THE MERGERS & ACQUISITIONS REVIEW

ELEVENTH EDITION

Editor
Mark Zerdin

THE LAWREVIEWS

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SWITZERLAND

Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon, Harun Can and David Mamane[1]

I OVERVIEW OF M&A ACTIVITY

In 2016, the level of M&A activity in Switzerland, as compared with the previous year, was higher, with an overall number of around 360 reported M&A transactions in 2016. In Swiss M&A news, China and the US dominated the headlines in 2016 in terms of landmark transactions. The overall transaction value increased from US$85 billion in 2015 to approximately US$120 billion in 2016.[2] There were a few large acquisitions with Swiss companies as targets of foreign acquirers, and many more transactions with foreign companies as targets of Swiss acquirers. The number of public tender offers in Switzerland increased from two in 2015 to six in 2016, while their aggregate volume increased from 2.5 billion Swiss francs in 2015 to 45.8 billion Swiss francs in 2016, including 43 billion Swiss francs for the acquisition of Syngenta by China Chemical Corporation, which was the largest outbound transaction ever undertaken by a Chinese company.

The Swiss M&A market continued to be cautious in the first months of 2017 due to the strong Swiss franc and political uncertainty in several countries. The European inbound M&A market was comparatively low in the first quarter of 2017. In other regions, while China implements stricter government regulations aiming at limiting capital outflows for non-strategic investments, Japan dominated the outbound M&A activity from Asia-Pacific.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Corporation Law and the statutory provisions on the purchase and sale of goods, both integrated in the Swiss Code of Obligations (SCO), provide the fundamental statutory framework for the purchase and sale of corporate entities or of their assets and liabilities, for privately held or listed companies. In addition, the Federal Act on Merger, Demerger, Conversion and Transfer of Assets and Liabilities regulates all types of corporate restructurings, including business combinations and spin-offs.

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1 Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon, Harun Can and David Mamane are partners at Schellenberg Wittmer Ltd. The authors would like to thank their colleague at Schellenberg Wittmer Ltd, Philippe Nicod, for his valuable contribution to this chapter.

2 KPMG Report 'Clarity on Mergers & Acquisitions 2017'.

Public tender offers are further regulated by the Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) and by several ordinances issued by the government (i.e., the Federal Council), the Swiss Financial Market Supervisory Authority (FINMA) and the Takeover Board (TOB).

The takeover regulations apply to public tender offers for equity securities of Swiss corporations that have at least one class of equity security listed on a Swiss stock exchange; and, newly, foreign corporations that have a primary listing on a Swiss stock exchange (together, Swiss target companies). The takeover regulations generally also apply to a public offer by a Swiss target company to buy back its own equity securities (including related conversion or option rights). If Swiss and foreign takeover regulations apply simultaneously to a public offer, it is possible to waive the application of Swiss law, provided the Swiss and foreign regulations are conflicting and the shareholders are equally protected under both foreign regulations and Swiss regulations.

Pursuant to the FMIA, anyone who acquires equity securities listed on a Swiss stock exchange representing more than one-third of the voting rights of a Swiss target company, whether such voting rights are exercisable or not, must submit a tender offer for all listed equity securities in such company (mandatory offer). The articles of incorporation of Swiss target companies may provide for a higher threshold of up to 49 per cent of the voting rights (opting-up) or may declare the mandatory tender offer obligations to be not applicable (opting-out). Share purchases that are not publicly announced are not subject to the takeover regulations unless the threshold for submitting a mandatory offer is exceeded.

The TOB and the FINMA ensure compliance with the takeover rules. The TOB reviews all public takeover offers subject to the FMIA. Parties may appeal to the FINMA against a decision of the TOB within five trading days; they may further lodge an appeal against a FINMA decision with the Swiss Federal Administrative Court within 10 calendar days, whose judgment shall be final.

M&A transactions that exceed certain turnover thresholds or lead to business concentrations having an effect on the Swiss market fall within the scope of the Swiss Act on Cartels and other Restraints of Competition (Cartel Act) and the relevant Ordinance on Merger Control (see Section IX, *infra*).

III DEVELOPMENTS IN CORPORATE, FINANCIAL MARKET AND TAKEOVER LAW

i Say on pay and other amendments to the corporate law

The corporate law is currently under revision, and will be amended to strengthen shareholders' rights further to the approval in 2013 of a popular legislative initiative aiming at introducing a mandatory say-on-pay mechanism with a requirement for a binding approval by the shareholders' meeting for Swiss corporations listed in Switzerland or abroad. Transitional rules on say on pay entered into force on 1 January 2014. However, and importantly, the revision does not set any rules or limitations regarding the absolute amounts of individual or aggregate compensation for directors or members of senior management.

The transitional rules brought far-reaching new rules on the corporate governance of Swiss public companies with direct effects on executive management, shareholders, pension funds and independent proxies, including:

a the obligation to submit each year the total compensation of board members, senior management and advisory board members to the approval of the shareholders' meeting;

b the yearly and individual election of the chair of the board, the board members, the members of the compensation committee and the independent proxy by the shareholders' meeting;

c the obligation for pension funds to vote in the interest of their insured persons and to disclose how they vote;

d the prohibition on all compensation to the members of the board of directors, the executive management and the advisory board (if any) taking the form of severance pay provided for by contract or articles ('golden handshake'), advance compensation ('golden hello') or incentive payments for restructurings within the group;

e a tighter regulation of credits or loans granted to board members, share and bonus plans, and a limitation on the number of appointments of a person as a board member;

f the elimination of the institutional voting representation by governing bodies of the company itself or custodians, and the strengthening of the role of the independent proxy; and

g strict (criminal) sanctions in the case of violations of the new rules, including imprisonment of up to three years and a fine of up to an equivalent of six years of annual compensation.

The transitional rules have to some extent changed the voting behaviour of shareholders, in particular pension institutions. Generally speaking, proxy advisers already have, and will further, become more influential in Swiss public companies. Said changes also gave activist shareholders additional means of intervention.

In addition to the replacement of the current transitional rules on say on pay, the contemplated revision of the corporate law includes further important amendments, including guidelines in terms of gender representation at higher executive levels of large Swiss corporations listed in Switzerland or abroad by proposing the introduction of quotas of at least 30 per cent of each gender at the board of directors level within a transitional period of five years, and at least 20 per cent of each gender at the executive management level within a transitional period of 10 years. Companies that do not comply with these requirements will have to explain the reasons for the under-representation and inform about measures taken or planned to reach the thresholds. Other proposed amendments include:

a easing of the rules governing the registered share capital with, in particular, the introduction of a capital band within which the company is given more flexibility to manage its capital;

b further developments of corporate governance for both private and listed companies;

c the use of the internet for holding shareholders' meetings;

d the possibility to have share capital issued in foreign currency;

e new protection rules concerning the reimbursement of reserves from capital contributions; and

f incentives for companies to take corporate restructuring measures at an earlier stage in the case of financial difficulties.

The Federal Council submitted the bill to the Parliament in 2016 and discussions started during the 2017 summer session. It is foreseeable that due to rather strong resistance from political parties, the proposed revision of the corporate law will still be subject to several material changes. It is not expected that the revised corporate law will enter into force before 2018.

ii Implementation of the Financial Action Task Force (FATF) recommendations

New rules implementing the revised recommendations of the FATF entered into force in two stages on 1 July 2015 and 1 January 2016, substantially tightening the Swiss framework for combating money laundering. The new rules introduce an obligation to report both the current holding and the purchase of bearer shares in privately held stock corporations, and an obligation to report the beneficial owner of significant shareholdings in privately held stock corporations and limited liability companies.

The acquirer of bearer shares in a privately held Swiss stock corporation must report the share purchase to the respective stock corporation (or a financial intermediary; see below) within one month following the purchase. Those who on 1 July 2015 already held bearer shares in a privately held stock corporation must also report their shareholdings in accordance with the above.

A person who, alone or acting in concert with third parties, acquires shares in a privately held Swiss stock corporation or limited liability company, and thereby reaches or exceeds the threshold of 25 per cent of the company capital or voting rights, shall identify and report the beneficial owner of the relevant shares to the company (or a financial intermediary; see below) within one month following the purchase. The ultimate beneficial owner of the shares can be either the direct or indirect holder of the stake in question at the end of the control chain. The reporting obligation, however, always lies with the direct shareholder.

In cases of non-compliance by a shareholder with the above reporting obligations, the membership and financial rights associated with the stake held by such shareholder will be forfeited. Upon regularisation, rights will be activated again, although only from the reporting date onwards.

The company (or, if so provided by a resolution of the shareholders' meeting, a financial intermediary instructed by the board of directors) must register the holders of its bearer shares in a bearer share register and must keep a record of the reported ultimate beneficial owners in a register of beneficial owners. Both registers, which must be accessible within Switzerland at any time, and all related records are subject to a mandatory retention period of 10 years.

iii Developments in the takeover law

In relation to the friendly takeover of Syngenta by ChemChina announced in February 2016 (see Section V, *infra*), the TOB confirmed and developed in March 2016 its practice concerning break fees. Syngenta and ChemChina had agreed in a transaction agreement that the Swiss target would pay a break fee of US$1.5 billion, representing close to 3.5 per cent of the transaction value, in the event that the offer was not successful or remained conditional. The parties further agreed that ChemChina would pay a reverse break fee of US$3 billion in the event of withdrawal of the offer. Just one day before the TOB issued its decision on the question of the break fee, ChemChina agreed to waive its right to any break fee above an amount of US$0.848 billion, corresponding to 1.99 per cent of the transaction value. The TOB confirmed its practice pursuant to which the review of the level of the break fee is relevant from a takeover perspective, potentially limiting the freedom of the shareholders and scaring off other potential bidders. The TOB further confirmed that the break fee shall in particular be in line with the expected transaction costs and that the existence of a reverse break fee is not relevant. The expected damage to ChemChina and its subsidiaries in the event that the offer would not be successful was evaluated to US$0.848 billion by its investment bank. In other takeover transactions, the usual level of the break fee admitted by the TOB was closer to 1 per cent. It remains to be seen if a break fee below 2 per cent, which may

have been negotiated with the TOB in the matter of ChemChina, will become the highest percentage admitted by the TOB or if a higher break fee would be admitted in the event of higher evaluated transaction costs.

The takeover of gategroup by the Chinese company HNA (see Section V, *infra*) was the second-largest public takeover in Switzerland in 2016 in terms of volume and confirmed the appetite of Asia-Pacific purchasers for Swiss companies. This transaction gave the opportunity to clarify the applicable procedure for postponing the settlement of an offer up to four months upon the expiration of the additional acceptance period in cases where some conditions remain outstanding, which is possible if the offeror reserved its right to postpone the settlement in the offer prospectus. In this transaction, HNA was still waiting to the regulatory approvals from two Chinese authorities. According to the practice developed by the TOB, in cases where some conditions precedent remain outstanding, the decision to withdraw an offer is not at the discretion of the offeror. If, in particular, some regulatory approvals could not be obtained, then the offeror must postpone the settlement by four months. Should the condition still not have been met upon expiration of such postponement period, then the TOB will decide if it is possible to withdraw the offer or if an additional postponement of the settlement is required, thereby also taking into account the interests of the shareholders.

iv Tightening anti-corruption legislation

Under Swiss law, bribery in a private context used to be an offence that was only prosecuted upon a complaint lodged by a victim. It was not perceived to be in the public interest to enforce law in that area in each and every case. Since 1 July 2016, Switzerland prosecutes bribery *ex officio* also if it is committed in a private context. Exceptions only apply to certain minor cases. While the detection of corruption is nowadays generally on the radar in M&A processes, the increased focus and the multiple efforts of state authorities around the globe to reveal and effectively punish illegal practices in that area make a careful assessment and analysis of a target business' practices more than ever an essential part of every due diligence process.

v Remodelling of the Swiss Financial Market Legislation

The Swiss financial market legislation is currently under revision and will be considerably amended, mainly to reinforce the protection of clients in asset management and the supervision of asset managers. It also introduces a new prospectus regime, allowing for stronger regulation of the primary market. The proposed remodelling includes the introduction of the new financial market infrastructure act (FIMA), which entered into force on 1 January 2016, the federal financial services act (FSA) and the financial institutions act (FIA). In June 2015, the Federal Parliament adopted the FIMA, while the Federal Council reported on the results of the consultation process and informed of changes to the draft FSA and FIA. The proposed FSA intends to strengthen client protection and to create a level playing field for all financial service providers, while the FIA will introduce a licensing requirement for asset managers. Asset managers will then be supervised by an independent supervision body, itself under the supervision of FINMA. The revised draft FSA proposes waiving the requirement for plaintiffs to pay in advance the costs of civil proceedings or to provide a guarantee, while under certain circumstances these costs will have to be supported by the financial service provider, even if the outcome of the civil procedure is in its favour.

It is expected that financial services providers will have to make extensive adjustments to comply with the new statutory requirements. The consolidation of the financial services industry in Switzerland is expected to continue, in particular in the private banking market where the number of participants continues to fall.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i Few restrictions for foreign investments

In general, foreign investors acquiring shares or assets of Swiss enterprises face very few restrictions. Certain exceptions apply for regulated industries, mainly in the areas of banking, finance, insurance, casinos and gaming, and air transport, where special requirements, regulatory approvals or notification duties might apply. For example, the acquisition of a Swiss bank by a foreign company is subject to specific disclosure and additional bank licensing requirements with the FINMA. Further restrictions apply to the direct or indirect acquisition of real estate in Switzerland by foreigners, although under the relevant provisions (Lex Koller), the acquisition of commercial property is generally not restricted. Nevertheless, the restrictions of the Lex Koller are a serious hurdle to be carefully considered in the case of potential acquisitions of real estate portfolios or real estate companies with residential properties or substantial building or land reserves.

ii Significant takeovers of Swiss companies by foreign enterprises

In 2016, Swiss companies were targets in 174 reported M&A deals (2015: 154), of which 87 target companies (2015: 77) were acquired by non-Swiss purchasers. As regards geographical background, the majority of the foreign acquirers were from Western Europe (53 per cent; 2015: 57 per cent), followed by Asia-Pacific (22 per cent; 2015: 18 per cent) and North America (21 per cent; 2015: 21 per cent).[3]

In terms of volume, Asia-Pacific was Switzerland's most important partner for M&A transactions in 2016, with combined deal values of approximately US$48 billion flowing between the two, including US$43 billion for the sole acquisition of Syngenta by ChemChina, compared to approximately US$22 billion for North America and US$13 billion for Western Europe.[4]

iii Significant takeovers of foreign companies by Swiss acquirers

In 2016, Swiss acquirers targeted foreign companies in 166 reported M&A deals (2015: 154). As regards geographical background, the majority of foreign targets were from Western Europe (59 per cent), followed by North America (22 per cent) and Asia-Pacific (9 per cent).[5]

3 KPMG Report 'Clarity on Mergers & Acquisitions 2017'.

4 Ibid.

5 Ibid.

V SIGNIFICANT TRANSACTIONS AND KEY DEVELOPMENTS

i Sika takeover battle

In December 2014, the French competitor Saint-Gobain disclosed its intention to take control of Swiss industrial group Sika AG by indirectly offering to acquire all shares held by the Burkard family through Schenker-Winkler Holding AG (SWH), Sika's current majority shareholder, for 2.75 billion Swiss francs. The offer, as initiated in late 2014 and binding until the end of 2016, would allow Saint-Gobain to control about 52.4 per cent of the voting rights but only about 16.1 per cent of the share capital of Sika AG. Saint-Gobain further disclosed its intention not to make a public takeover offer to the public shareholders of Sika AG in reliance on an existing opting-out clause in the articles of association of Sika AG. Upon the request of the majority shareholder, the TOB confirmed the validity of the opting-out clause in April 2015. Rejecting the request of several minority shareholders of Sika AG, all instances up to the Swiss Federal Administrative Court confirmed in 2015 that the application of the opting-out clause to the contemplated acquisition by Saint-Gobain was not abusive, and that as a consequence, Saint-Gobain had no obligation to launch a public takeover offer.

In January 2015, the board of directors of Sika AG, which does not support the contemplated transaction, announced its intention to restrict the voting rights privilege of SWH to 5 per cent of all registered shares. Consequently, the board of directors of Sika AG applied such voting rights limitation at all shareholders' meetings of Sika AG held since then in relation to the votes aiming at terminating the currently dissenting board members, and electing a new member and chair of the board, which would have allowed SWH to pass control over to Saint-Gobain. SWH started legal proceedings before the competent courts to challenge such voting right restriction, and such proceedings are still pending at the higher cantonal level. This long-lasting turmoil did not prevent Sika AG from posting a 21.8 per cent rise in net profit for 2016.

ii Syngenta: a landmark acquisition

This transaction, which will allow ChemChina to increase the output of domestic agriculture, was the largest outbound acquisition ever made by a Chinese company. In February 2016, China National Chemical Corporation (ChemChina) pre-announced an offer comprising two offers: a Swiss offer in accordance with the rules of the FMIA to purchase all publicly held shares in Syngenta listed in Switzerland, and a US offer in accordance with the Securities Exchange Act for all American depositary shares of Syngenta listed at the New York Stock Exchange, valuing the company at US$43 billion.

ChemChina's acquisition of Syngenta is among a trio of megamergers that are reshaping the global agrichemical and seeds industry. The other deals in the sector are the proposed merger of Dow Chemical and DuPont, and Bayer's plan to merge with Monsanto.

The European Commission conditionally approved the proposed acquisition of Syngenta by ChemChina on 5 April 2017, one day after the US Federal Trade Commission, representing the two biggest regulatory hurdles. The approvals are conditional on the divestiture of significant parts of ChemChina's European pesticide and plant growth regulator business as well as some pesticides assets in the US.

In May 2017, ChemChina announced the definitive end result for its offer to acquire all shares in Syngenta, representing a success rate of 94.7 per cent. Shortly thereafter, ChemChina and Sinochem announced that they are planning to merge in 2018, creating the world's biggest chemicals group in terms of revenues.

iii Takeover of gategroup

Second only to the takeover of Syngenta by ChemChina in terms of volume in Switzerland in 2016, the takeover of gategroup by HNA from Hainan in China was announced in April 2016 and completed in December 2016. The settlement date of the offer had to be postponed twice, as HNA was waiting for the approvals of two Chinese authorities, namely the Ministry of Commerce and the State Administration of Foreign Exchange. These two transactions targeting Syngenta and gategroup are representative of the interest of Asia-Pacific in general and Chinese investors in particular for Swiss assets. Meanwhile in December 2016, the Chinese government implemented stricter regulations in order to limit 'irrational investment activities' in some industries seen as less strategic, targeting in particular trophy-like investments in real estate, hotels, film studios, the entertainment industry and sports clubs, while continuing to support Chinese outbound investment in strategic projects, such as those alongside the 'Belt and Road' initiative. This tighter control should not limit further acquisitions in strategic assets in Switzerland. However, after a few months of implementation, the regulations represent a serious hurdle for the growth of small and medium-sized Swiss businesses recently purchased by Chinese investors, whose financing largely relies on funds coming from Chinese affiliates.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Many Swiss companies continue to have significant cash reserves and may also take advantage of their increased purchasing power, particularly as far as outbound M&A transactions are concerned. In addition thereto, debt-financed M&A remains attractive with low interest rates.

VII EMPLOYMENT LAW

Switzerland's employment law is generally widely considered to be flexible and investor-friendly compared with the laws of other European jurisdictions. Of particular interest in Swiss M&A transactions are the protective rules applicable to the transfer of an enterprise and its personnel in the case of an asset deal or statutory merger or demerger, which are not applicable, however, in the case of a share deal (that is to say, the transfer of shares).

If a transaction qualifies as a transfer of an enterprise as per the above, unless an employee declines the transfer, his or her employment is transferred to the acquiring party by operation of law, including all rights and obligations as of the date of transfer, the former employer remaining jointly and severally liable to the employee for all the latter's claims arising from the employment contract until the post-transfer date on which the employment contract could have been terminated. However, in the case of insolvency of the transferred enterprise, there is no such joint and several liability of the acquiring party with the former employer; in addition, employment relationships are not transferred by operation of law, but only with the consent of the acquiring party.

Employee representatives or, if there are none, employees, must be informed in due time prior to the transfer of the reason for the transfer and the transfer's legal, economic and social consequences. If, however, as a result of the transfer, measures affecting employees are planned (e.g., subsequent dismissals, salary reductions, transfer of workplaces), employees must in addition be adequately consulted in due time prior to any decision on these measures.

On 9 February 2014, the Swiss voters approved the initiative 'against mass immigration' with 50.3 per cent of the votes. The acceptance of this initiative, which aims at introducing employment quotas, obliges the Federal Council to renegotiate the EU labour market agreements within three years. The current treaties stay in force in the meantime, and the initiative therefore has no immediate legal consequences for the labour market. The mid and long-term consequences are still unknown.

VIII TAX LAW

Capital gains resulting from the sale of privately held shares in a company (also in a start-up company) are generally exempted from income taxation according to Article 16 Paragraph 3 Federal Direct Tax Act (FDTA). The law provides several exceptions to such a tax-free capital gain, for instance, the transposition according to Article 20a Paragraph 1 Letter b FDTA, the indirect partial liquidation according to Article 20a Paragraph 1 Letter a FDTA as well as the taxation of gains resulting from the sale of shell companies. Already well-established in practice, the above-mentioned concepts do not require any further explanation. The focus hereinafter will be on a more recent practice regarding the taxation of private capital gains developed by the Swiss federal tax authorities. It concerns the (partial) requalification of capital gains resulting from the sale of privately held shares into taxable income from employment.

The following three examples illustrate when a (partial) taxation of the capital gain on a sale of shares might occur:

a In this example, the selling shareholders of a target company who continue working for the target company after its sale receive a larger share in the sales price than the shareholders without continued employment.

It is not excluded that in such a case the share price of shareholders with continued employment will partially be requalified by the tax authorities as a hidden compensation for employment. In cases where different sale prices for shareholders with and shareholders without continued employment are agreed, it is advisable to transparently document and comprehensibly explain the difference by means of facts other than the continued employment or – if not possible – to treat all shareholders the same in order to avoid a taxation of shareholders continuing to work for the target company.

b In this example, the selling shareholder of the target company accepts an obligation of non-competition for a certain period after the sale of the target company and the share purchase agreement contains earn-out payments conditional to the obligation of non-competition.

To prevent a (partial) requalification of the capital gain into taxable income, it is advisable to either renounce a non-competition clause in the share purchase agreement (if at all possible) or at least to foresee a contractual penalty amount for the breach of the obligation of non-competition (a requalification of such a penalty into taxable income cannot be excluded).

c In this example, the sole and selling shareholder continues working for the target company after the sale of his or her shares whereby the purchase price is substantially above the net asset value of the company and the share purchase agreement contains an earn-out that is conditional if the obligation of continued employment for the target company.

To prevent a requalification of the capital gain, it is advisable to fix a salary at arm's length and to document the compensation separately. This might give an argument that further employment is sufficiently compensated and not part of the earn-out payment.

IX COMPETITION LAW

Under the current Swiss merger control legislation, the concentration of enterprises must be notified to the Swiss competition authorities if, in the last accounting period prior to the concentration, the enterprises concerned reported a joint turnover of at least 2 billion Swiss francs or a joint turnover in Switzerland of at least 500 million Swiss francs; and at least two of the enterprises concerned reported an individual turnover in Switzerland of at least 100 million Swiss francs.

Alternatively, a transaction must also be notified in any case if the Swiss competition authorities have previously issued a legally binding decision stating that one of the undertakings concerned is dominant in a specific market related (horizontally, vertically or adjacent) to the activities at issue in the transaction.

The term concentration means the merger of two or more enterprises that are independent of each other or any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more independent enterprises or a part thereof.

The threshold above which mergers have to be notified (formal criterion) is considered to be relatively high in comparison to international standards. A transaction can be notified prior to the conclusion of the final agreement. However, in such cases, the parties have to demonstrate a good faith intention to enter into a binding agreement and to complete the transaction. Once the notification has been submitted, the authorities will conduct a preliminary investigation, and have to decide within one month whether there is any need to initiate an in-depth investigation of the transaction. If initiated, the in-depth (Phase II) investigation will have to be completed within four months. Therefore, the entire procedure (Phase I preliminary assessment and Phase II in-depth investigation procedure) must not exceed five months. While closing of the transaction is prohibited prior to the notification and clearance or expiration of the preliminary investigation phase, the competition authorities may allow a preliminary closing if there are important reasons for such preliminary closing. In the past, this instrument was mainly used to allow the reorganisation of distressed companies. Recently, however, the competition authorities have also allowed a preliminary closing in the case of a pending public takeover bid. However, it has been made clear that there is no general exception for public bids (contrary to the situation according to the European merger control rules), and that each case will be assessed individually.

The practice of the Swiss Federal Supreme Court, in the merger cases *Swissgrid/Berner Zeitung AG* and *Tamedia AG/20 Minuten (Schweiz) AG*, reveals that even substantive law calls for a very high intervention threshold. The mere possibility of a merger creating or strengthening a dominant position is not sufficient for an intervention. The merger must also eliminate effective competition. In the case of the joint venture Swissgrid, the national network operator of the leading Swiss electricity companies, the Swiss Competition Commission approved the joint venture only subject to certain obligations and conditions. The Appeals Commission for Competition Law Matters, however, decided that due to the already non-existing competition for network services, there is no room to intervene against

the joint venture. It reasoned that if competition in a specific market is already ineffective, a concentration of enterprises cannot possibly eliminate competition. The Supreme Court confirmed the Appeals Commission's decision.

The question of the elimination of effective competition has considerable practical significance. If it is to be given an independent meaning in the sense of requiring qualified market dominance, Swiss authorities could only intervene in situations where a quasi-monopoly will be created by the merger.

If a transaction is prohibited by the Competition Commission, the decision can be appealed within 30 days to the Swiss Federal Administrative Court and ultimately to the Swiss Federal Supreme Court. Furthermore, the parties may apply to the Federal Council within 30 days to request a clearance of the transaction based on public interests. Third parties not directly participating in the transaction have no right to challenge decisions regarding notified transactions. This applies regardless of whether the third party has any interest of its own in lodging such an appeal.

On 1 December 2014 the EU–Swiss Competition Law Cooperation Agreement entered into force. This 'second generation' agreement increases the possibilities of the EU and Swiss competition authorities to cooperate with each other in competition law matters, and enables them to exchange evidence they obtain in their respective investigations and merger control procedures, provided that certain conditions are met. The planned revision of the Swiss Cartel Act, stuck in parliamentary deliberations during 2013 and 2014, failed to be approved by the Swiss parliament during the autumn session of 2014. The two chambers of parliament were unable to reconcile their differences regarding the content of the revision despite two rounds of deliberations, leading to a definite rejection of the complete revision project.

X OUTLOOK

The continuously strong Swiss franc and the general exposure to global economic and geopolitical risks only allow for a cautious outlook for 2017. The strong Swiss franc considerably affected Switzerland's economy and M&A activity during 2016. The increased purchasing power may continue to encourage outbound acquisitions in 2017. Consolidation in the Swiss financial services industry, including insurance and private banking, shall continue in 2017.

Appendix 1

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Lorenzo Olgiati is a partner and head of Schellenberg Wittmer's mergers and acquisitions group in Zurich. He regularly advises clients on mergers and acquisitions, public takeovers, private equity, securities regulation and corporate law. His corporate practice includes international joint ventures, corporate governance, directors' and officers' liability, as well as corporate structuring and restructurings. Among his clients are Swiss and international investors as well as publicly listed and closely held companies, including multinational groups of companies.

A graduate of the University of Zurich in 1989, where he also received his doctorate *summa cum laude* in 1995, Lorenzo Olgiati was admitted to the Swiss Bar in 1996 and went on to earn a master of laws with distinction from Georgetown University, Washington, DC, in 1997. He joined the firm in 1998 and became a partner in 2003. Mr Olgiati has authored various publications on mergers and acquisitions, public takeovers and corporate law, and is a lecturer at the University of Zurich in business law.

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