Switzerland

Law & Practice

Contributed by Niederer Kraft & Frey AG

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Trends

Market developments

Following the global financial crisis and the European sovereign debt crisis, legal work in Switzerland continued to partly bounce back in 2012 to a more 'courant normal' (normal state), including an increase in volume of M&A transactions. The majority of transactions in the past two years have been in the area of private M&A, while public tender offers continue to be relatively few. According to a survey conducted by Ernst & Young for the year 2012, 606 M&A transactions (including both private and public transactions) with an approximate deal volume of CHF111 billion were reported, representing a decrease of 16% in terms of number of deals, but an increase of about 116% in deal volume compared to 2011. The significant rise in deal volume is, however, largely attributable to the Glencore/Xstrata mega merger announced in early 2012.

For further information, please refer to **Trends & Developments**.

Amid continuing economic uncertainty, Swiss companies continue to be rather prudent actors, for example by taking more time for their due diligence review of potential targets. They have also become more selective and tend to defer execution to the end of reporting periods in order to base the deal on full or half-year accounts. Somewhat linked to this and similar to other European markets, there is an increasing trend in the Swiss M&A market in the use of the 'locked box' approach to determine the price for a target business in the context of a private M&A transaction instead of the completion accounts approach.

The strong yen has continued to fuel interest from Japanese investors, which has led to a number of transactions.

Key industries

According to a recent KPMG study, approximately 20% of the Swiss M&A transactions in 2012 related to industrial markets, followed by TMT (14%), commodities (12%) and consumer markets (12%). The number of 2012 deals in the financial services industry declined by 35% with a corresponding decline of 15% in deal volume compared to 2011 – a fact which can partly be explained by the notable absence of Credit Suisse and UBS from the deal tables while undergoing a period of strategic review and still adapting to a significantly changed regulatory environment.

For further information, please refer to **Trends & Developments**.

Overview of the regulatory field

Acquiring a company

The primary means of acquiring a Swiss privately held business is by way of a share deal, an asset deal or a statutory merger. The most common way to obtain control over a Swiss listed company is through a public takeover offer pursuant to the provisions of the Federal Act on Stock Exchanges and Securities Trading (SESTA).

Regulatory bodies

Public takeover offers are supervised by the Swiss Takeover Board (TOB). The TOB can issue binding orders, which can be challenged before the Swiss Financial Market Supervisory Authority (FINMA). The decisions of FINMA can, in turn, be appealed to the Swiss Federal Administrative Court.

Merger control matters are monitored by the Swiss Competition Commission (ComCo).

Foreign investment

There are generally no restrictions on foreign investment in Switzerland. However, certain restrictions may apply to the acquisition of real estate in Switzerland by foreign persons. In addition, in certain regulated industries such as maritime shipping or nuclear power generation, restrictions on foreign ownership apply.

Anti-trust regulations

The ComCo must be notified of business combinations (including statutory mergers and the acquisition of control) before the closing of the transaction if:

- the enterprises involved had in the last business year prior to the transaction an aggregate worldwide turnover of at least CHF2 billion or an aggregate turnover in Switzerland of at least CHF500 million; and
- at least two of the enterprises involved had in the last business year prior to the transaction an individual turnover in Switzerland of at least CHF100 million.

Specific rules are applicable to banks and insurance companies.

If the ComCo does not initiate an in-depth investigation within one month after receipt of the notification, the business combination may be completed. In case an in-depth investigation is initiated, it must be completed within another four months. The ComCo may either:

(i) clear the transaction unconditionally;
(ii) permit the transaction subject to certain conditions; or
(iii) prohibit the transaction.

Labour law

In a public takeover offer, the employees of the target neither need to approve the takeover offer nor be informed or consulted on the offer. However, in a statutory merger, the employees of both the transferring and the acquiring legal entity must be informed and, under certain conditions, consulted prior to the shareholders' meeting resolving the merger.

If the employer transfers the enterprise or part thereof to a third party, including transfers by way of a merger or through an asset deal, Swiss law provides that the employment relationship is automatically transferred to the acquiring party, unless the employee refuses the transfer. While this principle clearly rules out the possibility to dismiss employees before the transfer and to subsequently offer them the same job on less favourable terms, the Swiss Supreme Court clarified in a decision in 2010 that this principle does not exclude a reduction of staff prior to the transfer based on economic reasons.

Recent legal developments

In Switzerland, there has not been a landmark decision by a state court in the last five years related to M&A.

However, on 21 March 2012, the Swiss Supreme Court rendered a significant decision with respect to statutory mergers. In this decision, the court clarified important aspects of the appraisal right under Swiss merger law. Most importantly, it held that, in contrast to the minimum price rule in Swiss takeover law, a control premium paid in a preceding purchase of shares is entirely irrelevant for the assessment of the adequacy of the offered cash consideration.

Takeover legislation

There were no significant changes to the statutory provisions of Swiss takeover law in 2011 and 2012. However, the TOB (and the appellate bodies) have rendered significant decisions, inter alia, in the areas of:

(i) potential offers (so-called "put up or shut up");
(ii) opting out from the mandatory offer rule;
(iii) competing offers; and
(iv) minimum price rule (especially with regard to additional services as consideration in connection with a prior acquisition).

Significant amendments to Swiss takeover law are scheduled to come in effect on 1 May 2013. The most important change will be the prohibition of control premium payments in public takeover offers. Furthermore, the scope of Swiss takeover law will be expanded to also apply to target companies having their registered domicile abroad (to date, Swiss takeover law was generally only applicable to target companies incorporated in Switzerland) provided that their primary listing is on a stock exchange in Switzerland. The amended law will also entitle the TOB to suspend voting rights of, and to prohibit additional purchases of securities of a target company by, a person when there are sufficient indications that such person has violated the duty to launch a public takeover offer. In addition, the intentional violation of the duty to launch a takeover offer despite a final decision finding that such duty exists will be punished with a fine of up to CHF10 million. Finally, the threshold for shareholders to be admitted as a party in takeover proceedings will be increased from 2% to 3% of the voting rights in the target company.

Stakebuilding

Bidders are free to continuously build a stake in the target prior to launching a public takeover offer. However, the bidder must comply with the statutory disclosure obligations (see below). Due to the strict regime on disclosure of shareholdings (including derivative instruments), it has become impossible to build a considerable stake without being obliged to disclose it.

Dealings in derivatives of Swiss listed companies are generally allowed, but must be disclosed if certain thresholds of voting rights are reached (see **Disclosure thresholds**).

Disclosure thresholds

Whoever directly, indirectly or in concert with third parties acquires or sells for its own account, securities in a Swiss company listed in Switzerland and thereby attains, falls below or exceeds the thresholds of 3, 5, 10, 15, 20, 25 33.3, 50 or 66.6 % of voting rights must notify the issuer and the stock exchange on which the securities are listed. The disclosure duty is triggered by transactions in shares, call and put options, conversion rights or other kinds of derivatives, regardless of their type of settlement (cash or physical). Importantly, the disclosure duty applies to both purchase and sales positions which cannot be set off against each other for disclosure purposes. Sanctions for the violation of the disclosure obligations are fines or the suspension of voting rights for up to five years. sales positions which cannot be set off against each other for disclosure purposes. Sanctions for the violation of the disclosure obligations are fines or the suspension of voting rights for up to five years.

Amended provisions of SESTA are scheduled to come into force on 1 May 2013, extending the scope of the disclosure duty to the effect that substantial shareholdings (see above thresholds) in foreign issuers with a primary listing in Switzerland will have to be disclosed as well. In addition, under the amended law, FINMA (instead of a civil court) will be entitled to suspend voting rights and ban further purchases of securities if there are sufficient grounds to believe that the disclosure duty has been violated. Finally, the amended SESTA introduces a maximum fine of CHF10 million for intentional breaches of the disclosure duty.

During a public takeover offer, the bidder and all shareholders holding at least 3% of the voting rights of the target company and, if applicable, the company whose securities are offered for exchange must report each acquisition and sale of securities of such company.

Swiss listed companies have to disclose in the notes to their balance sheet shareholders and group of shareholders holding more than 5% of all the voting rights if such stakes are known to the company.

Swiss listed companies cannot amend (eg, through introducing higher or lower thresholds) the disclosure obligations under SESTA. However, Swiss listed companies may amend the mandatory takeover offer regime by including an opting out or opting up provision in their articles of incorporation (see **Mandatory offer thresholds**).

The articles of incorporation of a Swiss listed company with registered shares may set forth a percentage limit above which an acquirer will not be recognised as a shareholder with voting rights. Furthermore, a Swiss listed company with registered shares may refuse an acquirer's entry in the share register as a shareholder with voting rights if at the company's request the acquirer fails to declare expressly that he/she has acquired the shares in his/her own name and for his/her own account. The articles of incorporation may also impose restrictions on voting rights to the effect that each shareholder may only cast a certain percentage of the votes.

Obligations of acquiring shareholders

In a public takeover offer, the offer prospectus usually contains an overview of the transaction, its reasons and potential synergies. In such an offer prospectus, the bidder has to disclose its basic intentions with respect to the target company, including:

(i) its intentions regarding the integration of the target into the bidder group or the continuation of the target as an independent company;
(ii) changes to the dividend policy;
(iii) possible sale of parts of the target company;
(iv) the squeeze-out of the remaining minority shareholders; and
(v) the delisting of the target company.

The negotiation phase

Disclosure requirements

Pursuant to the listing rules of SIX Swiss Exchange, issuers have to inform the market of non-public potentially price-sensitive facts which have arisen in their sphere of activity (ad hoc publicity). Price-sensitive facts are facts which are capable of triggering a significant change in the price of securities of the respective company. According to the practice of SIX Swiss Exchange, the commencement of discussions regarding a potential public takeover may already constitute a price-sensitive fact. However, the target company may postpone the disclosure of price-sensitive facts if (i) the fact is based on a plan or decision from the target, (ii) disclosure might prejudice the target's legitimate interests, and (iii) the target maintains strict confidentiality of the facts in question. However, in the event of a leak, immediate disclosure is required.

Due diligence

The scope of due diligence may vary considerably. On one side, bidders are determined to perform as much due diligence as possible before making a public takeover offer because the opportunities to withdraw from an announced offer are limited. On the other side, there is no right to conduct due diligence against the will of the target under Swiss takeover law, provided that, if there are competing bids, each bidder must be afforded equal treatment and access to due diligence materials (see **Directors' duties**). It is also not possible to make a public takeover offer contingent upon the completion of a satisfactory due diligence review. However, some protection might be sought by including conditions regarding the protection of the economic substance in the public takeover offer (see **Use of offer conditions**). Overall, the target's board has wide discretion on the extent of the disclosure it is willing to provide. It is a judgement call influenced by the incentives to maintain business secrets on the one hand, and the incentive, as well as duty, to maximise the value of an offer on the other hand. Frequently, information will be disclosed gradually.

In the context of a public takeover offer, the bidder will have to confirm in its offer prospectus that it has not received information about the target company that is not publicly available and which could have a decisive influence on the decision of the recipients of the offer.

If a bidder is not permitted to conduct a due diligence review, the bidder may alternatively consult all publicly available information. Besides the company, such sources of information include, inter alia, the commercial registry, the intellectual property registries, the data provided by the SIX Swiss Exchange and the notifications in the Swiss Official Gazette of Commerce and, under certain conditions, the land registry and the tax registry (where the right of access varies pursuant to the regulations of the respective Canton).

In private M&A transactions fully fledged due diligence reviews have become the standard. Certain limitations apply in transactions concerning regulated entities, eg banks, where banking secrecy and similar rules may impose restrictions.

Standstills and exclusivity

It is common practice and normally required to comply with insider rules to undertake not to trade in securities of the target for a certain time period ("standstill").

Exclusivity may be demanded, but is subject to a very limited enforceability in the context of a public takeover offer. In particular, the TOB has ruled that a competing bidder must be granted the same access to due diligence as the first bidder. This ruling may also prevent the target's board from providing substantial information to a friendly bidder in the first place. Moreover, "no-shop" agreements are only permissible to the extent that the target's board keeps the right to respond to and negotiate with unsolicited proposals (see **Types of disclosure**). The duty to treat competing bidders equally does not, however, lead to an actual obligation to enter into a similar transaction agreement with competing bidders or to cancel existing agreements. To this extent, and subject to the general fiduciary duty, exclusivity may be granted in the context of a public takeover offer.

In private M&A transactions, exclusivity undertakings are not uncommon but it very much depends on the circumstances of the particular case.

Tender offers

In a friendly public takeover, it is common practice that the target's board and the bidder enter into a transaction agreement. From the perspective of the bidder, such agreements serve to secure the target's support for the public takeover offer. From a target's point of view, such agreements assure the submission of a serious and balanced public offer. Consequently, such agreements may, inter alia, govern the terms and conditions of the bid, the duty to support and recommend the bid, lock-up provisions and break fees (to the extent permissible – see **Deal security measures**), and the target's duty to arrange for a general shareholders' meeting in order to pass resolutions on the levy of certain restrictions within the articles of association. The main terms of such transaction agreements must subsequently be disclosed in the offer prospectus (see **Disclosure of transaction documents**). More often, strategic considerations, confidentiality and due diligence aspects will be governed in a preceding letter of intent.

Structuring

With regard to the acquisition of Swiss listed companies by way of public takeover offer, the publication of the offer prospectus is the triggering event for most of the time periods set forth in statutory provisions. Generally, the settlement of the offer may be reached within 54-74 days following the publication of the offer prospectus. However, this time period may be prolonged in the event of a competing bid. Moreover, a preliminary announcement may be made prior to the publication of the offer prospectus. Once announced, an offer prospectus must be published within six weeks.

The publication of an offer prospectus is followed by a cooling-off period of at least ten trading days during which the offer cannot be accepted. In principle, an offer must remain open for acceptance for an initial period of 20 to 40 trading days. The TOB can extend or shorten this time period in certain cases. Thereafter, the final interim results are to be published no later than four days following expiry of the offer. If successful, the offer must be reopened for acceptance for an additional acceptance period of ten trading days after which the final results will be published. Finally, the offer must be settled within ten trading days following expiration of the additional acceptance period. A competing bid must be published no later than the last trading day of the ordinary accepting period for the first offer and must remain open for acceptance for as long as the original offer. A competing bid will automatically extend the acceptance period for the first offer.

Mandatory offer thresholds

Anyone who directly, indirectly, or by way of acting in concert with third parties acquires shares, and as a result owns shares representing voting rights in excess of 33.3% of the voting rights of a target company, must submit an offer for all the listed equity securities of such company. However, companies are free to pass a shareholders' resolution with regard to an opting up (ie, raising the threshold triggering the duty to make a mandatory offer up to 49%) or an opting out (ie, completely discarding the duty to make a mandatory offer). If a listed company chooses to opt out after being admitted onto an exchange, it is subject to the additional requirement that this action does not prejudice the interests of shareholders.

In a decision in October 2012, the TOB departed from its prior practice with respect to opting out provisions introduced after the listing and ruled that (i) the TOB reserves the right to independently examine whether the introduction of an opting-out causes a prejudice to the shareholders' interests (even if the shareholders' resolution was not challenged in a civil court procedure) and (ii) the TOB will review both the results of the overall vote and the results of the overall vote excluding votes of potentially conflicted shareholders. If the non-conflicted, minority shareholders have also approved the opting-out, the TOB will assume de facto that the opting-out is in the interest of the minority shareholders and of the company, provided that the decision was based upon complete and transparent information. On the other hand, the TOB held in the same ruling that a selective opting-out (eg, only with regard to a certain shareholder or transaction) would be admissible.

Consideration

A bidder can offer cash, listed or non-listed shares, non-equity securities or any combination thereof. However, in the event of a mandatory bid, the bidder must alternatively offer cash as consideration when making an exchange offer. Based on equal treatment considerations, there is currently a proposed amendment to Swiss takeover law that would provide for an additional obligation to offer a cash alternative if a bidder has purchased 10% or more target shares for cash during a 12-month period preceding the announcement of a voluntary public offer. It is, however, still uncertain if and when this proposal might be adopted. An empirical study from 2010 highlights that out of 128 public offers from 1998 to mid-2010, 85 were cash bids, 30 exchange bids and 13 mixed bids.

Use of offer conditions

Swiss public takeover law does restrict the use of offer conditions. This is particularly true in the event of a mandatory bid (see **Mandatory offer thresholds**), which, in principle, cannot be conditional. The law provides for exceptions in case of important reasons, such as the need for regulatory approvals or if the shares to be obtained by the bidder will not confer voting rights on such bidder.

The regulation is more liberal in the event of a voluntary public takeover offer. However, the TOB generally reviews any offer condition critically. Swiss takeover law provides for the following general requirements regarding the permissibility of offer conditions:

(i) the bidder must have a legitimate interest in that particular condition, which means that there must be a valid and objective reason for the offer condition;
(ii) the bidder is not allowed to have decisive influence over whether such conditions come to apply;
(iii) the condition has to comply with the overriding principle of transparency, which includes that the condition contain sufficiently precise wording.

The following three main categories of conditions are common:

(i) conditions on obtaining control of the target (such as a minimum tender level, removal of transfer or voting restriction, control of target's board, etc);
(ii) conditions regarding a smooth settlement (such as regulatory approval, no injunction, approval by the bidder's shareholders, etc); and
(iii) conditions regarding the protection of the economic substance (material adverse change, changes in economic substance or structure, sale or purchase of assets, crown jewels, no golden parachutes, tax ruling, etc).

A public takeover offer cannot be conditional on the bidder obtaining financing. As discussed in **Making bids public**, the offer prospectus must contain details of the sources of financing and an independent review body will have to confirm that sufficient funds are available for completing the transaction. Moreover, in 2009 the TOB explicitly ruled that making a bid contingent upon obtaining financing was impermissible.

Minimum acceptance conditions

The minimum acceptance level must not be set unrealistically high. In this context, a minimum acceptance level of 66.6% is generally permissible. However, in the event that the bidder already holds a significant pre-existing stake, the minimum acceptance level can be as high as 90%. For most Swiss listed companies a stake well below 50% would suffice to obtain control of the target (which corresponds to the fact that a mandatory offer is necessary when passing 33.3%). However, Swiss corporate law stipulates that certain important shareholders' resolutions have to be passed by at least two thirds of the votes represented and the absolute majority of the par value of shares represented. Consequently, the above-mentioned minimum acceptance level of 66.6% would guarantee that no minority shareholder can exercise any veto power on the passing of shareholders' resolutions (unless of course the respective articles of association contain higher decision requirements). A controlling stake of above 90% would clear the path for a squeeze-out merger according to Swiss merger law, and a controlling stake of above 98% for a squeeze-out according to Swiss takeover law (see **Mechanisms employed to buy-out shareholders**).

Deal security measures

In a public takeover offer, a bidder may use the various permissible conditions in order to secure the settlement (see **Use of offer conditions**).

There are no statutory provisions as to whether break-up fees are permissible and, if so, what amount would be acceptable. Thus, the permissibility has to be defined in the context of the general fiduciary duties of the directors (see **Principal directors' duties**). In the context of a public takeover offer, break-up fees are generally viewed as permissible to the extent that they do not deter potential competing bidders or coerce shareholders into tendering. Most importantly, they have to correspond to possible costs incurred by the bidder in connection with the offer and have to be moderate in absolute terms. Break-up fees of a punitive nature are not permissible. In addition, break-up fees must be disclosed in the offer documents.

In terms of non-solicitation provisions, the general view is that the board of the target may agree to refrain from soliciting third party offers ("no shop"). However, the target board should retain the right to respond to and negotiate with unsolicited proposals to the extent required by its fiduciary duties, which do not leave room for strict "no-talk" undertakings ("fiduciary out"). Moreover, the statutory requirement to treat competing offers equally (see **Principal directors' duties**) encompasses the duty to disclose non-public information to third parties making an unsolicited proposal if such information has been previously disclosed to another bidder.

Lock-up provisions aimed at frustrating potential competing bidders (eg, an option on crown jewels) are, in principle, not permissible unless under extreme circumstances, such as when the target company is no longer viable and the only available rescuer insists on such a provision.

Additional governance rights

Swiss corporate law offers a limited range of possibilities to secure and strengthen the position of a majority shareholder apart from his/her already strong position derived from the sheer voting power. One possibility would be to grant a specific group of shareholders the right to have one or more representatives within the board of directors. There is also the option to issue special voting shares or preferential shares. However, during the process of issuing such special shares the principle of equal treatment would have to be strictly observed (eg, by proportional subscription rights). In this context it is important to emphasise that Swiss corporate law is generally quite protective of certain unalienable rights of minority shareholders, which, in turn, set a limit to the discretionary rule of the majority. The creative leeway to include certain features into the articles of association is not as large as, for example, under Anglo-American law. In light of this, shareholder agreements between important shareholders play a key role in practice as they allow for much greater flexibility. In such shareholder agreements, for example, it would be possible to mutually secure the election of representatives and to set forth pre-emptive rights. The company itself cannot be party to such agreements and is thus not legally bound by any of the provisions set forth in such shareholder agreements.

Mechanisms employed to buy-out shareholders

Swiss law offers two technically very distinct means to buy out shareholders that have not tendered following a successful offer. Firstly, Swiss takeover law provides for the possibility to request a squeeze-out of the remaining shareholders against payment of the offer price if the bidder holds more than 98% of the voting rights of the target company. To this end, the bidder may file a squeeze-out action with the competent civil court for cancellation of the remaining shares. The deadline for filing such a squeeze-out action is three months after expiry of the offer's acceptance period. Obtaining the appropriate court decision takes approximately six months. The law provides that the minority shareholders receive the offer price or the shares offered in exchange. This means that the shareholders do not have an appraisal right in the cancellation proceeding. The right to squeeze-out minority shareholders is a right of the bidder, and minority shareholders are not entitled to be bought out after a successful offer. However, non-tendering shareholders are protected by the possibility to accept a previously declined offer during the additional acceptance period following the publication of its interim results.

Secondly, Swiss merger law provides for an alternative in the event that the bidder has not reached the required threshold of 98% for a squeeze-out action, but holds a stake exceeding 90% of the voting rights of the target company. Under certain circumstances, shareholders holding up to 10% may be "squeezed-out" in a merger with another company.

Irrevocable commitments

It is common to approach certain principal shareholders of the target before making a public takeover offer. Discussions that are held in this context are not deemed to be a preliminary announcement (see **Making bids public**). Agreements between the bidder and the principal shareholders, in which the latter undertake to accept the bidder's upcoming offer ("irrevocables"), are common and admissible. According to the TOB, such a commitment alone does not make the committing shareholder a concert party of the bidder. Consequently, it will not trigger the mandatory bid rule. On the other hand, such a commitment may trigger the disclosure duty of the bidder if the number of his and the shareholder's shares crosses a relevant threshold level. Lastly, the agreements have to be reported in the offer prospectus (see **Types of disclosure**).

There are, however, considerable limits to the abilities of the bidder to lock up the transaction. Most importantly, all shareholders have an inalienable right to withdraw their undertakings to accept the bidder's upcoming offer in the event that a competing bid is made. The only way for a bidder to avoid the resulting uncertainty is to unconditionally purchase the shares of the principal shareholders upfront, which may then trigger the mandatory bid rule and/or the application of the minimum price rule. In light of this, combined with the upcoming prohibition on control premiums (see **Takeover legislation**), it will generally become less attractive to search for principal shareholders that are willing to sell in advance.

Disclosure

Making bids public

In a public takeover offer, the bidder has the option to publicly reveal its intentions either through direct publication of an offer prospectus or by making a preliminary announcement of an offer before the publication of the full prospectus. It is common practice to opt for a preliminary announcement. One of the main benefits of a preliminary announcement is that it will, inter alia, fix the calculation criteria for the minimum price rule as well as restrict the board of the target company from implementing defensive measures. In the event of a preliminary announcement, the full prospectus must be published within six weeks after the announcement's publication (an extension approved by the TOB is possible in certain cases). The terms in the offer prospectus must correspond to the terms announced in the preliminary announcement and only modifications in favour of the recipients are admissible.

If a bidder informally announces his intentions of making a public takeover offer, the TOB may require it to either publish an actual offer or declare that it will not make such an offer nor exceed the mandatory offer threshold within the next six months ("put up or shut up rule").

Both the preliminary announcement and the offer prospectus must be drawn up in German and French and be published in at least two different newspapers. In the case of the offer prospectus, the bidder is not required to publish the full prospectus and is permitted to publish a simple notice of the offer in the newspapers containing the main terms of the offer as well as a reference to the full prospectus. Moreover, both documents must be submitted to the TOB and to at least two electronic media sources that provide stock market information (eg, Reuters, Bloomberg). The submission must occur either 90 minutes before or 90 minutes after the close of trading on the stock exchange. Subsequently, the TOB will publish the offer documents on its website.

The offer prospectus must be reviewed by an independent review body, which will issue a report to be included in the offer prospectus confirming that (i) the offer prospectus is complete and correct, (ii) the shareholders are treated equally and (iii) the bidder has the necessary funds to complete the transaction. The offer prospectus has then to be filed with the TOB no later than the date on which it is published. The TOB will review the report as well, either prior or subsequent to the publication of the offer prospectus, and render a decision on whether or not the offer prospectus is compliant with all relevant regulations. The decision will be published on the website of the TOB.

Types of disclosure

Both the preliminary announcement and the offer prospectus are subject to detailed provisions in the Swiss takeover law setting forth the minimal disclosure requirements.

The offer prospectus must, inter alia, contain the following:

(i) information on the bidder and any parties acting in concert;
(ii) information on any share dealings in the target by the bidder during the 12 months before the offer was made;
(iii) information on the financing of the offer;
(iv) information on the terms of the offer and, in particular, the offer price;
(v) information on the target company (including the bidder's intentions as to the future of the target company and any agreements between the bidder and the target or its shareholders).

In the event of a public exchange offer, the offer prospectus must contain additional information about the company whose securities are being offered in exchange. The information includes, inter alia, the following:

(i) exchange on which the securities of the bidder are listed;
(ii) threshold values for the disclosure of shareholdings;
(iii) major shareholders;
(iv) details of the company's performance over the past three years;
(v) significant changes to the company's assets and liabilities, financial position, earnings and prospects that have occurred since the last annual or interim report; and
(vi) a valuation of the company's securities in the event that the securities which are offered in exchange are not traded on a stock exchange or that the market is illiquid.

Additional disclosure and prospectus duties apply if the new shares will be listed on the SIX Swiss Exchange (subject to certain exemptions).

Disclosure of financial statements

In public takeover offers, the offer prospectus must only provide information on where the latest published annual accounts of the bidder may be obtained without delay and free of charge. In a public exchange offer, the offer prospectus has to indicate where the last three annual reports and the latest interim report from the company whose securities are being offered in exchange may be obtained without delay and free of charge.

In addition, TOB typically requires the target company to issue an interim financial report if more than six months have passed from the accounting date of the last published annual or interim report. Such interim financial report does not have to be audited. The target's board must also confirm that the target's assets and liabilities, financial position, profits and losses, and prospects have not materially changed since the publication of the last financial report.

Additional disclosure duties (including pro-form financials if certain thresholds are exceeded) apply if the consideration includes newly issued listed shares.

Disclosure of transaction documents

In public takeover offers, transaction documents do not need to be disclosed in full. However, the bidder is required to disclose in the offer prospectus the main terms of the agreements that it has entered into with the target company, its directors, senior officers or shareholders.

As a rule, private M&A transaction documents do not need to be published.

Duties of directors

Principal directors' duties

Under Swiss corporate law, directors of a corporation are bound to carry out their duties with due care and must duly safeguard the interests of the company. Directors are also required to give shareholders equal treatment. While there is unanimity in the understanding that there is a primacy of shareholder interests, to what extent stakeholder interests can or even have to be taken into account remains uncertain.

However, in the event of a public takeover offer, the general duties outlined above are somewhat more clearly defined by law and practice. Directors are bound to act in the best interests of the company and to treat all shareholders and all bidders equally. More specifically, the board of directors of the target company is obliged to issue a report setting out its position in relation to the offer. The information provided by the target company has to be true and complete in order to enable the recipients of the offer to make an informed decision. The report may recommend that the offer be accepted or rejected. Alternatively, it may only point out the advantages and disadvantages of the offer without making a recommendation. It is common that a fairness opinion by an independent and qualified third party is added as an integral part to the report. A particular focus is set on the disclosure of potential conflicts of interest within the board of the target. Moreover, the board report must outline the intentions of each shareholder holding more than 3% of the voting rights, insofar as such intentions are known to the board. If such a report is not already published as an integral part of the offer prospectus, it must be circulated no later than 15 trading days after publication of the offer prospectus in the same manner as the latter.

In a friendly takeover, the board of directors of the target company usually recommends acceptance without violating its duties and without an obligation to initiate a bidders' auction. In a hostile takeover, statutory provisions explicitly declare some defensive measures as unlawful, as discussed in **Directors' use of defensive measures**. One reason behind those rules is the protection of (minority) shareholders that may, in contrast to the board and the majority shareholders, be willing to sell.

Special or ad hoc committees

In the event that conflicts of interest exist, the target company board must take appropriate actions; in particular, the target board should consider the establishment of a special committee of independent board members. Alternatively (or in addition), the target board may commission a fairness opinion.

The business judgement rule

In a decision by the Swiss Supreme Court in June 2012, the business judgement rule was for the first time explicitly acknowledged as being the standard by which Swiss courts ought to assess business decisions. This means that courts commit themselves not to challenge business decisions – even if they turned out to be inadequate in retrospect – if the decision was made free of conflicts of interest and following a diligent review process based upon adequate and sufficient information.

Independent advice

As outlined above in **Making bids public**, the bidder making a public takeover offer must have his/her offer and prospectus reviewed by an independent body. Such review body must be a securities dealer or an auditing firm regulated or recognised by FINMA. Moreover, both bidder and target may retain legal and financial advisers. The target may also wish, and can under certain conditions be required, to obtain a fairness opinion by an independent person.

Shareholder activism

As a general matter, shareholder activism was up and until recently not a very important force in Switzerland. In specific cases depending on the shareholder structure (eg, in cases where public companies remain to be controlled by a few families), shareholder activism may have been an issue. However, this assessment may alter slightly insofar as upcoming reforms in corporate law attempt to promote and strengthen shareholder activism.

A recent amendment to the constitution which has yet to be implemented at the statutory level provides that pension funds have to vote their shares in the interest of their insured persons and must disclose how they have voted.

Defensive measures

Hostile tender offers

Hostile tender offers are permitted in Switzerland. There is no duty to notify the target board before announcing the offer publicly. While friendly takeovers are still more common, the number of unfriendly tender offers has increased in Switzerland in recent years. An empirical study from 2010 highlighted that out of 128 public offers from 1998 to mid-2010, 113 were recommended and 15 were hostile bids.

Directors' use of defensive measures

In a hostile takeover situation, statutory provisions in Swiss takeover law explicitly declare some defensive measures as unlawful. First of all, some rules prevent the directors of the target company from taking certain frustrating actions as soon as the offer is published unless they are approved by a shareholders' resolution. The following, inter alia, are considered as illicit frustrating actions:

(i) the sale of corporate assets representing more than 10% of the latest annual balance sheet total or which contribute by more than 10% to the company's profitability ("scorched earth" tactics);
(ii) the sale or pledge of any part of the business or intangible assets that form part of the main subject matter of the offer ("crown jewels");

(iii) the signing of any contracts with members of the board of directors or management that provide for unusually high severance payments (excessive "golden parachutes"); and
(iv) certain security transactions (eg, the repurchase of own securities).

Frustrating measures that clearly infringe upon Swiss corporate law are illicit even if they were taken before the offer was published and, according to the controversial position of the TOB, even if they were approved by a shareholders' resolution. In the context of this rule, the TOB has previously ruled that exempting senior executives from their duties to work and not to compete with the company in case of a change of control is illicit. Due to the amendment of the constitution in connection with a popular vote on say-on-pay which now has to be implemented by the Swiss parliament, there will be changes in corporate law generally banning severance payments (ie, not only in the takeover context).

The board of the target company has a duty to render a report to the shareholders, setting out its position in relation to the offer; in this report, the board may come to the conclusion not to support the offer. Furthermore, the board can also actively search for a white knight.

Some of the various optional features provided for under Swiss corporate law may also be implemented in the context of defensive measures against takeovers, such as:

(i) shares with increased voting power (with a maximum ratio of 1:10);
(ii) the limitation of voting rights per shareholder;
(iii) the (narrowly defined) possibility to restrict the transfer of shares;
(iv) the introduction of qualified voting and decision requirements (ie, higher quorum requirements); and
(v) the use of authorised or conditional share capital with the exclusion of pre-emptive rights in the event of a public offer, if and to the extent such use has been explicitly approved by the respective shareholders' resolution.

In practice, the effect of such defensive measures is frequently addressed by the bidder by including a condition in its public takeover offer that any such defensive provisions in the articles of association have to be repealed in order for the offer to become binding.

While the defensive measures mentioned above are implemented by some companies as general defence measures outside the context of a specific takeover thread, defensive measures as discussed in **Directors' use of defensive measures** that would require shareholder approval have so far never been proposed by the board of a target company.

Directors' duties

Apart from refraining from any unlawful defensive measures as defined above, the board of the target company has to notify the TOB in advance about any defensive measure that it is considering. This reporting obligation allows the TOB time to react to any measure that it deems unlawful. This implies that a reporting obligation exists even if the measure is clearly lawful (eg, allowing a white knight to access the data room). Moreover, any and all actions of the board of the target company must be in line with the company's best interests and comply with the principle of equal treatment (see **Principal directors' duties**). In the event of a competing offer, the board of the target is obliged to treat the competing offers equally (eg, equal access to due diligence information).

Preventing a business combination
In the event of a public takeover offer, the board has no such power to "just say no"; the decision on the success of a takeover rests exclusively with the shareholders. Mergers and asset deals, on the other hand, require both co-operation and a prior agreement between the two boards.

Litigation
Swiss corporate law provides for any single shareholder to challenge resolutions adopted by the general shareholders' meeting. In contrast, board resolutions cannot be challenged and may only be declared null and void in the event of a very grievous infringement of Swiss corporate law. Consequently, any M&A transaction involving a shareholders' resolution may potentially be subject to litigation (eg, a resolution approving a merger). Moreover, the Swiss Merger Act provides for certain more specific appeal possibilities. In particular, a shareholder may demand a court to determine whether the compensation to be paid under the merger agreement is "adequate". However, because of cost risks and the collective action problem, such litigation is scarce.

In connection with public takeover offers, litigation is somewhat more frequent, but still not very common despite a noticeable increase in recent years. The TOB is empowered to take binding, enforceable and appealable decisions. In this context, it is noteworthy that the above-mentioned revision of SESTA (**Takeover legislation**) will provide for certain changes to procedural rules.

In private M&A deals, litigation over breach of representations and warranties has become increasingly common.

Transactional stage
The right to challenge a shareholders' resolution lapses two months after the publication of a merger in the Swiss Official Gazette of Commerce.

Litigation in the context of public takeover offers can be brought at various stages of the takeover process:

A qualified shareholder (2% under the current law, 3% under the revised law scheduled to come in effect on 1 May 2013) may participate in the proceedings before the TOB. For this purpose he/she must submit a petition to the TOB to be admitted as a party. Once party status is granted, the petitioner then has the right to participate in proceedings and to be heard prior to decisions taken by the TOB (the bidder and all parties acting in concert with it automatically have party status). The petition must be filed within five trading days after the earlier of (i) the publication of the offer prospectus and (ii) the publication of the first decision of the TOB.

A qualified shareholder who was not previously granted party status or a qualified shareholder who has made a timely request for party status, but was not consulted before the decision was issued, can object to decisions of the TOB. The objection must be filed within five trading days following the publication of the decision. The TOB itself will then issue a new order.

The bidder, parties acting in concert and qualified shareholders may also raise an appeal to FINMA against a decision of the TOB. The appeal must be raised within five trading days after the publication of the respective TOB decision. In this context, the revised law (scheduled to come into force on 1 May 2013) will clarify that minority shareholders can participate in appellate proceedings before FINMA only if they were a party to the proceedings before the TOB or if they did not have the possibility to participate in such TOB proceedings.

Finally, decisions of FINMA relating to takeover matters are subject to appeal to the Federal Administrative Court within ten calendar days of the publication of the decision. Such an appeal, in contrast to the appeal to FINMA, has no suspensory effect. The decisions of the Federal Administrative Court are final.

In private M&A, litigation would typically start at the time of verification of closing accounts or subsequently in cases of (alleged) breach of warranties. Swiss law also foresees a right of specific performance if a party refuses to close.