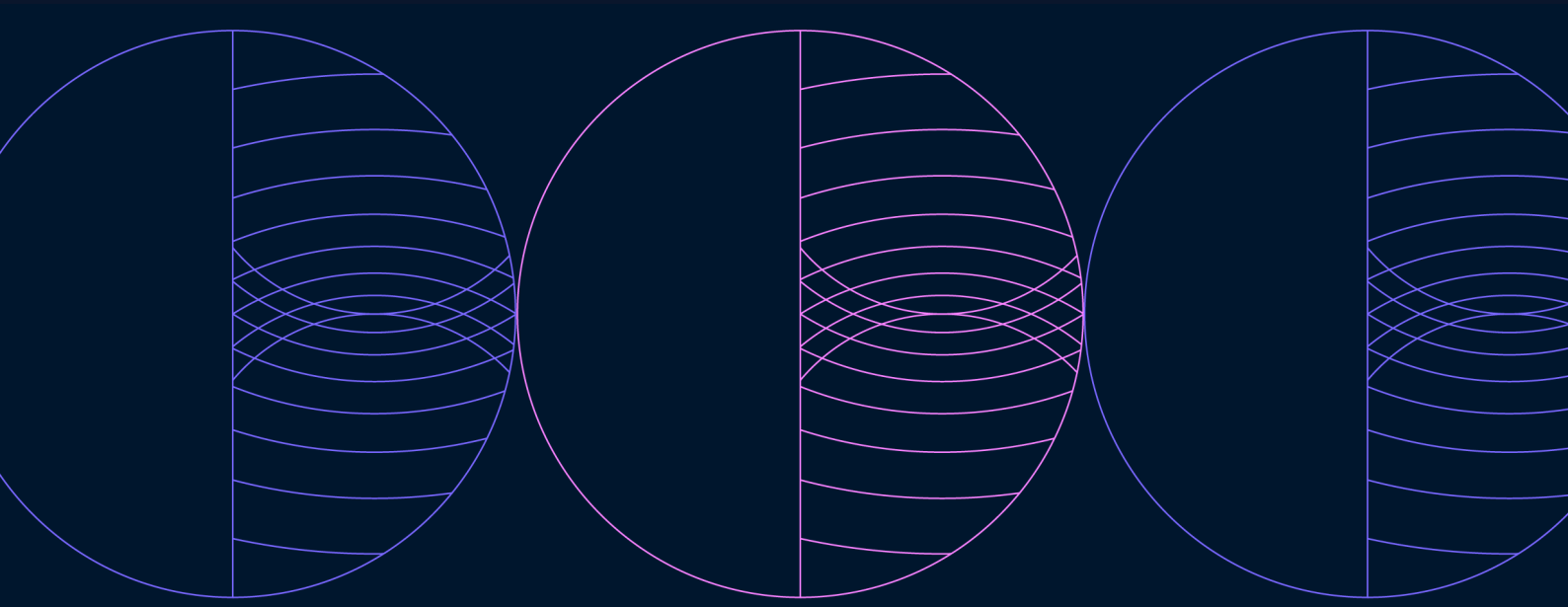
IN-HOUSE VIEW

Swiss M&A

PUBLIC M&A



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The In-House View: Swiss M&A provides a topical analysis of the legal framework, opportunities, challenges and risks that arise in connection with M&A transactions in Switzerland. It explores key trends, legislative developments and other issues impacting strategic decision-making.

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Public M&A

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Summary

Legal framework and recent changes

Swiss M&A transactions involving public companies are mainly governed by the Swiss Financial Market Infrastructure Act (including its implementing ordinances) and the Swiss Federal Merger Act. In addition, certain agreements entered into in connection with a public M&A transaction, such as block trade agreements, tender undertakings or shareholders' agreements, are governed by the Swiss Code of Obligations. Apart from the specific Swiss public takeover rules, a few other laws apply in the context of public tender offers, including the Federal Antitrust Act.

The Swiss public takeover rules are enforced by the Swiss Takeover Board (TOB). Decisions of the TOB may be challenged before the Swiss Financial Market Supervisory Authority (FINMA) and, finally, the Swiss Federal Administrative Court.

The Swiss takeover rules only apply if either the target is domiciled in Switzerland and its shares are fully or partly listed on a Swiss stock exchange (eg, SIX Swiss Exchange or BX Swiss) or the target is domiciled outside Switzerland but the main listing of all or part of its shares is on a Swiss stock exchange (the TOB may waive the applicability of the Swiss regime if the takeover rules of the country of domicile also apply, provided that those rules are not in conflict with the Swiss regime and provide for equivalent shareholder protection). In principle, the Swiss takeover rules do not apply to companies whose shares are exclusively listed on a stock exchange outside Switzerland or not listed on a stock exchange. However, the TOB has held that the Swiss takeover rules also apply to a company not listed on a stock exchange if, shortly prior to the transaction, either the shares were delisted to prevent the applicability of the takeover rules, or the target was demerged from a listed company.

The Swiss takeover rules apply to both Swiss and non-Swiss bidders irrespective of whether they are listed. As with private M&A transactions (as described in the chapter on private M&A), there are to date very few restrictions in respect of foreign investment control with regard to Swiss-incorporated public companies, in spite of other jurisdictions across Europe tightening foreign investment control. There is, however, one important exception. Pursuant to the Federal Act on the Acquisition of Real Estate by Foreigners (Lex Koller), non-Swiss buyers (ie, non-Swiss natural persons, non-Swiss corporations and Swiss corporations controlled by non-Swiss natural persons or corporations) have to obtain a special permit from cantonal authorities in order to purchase real property or shares in companies or businesses owning real property, unless the property is used as a permanent business establishment. The acquisition of shares of a public company whose shares are listed on a Swiss stock exchange is exempt from this special permit obligation even if its main purpose is to hold or buy and sell real estate. However, there may be restrictions regarding transactions involving such a public company following the settlement of the public tender offer, for example, regarding additional acquisitions of real estate in Switzerland or in the case of a migration of its statutory seat or a cross-border merger involving emigration outside of Switzerland. Political aspirations to introduce wider foreign investment control in Switzerland have, however, advanced in recent years. A draft law on the screening of foreign direct investments has been published and is currently undergoing parliamentary deliberation. The proposed regime would apply to acquisitions by foreign investors in

sectors deemed critical to public order or security, regardless of whether the investor is state-controlled.

Further requirements and restrictions exist in certain regulated sectors such as banking and securities trading, insurance, healthcare and pharmaceuticals, and media and telecommunications. For instance, the intended acquisition of a qualified direct or indirect participation (ie, 10 per cent or more of share capital or voting rights or significant influence by other means, eg, on a contractual basis) in a Swiss bank or securities firm as well as the reaching or crossing of further shareholding thresholds at 20, 33 and 50 per cent of share capital or voting rights triggers notification duties to FINMA, both on the part of the acquiring and disposing shareholders and on the part of the bank or securities firm itself. Given that qualified shareholders must fulfil regulatory fit-and-proper requirements, the notification duty de facto has the effect of an approval requirement. If, as a result of a planned transaction, a Swiss bank or securities firm stands to become foreign-controlled (ie, where foreign qualified shareholders directly or indirectly control more than 50 per cent of the voting rights or exercise control by other means), formal approval by FINMA in the form of a supplemental licence is required. Further requirements may apply in the context of financial groups or conglomerates subject to consolidated supervision by FINMA or a foreign lead regulator, which may create a need for coordination with or between different authorities in the approval process.

In connection with the Swiss takeover rules, no new laws or practices of particular note have been recently introduced. However, on 1 January 2023, the new Swiss corporate law entered into force, which seeks to update corporate governance by enhancing shareholder rights, facilitating company formation and increasing the flexibility of capital regulations and allowing for virtual shareholder meetings. It also: (1) implements the provisions of the Ordinance on Excessive Compensation at statutory level; (2) introduces gender equality guidelines for boards of directors and executive management ; (3) imposes stricter transparency rules regarding non-financial reporting; and (4) introduces an additional set of rules for companies in the commodity business. Swiss companies were required to adapt their articles of association and regulations as well as employment contracts with members of the management board to the new stock corporation law by the end of 2024.

As part of the general revision of Switzerland's financial regulatory framework, the Financial Services Act and the Financial Institutions Act (including their implementing ordinances) entered into force in January 2020.

Finally, a revision of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading is planned; the public consultation period ended on 11 October 2024. The Swiss Federal Council has yet to announce the next steps. The proposed new law, among other things, includes an increase of the lowest disclosure threshold from 3 per cent to 5 per cent. This change would be very welcome and would provide significant relief for investors and issuers, but it may take several years until a revised Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading enters into force.

Development of public M&A activity and landmark transactions

The record years 2021 and 2022 have been followed by comparatively calm years in 2023 and 2024 (as described in the chapter on private M&A). Even though private M&A transactions accounted for most of the overall Swiss M&A market in terms of number of deals in 2024, there were a few noteworthy public M&A deals and TOB procedures.

With the IPO of Galderma Group AG, the pure-play dermatology category leader, which raised nearly 2.3 billion Swiss francs through its listing on the SIX Swiss Exchange, the largest global IPO in the first quarter and the fifth largest in the year took place in Switzerland. Shortly after Galderma's IPO, L'Oréal, the world leader in beauty, purchased a 10 per cent stake in Galderma from a consortium led by EQT.

Additional significant public M&A deals in 2024 included the ongoing combination of SoftwareOne Holding AG and Crayon Group Holding ASA by way of a share and cash offer for shares in Crayon. Further, there have been six public tender offers in 2024, including the public tender offer by Constantia Flexibles GmbH, a portfolio company of an investment fund that is managed and advised by One Rock Capital Partners, LLC for all shares in Aluflexpack AG after the purchase of 57 per cent of the shares in Aluflexpack from its majority shareholder and the public tender offer by the majority shareholder Silvio Denz for the publicly held shares of Lalique Group SA. So far in 2025, following the mandatory offer by OEP 80 BV for all shares in Cicor Technologies AG in 2024, only one mandatory offer has been published this year, by Alpine 2 SCSp for all shares in ULTIMA Capital SA. A notable ongoing transaction in 2025 is, however, the announced merger of Baloise and Helvetia, which aims to create the second largest insurance group in Switzerland and a leading player in the European insurance market.

Besides the above-mentioned transactions, in 2024 the TOB was involved in several share buyback programmes and a number of procedures relating to the exemption from the duty to make a tender offer as well as regarding the determination of the non-existence of the obligation to submit a mandatory offer.

In addition to the IPO of Galderma, which was the only Swiss IPO in 2024, Sunrise returned to the Swiss stock exchange via a spin-off from Liberty Global, with an opening market capitalisation of 3.1 billion Swiss francs.

In 2024 and the beginning of 2025, shareholder activism in Switzerland has remained significant. The following two campaigns in Swatch and Nestlé are particularly interesting: Investor Steven Wood, holding approximately 0.5 per cent of Swatch's shares, sought election to the board, criticising the company's financial performance and calling for a renewed focus on premium brands. His candidacy was rejected by 79.2 per cent of the voting rights represented at the annual shareholders' meeting, largely due to the founder family's control of 44 per cent of voting rights through voting shares. However, Wood received support from over 60 per cent of the holders of bearer shares, highlighting concerns over governance. Proxy advisory firms also recommended the removal of several long-standing board members due to issues with board independence and executive compensation.

Further, Nestlé faced a shareholder campaign led by ShareAction, which called for the company to address its reliance on unhealthy food products and to report annually on its sustainability efforts. The resolution was rejected by 87.9 per cent of the voting rights, but Nestlé responded by committing to increase sales of healthier products by 50 per cent by 2030, though some shareholders considered the measures insufficient.

Typical stages of Swiss public M&A transactions

General

The process of a typical public M&A transaction is governed by the Swiss takeover regime. Regarding the structuring of such a transaction, the Swiss takeover rules, however, allow for great flexibility.

The classic method of acquiring a Swiss public company is a public tender offer for the purpose of acquiring the equity capital of the target. In exchange for the target shares, the bidder may offer shares (listed or non-listed), cash, or a combination thereof. Alternatively, control over a Swiss public company may also be obtained by:

- purchasing a controlling block of shares from the previous shareholder or shareholders (subject to an opting-out from the mandatory bid obligation);
- acquiring a business (assets and liabilities) or by a transfer of assets according to a merger agreement;
- participating in a major share capital increase (again, subject to an exemption or opting-out from the mandatory bid obligation); or
- a merger.

In the classic method of a public tender offer, the view of the target board determines the categorisation of the offer as friendly or hostile. The Swiss takeover rules apply irrespective of this categorisation. The support of the target board is, however, required to conduct a due diligence process prior to launching an offer. Further, a bid that is recommended by the board of directors of the target company is, in general, more likely to succeed (and is far more common than a hostile takeover).

Preliminary phase

Once the pre-announcement of the offer or the offer prospectus has been published, the typical stages and the timing of a public M&A transaction are regulated to a large extent. However, the phase immediately prior to the pre-announcement or the publication of the offer prospectus depends largely on the involved stakeholders and is relevant for the bidder to structure the deal and to obtain the support of the target's board of directors as well as possibly major shareholders. In this preliminary phase, the bidder and the target company usually conclude a confidentiality (and standstill) agreement. In the case of a friendly offer, the bidder and the target company will, in addition, typically conclude a transaction agreement according to which the bidder is obliged to publish a tender offer subject to certain terms and the target's board of directors commits to supporting and recommending the offer. Further, in such preliminary phase, the bidder may seek tender undertakings from major shareholders of the target.

In general, there are no rules about the approach by the bidder of the target company. As long as the threshold for triggering a mandatory offer (ie, 33 per cent), is not passed, creeping tender offers, where a stake is steadily built up, do not fall within the ambit of the

Swiss takeover rules. However, such a tactic is difficult to pursue owing to the disclosure obligations of significant shareholdings (starting at 3 per cent of the target's issued voting rights), and the bidder must keep in mind the minimum price rule.

During this preliminary phase, the potential bidder must be mindful of public statements. First, the TOB may qualify a public statement regarding a potential public takeover offer as a de facto pre-announcement of the offer if the statement already contains specific information as to the bidder's intent and the offer price. Second, even if the public statement does not fulfil the requirements of a pre-announcement, it may trigger certain obligations. In particular, the TOB may set a deadline for the potential bidder to either 'put up' by making a formal offer or to 'shut up' by confirming that it will refrain from launching an offer for a period of six months (put-up or shut-up rule). This put-up or shut-up rule aims at liberating a target company that has been taken hostage by the destabilising effects of a lingering potential offer.

Public tender offer procedure

After the negotiation and structuring phase and once an offer has been pre-announced, the bidder must publish the offer prospectus within six weeks. A pre-announcement is optional (ie, the bidder may directly publish the offer prospectus). If the bidder must obtain clearances from competition or other regulatory authorities prior to the formal publication of the offer, the TOB may extend the six-week period between pre-announcement and the publication of the prospectus. Prior to publication of the offer, the bidder must further appoint a review body to assess the offer and issue a report as to whether the offer complies with takeover law and whether financing is in place. In the case of a friendly takeover offer, the offer prospectus will also contain the report of the board of directors of the target. It is standard practice for the bidder to seek pre-clearance from the TOB prior to the publication of the offer prospectus, and the TOB will publish its decision regarding the offer's compliance, typically on the date of publication of the offer prospectus.

Following publication of the offer prospectus, a cooling-off period generally of 10 trading days applies, during which a qualified shareholder of the target (holding alone or together with other shareholders 3 per cent or more of the target's issued voting rights) may join the takeover proceedings as a party and appeal the decision of the TOB. The main offer period, which commences after the cooling-off period, typically lasts between 20 and 40 trading days and may be shortened or extended in specific situations with the consent of the TOB. On the trading day following the lapse of the main offer period, the bidder must publish the provisional interim results of the offer. The definitive interim result must be published no later than four trading days after the lapse of the main offer period and must specify whether the offer conditions have been met or waived and whether the offer has been successful. If the offer has been successful, the offer must be open for additional acceptances for 10 trading days after publication of the definitive interim result. The result of the offer must be published again on a provisional basis on the trading day following the lapse of the additional acceptance period and in its final form no later than four trading days after the lapse of the additional acceptance period. The settlement of the public tender offer must take place 10 days after the last day of the additional acceptance period but may take place later with the consent of the TOB when merger or other regulatory clearances have not yet been obtained.

Squeeze-out and delisting

A bidder who, following the public tender offer, holds more than 98 per cent of the voting rights of the target company, alone or together with persons acting in concert, is entitled to request the cancellation of the remaining shares against payment of the offer price by way of a statutory squeeze-out. The action must be filed within three months of the lapse of the additional acceptance period. The bidder may continue to purchase target shares to reach the 98 per cent threshold until the court's decision regarding the cancellation of the shares. The duration of the statutory squeeze-out procedure varies between four and six months. Shareholders' rights to challenge the statutory squeeze-out are limited to certain formal requirements and do not allow for any claim to increased compensation.

If the bidder holds more than 90 per cent of the shares but does not reach the 98 per cent threshold, minority shareholders may be forced out against compensation by way of a squeeze-out merger according to the Swiss Merger Act. The target shareholders have no right to obtain shares of the absorbing company, but may challenge the merger and the fairness of the compensation in court. Such appraisal claims may lead to a lengthy litigation procedure.

In the event of a successful tender offer followed by a squeeze-out merger or a statutory squeeze-out, and in the event the intention to delist the target company's shares has been disclosed in the offer prospectus, the requirements for a delisting are a mere formality and the timetable is very compact. The delisting decisions require shareholder approval. This approval can also be included as a condition to a voluntary offer (see below).

General principles and rules of the Swiss takeover regime

Mandatory public tender offers, opting-out or opting-up and exemptions

Under certain circumstances, a person may be required to make a mandatory public tender offer to buy all publicly held shares of a listed company. Such a mandatory offer is triggered by an acquisition of shares (completion of the sale), resulting in a shareholding exceeding 33 ⅓ per cent of the voting rights of a target company, irrespective of whether such voting rights may be exercised.

Although mandatory offers are generally governed by the same set of rules as voluntary bids, there are important exemptions where stricter provisions apply. The minimum price rule applies (see below), and settlement by means of an exchange against securities is only permitted if a cash alternative is offered (the cash alternative must comply with the minimum price rule, but can be lower than the value of the shares offered in exchange). Further, mandatory offers, unlike voluntary offers, may be made subject to only a very limited number of offer conditions.

The Swiss takeover rules allow a Swiss target company to opt out of the mandatory offer rules by adopting a provision to this effect in its articles of association. Target companies may also opt up the threshold triggering a mandatory offer requirement in their articles of association from 33 ⅓ up to 49 per cent. The TOB has established a number of strict rules regarding transparency and majority requirements in connection with the introduction of such a clause in the company's articles of association after the listing of the respective

company's shares, which, if they are not followed, prevent the opting-out or opting-up to be valid and effective (see the leading case regarding LEM Holding SA, in which the validity of such a shareholders' resolution was the topic in two TOB procedures in 2011 and 2019).

There are a number of exemptions to the obligation to make a mandatory offer when exceeding the threshold of 33 per cent of the shares of the target company. Some of these exemptions, such as (among others) a restructuring involving a capital reduction immediately followed by a capital increase so as to offset a loss, require only a notification to the TOB. Other potential exemptions, such as (among others) the transfer of voting rights within a group, the temporary exceeding of the threshold or the acquisition of shares for the purpose of a restructuring (as in the case of Schmolz + Bickenbach AG in 2019) require formal approval by the TOB and are only granted in justifiable cases.

Transparency and equal treatment of shareholders

The bidder must publish the offer in a prospectus with true and complete information to enable the recipients of the offer to reach an informed decision, including (among others) a brief description of any agreements between the bidder and the target as well as the target's shareholders. Further, the bidder must treat all shareholders of the target company equally, which is further expressed by the price rules applicable to Swiss tender offers.

Price provisions

According to the best price rule the bidder must pay the same price to all recipients of the offer. Therefore, should the bidder or a person acting in concert with the bidder pay a price that is higher than the offer price offered under the offer to any shareholder between the pre-announcement of the offer and the date that is six months from the expiry of the additional acceptance period, the higher price must be paid to all recipients of the tender offer. Pursuant to its practice, the TOB may extend this period of six months if the parties tried to circumvent the best price rule, which needs to be analysed carefully by the parties involved, in particular with regard to put or call options of certain major shareholders of the target company that have not tendered their shares under the offer.

In mandatory and in change-of-control offers (ie, offers that would allow the bidder to exceed the 33 per cent threshold if successful), the offer price must be at least equal to the 60 days' volume weighted average price (VWAP, if the stock is liquid) or the highest price paid for securities of the target company by the bidder or bidders in the 12 months preceding the offer, whichever is higher (minimum price rule). If the target shares are not deemed liquid from a takeover law perspective, the 60 days' VWAP is replaced by a valuation to be provided by the review body.

In partial tender offers or public tender offers for target companies with an opting-out provision in their articles of association, the minimum price rule does not apply and the bidder is free to set the offer price (the best price rule, however, applies).

Rolling shareholders and ancillary benefits

In recent years, with more private equity investors looking at Swiss-listed target companies, a trend has evolved whereby structuring options involving one or more major shareholders

of the target company either remaining in the company (and signing a respective non-tender undertaking) or rolling over into the bidder structure.

Such a structuring option involving a rolling shareholder leads to complex questions in connection with the price rules under the Swiss takeover law. The TOB may qualify certain benefits granted by the bidder to a rolling shareholder, which may be contained in a shareholders' agreement or other transaction documents such as put and call options or management or employee incentive plans (if the major shareholder is simultaneously a manager or an employee of the target), as ancillary benefits under the minimum, the best price rule or both. If this is the case, such benefits would lead to an increase in the price that the bidder must pay to all shareholders of the target company having tendered their shares into the offer.

To mitigate the risks for the bidder in such structuring options, it has become standard practice in Swiss public M&A deals with such a remaining or rolling shareholder that the bidder appoints an independent valuation expert to determine and value potential ancillary benefits included in such transaction documents (or reserves the right to delete them prior to the publication of the pre-announcement or the offer prospectus). Further, in such a transaction structure, the bidder will almost always seek a formal pre-clearance by the TOB to avoid any risk of breaching the price rules.

Offer conditions

The public tender offer may be subject to certain conditions. If, and only if, the offer conditions are not fulfilled (or waived), the bidder may walk away from the offer, which is, in Swiss public M&A transactions, extremely rare. In the context of voluntary offers, conditions are generally permissible if:

- their satisfaction is outside the bidder's control;
- they are stated clearly, objectively and in a transparent way in the offer documents; and
- they do not require any actions from the target company that could be unlawful (in particular, a violation of the board's fiduciary duties).

The bidder must take all reasonable steps to ensure that the offer conditions are met.

Typical offer conditions are:

- a minimum acceptance threshold;
- a material adverse change clause concerning the target company (within the specific thresholds set out by the TOB case law);
- the registration of the bidder in the share register (in the case of registered shares) and the cancellation of transfer or voting right restrictions in the target's articles of association;
- merger and other regulatory approvals;
- replacement of the board of directors;
- delisting approval; and
- no injunction or court order.

Mandatory offers may be made subject to only a limited number of conditions, such as merger and other regulatory approvals, the removal of transfer or voting right restrictions and no injunction or court orders.

Transaction notifications

From publication of the pre-announcement or the offer prospectus until expiry of the additional acceptance period, all parties in a takeover proceeding, shareholders holding at least 3 per cent in the target company and persons acting in concert with the bidder must disclose daily all transactions in securities relating to the offer to the TOB and SIX Swiss Exchange. The TOB publishes the transaction notifications on its website.

Persons acting in concert with the bidder

Persons are acting in concert with the bidder when they are coordinating their conduct by contract or in any other manner to purchase or sell securities or exercise voting rights. As a rule, persons acting in concert with the bidder must be disclosed in the prospectus and comply with the bidder's obligations, such as the obligation to treat shareholders equally (including adherence to the price provisions), to notify transactions and to comply with transparency requirements. Further, if the persons are acting in concert with a view to obtain joint control with the bidder over the target (ie, if they exercise a main role in the public tender offer), they are perceived as co-bidders and, if they hold in the aggregate 33 per cent of the voting rights, a mandatory offer may be triggered.

Transaction certainty and competing offer

Swiss takeover law limits the ability of a bidder to protect the envisaged takeover transaction, and absolute deal certainty is difficult to achieve. Conversely, Swiss law facilitates competing offers on a level playing field, which may be submitted until the last day of the main offer period. Generally, the target board of directors may lawfully agree to refrain from soliciting competing offers (no-shop undertaking). However, the right to react to unsolicited offers must be retained to the extent required by the board's fiduciary duties, including the disclosure of non-public information to, or negotiation with, the unsolicited bidder. Also, the target board must be free to withdraw its recommendation of the first offer and recommend a superior offer in compliance with its fiduciary duties. Obligations in the transaction agreement between the bidder and the target company that the TOB deems to be too restrictive on the right of the target board to consider competing offers have been declared void by the TOB. Further, break fees contained in the transaction agreement are not permissible if they will result in coercing shareholders to accept the offer. As a rough guide, the TOB has accepted in the past break fees of up to 1 per cent of the transaction volume.

Shareholders accepting an offer may revoke their commitment in the event of a competing offer. The same withdrawal right applies to tender undertakings (which, under Swiss law, are therefore not irrevocable).

To discourage potential competitors and to achieve greater transaction certainty, the bidder may build up a stake in the target prior to the offer. If the bidder secures a large stake from

a majority shareholder prior to the publication of the offer, but with a completion date after the publication of the offer (eg, because of required merger clearances), the bidder will need to ensure that the block trade share purchase agreement is not linked to the public tender offer. If it was, for example, conditional upon the success of the public tender offer, the TOB would treat it similarly to a tender undertaking that may be revoked in the case of a competing offer.

Outlook

Despite ongoing uncertainties related to geopolitical tensions (such as the continuing wars in Ukraine and the Middle East) and economic policy challenges (including new US tariffs and increasing regulatory scrutiny), the public M&A market is expected to remain resilient in 2025. While transaction volumes may continue to fluctuate, improved market stability and gradual monetary easing provide a supportive environment for deal-making. Nevertheless, political volatility and regulatory complexities remain key factors that could shape the pace and nature of M&A activity in the year ahead.

There has been a continued trend of private equity investors looking to take over Swiss-listed targets. Also, shareholder activists continue to play a role in Swiss public M&A transactions whereby they can have the role of a catalyst (eg, Cevian in the merger of Helvetia and Baloise this year) or the role of a blocking force if the offer price is deemed too low (eg, Veraison in the battle for Aryzta in 2020).

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