

# New rules, new deals

Alexander Vogel, Christoph Heiz and Andrea Sieber of meyerlustenberger discuss what legislation governs M&A in Switzerland

Private M&A transactions are primarily governed by the Swiss Code of Obligations, and, to the extent the acquisition structure includes a merger, demerger or asset deal, by the Swiss Merger Act, which provides detailed rules for each of these procedures. The acquisitions of interests in listed companies are further governed by the Swiss Act on Stock Exchanges and Securities Trading (Sesta), which contains the applicable rules for both friendly and hostile public offers. In addition, the Swiss Antitrust Statute needs to be taken into consideration if the turnover of each of the parties involved in the transaction is significant. The latter act provides for a preventive merger control procedure led by the Swiss Merger Control Commission for transactions exceeding certain minimal thresholds.

To the extent an acquisition is financed by the issuance of new listed securities or the transaction structure otherwise provides for new securities to be issued by an issuer listed on a stock exchange, the listing rules of such stock exchange will apply.

## Significant Swiss transactions

While the total number of transactions already decreased in 2008 by approximately 10% compared to the preceding year, this trend further accelerated in 2009. As a result 2009 saw a further substantial decline in both numbers as well as volumes of reported transactions. In particular during the first three quarters: after a weak first quarter, the second and third quarters tested new lows compared to the long term average.

The last quarter of 2009 showed a reversal of this trend and can be interpreted as a sign of a slow recovery of the market situation. Although the absolute number of transactions remained at -11%: still significantly below the number of transactions in the same period of the previous year. Over the whole year of 2009, the number of reported M&A transactions in Switzerland decreased by approximately 25%.

This dramatic decline of both transactions and transaction values reflects the deepening of the difficult market conditions faced by almost all industry sectors coupled with the ongoing uncertainty regarding the economic outlook. Another important reason for this decrease is the difficulty to raise debt financing for potential acquisitions at attractive conditions, which keeps mainly financial investors such as private equity funds off the negotiation table. In this climate, cross-border transactions declined. Also the strengthening Swiss Franc made acquisitions by foreign acquirers in Switzerland more expensive.

Conversely, while the number of transactions among Swiss counterparties also decreased, the decrease was much less dramatic (less than 10%) with regard to such internal transactions and to a lesser extent for transactions involving Swiss acquirers acquiring targets abroad. This is most probably because a considerable number of Swiss companies were hit less hard by the crisis than some of their European or worldwide peers and still had access to financing, although at more restricted conditions than before the crisis.

With regard to cross-border takeovers by Swiss companies, among the major deals in 2009 were the acquisition of the Australian operations of the Mexican cement maker Cemex SAB de CV, including a 25% stake in Cement Australia, by Swiss rival Holcim AG for about \$1.62 billion and the latter's acquisition of a further 13% stake in Huaxin Cement. This was a leading Chinese cement producer and Holcim's strategic partner in China. The deal was valued at \$282 million.

Elsewhere, Novartis' acquisition of the generic business of EBEWE Pharma, an Austrian pharmaceuticals company with worldwide activities, for \$1.2 billion in cash and of US pharma company Corthera for \$120 million (plus additional payments of up to \$500 million) also hit the headlines. There was also the public acquisition of MPS Group, a US-based provider of specialty staffing, consulting and business solutions, by Adecco, a Switzerland-based human resources services group, for a of approximately \$1.3 billion.

Also worth mentioning is the acquisition of Kraft Foods' frozen pizza business in the US and Canada by Swiss food giant Nestlé for \$3.7 billion in cash, which was negotiated in 2009, but announced only in the early days of this year. This happened just one day after the announcement of Nestlé's sale of its remain-

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ing 52% stake in Alcon, a listed manufacturer of eye care products headquartered in Switzerland, for \$28.1 billion to Novartis.

That last transaction was a further sequence of an agreement entered into by Novartis and Nestlé in April 2008 for the transition of Nestlé's 77% majority stake in Alcon to Novartis under which Novartis had acquired already a 25% stake in Alcon for \$10.4 billion in 2008. In early January 2010, Novartis exercised its call option to acquire Nestlé's remaining 52% Alcon stake.

The transaction was the second major acquisition by a Swiss drugmaker in 2009, after the completion of Roche's acquisition of Genentech by way of a short-form merger in which Genentech became a wholly-owned member of the Roche Group after the successful completion of Roche's tender offer in March 2009 which helped to squeeze out all remaining public shareholders who received a fixed cash amount for their shares. Roche's financing for the \$46.8 billion Genentech purchase made big headlines since it included the biggest single offering of corporate securities in Europe. It was a dollar-denominated offering that was the second-largest bond sale by a non-financial company worldwide, and a sale in Swiss francs.

High profile transactions of foreign acquirers involving Swiss companies or foreign issuers headquartered in Switzerland as target include the acquisition of Addax Petroleum by Chinese Sinopec International Petroleum Exploration and Production for \$7.56 billion. This resulted in the subsequent delisting of Addax Petroleum's shares from the Toronto and London Stock Exchange. There was also the acquisition of Paris Re by PartnerRe in a multi-step share exchange transaction for approximately \$2 billion and the planned combination by France Telecom and Danish carrier TDC of their Swiss operations – Orange and Sunrise – creating by way of a new entity Switzerland's second-largest mobile operator behind Swisscom.

The new entity was intended to be held 25% by TDC and 75% by France Telecom with the latter having to make a compensation payment to TDC of €1.5 billion. However, the Orange/Sunrise transaction was surprisingly rejected by the Swiss Competition Commission claiming that it would create a "dominant position" in the Swiss market and thus is on hold until the appeal against this veto will be decided.

Major transactions relating to foreign issuers whose shares are listed in Switzerland included SAF Simulation Analysis and Forecasting and BioXcell who received a friendly offer by German listed SAP. Since the shares of SAF are listed in Switzerland, but SAF is incorporated and has there-

## “The obligation to offer a cash consideration as a mandatory alternative to an exchange offer does not apply to voluntary tender offers”

for its registered office in Germany, neither the German nor the Swiss takeover provisions for public companies were applicable. However, SAP voluntarily submitted its public offer to the German provisions regarding public takeover offers. Further, Cosmo Pharmaceuticals and BioXcell agreed on a tender offer by Cosmo for all shares of BioXcell for a mixed consideration with a total value of CHF41.3 million in cash and new Cosmo shares as well as put options regarding the Cosmo shares. Cosmo and BioXcell are both companies incorporated in Italy but listed at the SIX Swiss Exchange.

Among the transactions relating to Swiss acquirers of Swiss target companies, the most visible transactions include Swiss Prime Site AG's public exchange offer for all publicly held shares of Jelmoli Holding AG, Swiss solar group Meyer Burger's acquisition by way of merger of the smaller listed solar manufacturer 3S Swiss Solar Systems for approximately CHF320 million and Julius Baer's acquisition of the fully-owned subsidiary of ING Group for CHF520 million. Further transactions involving Swiss listed issuers include Pelham Investments's public offer to the shareholders of Athris Holding, Vontobel Beteiligungen AG's public exchange offer for the shares of BB Medtech, Mobimo Holding's public exchange offer for the shares of LO holding Lausanne-Ouchy, Swiss Automotive Group's offer to the shareholders of Métraux Services, the public offer of Aquamit to the shareholders of Quadrant and of French MMA Vie for the shares of Harwanne, a Swiss investment company listed on the SIX.

While most of the transactions mentioned above were straight forward cash offers or exchange offers not subject to much legal controversy, some transactions were subject to much debate or long procedures. Among them the Jelmoli transaction(s), the Quadrant offer and the first transactions under the revised take over regulations, Harwanne.

The Jelmoli Holding offer put an end to a long divestiture process fraught with obstacles. In mid 2007, Jelmoli had agreed already to sell its real estate portfolio to a consortium of investors for CHF3.4 billion. The latter, however, in view of the approaching financial crisis preferred to retreat from the agreement, leaving Jelmoli with a broken deal. In the aftermath of this defeat of its plans, Jelmoli decided to divide itself into separately listed real estate and investment companies. The latter was to be created as a spin-off entity from Jelmoli under the name Arthris whose shares were listed on the SIX and distributed to all shareholders, resulting in Jelmoli shareholders holding shares in the two units.

Soon after the distribution of the shares of the spun off



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company was completed, Jelmoli became the target of an unsolicited exchange offer from Swiss Prime Site after the latter had acquired a stake of approximately 30% in Jelmoli from Pelham Investments. Both the board and major shareholders rejected the offer as unattractive and requested a premium on the actual share price. Only after two increases of the exchange rate and the waiving of conditions was the offer finally accepted and subsequently Jelmoli merged into SPS. The life span of the spun off entity as a listed company was also very short. After the listing in March 2009, its main shareholder Pelham launched a cash offer in December 2009 to take the company private, after the successful completion of the offer, the target's shares were delisted in January 2010.

MMA Vie's offer for the shares of Harwanne Compagnie de participations industrielles et financières SA, a listed investment company that had sold all its participations, was the first offer under the revised rules for public offers that came into effect as from January 1, 2009. In addition, it was one of the first to, among other amendments, grant qualified minority shareholders holding 2% or more of target company's voting rights, a standing in the proceedings before the Takeover Board as well as a right to appeal the latter's decision.

Both in the Harwanne case as well as in the Quadrant offer, qualified shareholders filed appeals against the decisions of the Takeover Board. In both cases, the amount of the offer price was the main subject of dispute. In Harwanne, the minority shareholders claimed that the volumes in the shares subject to the offer were not liquid within the meaning of the take over regulations. As a result, the offeror was not allowed to base its offer solely on the volume-weighted average price of the last 60 trading days preceding the offer, which is the minimum offer price for shares considered to be liquid under the relevant rules. Instead, it needed to obtain an independent valuation in order to determine the minimum offer price.

In Quadrant, the offer was made by an entity that was held 50% by the incumbent management and other funding shareholders of the target and 50% by Mitsubishi Plastics as strategic partner. The latter offered certain financing to the entity launching the offer, agreed to grant certain founders' rights and management options to the incumbent management.

A minority shareholder claimed that the valuation of these additional benefits was not performed properly for purposes of determining whether or not the offer to the public shareholders violated the minimum price rule.

While the minority shareholders prevailed in Harwanne, the claim of the minority shareholder in Quadrant was rejected by both the Takeover Board as well as the Finma (Swiss Financial Market Supervisory Authority). Both cases demonstrate, however, that in case of an appeal of one or more qualified shareholders against a decision of the Takeover Board the risk of a substantial delay of the proceedings (and therefore significant financial risks of the offeror whose offer can not be withdrawn once launched) is imminent. Significant delays are likely to occur if an appeal is made to the Federal Administrative Court due to its contradictory procedure and may force the offeror to make concessions, as demonstrated in the Harwanne case.

Further, another issuer that was subject to increased attention in 2009 was the construction company Implenia which continued its struggle against the English Laxey-Group that had acquired through the use of undisclosed contracts of difference (unnoticed by the target and by the markets) first a controlling and later on a majority interest in Implenia. But it was not entered into the register of shareholders of Implenia by the latter's board and thus could not vote with its shares.

Since Implenia refused to talk to any other interested buyer (among them the Austrian construction group Strabag) about a friendly transaction, Laxey finally decided to mandate Credit Suisse to sell its shares by way of private placement. The Takeover Board granted an exemption to Credit Suisse from the duty to make an offer to the shareholders of Implenia and further confirmed that Credit Suisse is not forming a group with the Laxey-Group or with the purchasers of the Implenia-stakes. It also said that the latter were not obliged to make an offer, if none of them exceeded the threshold of 33.33% of the voting rights of Implenia.

### Public takeovers

Public tender offers on issuers listed on an exchange in Switzerland are governed by the Stock Exchanges and

Securities Trading Act (Sesta). In certain instances, mainly in the case of a listed issuer spin-off of a non-listed company, an offer on the latter's shares is (even though not listed) nevertheless subject to the provisions of the Sesta.

Conversely, pure merger transactions are not subject to the provisions of the Sesta, but to those of the Swiss Merger Act. An exception applies, if one of the merging companies acquires before the effective date of the merger a controlling stake of the other merging company, thereby triggering the obligation to submit a public offer according to the Sesta. However, in that case the Takeover Board, while requesting compliance of the merger documentation, allows the acquirer to postpone the offer. Instead it can complete the merger with the consequence that the obligation to submit a public offer lapses due to the absorption of the target company. This is provided however, that if the merger fails and the acquirer will be obliged by the Takeover Board to follow through with its public offer.

Sesta defines when a purchaser is required to make a mandatory offer for all outstanding equity securities of a target. This is the case if an acquirer directly or indirectly controls more than 33.33% of the company's voting rights whether exercisable or not. Exceptions apply if the target had increased this threshold in its articles of incorporation to up to 49% (opting up) or if the latter contain an "opting out-clause".

Furthermore, once a public offer has been announced, the board of the target is no longer permitted to take any defensive measures that could have the effect of significantly altering the assets or liabilities of the target but has to submit such measures to the shareholders' meeting for approval.

Compliance with the rules provided for in the Sesta is supervised by the Takeover Board which issues binding administrative orders in the form of binding decrees. Any decision of the Takeover Board can be brought to the Financial Market Supervisory Authority for review. Against decisions of the Financial Market Supervisory Authority any party can make an appeal to the Federal Administrative Court whose decisions are final.

### Impact of recent legislation

The Swiss legislator recently enacted the new



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Financial Market Supervision Act (FinmaSA) providing for a new regulatory framework that entered into force as per January 1, 2009. Such new regulatory framework is supervised by the newly created integrated Financial Market Supervisory Authority (Finma).

Together with the new FinmaSA, several changes to the Sesta relating to public offers and the applicable procedural rules were enacted. In view of these changes in the legislation, the Finma and the Takeover Board undertook a general overhaul of the stock exchange ordinance of the Finma (Sesta-Finma, formerly Sesta-FBC) and the ordinance on public takeovers (TOO). These two ordinances also came into effect as per January 1, 2009.

The amendments to the Sesta, the Sesta-Finma and the TOO introduced some important changes to the applicable rules for public takeovers.

The current rules provide for a stronger position of the Takeover Board. While in the past the Takeover Board could only issue recommendations which could be accepted or rejected by the parties involved, its decisions are now handed down in the form of a decree.

In the past, the offeror and the target company could agree on the terms and conditions of a public offer and have those terms as well as all relevant documents relating to the offer approved by the Takeover Board prior to the publication of the pre-announcement of the offer or the offer. The Takeover Board then issued simultaneously with the publication its recommendation which could not be appealed by the shareholders. Since the shareholders could not participate in this procedure, the offeror was able to launch the public offer without having to wait for the lapse of a cooling-off period and without having to fear any appeal against the approval granted by the Takeover Board. The only potential threat to the success of a friendly offer was a competing offer by a third party offeror.

Under the new rules, shareholders can request to participate in the proceedings before the Takeover Board and submit objections or requests to the latter and/or appeal against a decree issued by the Takeover Board. Such right of participation is given to shareholders, holding in the aggregate 2% or more of the voting rights of the target (so called qualified shareholders). In order to qualify for admission to the pro-

ceedings, such qualified shareholders must hold their qualifying stake already at the time of the publication of the pre-announcement (if any) or the offer itself and keep holding at least 2% of the voting securities throughout the offer procedure in order not to lose their standing.

In view of these new rights granted to qualified shareholders, the offeror has to comply with a mandatory cooling-off period of usually 10 stock exchange days. Further, due to the possibility of an appeal, the terms of the offer and the offer documents will be published with only a preliminary approval of the Takeover Board, since the qualified shareholders may file an objection with the Takeover Board. This might cause the Takeover Board to reconsider its approval or an appeal against the decision of the Takeover Board might be filed with the Finma.

By making use of their procedural rights, qualifying shareholders have the possibility to considerably delay a friendly takeover. This is because in the case of an objection or appeal filed by a qualified shareholder, the cooling off period will be extended in most cases. Therefore, the offer period will not start until the Takeover Board, or in case of an appeal the Finma, has issued its decision. Such delays may considerably increase the transaction risks of both the offeror and the target company. The offeror on the one hand risks to be bound to its offer – and thus be exposed to market risks – for a much longer period than anticipated, which in turn increase the offeror's costs and the difficulties to obtain financing. The threat of extended litigation with a minority shareholder may thus well force the offeror to the negotiation table, trading better offer terms in exchange for withdrawing the legal challenges.

On the other hand, such delays may also have considerable disadvantages for the target company. Its management and work force, customers and suppliers do not know whether the intended transaction will be completed as planned or if an uninvited third party will enter the scene and launch a competing offer, trying to profit from the fact that the target has put itself in play.

#### Offered consideration

Pursuant to the rules of the Sesta-Finma regarding the consideration offered, the offer price in case of a

mandatory offer may be paid in the form of a cash consideration or by offering securities in exchange. However, according to the newly implemented amendment to the Sesta-Finma, in case of a mandatory offer, the offeror is required to offer a cash consideration as an alternative in addition to the shares offered in exchange to the remaining shareholders of the target.

According to the amended language of the Sesta-Finma, the rule applies to mandatory offers, regardless of whether the offered equity securities are liquid or not. In other words, the offeror whose holding in the target exceed the relevant threshold of voting rights and thus trigger the duty to submit a mandatory offer will not have a choice as to how to fulfil such obligation and is not only bound by the minimum price rule and best price rule. To the contrary, even if the offeror wishes to offer securities that are liquid (and therefore can easily be sold by the offeree) it will be obliged to offer a cash consideration as an alternative and must prove the availability of such additional financing.

However, the Takeover Board stated in its Communication 4 that the value of the offered securities and the value of the cash consideration need not be equal. Therefore, the offeror may offer a premium on the offered security consideration compared to the cash consideration.

#### Voluntary offers

As mentioned above, in Communication 4, the Takeover Board further confirmed its interpretation that the obligation to offer a cash consideration as a mandatory alternative to an exchange offer does not apply to voluntary tender offers. This applies particularly to voluntary tender offers made for a number of equity securities the acquisition of which would reach the applicable threshold triggering a mandatory offer. However, the exemption for voluntary offers does not apply if the offeror acquires equity securities of the target against a cash consideration after the exchange offer is launched.

On the other hand, the duty of equal treatment does not prevent the offeror from acquiring securities of the target against cash consideration, where the purchase has been effected prior to the pre-announcement or publication of the offer.



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