms regularly draft the tender 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 to a large extent regulated. 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 and whether financing is in place. 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 typically lasts between 20 and 40 trading days and may be shortened or 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. In its final form, it must be published 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 (typically) 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 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 cases where 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 of 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 not aiming to exceed the mandatory offer threshold 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 for such securities is deemed illiquid, a valuation must be prepared by the review body in order to allow an assessment as to whether or not the minimum price rule is adhered to (see question 2.2). In the 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, if applicable, the minimum price rule – see question 5.4), 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, i.e. the prices offered for each class of shares must preserve an equitable ratio (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 board members and top executives in connection with M&A transactions, are equally regarded as illegal by law, and board and top executive compensation is subject to the shareholders' approval.

If the public tender offer is successful, selected employments may be perpetuated, provided that both the bidder and 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 that there is no hidden share premium. 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?

M&A transactions are not subject to the approval of employees, pension trustees and other stakeholders. There is, however, an obligation to inform/consult employees in the case of an asset deal qualifying as business (or business unit) transfer, where employees are granted the right to refuse to be 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 the case of mass redundancies, the employees must also be given the opportunity to make proposals on how 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 standstill) 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. It also includes the report of the review body. In case the target's equity securities are deemed illiquid, the offeror must publish a valuation by the independent review body. In friendly takeovers, the prospectus usually includes the report on the offer of the target company's board of directors, in most cases 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. Non-Swiss offerors often choose to provide an English version voluntarily.

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 on the bidder's webpage. In cases where 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 may 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 fees of the review body (between CHF 70,000 and 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 (between CHF 150,000 and CHF 2,000,000). In addition, advisers' 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, both approval of the offer prospectus

and the report of the target's board of directors by the Takeover Board are 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?

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 that the shareholders of the offeror 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 on 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 target board is labelled as hostile. The FMIA regulates public takeovers irrespective of this categorisation.

3.2 Are there rules about an approach to the target?

In principle, there are no rules about the approach to the target company. As long as the threshold triggering a mandatory public tender offer (typically 33⅓ per cent) 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 a 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. Although target board support is not essential for success, 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?

Even if the target company does not allow a due diligence process, the potential purchaser can still access certain information. First of all, the Commercial Register provides for elementary and publicly 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 Swiss Exchange ("SIX"), 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 cases where the target has granted due diligence materials to competing bidders, reasonable access to the same 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 principle, 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 informed immediately. 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 inside information may not be exploited. 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 cases where the intended transaction becomes public, the market must be immediately informed. Disclosure must be made in order 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 the 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 offeror may, under certain conditions, 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?

The offeror may buy shares (on and off exchange) outside the public tender offer process prior to 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?

Derivatives may be bought 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 FMIA, any person who reaches, exceeds or falls below three, five, 10, 15, 20, 25, 33⅓, 50 or 66⅔ per cent of the

voting rights of the target company 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, (except for a large single block trade) 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 and qualified shareholders (i.e. shareholders holding at least three per cent in the target company) must disclose individually and on a daily basis (by noon on the following trading day) all transactions in securities relating to the offer to the Takeover Board and the Disclosure Office of the SIX.

5.4 What are the limitations and consequences?

Generally, the offeror is obliged to offer a price that equals at least 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 cases where the bidder pays a higher price before or outside the offer, it is required to equally offer such a 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 (fiduciary out).

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 the case of a public tender offer or the shareholders approve such an 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 the 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 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 will) 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; 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. In particular, 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 FMIA. 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 FMIA, the shareholders of the target company have an appraisal right in the event of a squeeze-out merger. The duration of the squeeze-out merger varies between two and three months.

8 Target Defences

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

In the case of an approach by a potential bidder, Swiss corporate law requires the target board to act in the best interests of the company. Depending on the interests 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 (these are typically forbidden according to the ordinance against excessive compensation in listed stock companies), 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 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.

Moreover, especially by protecting minority shareholders and limiting the ability to take frustrating actions (see question 8.2), by allowing break fees to be paid (see question 6.1) as well as irrevocable tender commitments to be obtained, 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, as they may prevent any subsequent squeeze-out merger pursuant to the MA, or shareholders holding at least three per cent of the target's shares 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 per cent 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 a non-qualified or, if required, a qualified decision-making quorum, the buyer will need the support of 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 your jurisdiction.

No new laws or practices of particular note have been introduced in recent months.

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- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
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- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
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