

**International
Comparative
Legal Guides**



Mergers & Acquisitions

2024

18th Edition

Contributing Editors:

Lorenzo Corte & Denis Klimentchenko
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

glg Global Legal Group

Expert Analysis Chapter

1

How May Companies React to Takeover Offers by Controlling Shareholders?

Lorenzo Corte, Denis Klimentchenko, Andrea Spadacini & Sarah Knapp, Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Q&A Chapters

5

Austria

Schoenherr: Christian Herbst, Sascha Hödl & Sascha Schulz

16

Bermuda

MJM Limited: Jeremy Leese & Brian Holdipp

23

Brazil

Pinheiro Neto Advogados:
Joamir Müller Romiti Alves, Carlos Elias Mercante & Luiz Felipe Fleury Vaz Guimarães

30

Bulgaria

Advokatsko druzhestvo Stoyanov & Tsekova in cooperation with Schoenherr: Ilko Stoyanov & Katerina Kaloyanova-Toshkova

40

Canada

Stikeman Elliott LLP: John R. Laffin, John Lee & Meghan Jones

51

Cayman Islands

Maples Group: Suzanne Correy, Louise Cowley & Akshay Naidoo

58

China

JunHe LLP: Jing Cai (Cathy)

65

Croatia

Vukić and Partners: Zoran Vukić, Iva Sunko, Ana Mihovilčević & Ema Vukić

72

Cyprus

Kilikitas & Co Law: Marinella Kilikitas

79

Denmark

Bech-Bruun: Steen Jensen & David Moalem

86

Finland

Dittmar & Indrenius: Anders Carlberg & Jan Ollila

94

France

Vivien & Associés: Lisa Becker & Julien Koch

102

Greece

Masouros & Partners: Pavlos Masouros, Antonis Nikolaidis & Christos Liapis

109

Hungary

Oppenheim Law Firm: Rita Koczka, Barna Fazekas & Gábor Kordoványi

116

India

Shardul Amarchand Mangaldas & Co.:
Raghubir Menon, Sakshi Mehra & Rooha Khurshid

127

Ireland

Philip Lee LLP: Inez Cullen & Rebecca McEvoy

137

Japan

Nishimura & Asahi (Gaikokuho Kyodo Jigyo):
Tomohiro Takagi & Keiichiro Yamanaka

147

Liechtenstein

Ospelt & Partner Attorneys at Law Ltd.:
Judith Hasler & Thomas Plattner

153

Luxembourg

GSK Stockmann: Marcus Peter & Kate Yu Rao

160

Malaysia

WM Leong & Co: Wan May Leong, Wai Kin Leo,
Wan Yi Lim & Ryan Heng

171

Mauritius

SC Legal: Shaheena Abdul Carrim

178

Montenegro

Moravčević Vojnović i Partneri in cooperation with
Schoenherr: Slaven Moravčević & Luka Veljović

186

Netherlands

Houthoff: Alexander J. Kaarls,
Willem J.T. Liedenbaum & Kasper P.W. van der Sanden

195

New Zealand

Russell McVeagh: Cath Shirley-Brown &
David Raudkivi

203

Nigeria

The Trusted Advisors: Olawunmi Olamide Ojo,
Deborah Onafadeji, Adeife Omolumo &
Maureen Izibevie Esegie

213

Norway

Aabø-Evensen & Co Advokatfirma:
Ole Kristian Aabø-Evensen

229

Portugal

Bandeira, Reis Lima & Brás da Cunha – Sociedade de
Advogados, SP, RL: Miguel Brás da Cunha &
Mariana da Silva Esteves

236

Serbia

Moravčević Vojnović i Partneri in cooperation with
Schoenherr: Matija Vojnović & Vojimir Kurtić

244

Singapore

Bird & Bird ATMD LLP: Marcus Chow, Jolie Giouw &
Luke Oon

Q&A Chapters Continued

- 254** **Slovakia**
NOMUS Law Firm: Marián Bošanský & Jozef Boledovič
- 260** **Slovenia**
Schoenherr: Vid Kobe & Bojan Brežan
- 271** **South Africa**
Bowmans: Ezra Davids, Ryan Kitcat & Nanga Kwinana
- 280** **Spain**
J&A Garrigues, S.L.P.: Ferran Escayola & Elisabet Terradellas
- 288** **Switzerland**
Bär & Karrer AG: Dr. Mariel Hoch
- 296** **United Kingdom**
Weil, Gotshal & Manges (London) LLP: David Avery-Gee & Murray Cox
- 304** **USA**
Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thad Hartmann
- 323** **Zambia**
Moir Mukuka Legal Practitioners: Sharon Sakuwaha & Sampa Kang'ombe
- 330** **Zimbabwe**
Absolom & Shepherd Attorneys: Simbarashe Absolom Murondoti & Shepherd Machigere

International Comparative Legal Guides

Switzerland

Bär & Karrer AG



Dr. Mariel Hoch

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 are 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 Lex Koller, foreign buyers (i.e. a foreigner, a foreign corporation or a Swiss corporation controlled by foreigners) must 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.

In addition, in May 2022, the Swiss Federal Council published its preliminary draft for a new law on the control of foreign direct investment and initiated the consultation process. The new law is intended to protect public order and security in the event of takeovers of domestic companies by foreign investors. The preliminary draft focuses (i) on takeovers by foreign investors that are under the direct or indirect control of a foreign state, and (ii) on takeovers in certain sectors that are security-critical. As a result of the largely sceptical feedback received during the consultation process, which was based, in particular, on concerns that Switzerland would lose its attractiveness as a business location, the Federal Council has instructed the Federal Department of Economic Affairs, Education and Research (“DEAER”) to draft legislation by the end of 2023 that is limited to the most critical investments in terms of security.

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 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 punishable offences; 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 by: (i) purchasing a controlling block of shares from the previous shareholder(s) (subject to an opting-out from the mandatory bid obligation); (ii) acquiring a business (assets and liabilities) or by a transfer of assets according to the MA; (iii) participating in a major share capital increase (again, subject to an exemption or opting out from the mandatory bid obligation); or (iv) 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 TOB 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 TOB 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 TOB (first before the TOB 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 TOB. 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) standstill 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 $\frac{1}{3}$ 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 TOB. 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 provisions of the CO and the Swiss Criminal Code on compensation in listed stock companies (formerly contained in the ordinance against excessive compensation in listed stock companies and incorporated into the CO and the Swiss Criminal Code as of 1 January 2023), severance payment agreements concluded with board members and top executives of a listed stock company 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 employment 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 a 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 statement 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 TOB (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 million). 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 TOB are required. The offeror normally provides the TOB with a draft as early as possible to prevent it from asking for amendments after publication, which would need to be published again. The TOB 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 TOB 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 that 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 of the voting rights) 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 TOB takes longer in hostile situations. Furthermore, hostile takeovers may envisage defensive measures of the target company as the 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 that 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 TOB 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-day volume weighted average price ("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 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 negotiation 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. 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 TOB. 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. During the course of an offer, the target board may not enter into transactions that 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 a (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.

The process of delisting the target shares from the SIX can generally be timed in order to align it with the squeeze-out procedure. The decision to delist the target shares lies with the shareholders' meeting of the target (it used to be a decision of the target board of directors until the revised corporate law came into force on 1 January 2023) and requires a super majority of $\frac{2}{3}$ of the votes and more than 50 per cent of the capital of the target shares.

8 Target Defences

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

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 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, 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 TOB 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 are 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), as well as 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, introducing contingent capital or a

capital band, increasing the share capital by way of capitalisation of reserves or against contributions in kind, restricting or cancelling shareholders’ subscription rights, delisting the shares of the company, 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.

The law on stock companies, which forms part of the CO, has been revised and came into force on 1 January 2023. The main objectives of the revision were to improve corporate governance, modernise the general meeting of shareholders and make capital requirements more flexible. In addition, the provisions formerly contained in the ordinance against excessive compensation in listed stock companies have been incorporated into the CO and several changes strengthening minority rights have been adopted, according to which shareholders holding at least five per cent of the share capital or votes in a listed company may demand: (i) the inspection of business books and documents; (ii) a special investigation; or (iii) the convening of a shareholders’ meeting, and shareholders holding 0.5 per cent of the share capital or votes in a listed company may submit requests to the shareholders’ meeting.



Dr. Mariel Hoch is a partner in the corporate and M&A department at Bär & Karrer. Her practice focuses on domestic and cross-border public tender offers and mergers, and general corporate and securities matters, including proxy fights, hostile defence matters and corporate governance. She also represents clients in M&A-related litigation. She has advised a broad range of public and private companies and individuals in Switzerland and abroad in a variety of industries, including technology, healthcare, pharmaceuticals, financial services, retail, leisure, transportation and industrial products.

Mariel Hoch graduated from the University of Zurich in 1999. From 1999 until 2001, she worked as a research and teaching assistant to Prof. Dr. Hans Caspar von der Crone, and in 2002, she became a trainee at Bär & Karrer. In 2003, Mariel Hoch obtained her PhD from the University of Zurich, and in 2005, she was admitted to the Zurich Bar. In 2007, she was seconded to Human Rights Watch, and in 2008, to Slaughter and May's M&A group, both in London.

Mariel Hoch has frequent speaking engagements on M&A-related topics and teaches regularly at a number of private and public universities (e.g. Europainstitut of the University of Zurich, Switzerland; University of St. Gallen, Switzerland; and Insper Instituto de Ensino e Pesquisa in São Paulo, Brazil).

Bär & Karrer AG
Brandschenkestrasse 90
CH-8002 Zürich
Switzerland

Tel: +41 58 261 55 99
Email: mariel.hoch@baerkarrer.ch
URL: www.baerkarrer.ch

Bär & Karrer is a leading Swiss law firm with more than 200 lawyers in Zürich, Geneva, Lugano, Zug and Basel. Our core business is advising our clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. Our clients range from multinational corporations to private individuals in Switzerland and around the world.

Most of our work has an international component. We have broad experience handling cross-border proceedings and transactions. Our extensive network consists of correspondent law firms that are all market leaders in their jurisdictions.

Bär & Karrer has repeatedly been awarded Switzerland Law Firm of the Year by the most important international legal ranking agencies in recent years:

- 2022, 2019, 2018, 2016, 2015 and 2014 *Mergermarket* European M&A Award ("Legal Adviser of the Year").
- 2022 *International Legal Alliance* Summit & Awards Law Firm of the Year Switzerland.
- 2021 *Citywealth* Magic Circle Awards Law Firm of the Year.
- 2020 *Euromoney LMG* Life Science Firm of the Year.
- 2020 *Euromoney LMG* European Financial & Corporate Firm of the Year.
- 2020 STEP International Legal Team of the Year.

- 2020 *IP Global Awards*, Swiss IP-Transactions Firm of the Year.
- 2020, 2019, 2018 and 2017 *Trophées du Droit* Silver.
- 2019, 2015 and 2014 *IFLR* Award.
- 2019 *IFLR* Debt and Equity-linked Deal of the Year.
- 2018 *IFLR* M&A Deal of the Year.
- 2018 Best in Trusts & Estates by *Euromoney LMG*.
- 2016 *Trophées du Droit* Gold.
- 2016, 2013 and 2012 *Chambers European Awards*.
- 2016, 2015 and 2014 *The Legal 500* ("most recommended law firm in Switzerland").

www.baerkarrer.ch

BÄR
& KARRER

International Comparative Legal Guides

The **International Comparative Legal Guide (ICLG)** series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

Mergers & Acquisitions 2024 features one expert analysis chapter and 38 Q&A jurisdiction chapters covering key issues, including:

- Relevant Authorities and Legislation
- Mechanics of Acquisition
- Friendly or Hostile
- Information
- Stakebuilding
- Deal Protection
- Bidder Protection
- Target Defences
- Other Useful Facts
- Updates