Mergers & Acquisitions in Switzerland

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The Swiss M&A market year 2001 was characterized by a stabilisation of the value of the mergers and by a reduction in numbers of cross-border transactions. Of all reported deals involving Swiss companies, 36% were purely domestic, 43% involved a Swiss buyer acquiring a foreign company and 21% involved a foreign buyer acquiring a Swiss company.

High profile transactions involving a target in Switzerland during the years 2001 and 2002 include the acquisition of Selecta Group by Compass Group for CHF 901m; the sale of the flavour unit of Nestlé to Givaudan for CHF 750m.; and the sale by SAirGroup of its ground handling unit Swissport to Candover Investments for CHF 580m. Swiss companies have again been very aggressive in foreign markets, namely in the US, e.g., the acquisition of Ralston Purina by Nestlé for USD 10.3bn and Lincoln Re by Swiss Re for USD bn, or the tender offer of Kaba Holding for Unican Security for CAND 760m.

Out of approximately 15 public takeover offers open for acceptance in the year 2001, five have been qualified as unfriendly (Incentive Capital vs. Sulzer, Model vs. Axantis Holding, CreInvest vs. Altin, Hansa vs. ENR and Multipapiers vs. Baumgartner Papiers). The remaining 10 transactions were friendly offers, including those undertaken for restructuring purposes (e.g., the offer of Bobst Group AG for the shares in Bobst AG) and the taking private transactions (e.g., the offers by Allianz Aktiengesellschaft for the shares in Berner Allgemeine Versicherungs-Gesellschaft and by Siemens Aktiengesellschaft for the shares in Netstal-Maschinen AG).

The equity offering market 2001 was characterised by a reduction in the number of IPOs, however, with an increase of the total value of the equities offered. 6 companies were newly listed on the SWX Swiss Exchange. The flotation of Converium, the reinsurance business of ZFS Financial Services, made more than half of the new capital offered (CHF 2.87bn).

1. REGULATORY FRAMEWORK

As a general rule, M&A is regulated by general corporate and contract law provisions contained in the Swiss Code of Obligations (CO). In addition, other legislations (briefly listed below) are relevant as well. No specific regulations exist, however, with respect to exchange control, general registration requirements for issuance of securities or general restrictions on foreign investments.
1.1. Merger control

Under the Act on Cartels, the parties to a business combination are required to notify the Federal Competition Commission (FCC) if, in the last accounting period prior to the signing of the agreement in which the concentration is agreed, (i) the undertakings concerned reported worldwide joint sales of at least CHF 2 bn or sales in Switzerland of at least CHF 500m, and (ii) at least two of the undertakings concerned reported individual sales in Switzerland of at least CHF 100m. Special rules apply for banks and savings institutions, insurance companies and media enterprises. Concentrations between affiliated companies are usually not subject to notification.

A concentration is deemed approved unless the FCC decides within one month of notification to open an investigation. If so, the final decision has to be rendered within another four months. The merger may be (i) cleared; (ii) cleared subject to conditions; or (iii) prohibited. The test is whether the concentration has the potential to eliminate (and not only significantly restrict) workable competition. In 2001, 35 mergers were notified, two of which were made subject to a second stage investigation. Of those, one filing (GE / Honeywell) was finally withdrawn and the other (Tamedia / Belcom) was cleared subject to conditions.

1.2. Regulated industries

In general, foreigners are not excluded from purchasing an interest in a Swiss company. Still, several laws specifically address such purchase in certain industries (e.g., financial services, radio and television, telecommunications or transportation). For instance, the acquisition of a significant interest in a Swiss bank or a Swiss securities dealer (generally any interest in excess of 10% of the capital or votes) must be reported to the Federal Banking Commission (FBC). The reporting requirement extends to Swiss and foreign acquirers alike. However, in the latter case, the FBC may intervene under certain circumstances.

The sale of an ongoing business, which requires a license or a concession to operate (e.g., transport, telecommunication, healthcare), may require the approval by the competent authorities. Under some statutory rules, the same approval requirement applies to a direct or indirect change of control in such a business.

1.3. Securities regulation

The Federal Act on Stock Exchange and Securities Trading (SESTA) provides for certain rules with respect to M&A activities, namely rules concerning both the disclosure of shareholdings and public takeover offers.
1.4. Insider trading and market manipulation

Insider trading and market manipulation are considered a felony under the Swiss Penal Code. Insider trading is committed by persons who, as direct recipients of non-public information relating to a listed company that is likely to materially affect the market price of the securities of such company, obtain a pecuniary benefit by exploiting their knowledge of such non-public information. An impending acquisition or a merger is deemed to be an inside information. However, pursuant to the predominant view, the purchase of shares of a company by a potential bidder prior to the launch of a tender offer (stake-building) does not violate insider trading laws.

1.5. Acquisition of Swiss real estate

The Federal Act on the Acquisition of Real Estate by Persons Abroad (Lex Koller) proscribes the acquisition by a foreigner or a foreign-controlled company of residential, i.e., non-commercial real estate in Switzerland. No such restrictions exist anymore for commercial real estate. For purposes of Lex Koller, commercial real estate is real estate on which commercially used buildings stand. They may include a minor portion of residentially used space and may include land reserves, which as a rule of thumb should not exceed 50% of the area already being used. All other real estate is deemed non-commercial real estate, for the acquisition of which an approval is necessary. Non-commercial real estate includes residential property (including land the buildings on which will have to have a certain portion of residentially used space), abandoned property (such as old manufacturing buildings) and real estate property, even if for commercial use, if it is unlikely that there will be construction of premises within the next 2-3 years. Further, the acquisition of shares or quotas in a company the statutory or factual business purpose is the trading in non-commercial real estate is also subject to approval. Such government approval is only granted in exceptional cases.

1.6. New law developments

Two main developments must be reported. First, the new Federal Act on Merger, Splitting and Conversion of Legal Entities and the Assumption of Property (Merger Act) is currently debated by Parliament. Entry into force is foreseen at the earliest in 2003. Second, the corporate governance issues have become a hot issue in Switzerland as well. The SWX Swiss Exchange is presently drafting a directive on disclosure requirements for listed companies; the Swiss Business Federation has edited a Swiss Code of Best Practice, with the aim to increase transparency and disclosure policy within listed companies as well.
2. PRIVATE TRANSACTIONS

2.1. Purchase of shares or assets

In private transactions, the purchase of a business is most commonly based on a share or asset purchase agreement, governed by the Swiss Code of Obligations and its provisions on sales. Such agreements are often preceded by a letter of intent, which, in general, is not binding with respect to the conclusion of a definitive acquisition agreement.

In share purchases, statutory implied warranties relate only to title to the shares and to defects in the share certificates delivered, not to the underlying business. Specific representations and warranties relating to the business are, therefore, essential for the purchaser, e.g., as to the accuracy of financial statements, absence of contingent liabilities (litigation, taxes, pensions, environment, condition of assets, etc.). It has therefore become common in Switzerland to draft such acquisition agreements in an Anglo-American style.

Asset purchases are rather complicated under Swiss law because title to each asset must be transferred separately pursuant to form requirements applicable to such asset transfers: written deed of assignment for claims and patent rights, delivery for tangible property, notarised instrument for real property. If the asset purchase relates to a full business, the assets will still have to be transferred separately; however, the liabilities may be transferred automatically without the need for creditor consent. In such case, the seller remains liable to creditors for a period of two years from the closing date of the transaction. Contracts and governmental authorizations may only be transferred with the consent of the third party or the competent governmental authority, except for (i) employment contracts, which are, in case of transfer of an entire business or part thereof, transferred by operation of law unless such transfer is declined by the employee, and (ii) under certain circumstances, insurance and lease contracts.

In both cases, since the Swiss statute of limitations for warranty claims is short (one year), it is usually extended and the purchaser is given additional time to examine the accuracy of the seller's representations and warranties.

2.2. Mergers

Statutory mergers are effected by absorption (one company is dissolved and merged into an other) or combination (two companies are dissolved into a newly formed company). In either case, the assets and liabilities of the dissolved companies are transferred by operation of law to the surviving or new company. A statutory merger does not eliminate minority shareholders, though. Mergers require execution of a merger agreement, shareholder approval, and compliance with special requirements for the protection of creditors. Furthermore, the board has to issue a special report to be certified by the company's auditors if the merger leads to a capital increase of the surviving company. In
recent years, most of the important mergers involving public companies have been made by creating first a new company which takes over the two merging companies by absorption, acquiring thereby the entire assets and liabilities of both companies.

The current law only governs mergers between stock companies, between limited partnerships and between cooperatives. The possibility of a merger between entities with different legal forms is only allowed under certain limitations. Statutory law does not explicitly cover cross-border mergers, albeit Swiss authorities acknowledge them. Furthermore, the conversion of one form of business entity into another without a concurrent liquidation is only regulated for the transformation of a corporation into a limited liability company, albeit the Swiss Federal Court has acknowledged the reverse situation in 1998. The practice of splitting companies is still unrecognised under Swiss law. This lack of transparency and the legal uncertainty related thereto, as well as the harmonisation of Swiss regulation with EU law, are the reasons for the proposal of the Merger Act. The main features of the proposed Merger Act are the audit of the merger agreement by a specially qualified auditor, the requirement of a merger report issued by the board of directors, the facilitation of intra-group mergers and the principle of tax neutrality of all forms of reorganisation.

Alternatives to a statutory merger can be achieved by using forms such as a sale of all assets and liabilities, a share for share transaction ("quasi-merger"), or the formation of a new company which takes over assets and liabilities of the two "merging" companies in exchange for own shares. Since under Swiss law cross-border statutory mergers are unprecedented, cross-border combinations are very often made by one or two exchange offers (e.g., creation in 1999 of the single share structure of ABB Ltd).

Furthermore, Swiss law does not provide for a cash-out merger (except for listed companies after a successful public takeover offer). However, under certain circumstances, a squeeze-out might be achieved by liquidating one company into another and paying cash liquidation proceeds to the minority shareholders. Because such a procedure may affect upon the interests of the minority shareholders and the principles of equal treatment, it is available only if justified by compelling reasons. However, the draft Merger Act provides that the shareholders of the target company may with a 90 % majority vote on the merger waive their right to receive shares in the surviving company, allowing the buy-out of minority shareholders with cash (cash-out merger), shares of a third company (triangular merger) or other assets.

2.3. Joint ventures

Joint ventures may be organised as pure contractual relationships, as partnerships or by using a jointly held company in the form of "quasi-mergers". The terms of such joint ventures are typically set out in a partnership or joint venture agreement, which, in case of a jointly held company, usually is in form of a shareholders’ agreement.
3. PUBLIC TRANSACTIONS

3.1. Disclosure of shareholdings

Under the SESTA, anyone who directly, indirectly (e.g., through nominees or intermediary companies) or in concert with third parties, acquires or sells for his own account securities in a Swiss company listed in Switzerland and thereby reaches, exceeds or falls below the thresholds of 5, 10, 20, 33 1/3, 50 or 66 2/3% of the voting rights must report these participations to the company and to the exchange on which the shares are listed. This allows the other shareholders to react to a change in the ownership and prevents creeping takeover offers. The obligation to notify arises once the agreement to acquire or to sell is entered into (as opposed to the date of its performance). This disclosure obligation also covers call and put options as well as conversion rights. However, these transactions are exempted from reporting if the rights entitle delivery of less than 5% of the underlying shares. Therefore, a bidder, which decides to build up a stake in the target before launching the bid, may acquire up to 4.99% of shares with voting rights plus options for additional 4.99% of shares with voting rights without having to disclose its built-up stake in the target company. Failure to notify a shareholding is a criminal offence punishable by a fine.

In addition, the CO requires listed corporations to disclose in their annual report the identity of shareholders or organized groups of shareholders holding more than 5% of the voting rights (subject to a lower percentage pursuant to the articles of incorporation). This disclosure obligation applies even if participations do not change from year to year.

If the company is the target of a public takeover offer, the bidder and all shareholders, including the target itself, holding more than 5% of the voting rights of the target must, during the offer period, report all transactions in equity securities in the target and, as the case may be, in the company whose securities are offered in exchange for the equity securities of the target.

3.2. Public takeover offers

Public takeover offers are supervised by the Takeover Board (TB). The TB may only issue recommendations to the interested parties, stating whether the applicable regulations have been complied with or not. If these recommendations are disregarded or not accepted, the FBC may issue binding decrees that may be enforced against the party concerned. The decisions of the TB and of the FBC are published at www.takeover.ch.

3.2.1. Scope of application of SESTA

The takeover provisions of the SESTA cover both friendly and unfriendly public takeover offers and are designed to ensure transparency, fairness and equal treatment in corporate takeovers. They apply to cash or exchange offers addressed publicly to the holders of
equity securities of Swiss companies that have at least one class of equity securities listed on a Swiss exchange. In certain exceptional circumstances, the Swiss takeover rules may also apply to the acquisition of a non-Swiss target company listed on a Swiss exchange if the target is in fact operated from Switzerland. In addition, a bidder may voluntarily submit a public takeover offer for a non-Swiss company to Swiss takeover regulation. As a general rule, self-tender offers and share buyback programs are also subject to the takeover rules. However, (i) repurchases of less than 2% of the company's share capital are generally exempt, and (ii) repurchases of more than 2% but less than 10% of the company's share capital may be exempted from the takeover rules by the TB under certain circumstances. Due to adverse Swiss withholding tax implications, share buyback programmes are usually seen in two forms: either the company grants put options to its shareholders or it opens a second trading line where only the company acts as a buyer.

3.2.2. Pre-offer due diligence

Practice varies both as to the scope of due diligence and the way it is carried out. Bidders tend to carry out as much due diligence as possible prior to the bid, as the opportunities to withdraw from a launched bid are limited. On the other hand, in a friendly transaction bidder and target to some extent share an interest in maintaining secrecy until the takeover is launched. Rumors of a proposed transaction may artificially inflate the target's share price and therefore shrink the premium that the bidder intends to offer.

Any due diligence exercise has to be limited to the extent that (i) the confidentiality of the information disclosed is preserved (e.g., by executing a confidentiality agreement), (ii) no business secrets protected by the Swiss Penal Code are disclosed, (iii) the rules on insider trading are complied with (e.g., by executing a standstill agreement), (iv) the board of directors observes its duty to safeguard the interests of the target company as set forth in the CO and (v) the board of directors does not violate applicable antitrust provisions. For all these reasons, a due diligence investigation will typically involve a relatively small number of high level personnel focusing on key aspects of the target's business. It should also be noted that the board of directors has a statutory duty to treat all shareholders equally. This duty is sanctioned by the requirement that a bidder must certify in the offer prospectus that it has received no material non public information on the target company that is likely to have a decisive influence on the decision of the recipients of the offer. If such information is received, it must be disclosed in the offer prospectus. The completion of a satisfactory due diligence may not be a condition attached to an offer. However, clear assumptions, such as, e.g., the non-existence of unsettled litigation against the company exceeding a certain threshold may constitute a valid condition. Finally, the findings of a due diligence review may be one of the two reasons which enable the bidder to reduce the offer price to the disadvantage of its recipients.

3.2.3. Announcing the offer

The bidder may publicly announce its intention prior to the publication of the offer by publishing a preliminary announcement. The preliminary announcement serves as a cut-off date for the calculation of the purchase price in a mandatory bid, the application of the
disclosure rules for shares transactions during the offer period, and the implementation of
defensive measures by the target company. The price set in the preliminary
announcement may be changed to the recipient’s disadvantage only if the target has been
subject to a due diligence review and the change is objectively justified or if the offer price
is set in proportion to a price still to be negotiated by the bidder within the framework of
the acquisition of a significant holding.

A preliminary announcement is particularly advisable in the event that (i) the bidder
wants to lock in the minimum offer price in case of a mandatory offer, (ii) the bidder
wants to restrict the target’s options concerning defensive measures, (iii) the SWX Swiss Exchange *ad hoc* publicity rules would require disclosure, for instance in case
of leak, (iv) a competing offer is being prepared; or (v) clearance need to be obtained
from the competition authorities before an offer can be made.

**3.2.4. Takeover offer procedure**

After a preliminary announcement, the takeover offer must be launched within 6 weeks by
publication of an offer prospectus, which must contain all information necessary to enable
the recipients of the offer to reach an informed decision whether or not to tender their
shares. Prior to its publication, the offer prospectus must be examined by a recognised
review body, usually an auditing firm; thereafter, it must be filed with the TB for approval,
but not later than the date of publication of the offer.

Within 15 exchange trading days of the publication of the offer, the board of directors of
the target company must issue a report to the shareholders. This report must contain all
the information necessary for the recipients of the offer to make a fully informed decision,
i.e., disclose the intentions of substantial shareholders, whether the board plans to
implement defensive measures and address all potential conflicts of interests of the target
company’s board member and senior officers. In friendly takeover offers, it has become
standard to publish the prospectus with the recommendation of the TB and the report of
the board of the target altogether.

The takeover offer must be open at least for 20, but not more than 40, exchange trading
days. Once completed, the bidder must publish the preliminary result of the offer and state
whether the conditions under which the offer was made have been fulfilled; thereafter, the
offer period is extended for another 10 exchange trading days.

**3.2.5. Equal treatment principle**

The bidder must extend equal treatment to all holders of securities of the same class or, if
the offer is made for several classes of equity securities, to all classes of listed equity
securities of the target company. As a result, the offer must be made for all listed equity
securities, including those resulting from the exercise of option rights, but need not
necessarily be extended to non-listed security rights, such as option rights issued under
an employee participation plan. The bidder may, however, pay a premium on certain
classes of equity securities, such as shares with preferred voting or patrimonial rights; the
TB as a rule permits price differentiation on the basis of prior stock exchange prices. In the case of a partial offer, acceptances must be processed proportionately.

If, following the publication of the offer and until 6 months after expiration of the additional acceptance period, the bidder acquires equity securities of the target company for a higher price than the offer price, he must offer such higher price to all those who have accepted the takeover offer (so called best price rule).

3.2.6. Conditional offers

Takeover offers, in general, may be made subject exclusively to conditions precedent, i.e., the conditions must be fulfilled before the end of the offer period. In addition, such conditions must be beyond the bidder’s decisive control (e.g., entry in the share register of the target company or regulatory approval but not financing of the offer or tender of at least 98% of the shares which is the threshold for the squeeze-out). Where the nature of the conditions precedent is such that the bidder's co-operation is required to fulfill them, the bidder must take all reasonable steps to ensure that the conditions are fulfilled. At the close of the offer period, it must be clearly stated whether they have been fulfilled. The terms of the offer may reserve the bidder's right to waive certain conditions. With the approval of the TB only, the offer may be made subject to conditions subsequent, if the advantages of such conditions for the bidder outweigh its disadvantages for the recipients of the offer and for the bidder, e.g., the grant of a regulatory approval.

A mandatory bid may, in principle, not be subject to conditions. However, it may be made conditional for cause. Permitted conditions may include (i) granting of a regulatory approval, (ii) recognition of the bidder as a shareholder with voting rights and (iii) maintenance of a status quo as to the economic substance of the target company.

Finally, a published offer may be withdrawn, even if successful, if the bidder has expressly reserved the right to do so by inserting one or more conditions in the offer or in the event of a competing offer.

3.2.7. Competing offers

A competing offer must be published no later than on the third exchange trading day prior to expiration of the initial offer, and shall remain open for the same duration as the initial offer, but not less than ten exchange trading days. If necessary, the offer period of the initial offer will automatically be extended to the expiration date of the competing offer. The shareholders may revoke their acceptances of the initial offer until the expiration of the competing offer. The target company must treat all bidders equally and provide them with the same information. If modified, the initial offer must again be open for 10 exchange trading days. However, the total duration shall not be excessive; the TB may intervene and set certain time limits.
3.2.8. Mandatory offer

A person who acquires, directly, indirectly or in concert with third parties, more than 33 1/3% of the voting rights of a Swiss company listed in Switzerland must submit within two months after having exceeded such threshold an offer for all listed equity securities of the company. In such case, the offer price must be at least equal to the average opening price of the 30 exchange trading days preceding the announcement of the bid. In addition, it may not be less than 75% of the highest price paid by the bidder for securities in the target in the preceding 12 months (thereby allowing for a control premium of 33%). Nonetheless, a company shareholders’ meeting may discard this mandatory offer obligation (opting out) or raise its threshold from 33 1/3 % to up to 49 % (opting up). The FBC has ruled that shareholders may not resolve on an opting-up or opting-out provision which is applicable for a limited period of time only and for a specific shareholder only. The obligation to make a mandatory offer exists only if the pertinent transaction is completed; the mere execution of the share purchase agreement does not itself trigger a mandatory offer.

The TB may grant exemptions from the obligation to make an offer for cause, in particular where (i) the transfer of voting rights occurs within a group, (ii) the threshold is exceeded as a result of a decrease in the total number of voting rights in a company, (iii) the threshold is exceeded only temporarily, (iv) the securities have been acquired without consideration or upon the exercise of pre-emptive rights pursuant to a share capital increase and (v) where the securities have been acquired for reorganisation purposes. The obligation to make an offer does not apply if the voting rights have been acquired as a result of a donation, an inheritance, the division of an estate or a matrimonial arrangement, or in case of the enforcement of judgments.

3.2.9. Squeeze-out

Following a successful public takeover offer, a bidder may request a squeeze-out of the remaining shareholders, if, after the public offer, it holds more than 98% of the voting rights of the target company. To that end, the bidder must within three months following completion of the public offer file with the competent court a request for cancellation of the remaining equity securities. The court orders the cancellation of the remaining equity securities, the target company must reissue them and allot them to the bidder against payment of the offer price or completion of the exchange offer in favour of the holders of the equity securities.

3.3. Defense measures against hostile takeovers

3.3.1. Principle

Once a takeover offer has been publicly announced (or pre-announced in the event of a preliminary announcement) and until the publication of its final result, the board of directors of the target company must abstain from any action that may frustrate the offer,
irrespective of the deal being friendly or unfriendly. Such actions could be, among others, entering into any transactions which would have the effect of significantly altering the assets or liabilities of the target company, including the sale of those assets that are the main target of the bidder and which have been described as such in the offer (prohibition of lock-up agreements). It may, however, according to the prevailing view, undertake defensive measures before the announcement of an offer, even if it knows that such an offer is imminent. After the takeover offer has been publicly announced (or pre-announced), only the shareholder's meeting of the target company may decide on defensive measures. The question whether the shareholders' meeting may set up defensive measures before the announcement of the offer, but whose implementation - before or after the launch - lies in the competence of the board, is controversial. The main defense techniques to defend a hostile takeover pre-bid (i.e., prior to the public announcement or preliminary announcement) are the following:

3.3.2. Enhanced voting rights

A company may issue registered shares with different nominal values and stipulate in the articles of incorporation that each share carries one vote irrespective of its nominal value. However, the total nominal value of common shares may not exceed 10 times the total nominal value of common shares with increased voting powers.

3.3.3. Transfer restrictions of registered shares

The articles of incorporation of a listed company with registered shares may provide for a percentage limit (usually 2% to 5%) above which registration in the share register may be refused by the board, provided it complies with the principle of equal treatment of shareholders. A company using such share transfer restrictions may only be successfully taken over if the bidder acquires, and has registered, sufficient votes both to amend the relevant provisions of the articles of incorporation and to replace the board of directors refusing registration. Accordingly, an offer can be made subject to the condition that such provisions in the articles of incorporation are deleted.

3.3.4. Maximum voting rights

The articles of incorporation may provide that no shareholder, directly, indirectly or acting in concert with third parties, may cast, itself or as proxy, more than a certain percentage of votes. The board may grant exemptions if it complies with the principle of equal treatment of shareholders. This restriction may apply to registered and bearer shares. A bidder may make his offer subject to the prior lifting of such restrictions.

3.3.5. Requirements on changes of articles of incorporation

The above provisions on share transfers and voting restrictions can be further entrenched by imposing special majority requirements for their lifting in the articles of incorporation of the company.
3.3.6. **Repurchase of own shares**

A corporation may purchase up to 10% of its own shares (except if the purpose of the repurchase is to decrease its share capital). In case of a purchase of own shares in connection with a transfer restriction of registered shares, the company may acquire up to 20% of its own shares, but must dispose of them or cancel them by means of a capital reduction within two years. Selective share repurchases (and re-sales) by the target company are, however, limited by the principle of equal treatment of shareholders in like circumstances, which might also prevent *green mailing*.

3.3.7. **US style poison pill**

A poison pill mainly consists of options or subscription rights granted to all or some shareholders or third parties, but for the unfriendly bidder, entitling them to acquire new shares or other securities of the target at a substantial discount in case of an unfriendly takeover attempt. Such poison pills are generally not permitted in Switzerland.

3.3.8. **Change of control clause in major contracts**

By means of a change of control clause in its major contracts, e.g., financial indentures, a company makes immediately repayable a larger or smaller part of its private or public debt in case of a takeover. Many Swiss companies have express or implied poison puts in their loan documentation.

3.3.9. **Disposal/acquisition of substantial assets**

The SESTA specifically enjoins the board of the target company from selling or acquiring assets for a value or price corresponding to more than 10% of the balance sheet of the target (on the basis of the latest annual or interim accounts, consolidated if appropriate), either voluntarily (*scorched earth tactics*) or on the basis of a *lock-up agreement*, or from selling or encumbering such part of the target's assets that have been designated by the bidder as being among its principal assets (*crown jewels*). This rule may also prevent to some extent the *pac-man defense*, i.e., a reverse offer of the target on some part or all of the bidder's shares.

3.3.10. **Golden parachutes**

Indemnities becoming payable to the management in case of an unfriendly takeover are possible. However, if such indemnities were considered to be excessive, they would be unlawful defensive measures and expose the board and the officers to personal liability.

3.3.11. **White knight**

The search for a *white knight* is not prohibited by the SESTA. Its registration in the share register of the target, despite the percentage limitation, may however be challenged by the
shareholders. The board and/or the management of the target may even take over the company themselves (management buy-out).

3.4. Directors' and Officers' Duties

Under Swiss law, directors and officers have far-reaching fiduciary duties towards the company but not towards individual shareholders. If they violate their duties they may become personally liable to the company, its shareholders and creditors for the damage caused.

In case of a public takeover offer, directors and officers are bound to act in the best interest of the company and to observe the rules of equal treatment of the shareholders. In case of friendly takeovers which comply with the requirement of the SESTA, the board may, in normal circumstances, recommend acceptance without violating its fiduciary duties. On the other hand, there is no case law specifying the requested standards for a board's reaction to unsolicited offers.

As a general rule, controlling shareholders have no such fiduciary duties towards the company or its minority shareholders.

4. TAX CONSIDERATIONS

4.1. Tax aspects for the seller

4.1.1. Sale of shares

If the seller is an individual, capital gains out of his private portfolio are usually tax-exempt. In specific cases the tax authorities tend, however, to perceive capital gains as (i) de facto dividends (in so-called "transformations", if the individual sells his shares to a company which he controls) or (ii) liquidation proceeds (in so-called "partial liquidations", if the sale is re-financed by the assets of the acquired company) or (iii) income (if seller qualifies as professional securities dealer, which is also given according to the jurisprudence if an individual seller regularly and systematically deals with securities), which makes the seller subject to income taxation and social security contributions.

If the seller is a company incorporated in Switzerland, capital gains are subject to federal and cantonal income taxation of 20%-30% (effective tax rate from profits before taxes), depending on the canton of domicile and the amount of profit. However, if the seller qualifies as a company with cantonal holding or domicile privilege, only the federal income tax of 8.5% (effective tax rate 7.8%) is due. In addition, if the shares sold have been purchased after January 1, 1997, capital gains from the sale of a qualifying investment (i.e., at least a 20% participation) - if held for at least one year - do qualify for the so-called
participation relief, leading to a full capital gains tax exemption at both the federal and the cantonal level. Qualifying investments purchased before January 1, 1997 may be transferred tax neutrally to a foreign group company.

4.1.2. Sale of assets

Capital gains on business assets sales are fully taxable for Swiss seller individuals and companies. An individual seller may avoid these tax consequences if he bundles the assets and liabilities to be sold in a new company and waits a period of 5 years before selling. Furthermore, the sale of assets is subject to a 7.6% VAT which is recoverable by the purchaser if it qualifies as a Swiss VAT subject and uses the assets for Swiss VAT underlying activities. Under the same qualifications, in case of transfer of a closed group of assets (and liabilities), the VAT duty can be fulfilled with a notification to the federal tax administration.

4.2. Tax aspects for the purchaser

In a business acquisition, a purchaser aims at writing off the goodwill against taxable income and at using the operating income of the target for the payment of interest on the acquisition debt. This would enable to finance an important part of the purchase price through tax savings.

4.2.1. Purchase of shares

A foreign purchaser must be aware of the fact that Swiss companies often have hidden reserves or deferred tax liabilities without adequate provision.

In a share purchase, the tax base for the shares in the purchaser's books is equal to the purchase price. Except in particular cases (e.g., if the acquired company encounters serious financial difficulties), it is not possible to write off the goodwill component for tax purposes. In contrast, in an asset purchase, the goodwill might be recorded separately and written off against taxable income.

Swiss tax law does not acknowledge the concept of tax grouping or tax consolidation which makes it more difficult to set off the acquisition debt or losses carried forward against operational income of an acquired company. Therefore, before the acquisition of a Swiss operating company or a group holding company, foreign investors very often form a Swiss leveraged acquisition vehicle, which subsequently purchases the shares of the Swiss target company. If Newco and the target company are merged thereafter, Newco's debts will be taken up into the operating company, so that the operating income may be used for the payment of interest on the debt. If Newco is not merged with the target company, dividends paid out of the target company may serve to finance the acquisition debt. However, the tax authorities might qualify these structures as unusual procedures and treat them as tax evasion with the result that the interests paid on debt are no longer
tax deductible and/or the acquisition might be considered as an indirect partial liquidation, triggering unfavorable tax effects on the seller, if done within 5 years from the acquisition.

Even if the acquisition vehicle is not merged with the target company, it may be advantageous to incorporate such an acquisition vehicle: dividends, which are taxable income for a Swiss resident individual or company, may be sheltered, if the shares are held by a Swiss holding company or by an operational company taking advantage of the participation relief. If dividends are not sheltered, the company's income is taxed twice: i.e., as profit of the acquired company and as dividend income of the shareholder. In any event, the distribution of dividends is subject to a 35% withholding tax which might be fully recovered by a Swiss taxpayer or fully or partially recovered in the event of a foreign recipient under an applicable double taxation treaty. The tax authorities may refuse to refund the withholding tax, if immediately following the acquisition the acquired company is divinding out all, or a substantial part, of its retained earnings to the purchaser who is entitled to a refund which is higher than that which the seller would have obtained.

4.2.2. Purchase of assets

In a purchase of assets, the tax base in the purchaser's book is equal to the purchase price of the assets purchased; the goodwill may, to some extent, be recorded separately and written off against taxable income. In a purchase of assets, the operating income of the purchase may be used for the payment of interests on the acquisition debt.

4.3. Tax rulings

Swiss tax laws leave the authorities with certain discretionary powers. In complex M&A transactions it is, therefore, recommended to obtain advance tax rulings.

4.4. Transactional taxes

The sale of shares, whether by Swiss residents or non-Swiss residents, may be subject to a Swiss securities transfer stamp tax of 0.15% (for shares of a Swiss company) or 0.30% (for shares of a foreign company) calculated on the sale proceeds if it occurs through or with a Swiss bank or other securities dealer as defined in the Swiss Federal Stamp Tax Act. In addition to this stamp duty, the sale of shares by or through a member of the Swiss Exchange SWX may be subject to stock exchange levy.

The transfer of assets is subject to VAT. However, in case of transfer of a closed group of assets (and liabilities), the VAT duty can be fulfilled with a notification to the federal tax authorities.

The transfer of real estate usually is subject to real estate gains tax and real estate transfer tax.
4.5. Taxes on mergers

Shares issued in a merger are exempt from the 1% stamp duty on issuance of securities.

Capital gains of individual shareholders of the acquired company are normally tax-free if they reside in Switzerland. Should the nominal value of the new shares, however, exceed the nominal value of the shares of the merged company, the difference might be subject to income tax. Corporate shareholders are not taxable if they retain the same tax base for the new shares. If assets and liabilities are transferred at book value, no income tax is usually incurred.

Real estate gain or transfer tax is levied by a few cantons and municipalities if the merged or absorbed company owns real estate in Switzerland.

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