



M&A IN

SWITZERLAND

Christoph Neeracher specialises in international and domestic M&A transactions (focusing on private M&A and private equity transactions, including secondary buyouts, public-to-private transactions and distressed equity), transaction finance, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders' agreements) and all directly related areas.

He is experienced in a broad range of national and international transactions, both sell and buy side (including corporate auction processes), and in assisting clients in their ongoing corporate and commercial activities.

Additionally, he represents clients in litigation proceedings relating to his specialisation.

Philippe Seiler has broad experience in M&A transactions in various industries (inter alia, manufacturing and engineering, IT, watch, real estate and logistics). In addition to large-scale transactions and takeovers, he focuses on small- and medium-sized M&A transactions, private equity transactions, management buyouts and outsourcing projects. Furthermore, he specialises in regulatory matters in the fields of life sciences and healthcare.

Raphael Annasohn has broad experience in international and domestic M&A transactions in various industries focusing on private M&A and private equity, corporate reorganisations and restructurings as well as corporate law and general contractual matters, in particular shareholders' agreements. Furthermore, he specialises in the fields of venture capital and start-ups and assists clients in their ongoing commercial activities.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

Christoph Neeracher, Philippe Seiler and Raphael Annasohn: In the first half of 2018, the high level of M&A activity continued and even exceeded the results of 2017. Both, the number of M&A deals with Swiss involvement (168 in the first half of 2018) as well as the volume of transactions (US\$78 billion) slightly increased on a year-on-year comparison (2017: 160 deals worth a total of US\$69.3 billion). Switzerland so far represents 10 per cent of all M&A transactions in Europe. Notably, we recorded a very high activity of private equity investors as they were involved in 36 per cent of all transactions (compared to 28 per cent in 2017) in the first two quarters of 2018. In the recent past, some political and economic uncertainties (such as slightly rising interest rates, ongoing trade dispute with the US and instability in the Eurozone) have emerged. Nevertheless, the Swiss M&A market, and in particular the private equity market, are still in good shape and continue to grow.

We identify the following key factors for this continuously positive trend. First, despite new regulations on capital outflows and a general decrease of the number of Chinese acquisition in Europe, Chinese investors' appetite for investment opportunities in Switzerland has not diminished in 2018, with seven transactions in the past half year, among them Bally International, Mercuria Energy Group and Lista Holding. We expect that Chinese buyers will further increase their activity in the Swiss M&A market in the future. Second, the ongoing environment with (still) low interest rates and generous borrowing conditions continues to facilitate the funding of possible acquisitions and puts pressure on investors to invest. Third, Switzerland with its various investment opportunities and no (or very little) investment restrictions remains attractive for investors – notably small- and medium-sized enterprises (SMEs), which will need to deal with succession planning in the coming years (estimated to be approximately 80,000), are attractive targets for investors.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

CN, PS & RA: We see a high level of M&A activity in the healthcare sector with various private equity investors having dedicated healthcare desks for such investments. This trend has, in our view, two main reasons:

- first, despite some recent changes in the regulatory landscape, the Swiss healthcare sector is still very attractive for investors with growing revenues; and

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- second, there are various buy-and-build possibilities in the healthcare sector which provide for interesting investment opportunities.

Other active sectors include technology, media and telecommunications and in particular pharmaceuticals.

The past year as, so far, been a strong year for SMEs as well, with an increase of 6.4 per cent in the total number of transactions. Company sales to foreign buyers even reached a new record

between January and July 2018 (38 per cent more than in 2017).

GTD: What were the recent keynote deals? What made them so significant?

CN, PS & RA: In March 2018, Novartis AG sold its stake in a consumer healthcare joint venture with GlaxoSmithKline plc to the latter for US\$13 billion which was the largest transaction of the first six months in 2018. In addition, in April 2018, Novartis AG announced its takeover of the US stock exchange listed company AveXis, Inc, for approximately US\$8.7 billion. Those transactions are exemplary for the growing M&A activity in the pharmaceutical sector, which already adds up to a transaction volume of US\$26 billion. Another deal which stands out so far is the acquisition of the consumer packaged goods and food service distribution business of the Starbucks Corporation, one of the leading coffee shop operator worldwide, by Nestlé SA. This strategic alliance between these two big players will have an impact on or increase the position and the influence of Nestlé SA, particularly in the US market.

GTD: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

CN, PS & RA: Generally speaking, consideration may either consist of cash, shares, securities or a combination thereof. Cash settlements tend to be more frequent, as share deals are usually only accepted by the seller if the shares given as consideration are readily marketable, as is the case especially for publicly listed companies. Tax considerations also typically play an important role in determining the type of consideration that is eventually agreed upon.

The type of consideration accepted will, in each case, largely depend on the shareholders involved and their intentions, as well as on the specific transaction type and process.

GTD: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

CN, PS & RA: In the past few years, regulation has become a central strategic aspect of M&A deals. The complexity of the regulatory environment – and thus the requirements and costs for market participants – are increasing, while the strategic scope is getting smaller. Even if Switzerland is not a member of the European Union, European directives play an important role. As part of a new Swiss legislation aimed at

preventing money laundering and tax evasion, any entity acquiring 25 per cent or more of a non-listed Swiss company must inform the latter regarding the acquiring entity's beneficial owner and update such notification in case of changes. In standard private equity structures, the administrative burden of this new legislation can – in our view – be minimised by implementing a practical solution compliant with the rules. As typically the general partner takes the relevant decisions regarding the fund and its portfolio companies, the individuals controlling the general partner (respectively controlling the ultimate shareholder of the general partner) should be disclosed as beneficial owners. If such individuals cannot be determined, the top executive officer (chairman or CEO) of the general partner, respectively of its ultimate shareholder, may be disclosed.

Publicly listed companies on a Swiss stock exchange are subject to a new law approved by the Swiss voters in 2013, which is intended to limit so-called 'fat cat' salaries. The law, which also includes criminal charges if violated, sets forth a range of mandatory rules on transparency and compensation that have increased administrative costs for companies. The law prohibits, inter alia, severance payments, advance payments and similar extraordinary payments to directors or senior management, and requires the articles of association to include rules on additional remuneration for the board and senior management. Furthermore, as of the annual general meeting 2015, shareholders must approve the aggregate compensation of the board of directors and the senior management. Additionally, the voting rules at the shareholders' meeting have been overhauled, which strengthens the role of the independent proxy advisers.

Another example of EU regulations affecting the regulatory landscape in Switzerland is the General Data Protection Regulation (GDPR) of the European Union. Even if Switzerland is not a member of the EU, the new guidelines are directly applicable to all Swiss-based companies doing business in the EU. In addition, EU companies are asking its Swiss business partners to be GDPR-compliant. Therefore, the GDPR has an impact on numerous Swiss based companies.

GTD: Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

CN, PS & RA: Switzerland remains highly attractive for inbound investment with plenty of opportunity – notably SMEs, which will need to deal with succession planning over the coming years (estimated to be approximately 80,000), serve as particularly attractive targets for investors. According to a study prepared by Deloitte, the first half of 2018 saw a sharp increase of Swiss SME transactions. As in past years, the majority of transactions involving Swiss SMEs

were cross-border (71 per cent). The most active foreign investors in these transactions were from Germany and the United States. Specific restrictions that apply to foreign buyers only are limited. One such restriction is the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (Lex Koller), which restricts the acquisition by foreigners of real estate properties that are not used for the permanent establishment of a trade, production or other business run in a commercial way, a craftsman's establishment or a free profession (non-commercial properties). In particular, residential properties and unbuilt land and generally properties not used for commercial purposes are subject to the Lex Koller.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

CN, PS & RA: Traditionally, shareholder activism has not been a part of Switzerland's corporate scene, due to the rights of minority shareholders being quite limited.

However, in recent years there has been a significantly growing trend towards shareholder activism in Switzerland, as reflected globally and, especially more recently, in Europe. Examples include:

- the involvement of the US-based investor group Third Point in Nestlé (1.3 per cent), which now requests that Nestlé be split into three divisions;
- RBR Capital Advisors which acquired a stake of 0.2–0.3 per cent in Credit Suisse; and
- the successful prevention of the merger between Clariant and Huntsman by White Tale Holdings.

To sum up, shareholder activism is still a rather new phenomenon in Switzerland that primarily affects listed companies and is posed with numerous barriers by Swiss regulation. Companies at risk of becoming a target may nevertheless be well advised to implement a number of structural defences.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

CN, PS & RA: The general procedure as well as the different stages vary substantially from one case to another, depending on, inter alia, the seller, the purchaser and the legal form of transaction envisaged (share deal, asset deal, mixed share and asset deal or statutory merger). Generally speaking, however, a typical Swiss M&A transaction consists of the following stages.

In the first stage (preparation phase), the seller and its advisers prepare the sale documentation as well as the marketing material. In the next phase (marketing phase), the executive management or, more often, a professional financial intermediary,



THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Switzerland's stable political system, globally-orientated and liberal economy, highly skilled workforce and efficient legal environment, as well as a traditionally mild tax regime and relatively low bureaucracy, create an excellent environment, not only for private equity, but also for business in general.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

Competence, deal experience and accessibility are certainly the most crucial for successfully completing complex transactions.

What is the most interesting or unusual matter you have recently worked on, and why?

Every deal naturally raises interesting and unique questions. A very interesting and challenging deal we worked on in the last couple of months was the acquisition of the clinic group Paracelsus by Porterhouse Group AG. As the clinic group Paracelsus was subject to insolvency proceedings in Germany the deal raised complex questions in the fields of corporate, insolvency and tax law and involved Germany and Switzerland.

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instigates first contact with potentially interested parties. The potential bidders are required to sign a non-disclosure agreement and receive an information memorandum containing key information. Based on this information, the bidders might decide to make a non-binding offer to the seller. In the third phase (due diligence phase), after any questions regarding the offers have been clarified, due diligence and management visits take place and Q&A or expert sessions are organised. The parties then negotiate and finalise the transaction agreement, which is usually drafted according to international

standards, in a fourth phase (negotiation, signing and closing phase). Upon completion of this process, the parties will sign the transaction agreement. As the closing of a Swiss transaction agreement depends, among other things, on the presence of the necessary governmental approvals and third party consents, a certain lapse of time will normally pass between signing and closing, during which time the parties have to fulfil certain obligations and follow specific rules of conduct as set out in the transaction agreement. The form of the closing itself varies depending on the legal form of the target business and the form of the respective transaction. Concerning the last phase (post-closing phase), the parties may have agreed on non-competes for the seller or certain obligations, such as continuation of the business, of the purchaser.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

CN, PS & RA: A revision of Swiss company law is anticipated. Its primary goal is to adopt into federal law the Ordinance against Excessive Remuneration in Listed Companies and to improve corporate governance for listed as well as non-listed companies. Furthermore, the revision will introduce more flexibility with regards to company foundation and capital, and will adapt the rules on companies limited by shares to the new accounting legislation. Beyond that, provisions regulating transparency of economically significant companies active in the extractive industries may be introduced.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

CN, PS & RA: The first half of 2018 shows an even higher level of M&A activity in Switzerland compared to 2017. We are fairly optimistic that this trend will continue for the coming 12 months. Key drivers remain, in particular, the low interest rates and the high cash levels that enable companies to improve their market position. Given the attractive investment opportunities in Switzerland, we expect further investments of foreign buyers in Switzerland, particularly in the healthcare sector. Swiss SMEs may be attractive targets for aspiring investors and buyers.