PRACTICE GUIDES

Swiss M&A

Second Edition

Contributing Editors
Ueli Studer, Kelsang Tsün and Joanna Long

LEXOLOGY®
Getting The Deal Through

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Practice Guide

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Legal framework and recent changes

Swiss M&A transactions related to public companies are mainly governed by the Swiss Financial Market Infrastructure Act (including its implementing ordinances) and the Swiss Federal Merger Act. In addition, certain agreements entered into in connection with a public M&A transaction, such as block trade agreements, tender undertakings or shareholders' agreements, are governed by the Swiss Code of Obligations. Apart from the specific Swiss public takeover rules, a number of other laws apply in the context of public tender offers, including the Federal Antitrust Act.

The Swiss public takeover rules are enforced by the Swiss 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.

The Swiss takeover rules only apply if either the target is domiciled in Switzerland and its shares are fully or partly listed on a Swiss stock exchange (eg, SIX Swiss Exchange or BX Swiss) or the target is domiciled outside of Switzerland but the main listing of all or part of its shares is on a Swiss stock exchange (the TOB may waive the applicability of the Swiss regime if the takeover rules of the country of domicile also apply, provided that such rules are not in conflict with the Swiss regime and provide for equivalent shareholder protection). In principle, the Swiss 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 Swiss 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.

The Swiss takeover rules apply to both Swiss and non-Swiss bidders irrespective of whether they are listed. As with private M&A transactions (as described in the chapter on private M&A), there are to date very few restrictions in respect of foreign investment control with regard to Swiss-incorporated public companies, in spite of other jurisdictions across Europe tightening

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foreign investment control. Political aspirations to introduce wider foreign investment control in Switzerland are, however, increasing. There is, however, one important exception. Pursuant to the Federal Act on the Acquisition of Real Estate by Foreigners (Lex Koller), non-Swiss buyers (ie, non-Swiss natural persons, non-Swiss corporations or Swiss corporations controlled by such non-Swiss natural persons or corporations) 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. The acquisition of shares of a public company whose shares are listed on a Swiss stock exchange is exempted from such special permit obligation. However, there may be restrictions regarding transactions of such public company following the settlement of the public tender offer, for example, regarding additional acquisitions of real estate in Switzerland or in the case of a migration of its statutory seat or an emigration cross-border merger outside of Switzerland. Further requirements and restrictions exist in certain regulated sectors such as banking and securities trading, insurance, healthcare and pharmaceuticals, and media and telecommunications.

For instance, the intended acquisition of a qualified direct or indirect participation (ie, 10 per cent or more of share capital or voting rights or significant influence by other means, eg, on a contractual basis) in a Swiss bank or securities firm as well as the reaching or crossing of further shareholding thresholds at 20, 33 and 50 per cent of share capital or voting rights triggers notification duties to FINMA, both on the part of the acquiring and disposing shareholders and on the part of the bank or securities firm itself. Given that qualified shareholders must fulfil regulatory fit-and-proper requirements, the notification duty de facto has the effect of an approval requirement. If, as a result of a planned transaction, a Swiss bank or securities firm stands to become foreign-controlled (ie, where foreign qualified shareholders directly or indirectly control more than 50 per cent of the voting rights or exercise control by other means), a formal approval by FINMA in the form of a supplemental licence is required. Further requirements may apply in the context of financial groups or conglomerates subject to consolidated supervision by FINMA or a foreign lead regulator, which may create a need for coordination with or between different authorities in the approval process.

In connection with the Swiss takeover rules, no new laws or practices of particular note have been recently introduced. However, a notable change in Swiss corporate law regarding the disclosure of the beneficial owner of shares by the shareholder as well as the abolition of bearer shares was implemented in November 2019 (as described in the chapter on private M&A). One of the few exceptions to the prohibition of bearer shares is companies with shares listed on a Swiss stock exchange. Following the settlement of a public tender offer and subsequent delisting from the Swiss stock exchange, such company will therefore need to convert its bearer shares into registered shares. As part of the general revision of Switzerland's financial regulatory framework, the Financial Services Act and the Financial Institutions Act (including their implementing ordinances) entered into force in January 2020. Further, the law on stock companies, which forms part of the Swiss Code of Obligations, is currently under review and several changes strengthening minority rights have been proposed. The changes are not yet final and the date of entry into force is not yet known.

Development of public M&A activity and landmark transactions

The development and performance of the overall Swiss M&A market continued to see strong activity in 2020 (as described in the chapter on private M&A). Even though private M&A

transactions accounted for the majority of the overall Swiss M&A market both in terms of number of deals and deal value in 2020, there were a few noteworthy public M&A deals and TOB procedures.

The largest public M&A deal of 2020 was the public tender offer submitted by Liberty Global plc, United Kingdom, for all publicly registered shares in Sunrise Communications Group AG, with a transaction volume of approximately 6.8 billion Swiss francs. The public tender offer was announced on 12 August 2020 and settled on 11 November 2020. At the end of the public tender offer, 96.6 per cent of all Sunrise shares had been tendered into the offer. Following the subsequent statutory squeeze-out of the remaining public shareholders, Sunrise was taken private and delisted from SIX Swiss Exchange.

On 10 July 2020, MCH Group AG announced a comprehensive set of measures, including a new anchor investor, Lupa Systems LLC, an independent private investment company owned by James Murdoch. MCH conducted a capital increase of 104.5 million Swiss francs, whereby Lupa Systems became a new anchor shareholder. The transaction aimed, inter alia, to secure Art Basel in Basel. The transaction was a contested one that involved a settlement with a disgruntled shareholder.

The only other public tender offer that took place in 2020 was the exchange offer of Parjointco NV, Netherlands, for all publicly held bearer shares in Pargesa Holding SA, Geneva.

The SIX Swiss Exchange-listed bakery Aryzta was subject to a proxy fight in 2020 that led to the replacement of the majority of the board of directors, including its chairman. Elliott Advisors was reported to have made a non-binding offer to the Aryzta board for all publicly held shares in Aryzta, which the board of directors of Aryzta rejected.

Besides the above-mentioned transactions, in 2020 the TOB was involved in a number of share buyback programmes, as well as a number of procedures relating to the applicability of public takeover rules.

Typical stages of Swiss public M&A transactions

General

The process of a typical public M&A transaction is governed by the Swiss takeover regime. Regarding the structuring of such a transaction, the Swiss takeover rules, however, allow for great flexibility.

The classic method of acquiring a Swiss public company is a public tender offer for the purpose of acquiring equity capital of the target. In exchange for the target shares, the bidder may offer shares (listed or non-listed), cash, or a combination thereof. Alternatively, control over a Swiss public company may also be obtained by:

- purchasing a controlling block of shares from the previous shareholder(s) (subject to an opting out from the mandatory bid obligation);
- acquiring a business (assets and liabilities) or by a transfer of assets according to the merger agreement;
- participating in a major share capital increase (again, subject to an exemption or opting out from the mandatory bid obligation); or
- a merger.

In the classic method of a public tender offer, the view of the target board determines the categorisation of the offer as friendly or hostile. The Swiss takeover rules apply irrespective of this categorisation. The support of the target board is, however, required in order to conduct a due diligence process prior to launching an offer. Further, a bid that is recommended by the board of directors of the target company is in general more likely to succeed (and is far more common than a hostile takeover).

Preliminary phase

Once the pre-announcement of the offer or the offer prospectus have been published, the typical stages and the timing of a public M&A transaction are regulated to a large extent. However, the phase immediately prior to the pre-announcement or the publication of the offer prospectus depends largely on the involved stakeholders and is relevant for the bidder to structure the deal and to get the support of the target's board of directors as well as possibly major shareholders. In this preliminary phase, the bidder and the target company usually conclude a confidentiality (and standstill) agreement. In the case of a friendly offer, the bidder and the target company will typically conclude a transaction agreement according to which the bidder is obliged to publish a tender offer subject to certain terms and the target's board of directors commits to support and recommend the offer. Further in such preliminary phase, the bidder may seek tender undertakings from major shareholders of the target.

In general, there are no rules about the approach by the bidder of the target company. As long as the threshold for triggering a mandatory offer (ie, 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 owing to the disclosure obligations of significant shareholdings (starting at 3 per cent of the target's issued voting rights), and the bidder must keep in mind the minimum price rule.

During this preliminary phase, the potential bidder has to be mindful of public statements. First, the TOB may qualify a public statement regarding a potential public takeover offer as a de facto pre-announcement of the offer if such statement contains already specific information as to the bidder's intent and the offer price. Second, even if such public statement does not fulfil the requirements of a pre-announcement, it may trigger certain obligations. In particular, the TOB may set the potential bidder a deadline to either 'put up' by making a formal offer or to 'shut up' by confirming that it will refrain from launching an offer for a period of six months (put-up or shut-up rule). This put-up or shut-up rule aims at liberating a target company that has been taken hostage by the destabilising effects of a lingering potential offer.

Public tender offer procedure

Subsequent to the negotiation and structuring phase and once an offer has been pre-announced, the bidder must publish the offer prospectus within six weeks. A pre-announcement is optional (ie, the bidder may directly publish the offer prospectus). If the bidder 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 between pre-announcement and the publication of the prospectus. Prior to publication of the offer, the bidder must further 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. In the case of a friendly takeover offer, the offer prospectus will also contain the report of the board of directors of the target. It is standard practice for the bidder to seek pre-clearance from the TOB prior to the publication of the offer prospectus, and the TOB will publish its decision regarding the compliance of the offer typically on the date of publication of the offer prospectus.

Following publication of the offer prospectus, a cooling-off period generally of 10 trading days applies, during which a qualified shareholder of the target (holding alone or together with other shareholders 3 per cent or more of the target's issued voting rights) may join the takeover proceedings as a party and appeal the decision of the TOB. The main offer period, which commences after the cooling-off 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 lapse of the main 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 lapse of the main offer period, and must specify whether the offer conditions have been met or waived and whether the offer has been successful. If the offer has been successful, the offer must be open for additional acceptances for 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 lapse of the additional acceptance period and in its final form no later than four trading days following the lapse of the additional acceptance period. The settlement of the public tender offer must take place 10 days after the last day of the additional acceptance period, but may take place later with the consent of the TOB in case merger and other regulatory clearances have not yet been obtained.

Squeeze-out and delisting

A bidder holding, alone or together with persons acting in concert, more than 98 per cent of the voting rights of the target company is entitled to request the cancellation of the remaining shares against payment of the offer price by way of a statutory squeeze-out. The action must be filed within three months following the lapse of the additional acceptance period. The bidder may continue to purchase target shares in order to reach the 98 per cent threshold until the court's decision regarding the cancellation of the shares. The duration of the statutory squeeze-out procedure varies between four and six months. Shareholder rights to challenge the statutory squeeze-out are limited to certain formal requirements and do not allow for any claim to increased compensation.

If the bidder holds more than 90 per cent of the shares but does not reach the 98 per cent threshold, minority shareholders may be forced out against compensation by way of a squeeze-out merger according to the Swiss Merger Act. The target shareholders have no right to obtain shares of the absorbing company, but may challenge the merger and the fairness of the compensation in court. Such appraisal claims may lead to a lengthy litigation procedure.

In the event of a successful tender offer followed by a squeeze-out merger or a statutory squeeze-out, and in the event the intention to delist the target company's shares has been disclosed in the offer prospectus, the requirements for a delisting are a mere formality and the timetable is very compact. In the absence of any rules to the contrary in the target's articles of association, the decision to delist the target's shares lies with the target board of directors. As of 2023, as part of the revised corporate law, delisting decisions will require shareholder approval.

General principles and rules of the Swiss takeover regime

Mandatory public tender offers, opting-out or opting-up and exemptions

Under certain circumstances, a person may be required to make a mandatory public tender offer to buy all publicly held shares of a listed company. Such a mandatory offer is triggered by an acquisition of shares (completion of the sale), resulting in a shareholding exceeding 33⅓ per cent of the voting rights of a target company, irrespective of whether such voting rights may be exercised.

Although mandatory offers are generally governed by the same set of rules as voluntary bids, there are important exemptions where stricter provisions apply. The minimum price rule applies (see below) and settlement by means of an exchange against securities is only permitted if a cash alternative is offered (such cash alternative must comply with the minimum price rule, but can be lower than the value of the shares offered in exchange). Further, mandatory offers, unlike voluntary offers, may be made subject to only a very limited number of offer conditions.

The Swiss takeover rules allow a Swiss target company to opt out of the mandatory offer rules by adopting a provision to this effect in its articles of association. Target companies may also opt up the threshold triggering a mandatory offer requirement in their articles of association from 33⅓ up to 49 per cent. The TOB has established a number of strict rules regarding transparency and majority requirements in connection with the introduction of such a clause in the company's articles of association, which, if they are not followed, prevent the opting-out or opting-up to be valid and effective (see leading case regarding LEM Holding SA, in which the validity of such a shareholders' resolution was the topic in two TOB procedures in 2011 and 2019).

There are a number of exemptions to the obligation to make a mandatory offer when exceeding the threshold of 33⅓ per cent of the shares of the target company. Certain of these exemptions, such as (among others) a restructuring involving a capital reduction immediately followed by a capital increase so as to offset a loss, require only a notification to the TOB. Other potential exemptions, such as (among others) the transfer of voting rights within a group, the temporary exceeding of the threshold or the acquisition of shares for the purpose of a restructuring (as in the case of Schmolz + Bickenbach AG in 2019) require a formal approval by the TOB and are only granted in justifiable cases.

Transparency and equal treatment of shareholders

The bidder must publish the offer in a prospectus with true and complete information in order to enable the recipients of the offer to reach an informed decision, including (among others) a brief description of any agreements between the bidder and the target as well as the target's shareholders. Further, the bidder must treat all shareholders of the target company equally, which is further expressed by the price rules applicable to Swiss tender offers.

Price provisions

According to the best-price rule the bidder must pay the same price to all recipients of the offer. Therefore, should the bidder or a person acting in concert with the bidder pay a price that is higher than the offer price offered under the offer to any shareholder between the pre-announcement of the offer and the date that is six months from the expiry of the additional acceptance period, such higher price must be paid to all recipients of the tender offer. Pursuant to its practice, the TOB may extend such period of six months if the parties tried to circumvent the best-price rule, which needs to be analysed carefully by the parties involved, in particular with regard to put or call options of certain major shareholders of the target company that have not tendered their shares under the offer.

In mandatory and in change-of-control offers (ie, offers that would allow the bidder to exceed the 33⅓ per cent threshold if successful), the offer price must be at least equal to the 60 days' volume weighted average price (VWAP, if the stock is liquid) or the highest price paid for securities of the target company by the bidder(s) in the 12 months preceding the offer, whichever is higher (minimum price rule). If the target shares are not deemed liquid from a takeover law perspective, the 60 days' VWAP is replaced by a valuation to be provided by the review body.

In partial tender offers or public tender offers for target companies with an opting-out provision in their articles of association, the minimum price rule does not apply and the bidder is free to set the offer price (the best-price rule, however, applies).

Rolling shareholders and ancillary benefits

In recent years, with more private equity investors looking at Swiss-listed target companies, a trend has evolved whereby structuring options involving one or more major shareholders of the target company either remain in the company (and sign a respective non-tender undertaking) or roll over into the bidder structure.

Such a structuring option involving a rolling shareholder leads to complex questions in connection with the price rules under the Swiss takeover law. The TOB may qualify certain benefits granted by the bidder to such rolling shareholder, which may be contained in a shareholders' agreement or other transaction documents such as put and call options or management or employee incentive plans (if the major shareholder is simultaneously a manager or an employee of the target), as ancillary benefits under the minimum, the best-price rule or both. If this is the case, such benefits would lead to an increase of the price that the bidder must pay to all shareholders of the target company having tendered their shares into the offer.

To mitigate the risks for the bidder in such structuring options, it became standard practice in Swiss public M&A deals with such a remaining or rolling shareholder that the bidder appoints an independent valuation expert in order to determine and value potential ancillary benefits included in such transaction documents (or to be in a position to delete them prior to the publication of the pre-announcement or the offer prospectus). Further, in such a transaction structure, the bidder will almost always seek a formal pre-clearance by the Swiss TOB to avoid any risk of breaching the price rules.

Offer conditions

The public tender offer may be subject to certain conditions. If, and only if, such offer conditions are not fulfilled (or waived), the bidder may walk away from the offer, which is, in Swiss public M&A transactions, extremely rare. In the context of voluntary offers, conditions are generally permissible if:

- their satisfaction is outside the bidder's control;
- they are stated clearly, objectively and in a transparent way in the offer documents; and
- they do not require any actions from the target company that could be unlawful (in particular a violation of the board's fiduciary duties).

The bidder must take all reasonable steps to ensure that the offer conditions are met.

Typical offer conditions are:

- a minimum acceptance threshold;
- a material adverse change clause relating to the target company (within the specific thresholds set out by the TOB case law);
- the registration of the bidder in the share register (in the case of registered shares) and the cancellation of transfer or voting right restrictions in the target's articles of association;
- merger and other regulatory approvals;
- replacement of the board of directors; and
- no injunction or court order.

Mandatory offers may be made subject to only a limited number of conditions, such as merger and other regulatory approvals, the removal of transfer or voting right restrictions and no injunction or court orders.

Transaction notifications

From publication of the pre-announcement or the offer prospectus until expiry of the additional acceptance period, all parties in a takeover proceeding, shareholders holding at least 3 per cent in the target company and persons acting in concert with the bidder must disclose on a daily basis all transactions in securities relating to the offer to the TOB and SIX Swiss Exchange. The TOB publishes the transaction notifications on its website.

Persons acting in concert with the bidder

Persons are acting in concert with the bidder when they are coordinating their conduct by contract or any other manner to purchase or sell securities or exercise voting rights. As a general rule, persons acting in concert with the bidder must be disclosed in the prospectus and comply with the bidder's obligations, such as the obligation to treat shareholders equally (including adherence to the price provisions), to notify transactions and to comply with transparency requirements. Further, if the persons are acting in concert in view to obtain joint control with the bidder over the target (ie, if they exercise a main role in the public tender offer), they are perceived as co-bidders and, if they hold in the aggregate 33⅓ per cent of the voting rights, a mandatory offer may be triggered.

Transaction certainty and competing offer

Swiss takeover law limits the ability of a bidder to protect the envisaged takeover transaction and absolute deal certainty is difficult to achieve. Conversely, Swiss law facilitates competing offers on a level playing field, which may be submitted until the last day of the main offer period. Generally, the target board of directors may lawfully agree to refrain from soliciting competing offers (no-shop undertaking). 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 bidder. Also, the target board must be free to withdraw its recommendation of the first offer and recommend a superior offer in compliance with its fiduciary duties. Obligations in the transaction agreement between the bidder and the target company that the TOB deems to be too restrictive on the right of the target board to consider competing offers have been declared void by the TOB. Further, break fees contained in the transaction agreement are not permissible if they will result in coercing shareholders to accept the offer. As a rough guide, the TOB has accepted in the past break fees of up to 1 per cent of the transaction volume.

Shareholders accepting an offer may revoke their commitment in the event of a competing offer. The same withdrawal right applies to tender undertakings (which, under Swiss law, are therefore not irrevocable).

To discourage potential competitors and to achieve a higher transaction certainty, the bidder may build up a stake in the target prior to the offer. If the bidder secures a large stake from a majority shareholder prior to the publication of the offer, but with a completion date after the publication of the offer (eg, because of required merger clearances), the bidder will need to pay attention that such a block trade share purchase agreement is not linked to the public tender offer. If it was, for example, conditional upon the success of the public tender offer, the TOB would treat it similarly to a tender undertaking that may be revoked in the case of a competing offer.

Outlook

Issues surrounding the covid-19 pandemic have put a (temporary) halt to several planned public M&A transactions with regard to public companies whose shares are listed on Swiss stock exchanges. While the current environment and generally low level of stock prices also offer opportunities with regard to public M&A deals, we expect the public M&A market to slowly recover in the second half of 2021.

Apart from the most recent events surrounding covid-19, there has been a continued trend of private equity investors looking to take over Swiss listed targets. Also, shareholder activists have started to play a role in Swiss public M&A transactions whereby they may have the role of a catalyst (eg, Cevian in the DSV offer for Panalpina in 2019) or the role of a blocking force if the offer price is deemed too low.

Appendix 1

About the Authors

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Mariel Hoch's practice focuses on domestic and cross-border public tender offers and mergers, private M&A transactions, 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 healthcare, pharmaceuticals, technology, financial services, retail, leisure, transport and industrial products.

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