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Editor
Mark Zerdin

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PREFACE

While the previous edition of *The Mergers & Acquisitions Review* highlighted some causes for optimism for growth in the M&A market, the resilience of companies has been severely tested in 2020 in light of the covid-19 pandemic. Political uncertainty and economic shifts have taken a back seat to the wide-reaching global effects of the pandemic, which are leaving many jurisdictions and sectors in dire straits.

The figures for the first half of 2020 reflect this, as global deal value fell by 53 per cent and deal volume by 32 per cent (compared with the first half of 2019), while megadeals (over US$10 billion) were down by 48 per cent.[1] The global deal value figure is the lowest half-yearly total since the first half of 2010. The priority for many businesses in the wake of the crisis has been to conserve cash and protect their revenue streams rather than seeking to invest in M&A.

The Americas saw the largest fall in share of global M&A, as its value fell to 33.4 per cent from 52.8 per cent in 2019.[2] The US is facing not only political uncertainty with the upcoming presidential election and protests across the country, but also a sharp decline in economic productivity due to the lockdown enforced by the covid-19 crisis. M&A deal activity in the US fell to lower levels than the 2008 global financial crisis, with higher value deals particularly affected. Despite the bleak figures for the first half of 2020, though, there are signs that some sectors, notably the technology sector, are rebounding. This is perhaps unsurprising as the future of many industries will depend on technology services.

European M&A saw its lowest quarterly value since 2009 in the second quarter of 2020 of just US$83.6 billion. There was also a drop of 30.6 per cent in the value of European M&A in the first half of 2020 when compared with the figures in the first half of 2019. With economies beginning to open up towards the end of the first half of 2020, there are early signs as to where the focus of M&A activity will likely be in the aftermath of the crisis. Private equity buyouts have accounted for almost 20 per cent of deals targeting Europe, up from 18.9 per cent in 2019.[3] In Europe, as in the Americas, the tech sector is continuing to attract interest and reached a total of US$27.8 billion across 477 deals in the first half of 2020. By contrast, the consumer sector has been severely impacted and has fallen to its lowest value since 2009.

Looking forward to the remainder of 2020 and beyond, there are some reasons to be optimistic that the global M&A market will show some signs of recovery. There has already

1 Mergermarket, 'Global & Regional M&A Report 1H20'.
2 ibid.
3 ibid.

been a resurgence since the first half of 2020, with the third quarter seeing 36 deals worth US$5 billion-plus, making it the busiest third quarter on record.[4] The challenges caused by restricted international travel, less physical diligence and almost no face-to-face meetings are, for the most part, being surmounted. It is also anticipated that private equity funds will begin to put their dry powder to use as further clarity emerges on the duration and effects of the pandemic.

I would like to thank the contributors for their support in producing the 14th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 42 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
December 2020

4 *Financial Times*, 'Dealmaking rebound drives busiest summer for M&A on record'.

Chapter 36

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

After having reached a peak in 2018, the number of M&A transactions involving Swiss businesses were slightly down in 2019. According to KPMG, the number of transactions with Swiss involvement dropped from 493 to 402; the transaction volume declined from US$133 billion to US$127 billion. The life science and pharmaceutical industries and the industrial and TMT sectors made the largest contributions to this volume.

In the first half of 2020, the M&A activity registered a historic fall as a result of the covid-19 crisis. According to a study from Deloitte, there was a decrease of 42 per cent in inbound transactions targeting Swiss SMEs and a 24 per cent reduction in outbound transactions by Swiss SMEs during the first half of 2020 compared to the first half of 2019, while the volume of domestic transactions remained stable.

As in past years, 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.

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

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.

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 Federal Act on Financial Services and 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;

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 has been under revision for more than 12 years in several aspects and with multiple aims. On 19 June 2020, the Swiss parliament finally adopted the revised law. It is expected that the Federal Council will set the date of entry into force of the revised law to the second half of 2021 at the earliest. First, the new law implements the Ordinance against excessive remuneration in listed stock corporations, which entered into force on 1 January 2014 as a transitional regulation. Second, the rules on the capital structure will become more flexible. Finally, guidelines on gender representation at board and senior executive level in major listed companies will be introduced.

2 At www.takeover.ch.

The 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 new law 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, shareholders meetings may henceforth by held outside Switzerland or simultaneously at several venues, via electronic means or in writing by way of circular resolution.

The new law contains further 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.

Furthermore, in an effort to make financial flows in the commodities sector more transparent, the new law imposes 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 new law introduces 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.

ii Public M&A

In 2019, there was considerable public M&A activity in Switzerland. In total, six public takeovers for companies listed on the SIX Swiss Exchange or the BX Berne eXchange were announced. The largest deals were the following: CMA CGM Ltd's public tender offer for all publicly held shares in Ceva Logistics Ltd; DVS A/S's public tender offer for all publicly held shares in Panalpina Welttransport (Holding) Ltd; and Schweizerische Kraftwerksbeteiligungs AG's public offer for all publicly held shares in Alpiq Holding Ltd.

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. Though unclear at this stage, the future foreign investment regime will possibly only apply: (1) if national security might be jeopardised; or (2) if the respective foreign state does not grant reciprocity.

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 and securities dealers, insurance, real estate, telecommunication, nuclear energy, radio and television, aviation, postal services, power and gas installations, railways, defence, and casinos 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

The largest transaction in 2019 involving a private equity investment fund was the acquisition of Nestlé's Skin Health business by EQT, the Swedish private equity group, and Abu Dhabi Investment Authority. The transaction volume is beyond 10 billion Swiss francs and shows that private equity groups have the capabilities to structure and implement transformational transactions on a global scale.

The strength of Switzerland's technology sector was demonstrated by the acquisition of Avaloq Group AG by Tokyo-listed NEC Corporation with a transaction value of 2.05 billion Swiss francs. Avaloq is a leading Swiss financial software company held by its management and a private equity investor and its acquisition by a global technology group will be instrumental to its worldwide expansion.

A lot of controversy was triggered by the attempted acquisition by Sunrise Communications of UPC Switzerland as a move for consolidation of the Swiss telecom and cable business. The transaction failed after Sunrise's major shareholder, Freenet, and others opposed the 2.8 billion Swiss francs capital increase that was meant to provide the financing of the transaction. As a consequence of the cancellation of the transaction, Sunrise had to pay a break fee of 50 million Swiss francs. Only a few months after this failed attempt by Sunrise, UPC Switzerland and its owner Liberty Global came back with a public offer for the listed Sunrise, in a deal that valued Sunrise at 6.8 billion Swiss francs. In October 2020, it was announced that the public offer was successful, ending this particular saga of Swiss M&A history.

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 2019. 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 that respect, it is noteworthy that the Swiss Federal Council announced in April 2020 that it aims to strengthen the Swiss debt market through tax reform. In particular, it plans to abolish the Swiss withholding tax on interest-bearing investments, including bond issuances of Swiss companies. 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 2019 and 2020. 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

As of 1 January 2020, as part of a major corporate tax reform, various tax provisions have entered 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, have or will reduce their corporate tax rates. 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 is 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 share (as of 1 January 2020 the minimum shareholding quota has been reduced to zero from 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 least 50 per cent. Also, as of 1 January 2020 this no longer needs to be considered in the case of an initial public offering. 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. This means that when a non-Swiss holding company sells its Swiss subsidiary to a company that is tax-resident in a third country and the Swiss subsidiary is to 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

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

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 if the seller is also an employee of the target company.

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 TOB.

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

Certain economic-sensitive industries, such as the sectors of consumer goods, tourism, hotels, restaurants, and transportation have been hit hard by the covid-19 pandemic. Uncertainties with respect to the future performance and the prospects of certain businesses have halted many transactions and may lead to lower prices. While private equity funds still have strong liquidity, the valuation expectations of the sellers and the prices that buyers are willing to pay often diverge. Furthermore, banks tend to be less accommodating in financing transactions; therefore, buyers may leverage a lower part of the purchase price. Finally, the competitive environment in certain sectors under pressure may result in a consolidation.

Appendix 1

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Philippe Weber specialises in large cross-border M&A and financing transactions in various industries, including technology, luxury, industrial goods, travel and retail, life sciences and financial services. He regularly advises international companies and investors (including foreign sovereign wealth funds, state-owned enterprises, private equity) in important investments and other business transactions.

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