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The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Trends and Developments

Contributed by Bär & Karrer AG

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A Busy Year for M&A

2017 was a strong M&A year for Switzerland. Apart from the record year of 2014 with over 400 transactions involving Swiss companies, there have not been as many transactions in Switzerland in the past ten years. The overall transaction volume slightly decreased compared to the previous year, but was still remarkable, at over USD100 billion. If the planned multibillion-dollar merger between the chemical giants Clariant and Huntsman had taken place, the transaction volume would have reached the level of the previous year.

Activists Playing a Key Role With Limited Instruments

The failed merger between Clariant and Huntsman shows that shareholder activists are still active in Switzerland. The transaction, which would have been structured as a cross-border reverse triangular merger creating a leading global speciality chemical company with a dual listing on the SIX Swiss Exchange (SIX) and New York Stock Exchange (NYSE), was prevented by the activist shareholder White Tale. Between July and October 2017, White Tale increased its stake in Clariant from 3.5% to over 20% and forced Clariant to abandon the merger. It would have been interesting to observe a proxy fight but the companies decided to dissolve the combination agreement, although Swiss law provides for some instruments to strengthen the position of a company in a proxy fight. A structural defence, in particular an "unpopular" voting restriction, could have saved the deal. The failed combination also demonstrates that Swiss law differs in two essential aspects from US law when it comes to combinations of companies: Swiss law provides for very limited deal protection measures and activist shareholders are far less bound — one could almost say not bound at all except for disclosure of shareholdings obligations — by rules restricting their behaviour and actions under Swiss law.

Apart from White Tale, the USA-based investment fund Third Point and RBR Capital Advisors were engaged in activist campaigns in 2017. Third Point, with its founder Daniel Loeb, acquired a 1.3% stake in Nestlé and RBR Capital Advisors, with its manager Rudolf Bohli, acquired a stake of 0.2% to 0.3% in Credit Suisse and requested that Credit Suisse be split into three businesses: an investment bank, an asset manager and a wealth management group.

The instruments an activist shareholder can use, however, are rather limited in Switzerland. He or she can request from the board of directors that some agenda items are included in the invitation of a shareholders' meeting or, if the shareholder owns at least 10%, that an extraordinary shareholders' meeting be held. These rights are, however, limited to request

votes on issues that can be decided by the shareholders. As the powers of a shareholders' meeting are limited, in most cases requests of activists are focused on the board composition, or, as in the case of Clariant, activists just build a large stake and try to exert pressure on the board of directors by other means. As such other means are limited in Switzerland, short term-oriented activists are often seen in special situations only. Long term-oriented activists are forced to be represented on the board of directors due to the limited legal instruments available to activists in Switzerland.

Shareholders Keen to Retain a Stake in the Future

Another trend seen lately is that existing shareholders do not want to exit in the context of a going-private transaction, but rather want to remain invested in some way. The takeover of the SIX-listed Actelion by the NYSE-listed Johnson & Johnson, for example, involved the creation of Idorsia, a spin-off keeping Actelion's drug discovery and early clinical pipeline that was listed on SIX in June 2017. The founder and CEO of Actelion, Jean-Paul Clozel, is the CEO of Idorsia and together with his wife holds over 25% in Idorsia. Another example where former shareholders remained invested is the public takeover of ImmoMentum, a real estate company that was listed on the BX Berne eXchange. Four shareholders, who together held 15.22% in ImmoMentum, contributed a certain number of their ImmoMentum shares to the offeror at the offer price and in turn received shares of the offeror. Finally, this trend also seems to have been established in private M&A transactions. When, in April 2017, the Kuoni Group, which since a public takeover in 2016 has been controlled by EQT, sold the B2B bed bank GTA to the Spanish Hotelbeds group, it announced that the Kuoni and Hugentobler Foundation will keep a stake in the combined Hotelbeds/GTA business.

Going-private transactions in which one or several main shareholders become shareholders of the offeror — and remain invested — are quite demanding to implement because of the equal treatment obligation of the offeror and in particular the limits set by the (minimum) price rules. The overall benefits and costs associated with becoming a shareholder of the offeror based on an existing position as a shareholder of the target company must be such that the price rules and the equal treatment obligation are met. Such an assessment entails extensive valuation exercises of shareholder positions and rights governed in shareholder agreements normally performed by boutique firms focused on valuations. In theory, the equal treatment rule might even lead the respective main shareholder to receive less than tendering shareholders who exit in the course of the going-private if the ancillary benefits stemming from the new shareholding in the offeror exceed the costs associated with this new position.

Anchor Shareholders Providing Stability

In 2017 another trend seemed to accelerate: companies are evaluating ownership structure with an anchor shareholder. Such a structure can be implemented by different means, in particular a partial public tender offer, a capital increase, a commitment to purchase shares in an IPO, an acquisition of a business with a consideration in shares (capital increase based on a contribution in kind), or, as in the case of Clariant, an activist selling its participation to a long term-oriented shareholder. A company assumes that with an anchor shareholder, a strategy focused on long-term shareholder value creation can be pursued without disruption by other shareholders and/or opportunistic acting activists or competitors. At the same time, companies often aim to enter into a relationship agreement (often also labelled as a corporate governance agreement) with the anchor shareholder and attempt to channel the influence of the anchor shareholder by voting arrangements.

Such a relationship agreement normally governs at least the representation of the anchor shareholder on the board of directors by providing for a duty of the company to propose a number of members nominated by the anchor shareholder, but by also limiting such number. In addition, some form of a standstill is usually implemented, in which the anchor shareholder agrees that he or she will not increase the participation above a certain level and/or that he or she will not launch a public tender offer unless the board is willing to recommend the offer to the shareholders. Companies often also try to govern how the votes of the anchor shareholder are exercised. Normally, anchor shareholders only accept voting arrangements with respect to selected agenda items such as dividend payments or third-party transactions. Such voting arrangements are normally limited in time and often simply oblige the anchor shareholder to exercise the votes pursuant to the proposal of the board of directors. The extent to which such voting arrangements in a relationship agreement are legally valid under Swiss law is unclear and disputed.

Question Marks Over Enforceability

Another important, but in most respects unclear, aspect of voting arrangements is enforceability. Although it seems to be clear that a relationship agreement leads to an acting in concert for the purpose of disclosure of shareholdings, it is not entirely clear under which circumstances a relationship agreement might trigger a duty to launch a mandatory offer if the shares held by the anchor shareholder together with the treasury shares of the company are above one third of all shares. If the rights and obligations under such an agreement result in an acting in concert within the meaning of the mandatory offer rules and if the combined "holding" is in excess of one third of the recorded share capital, a solution can be that some form of an opting out — a selective partial opting out is the preferred solution — is implemented

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in the articles of association of the company by a respective shareholder resolution.

Irrespective of all these uncertainties, it must be assumed that in 2018 even more companies are evaluating some kind of transaction resulting in an ownership structure with an anchor shareholder. Advising an anchor shareholder or the company is an interesting and challenging matter because precedents are rare and the standards can be elaborated.