The Mergers & Acquisitions Review

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Editor
Mark Zerdin

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PREFACE

2018 was the year of the mega-deal, with an unprecedented number of big-ticket mergers taking place across a range of jurisdictions and sectors. In the first six months of 2018, global deal value rose by 59 per cent compared to 2017, despite volumes falling by 12 per cent. Although there was a considerable drop off in activity in the second half of the year, 2018 nonetheless saw robust overall performance by market participants, with global activity in 2018 exceeding US$3 trillion for the fifth consecutive year.

The United States remained the most targeted and acquisitive region globally in 2018; however, the deal-making landscape in the US for the remainder of 2019 presents a mixed picture. On the one hand, tax reform, a more relaxed US regulatory climate and growing cash reserves present a favourable environment for investors. On the other, dealmakers are likely to be concerned by the trade dispute between the US and China – which is already threatening economic growth and, at the time of writing, shows no sign of abating – and the ongoing uncertainty regarding antitrust policies, which may lead to increased scrutiny of M&A deals.

In Europe, after a record-breaking start to the year, the prolonged uncertainty caused by stuttering Brexit negotiations and wider political tensions across the continent finally caught up with dealmakers in the second half of 2018. In line with a softening of the global economy, the value of European deals in H2 plummeted to its lowest level since 2013, and the volume of transatlantic deals between North America and Europe also fell by 29 per cent year-on-year.

One of the main disruptors to M&A activity over the past 12 months has been the rise in political intervention in cross-border deals. In particular, concerns over national security have led to the tightening of foreign investment regimes and antitrust regulations, coupled with more active enforcement by regulators. This growth in protectionism is likely to remain one of the main obstacles facing dealmakers in the near future.

Nevertheless, looking forwards into the remainder of 2019, there is certainly cause for optimism: private equity continues to enjoy record-breaking levels of dry powder, and developments in technology are driving both the sector itself and the facilitation of deals more broadly. Finally, and perhaps most importantly, the past 12 months have highlighted the resilience of companies and private equity firms in their navigation of global political uncertainty and economic shifts.

I would like to thank the contributors for their support in producing the 13th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 47 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
July 2019

Chapter 41

SWITZERLAND

Manuel Werder, Till Spillmann, Thomas Brönnimann, Philippe Weber, Ulysses von Salis, Nicolas Birkhäuser and Elga Reana Tozzi[1]

I OVERVIEW OF M&A ACTIVITY

The number of M&A transactions involving Swiss businesses reached a peak in 2018, driven by strong activity in diverse sectors and an increase in private equity transactions, which constituted 32 per cent of M&A transactions in the period (up from 17 per cent in 2009). According to KPMG, there were 230 outbound deals in 2018, which was approximately double the number of inbound transactions. KPMG calculates the top 10 Swiss M&A transactions of 2018 as having a total transaction value of US$62.1 billion, with these transactions targeting the pharmaceutical, energy and utilities, consumer goods, logistics and fintech sectors. In the past five years, according to Dealogic, there has also been a steady growth in technology M&A transactions involving a Swiss buyer or target, with a total of 713 deals since 2014 offering an average transaction size of US$39 million.

These numbers show that relative to the size of its population, Switzerland plays a disproportionately important role in M&A in the DACH (Germany, Austria and Switzerland) region and offers interesting investment opportunities to foreign investors.

Some of the most notable deals in 2018 and Q1 2019 include the following:

a the spin-off by Novartis of Alcon Inc, with Alcon becoming dual-listed on the SIX Swiss Exchange and the New York Stock Exchange at a total valuation of 26.85 billion Swiss francs;

b Sunrise Communications' announced indirect acquisition of UPC Switzerland from Liberty Global, with an enterprise value of 6.3 billion Swiss francs;

c the 2.9 billion Swiss franc acquisition of SIX Payment Services from SIX Group by Paris-listed Worldline;

d CMA's acquisition of CEVA Logistics by way of a public tender offer at a deal value of 2.3 billion Swiss francs;

e the sale by EQT of a stake in Sportradar to CPPIB and Technology Crossover Ventures for 1.2 billion Swiss francs; and

f RennaisanceRe's 1.5 billion Swiss franc acquisition of Tokio Millennium Re.

1 Manuel Werder, Till Spillmann, Thomas Brönnimann, Philippe Weber, Ulysses von Salis and Nicolas Birkhäuser are partners and Elga Reana Tozzi is a counsel at Niederer Kraft Frey Ltd.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A transactions are mainly governed by:

a the Swiss Code of Obligations, which provides the statutory framework for the acquisition and sale of companies (share deals) or of their assets and liabilities (asset deals);

b the Federal Act on Merger, Demerger, Transformation and Transfer of Assets, which regulates mergers, demergers, conversions and transfers of assets and liabilities; and

c the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act (FMIA)) and its implementing ordinances.

The FMIA applies to public cash and share exchange offers to holders of equity securities of companies whose equity securities are listed on a Swiss exchange (in the case of non-Swiss domiciled companies, the FMIA applies only to those companies with a primary, full or partial listing on a Swiss exchange). The rules and procedures applicable to public tender offers laid down in the FMIA and its implementing ordinances are designed to ensure fairness, equal treatment and transparency in voluntary and mandatory public tender offers. The obligation to launch a mandatory tender offer arises whenever a person or a group of persons acting in concert, directly or indirectly, acquires equity securities of a Swiss company listed in Switzerland, or a foreign company with a primary listing in Switzerland, and thereby exceeds the threshold of one-third of the voting rights (whether exercisable or not). In the case of a mandatory tender offer (including offers that would result in the triggering threshold being exceeded), the offer price per share may not be lower than the volume-weighted average stock price on the relevant Swiss exchange of 60 trading days prior to the formal announcement or publication of the offer or the highest price paid by the bidder (or persons acting in concert with the bidder) for equity securities (including options) of the target during the preceding 12 months.

The articles of association of listed companies may provide for a higher threshold of up to 49 per cent of the voting rights (opting up) or may declare the mandatory tender offer obligations to be not applicable (opting out). The Takeover Board (TOB) and its supervisory authority, the Swiss Financial Market Supervisory Authority (FINMA), monitor public tender offers. The TOB can issue binding orders against parties, which can be appealed to FINMA. FINMA's decisions can be appealed to the Federal Administrative Court. The relevant decisions are published online.[2]

Various other rules may also be relevant for the acquisition and sale of corporate entities and of their assets and liabilities, including, among others:

a the listing rules of the respective stock exchange if the transaction results in the listing of new shares on a stock exchange;

b employment law (automatic transfer of employment relationships and information and consultation rights of employees);

c the Federal Act on the Acquisition of Real Estate by Persons Abroad, which contains regulations on the acquisition by foreign persons, or foreign-controlled companies, of residential property or land in Switzerland;

2 At www.takeover.ch.

d the Federal Act on Cartels and other Restraints of Competition, which in combination with the Ordinance of Merger Control regulates merger control; and
e industry-specific laws and regulations, such as financial services, telecommunications, insurance, and energy laws and regulations.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Private M&A

Corporate law is currently under revision in several aspects and with multiple aims. On 23 November 2016, the Swiss Federal Council issued a report on its amendment proposal. First, the Ordinance against excessive remuneration in listed stock corporations, which entered into force on 1 January 2014 as a transitional regulation, is to be adopted into federal law. Second, the rules on the incorporation of companies and the capital structure are to become more flexible. Third, the draft legislation contains a proposal for transparency rules for economically significant companies that are active in the extractive industries. Finally, guidelines on gender representation at board and senior executive level in major listed companies have been proposed.

The proposed new legal provisions that originate in the Ordinance against excessive remuneration in listed stock corporations foresee the following:
a sign-on bonuses that do not offset any demonstrable financial disadvantage are to be prohibited or limited;
b compensation for non-compete clauses that are not commercially justified are to be prohibited or limited;
c shareholders may vote in advance or *ex post* on the remuneration for top managers. If shareholders vote in advance on the variable remuneration for top managers, they must also be presented with the annual compensation report for a subsequent consultative vote; and
d more effective ways shall be introduced for claiming the reimbursement of unlawful payments.

Furthermore, the Federal Council's report provides for increased flexibility and simplification in a number of areas. Share capital may henceforth be denominated in a foreign currency. The new law introduces the possibility for a shareholders' meeting to foresee a new capital band, which authorises the board of directors to freely increase (authorised capital increases) and reduce the share capital (authorised capital reductions) within the capital band without any need for further shareholder resolutions. In addition, the need for public certification by a notary for the incorporation of stock corporations, limited liability companies and cooperatives, and their dissolution and cancellation from the commercial register, will now be both possible and straightforward.

The Federal Council is further proposing reforms to other specific areas. For example, by revising the provisions on corporate restructuring, it aims to create incentives for companies to take necessary actions at an early stage and thus avoid insolvency. In addition, arbitral tribunals will be able to rule on disputes under company law as well to the public courts, as is the case at present.

Furthermore, in an effort to make financial flows in the commodities sector more transparent, the Federal Council has proposed, in an electronic report, the imposition of a requirement on significant companies that are active in the extractive sector to disclose payments to state bodies in excess of 100,000 Swiss francs per financial year.

Finally, the Federal Council proposed the introduction of gender guidelines for the boards of directors and executive boards of major listed companies, namely that women should account for at least 30 per cent of a board of directors and at least 20 per cent of an executive board. The law provides for a comply or explain approach, that is to say if these thresholds are not met, a stock corporation will be required to state the reasons, and the action that is being taken to improve the situation, in its remuneration report. The new law provides for transitory periods of five years for boards of directors and 10 years for executive boards.

The proposal has been discussed in one chamber of the Swiss Parliament but not yet in the other chamber. Only the legal commission of the second chamber has held discussions. It appears that the discussions may be extensive and time-consuming, and that the deliberations will result in changes to the proposed bill. It cannot therefore be anticipated when the new legislation will enter into force and in what exact form.

ii Public M&A

Public M&A activity was very active in 2018, and the Swiss Takeover Board issued a number of decisions. However, no major amendments were made to takeover legislation in 2018.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

There is no general foreign investment regime in Switzerland, on the basis of national interest and regardless of the industry sector, as it has been enacted in several other jurisdictions. In February 2019 the Federal Council decided against foreign investment controls for the time being. However, the Federal Council intends to conduct a monitoring procedure and review the matter within the next four years.

There are few foreign investment control restrictions applying to M&A transactions involving Swiss target enterprises. There are provisions in the legislation covering specific sectors. Restrictions apply to sectors such as banking, finance, insurance, telecommunication, transportation, energy, war materials, lotteries and gambling where approvals, state licences and concessions may be required (mostly on a federal level, but sometimes also on a cantonal level).

For example, for the acquisition by a foreign investor of a bank or financial institution that is prudentially supervised, an approval from FINMA is required, whereas different tests apply to the acquisition of a controlling stake (i.e., when foreigners holding qualified participations directly or indirectly hold more than half the voting rights or exert a controlling influence in any other way) and the acquisition of a minority interest. The approval of an acquisition of a controlling stake will depend, among other things, on the granting of reciprocal rights by the country in which the qualified participant is resident or domiciled.

Furthermore, for example, the Federal Law on the acquisition of real estate in Switzerland by non-residents (known as Lex Koller) restricts the direct or indirect acquisition of non-commercial real estate in Switzerland by foreigners. These rules may also apply to a target entity that has a commercial purpose and pursues commercial activities, if it owns residential real estate in its portfolio or if it has significant unused land reserve.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

One of the most innovative and notable M&A transactions in Switzerland in recent years was completed in 2018: the takeover of Actelion Ltd, the Swiss-listed biotech company, by Johnson & Johnson. The purchase price of US$30 billion in cash makes this the largest biotech transaction in Europe. Johnson & Johnson agreed on 26 January 2017 to launch a public cash offer for all shares in Actelion, which is listed on the SIX. As part of the agreed transaction, Actelion made a spin-off of its promising drug discovery operations and early-stage clinical development assets into a newly created Swiss biopharmaceutical company, Idorsia Ltd. Before closing, the shares in Idorsia were, by way of an extraordinary dividend in kind, distributed to Actelion's shareholders, and at closing the shares in Idorsia were listed on the SIX, thereby starting a biotech start-up with more than 600 employees, more than 1 billion Swiss francs in cash and an initial public offering (IPO) at its first business day. This transaction structure allowed the shareholders of Actelion to keep the potential profits of the research that Actelion had been nurturing for decades with its outstanding research team, bridging the problem that it would have been very difficult to agree with Johnson & Johnson on a reasonable valuation of this high-risk, early-stage research business. It also allowed a large number of the management team at Actelion, including chief executive officer Paul Clozel, to continue to work in an independent company with a very entrepreneurial spirit. Johnson & Johnson bolstered its product portfolio with Actelion's blockbuster drugs while also receiving an option on Idorsia's ACT-132577, a compound for resistant hypertension that is in development.

As part of the transaction, Actelion had to be split by spinning-off its drug discovery operations and early-stage clinical development assets into a new entity. This complex undertaking had to be fully implemented within less than six months, including splitting the intellectual property portfolio and finding solutions for business functions that both business units had been sharing. As part of the transaction, Johnson & Johnson also acquired a significant shareholding in Idorsia, whereby a well-designed governance structure had to be developed to address concerns from the competent merger control authorities. Finally, Johnson & Johnson is also providing a credit facility to Idorsia.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In general, low interest rates and high cash levels at companies and sponsors continued to underpin the strong M&A activity in 2018. Large Swiss leveraged acquisition finance transactions are usually arranged by international banks through the UK or US markets and placed with banks and institutional investors using Luxembourg or Netherlands acquisition vehicle structures. In most cases, funding is made through both loans and bonds. The domestic acquisition finance market is mainly driven by the large Swiss banks and some smaller ones, such as cantonal banks and other smaller financial institutions. Because of the particularities of the Swiss tax laws, bonds issued by Swiss issuers are less attractive, in particular in the context of leveraged acquisition finance transactions. In addition, because of the negative interest rates, the trend of institutional investors (in particular, insurance companies and pension funds) and other non-bank lenders providing lending has also continued. Such investors are particularly interested in real estate, infrastructure and energy investments offering relatively secure long-term and resilient cash flow and return profiles.

VII EMPLOYMENT LAW

No major amendments were made to Swiss employment law in 2018. In the context of M&A transactions, the relevant rules are those governing the transfer of employees in the event of a transfer of an enterprise by way of an asset transfer, merger or demerger. These rules do not apply to share transfers. In the event of a transfer of an enterprise, the employment agreements with the employees transfer by operation of law unless an employee refuses the transfer, in which case the employment agreements will transfer to the acquiring party but be terminated within the statutory periods (i.e., one to three months, depending on the number of years the employee has been employed).

The employee representative body or, if there is none, the employees themselves, must be informed in due time prior to an anticipated transfer about the reasons for the transfer and the legal, economic and social consequences. If measures affecting employees are contemplated as an outcome of the transfer, the employee representative body or, if there is none, the employees themselves, must be consulted prior to any decision on these measures being made. This may conflict with stock exchange rules, which require that transactions are kept confidential until they are executed and that only a confined circle of persons are involved in the transaction process on a need-to-know basis.

VIII TAX LAW

On 19 May 2019, the Swiss corporate tax reforms were approved by popular vote. As of 1 January 2020, various tax provisions will enter into force, such as the cantons having to abolish their preferential tax regimes (e.g., holding and domicile privilege, mixed company status), and as consequence will reduce their corporate tax rates (subject to cantonal referendum, and in some cantons this will be subject to a vote during 2019). The main new rules include those regarding the introduction of a patent box regime, a R&D super deduction and the tax-neutral step up of the tax basis for migration to Switzerland. For companies losing their privileged tax status, a step up of the tax basis would be possible.

Under the Federal Direct Tax Act (FDTA),[3] capital gains arising from the sale of privately held shares of a Swiss tax-resident person are tax-free. However, the tax law states some exemptions whereby a capital gain would be subject to income tax and withholding tax in the following two basic cases:

a an indirect partial liquidation[4] (i.e., capital gains arising from the sale of at least 20 per cent of the capital of a company if the purchaser was a company or an individual person holding those shares as a business asset). It is a well-known practice that the seller asks for tax warranties and representations in the sale and purchase agreement, whereas the purchaser cannot merge the target with the acquisition company or declare a dividend from distributable non-business-related reserves (available at the date of the purchase) during a five-year blocking period; and

b a transposition,[5] that is to say a realisation of a nominal value gain if a shareholding of at least 5 per cent was contributed by an individual shareholder to a company in exchange for shares, with the result that the individual shareholder would own at

3 Article 1b, Paragraph 3 of the FDTA.
4 Article 20a, Paragraph 1(a) FDTA.
5 Article 20a, Paragraph 1(b) FDTA.

least 50 per cent. The minimum shareholding quota of 5 per cent will be reduced to zero as of 1 January 2020 (i.e., even a contribution of one share into a controlled company could result in a transposition treatment). This should not only be considered for family-owned businesses but also in the case of an IPO. In practice, shareholder agreements and the execution of call options could also trigger a transposition and requalify a nominal value gain into taxable income.

In recent years, the Swiss Federal Tax Administration (SFTA) has developed a new practice for cases of substitutional liquidation, that is to say when a non-Swiss holding company would sell its Swiss subsidiary to a company that is tax-resident in a third country and the Swiss subsidiary would be merged with the non-Swiss tax resident acquisition company, which would result in the distributable reserves of the Swiss subsidiary being transferred to the non-Swiss tax resident company and, accordingly, no longer being subject to Swiss withholding tax. The SFTA could in such a case levy a withholding tax at a rate that is the difference between the residual tax rate applicable pursuant to the applicable double tax treaty between the seller state and Switzerland and the applicable double tax treaty between the state of the acquisition company and Switzerland.

The SFTA could in some cases also refuse the refunding of withholding tax if it is deemed that there has been an international transposition, that is to say if a surplus was to be returned to a shareholder through the repayment of loans or by distributing capital contribution reserves instead of a dividend distribution that would be subject to Swiss withholding tax: for example, a Swiss company held by non-Swiss individuals, which cannot benefit from a full refund of the Swiss withholding tax, would be transferred to another Swiss company that could benefit from a full refund of the Swiss withholding tax.

Attention should also be given if a target company has an employee share option plan in place. The relevant practice is very strict in respect of the requalification of a capital gain into salary income. In particular, if an employee buys shares (cash settlement of the purchase, i.e., not when shares are issued as a bonus compensation) at a value that is calculated based on an agreed formula, and those shares would be sold to a third party based on a different fair market value calculation, the surplus gain (i.e., the difference between the actual formula value and the effective fair market value) would be requalified as salary income and be subject to income tax, and to social security and eventually to pension funds (or even source taxes), which might be a liability of the company.

Furthermore, the facts and circumstances of purchase price payments related to certain earn-out clauses need to be analysed carefully given that such payments could also be requalified as a salary income.

Switzerland still levies stamp duty of 1 per cent on the issue of shares, but restructuring exemptions are available. Based on a recent Federal Supreme Court case, stamp duty would be due in the case of a quasi-merger if no new shares were issued (i.e., shares in one company would be contributed to another company). In practice, until now it has been possible to contribute to another company without issuing new shares (i.e., in cases of internal reorganisations), but going forward, it is mandatory to issue at least one share.

IX COMPETITION LAW

Under the current merger control legislation, the following transactions are deemed to be a concentration of undertakings subject to merger control:

a a statutory merger of two or more previously independent undertakings;
b the acquisition of control over one or more previously independent undertakings or parts of undertakings through any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement; and
c the acquisition of joint control over an undertaking (joint venture).

Control is assumed if an undertaking can exercise a decisive influence over the activities of the other undertaking by the acquisition of rights over shares or by any other means. The means of obtaining control may, in particular, involve the acquisition of the following:

a ownership rights or rights to use all or parts of the assets of an undertaking (if those assets constitute the whole or part of an undertaking, which is a business with a market presence to which a market turnover can be attributed); or
b rights or agreements that confer a decisive influence on the composition, deliberations or decisions of the organs of an undertaking.

Partial interests and minority shareholdings are only covered if they allow an undertaking to exercise a decisive influence over another undertaking (this can also be in combination with contractual agreements between the parties or factual circumstances). There is a risk that the acquisition of a minority interest may qualify as an anticompetitive agreement if the undertakings concerned agree to cooperate.

Planned concentrations of undertakings must be notified to the Competition Commission before their implementation if in the financial year preceding the concentration (cumulatively) the undertakings concerned together reported a worldwide turnover of at least 2 billion Swiss francs or a turnover in Switzerland of at least 500 million Swiss francs; and at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 million Swiss francs.

In the case of insurance companies, turnover is replaced by annual gross insurance premium income, and in the case of banks and other financial intermediaries by gross income.

The Secretariat decided that a joint venture is exempted from notification (even if the parent companies meet the thresholds) if the following two conditions are both met: the joint venture does not have activities in Switzerland or does not generate any revenues in Switzerland; and those activities or revenues are not planned in Switzerland and are not expected to take place in the future.

In addition to turnover, notification is mandatory if one of the undertakings concerned in proceedings under the Cartel Act in a final and non-appealable decision was held to be dominant in a market in Switzerland, and if the concentration concerns either that market, or an adjacent market or a market upstream or downstream of that market.

There is no applicable triggering event or time limit. However, notification must be made before the concentration is implemented. For public bids for acquisitions of undertakings, the notification must be made immediately after publication of the offer and before the acquisition is implemented. The Competition Commission should be contacted in advance so that it can coordinate the proceeding with the Swiss Takeover Board.

Under the current merger control legislation, the Competition Commission may prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration both creates or strengthens a dominant position liable to eliminate effective competition; and does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

The following is currently being debated in Switzerland: the Federal Council has commissioned the Department of Economic Affairs, Education and Research to draw up a consultation proposal for adapting the merger control test. It is proposed that the current market dominance test applicable in Switzerland (under Article 10 of the Cartel Act) should be replaced by the significant impediment of effective competition test.

X OUTLOOK

Swiss M&A activity continues to punch above its weight, with particularly strong activity in the traditional powerhouses of the pharma, energy and utilities, consumer goods and fintech sectors. A steady increase in private equity involvement in Swiss M&A transactions has also contributed to growth in the market.

Appendix 1

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