Jurisdiction: **Switzerland**

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The key laws and regulations that govern mergers and acquisitions (M&A) in Switzerland are the Code of Obligations (CO), the Merger Act, the Federal Act on Cartels and other Restraints of Competition (Cartel Act), the Financial Market Infrastructure Act (FMIA) as well as the Listing Rules (LR) of the SIX Swiss Exchange. These regulations are complemented by their corresponding ordinances such as the Merger Control Ordinance (MCO), the Financial Market Infrastructure Ordinance (FMIO), the Financial Market Infrastructure Ordinance FINMA (FMIO-FINMA), the Ordinance of the Swiss Takeover Board on Public Takeover Offers (TOO) and the Directive Ad Hoc Publicity of the SIX Swiss Exchange (DAH).

The CO and the Merger Act govern M&A in general by establishing rules for the purchase and transfer of shares or assets as well as statutory mergers and demergers.

Public M&A transactions (i.e. transactions concerning companies listed on a stock exchange) are subject to additional provisions in the FMIA and, under certain circumstances, the listing rules of a stock exchange. The FMIA regulates public takeover offers as well as the disclosure of shareholdings in a public company when certain thresholds (starting at 3% of the voting rights) are met and market conduct rules (insider trading and market abuse).

The listing rules of a Swiss stock exchange apply if a transaction results in the listing of securities on a stock exchange. In particular, if a listed company concludes a transaction which is deemed price-sensitive, it is, as a rule, obligated to disclose the transaction to the public without delay. Further, any management transactions must be reported.

Special rules apply for transactions involving (residential) real estate and certain regulated industries. Finally, large transactions that meet certain turnover thresholds set forth in the Cartel Act are subject to merger control clearance by the competition authorities (cf. question 4).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The Swiss Takeover Board assesses whether a public takeover offer complies with the legal requirements. It may issue binding decisions for the enforcement of public takeover law, which can be appealed to the Swiss Financial Market Supervisory Authority (FINMA) and further to the Swiss Federal Administrative Court.

The FINMA also supervises and regulates the financial industry. It has to be notified when a qualified participation in a bank or an insurance company is acquired, increased or reduced.

The regulatory bodies of SIX Swiss Exchange, Switzerland's most important stock exchange, issue, monitor and enforce regulations concerning the listing and trading of securities. Swiss stock exchanges have self-regulatory powers and are supervised by the FINMA.

The Swiss Competition Commission (ComCo) has to be notified when an M&A transaction meets the turnover thresholds set forth in the Cartel Act. It will then initiate an examination of a transaction's effects on

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Robert Bernet specializes in advising Swiss and foreign clients in corporate transactions - public takeovers of listed companies, mergers, de-mergers, joint ventures, private equity and venture capital transactions - and has considerable experience in transaction management. He also advises national and international companies and their owners and executive bodies on matters relating to company law and corporate governance & compliance.

Robert Bernet is recognized by the Regulatory Board of the SIX Swiss Exchange as representative of issuers.

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Professional associations/memberships
Zurich Bar Association, Basel Bar Association, Swiss Bar Association, German-Swiss Lawyers Association, International Bar Association, Board member of the German-Swiss Lawyers' Association (DSJV).

competition (cf. question 13).

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids (i.e. public offers that are not supported by the target's board of directors, for example in the case of a competing offer) are permitted in Switzerland. Both friendly and hostile bids are regulated by the FMIA. However, hostile bids rarely occur in Switzerland. In fact, between 2010 and late 2019, out of 31 transactions completed, only one was a hostile offer with unfriendly completion.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, antimonopoly or national security legislation).

According to the Cartel Act and the MCO, concentrations of companies must be notified to the ComCo if they meet the relevant turnover thresholds (cf. question 13 regarding procedural aspects). The thresholds are met if in the business year preceding the concentration:

(a) the companies concerned reported a joint global turnover of at least CHF 2 billion or a joint turnover in Switzerland of at least CHF 500 million; and

(b) at least two of the companies concerned each reported an individual turnover in Switzerland of at least CHF 100 million.

Special provisions apply to insurance companies, banks and other financial intermediaries as well as companies for which, in a previous decision, the competition authorities have held that they have a dominant position on a market in Switzerland.

The ComCo may only prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration:

(a) creates or strengthens a dominant position by which effective competition may be eliminated; and

(b) does not improve competition in another market such that the harmful effects of the dominant position can be outweighed.

These criteria are difficult to meet, especially compared to the criteria used in other jurisdictions. Consequently, the ComCo hardly ever prohibits a concentration and only occasionally issues authorisations subject to conditions and obligations.

Apart from merger control, there are no general mechanisms in Swiss law to restrict M&A transactions. In particular, there is no cross-sector foreign investment control or a national security review of investments. There are, however, some restrictions on (foreign) investments concerning specific areas (such as residential real estate) or regulated industries (such as defense and arms, energy, financial sector, infrastructure, insurance, media, pharmaceuticals, public transportation, and telecommunication). Further, economic sanctions imposed on certain countries, groups or individuals may pose a hindrance to conducting business in Switzerland (cf. questions 14 and 15).

5. What documentation is required to implement these transactions?

Private M&A transactions are, in essence, based on a share purchase agreement or an asset purchase agreement (including any ancillary corporate and contractual documentation as required for the particular transaction). It is common in private M&A transactions to initially prepare a letter of intent or term sheet containing, inter alia, the envisaged basic transaction parameter provisions regarding confidentiality, exclusivity and jurisdiction. A structured sale (auction process) typically involves at the first stage an indicative non-binding offer by all potential buyers and – if the transaction proceeds with any selected buyer(s) after satisfactory due diligence – the final binding offer by such buyer(s). The seller may wish to provide a disclosure letter in order to qualify warranties requested by the buyer. Recently, sellers of Swiss companies have often demanded that buyers take out a warranty & indemnification (W&I) insurance to cover losses from breaches of representation and warranties, or claims for indemnities. In transactions involving a majority but not all of the target company's shares, the buyer typically seeks to conclude a shareholders' agreement with any minority shareholders. In an asset sale, the purchase agreement contains an inventory of the assets to be transferred. Typically, at (pre-)closing of a transaction, (pre-)closing minutes are executed (including all their annexes, for example, the required corporate resolutions, updated corporate registers, beneficial owner documentation etc.). Usually immediately after closing, the necessary commercial register filings (if any) are made.

In public M&A transactions, before the voluntary pre-announcement of a public takeover offer, the target company and the offeror usually enter into preliminary agreements, such as a letter of intent, a confidentiality agreement and a stand-still agreement. Subsequently, in friendly transactions, the offeror and the target company will negotiate a transaction

agreement, setting forth the terms of the transactions as well as certain duties of the offeror and the target company before, during and after the offer phase. No later than six weeks after the pre-announcement of the offer, the offeror publishes the offer prospectus which contains the relevant information about the offeror, the target company, the offeror's intentions, the object and price of the offer as well as financing. The target's board of directors must publish its report (including its stance on the offer) either in the prospectus (common in friendly transactions) or as a separate document. During the offer period, the offeror must publish any major changes to the offer as well as the preliminary and final interim and end results of the offer. Essentially all public takeover offer documents must be published in at least German and French; an additional voluntary English version is also often made available.

In the case of a statutory merger, a merger agreement between the merging companies and a merger report are required. The merger agreement sets out the terms and conditions of the merger whereas the merger report mainly describes the reasons for and the effects of the merger. The competent corporate bodies (i.e. the board of directors and – unless in simplified cases, e.g. intragroup mergers – also the shareholders' meeting of the involved companies) have to approve the merger.

6. What government charges or fees apply to these transactions?

The Swiss Federal Government levies a tax on the sale of shares. This so-called transfer stamp duty amounts to 0.15 percent of the purchase price for the sale of shares in a domestic company and 0.3 percent of the purchase price for the sale of shares in a foreign company.

The Swiss Takeover Board charges fees between CHF 25,000 and CHF 375,000 based on the value of the transaction and the scope and difficulty of the review proceedings.

Certain M&A transactions entail entries, amendments or deletions in the commercial register. The Ordinance on Fees for the Commercial Register contains a detailed list of fees that the commercial register offices may charge for their services. However, if compared to the overall transaction costs, such commercial register fees are of minor relevance.

In cases where the transaction concerns real estate, notary and land register fees may apply. These are subject to cantonal legislation and may vary depending on the location of the property.

The ComCo charges a flat rate of CHF 5,000 for the preliminary examination of the merger control proceeding. If it decides to conduct a comprehensive investigation, the fees depend on the amount of time and resources spent to reach a conclusion (cf. question 13).

7. Do shareholders have consent or approval rights in connection with a deal?

In general, whether concerning private or public M&A transactions, the shareholders do not have any consent or approval rights in connection with a deal as such. However, shareholders will have to support an intended share capital increase as a possible structural element of an M&A transaction in order to issue the relevant shares offered to an investor or – for instance – as consideration with regard to public takeovers by way of exchange offers.

Potential bidders usually try to receive positive signals and ideally irrevocable undertakings from the target's major shareholders to tender their shares into the offer or enter into SPA(s) before the offer is announced. Depending on how closely such groups of shareholders and/or potential bidders are liaising, the special regime of "acting in concert" may have to be complied with.

Furthermore, transfer restrictions or other defensive measures may be included in the articles of association of the target. A bidder will normally tie its offer to the condition, that such defensive provisions in the articles

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of association be revoked by the shareholders' meeting. Thus, the cooperation of the (major) shareholders may become crucial in M&A deals, always depending on the specific circumstances and structure of a transaction.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Directors and officers of a Swiss corporation owe a duty of care, loyalty, a duty to defend the interests of the company in good faith as well as the obligation of equal treatment of its shareholders. The board of directors owes these duties to the company. In order to fulfil such duties, it may have to engage professional advisors in complex transactions and if the involved persons do not have the necessary know-how and experience. As well, the directors have publication and notification duties in accordance with listing regulations (if applicable). Compliance with these obligations by the board of directors

ensures protection of stakeholders' interests to a certain extent and – beyond this statutory protection of interests – directors and officers may further take into account specific interests of stakeholders other than the company's shareholders in their actions. In addition, labour law legislation provides for protective regimes in connection with business combinations (cf. question 16). Nevertheless, there are no direct and enforceable duties of directors and/or shareholders to stakeholders in connection with a deal.

Certain specific additional duties apply to the board of the target of a public tender offer. In the interests of the company, the target's board has to seriously consider an approach by a potential bidder, but is not obliged to initiate an auction or enter into negotiations with a potential bidder if they decide that this is not in the company's best interests. Furthermore, bidders are to be treated equally by the target's board in certain circumstances (e.g. same due diligence access). After the public announcement of an offer, there are certain defensive measures that the target's board may not take and it has to report their intention to take specific defensive measures to the Swiss Takeover Board.

9. In what circumstances are break-up fees payable by the target company?

In general, break-up fees are payable only if mutually agreed by the contracting parties. Regarding break-up fees payable under an agreement, private and public acquisitions have to be distinguished. In private M&A transactions, the break-up fees payable by the target company may be mutually agreed within the statutory limits. When it comes to public M&A transactions, the practice of the Swiss Takeover Board provides guidance for determining the amount: The break-up fee must be (a) proportionate in its amount and (b) be based in particular on the costs and expenses incurred as a result of the offer. The Swiss Takeover Board assesses a break-up fee based on all relevant circumstances and without reference to a fixed threshold, either in absolute terms or as a percentage. The highest break-up fee deemed permissible to date was 1.99 percent of the offer value.

In addition, the principle of "culpa in contrahendo" (a quasi-contractual entitlement) may be applicable under very specific circumstances. However, as the target company is not a transactional party, it is generally not obliged to pay damages under the latter.

10. Can conditions be attached to an offer in connection with a deal?

In private M&A transactions, the bidder can decide either to make a conditional (e.g. subject to due diligence) or an unconditional offer to the vendor or vendors.

In public M&A transactions, voluntary and mandatory offers have to be distinguished:

(a) Mandatory offers have to be unconditional unless an important reason, such as the need to obtain a regulatory approval, results in an exception being applicable; and

(b) Voluntary offers may be subject to clearly defined, objective conditions (and these may, if reserved by the bidder, be subject to a right to waive). In addition, the bidder needs a justified interest and may not have a substantial influence on the conditions. He has to take reasonable measures to ensure the fulfilment of conditions that require his contribution in order to achieve fulfilment. At the end of the offer period, the bidder has to speak out on whether or not the conditions of the offer have been satisfied (or waived).

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

For private M&A transactions there are no legal requirements regarding financing. Usually the seller requires the buyer to provide proof that sufficient funds are available to complete the transaction.

In the case of a public takeover offer, the offeror has to provide the essential financing details in the offer prospectus. In addition, an independent audit firm has to confirm that the offeror has taken all necessary measures to ensure that the required funds are available on the closing date.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Swiss corporate law provides for two possible scenarios regarding the squeeze-out of minority shareholders:

(a) If a bidder holds more than 98 percent of the voting rights of the target after expiry of the offer period, it may, within a period of three months, request the court to declare the remaining equity securities null and void. Thus, the statutory squeeze-out procedure is a court procedure. For this purpose, the bidder must bring an action against the company (at the competent court at the seat of the target). The remaining shareholders may join the proceedings. Upon a respective court order, the target then issues these equity securities again and hands them over to the bidder against payment of the offer price or fulfilment of the exchange offer in favour of the owners of the invalidated equity securities. Not only the initiation of the squeeze-out proceedings but also the final court order must be published in, at least, the Swiss Official Gazette of Commerce (SHAB).

(b) Alternatively, the Merger Act allows a squeeze-out merger of corporations if the absorbing company does not own all, but at least 90 percent, of the shares of the transferring company that grant voting rights.

If the merger agreement provides only for a cash compensation payment to the minority shareholders (but not for shares in the absorbing company), the shareholders' resolution by the target company approving the merger agreement must be passed by at least 90 percent of the shares carrying voting rights.

13. What is the waiting or notification period that must be observed before completing a business combination?

Provided certain turnover thresholds are reached or a market dominant position within the meaning of the Cartel Act has been established, merger control filing (notification to the ComCo) is mandatory and has to be made prior to the completion of a merger. Usually, if all prerequisites are fulfilled, such filing is made after signing of the relevant agreements and in any case prior to completion.

When notified of a merger the ComCo decides whether an investigation is to be carried out. Within one month of such notification, the ComCo must inform the companies involved either (i) of the initiation of an investigation, or (ii) that it regards the contemplated transaction to be compliant with the applicable competition law (comfort letter).

During this period of time, the companies must not complete the contemplated transaction, unless the ComCo, at the request of the companies involved, has specifically authorized them to do so for good cause. Valid reasons for such a request are, inter alia, the imminent suffering of substantial financial damage or a consequential impossibility of transaction completion. If the ComCo does not inform the companies within this period, the combination may be implemented without reservation.

If the ComCo decides to conduct an investigation, the Commission's Secretariat will publish the main content of the notification of the concentration and the time limit within which third parties are invited to submit their observations on the notified transaction. At the beginning of the investigation, the ComCo decides whether the transaction may be provisionally implemented or completion remains suspended. Subject to exceptional delay caused by the companies involved, the investigation process takes up to four months.

If applicable and thus required, the merger control procedure can take up to five months

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Professional associations/memberships
Zurich Bar Association, Swiss Bar Association, International Bar Association, Young SECA.

in total and should therefore be adequately considered when drawing the timeline of an M&A transaction.

14. Are there any industry-specific rules that apply to the company being acquired?

Yes, as there are a few regulated industries in Switzerland (e.g. defense and arms, energy, financial sector, infrastructure, insurance, media, pharmaceuticals, public transportation, and telecommunication) and the bidder must carefully clarify whether industry-specific rules are applicable. If such rules exist, the respective parties also have to clarify which agency or agencies (e.g. Federal Electricity Commission as authority in the electricity sector, FINMA as financial market supervisory authority) need to be involved and which dates and deadlines have to be observed. Transactions in regulated industries may be subject to restrictions that may include authorisations (with or without conditions and obligations), notification duties and other duties and obligations.

15. Are cross-border transactions subject to certain special legal requirements?

Yes – cross-border transactions may be subject to the following special legal requirements:

(a) The Federal Act on the Acquisition of Real Estate by Persons Resident Abroad, informally referred to as "Lex Koller" (or "Lex

Friedrich"), regulates the extent to which persons who are regarded as persons abroad under the Lex Koller may acquire real estate (especially for residential purposes) in Switzerland. In other words, restrictions of the acquisition (direct as well as indirect) of real estate by persons abroad (non-residents of Switzerland as well as foreign-controlled companies) as defined in Lex Koller may be applicable. If the buyer is subject to the restrictions of Lex Koller and does not obtain an authorisation from the competent authority, the respective transaction remains binding between the parties but ineffective as long as no legally binding authorisation has been granted (and becomes null and void if carried out without authorisation, e.g. if the purchase of shares in a real estate company is closed);

(b) The Federal Act on the Implementation of International Sanctions (Embargo Act) has formed the legal basis for the implementation of sanctions imposed by Switzerland that have been ordered by the United Nations Organisation, by the Organisation for Security and Cooperation in Europe or by Switzerland's most significant trading partners and which serve to secure compliance with international law. Pursuant to the Embargo Act, compulsory measures may in particular (i) directly or indirectly restrict transactions involving goods and services, payments and capital transfers, and the movement of persons, as well as scientific, technological and cultural exchange and (ii) include prohibitions, licensing and reporting obligations as well as other restrictions of rights; and

(c) Federal acts regulating specific industries provide for restrictions (cf. question 14).

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

If the employer transfers the business or a part thereof to a third party by way of private asset deal or statutory merger under the Swiss Merger Act, the employment relationship and all corresponding rights and obligations automatically pass to the acquirer as of the date of the transfer, unless the employee refuses such transfer.

In the event that an employee refuses the transfer, the employment relationship ends on expiry of the statutory notice period. Until then, the acquirer and the employee are obliged to perform the transferred employment contract.

In due time before the transfer takes place, the employer must inform the employee representative committee or, where there is none, the employees themselves, of the reason for the transfer, as well as its legal, economic and social consequences for the employees. Where measures affecting the employees are envisaged as a result of such transfer, the employee representative committee or, where there is none, the employees themselves must be consulted in due time before the relevant decisions are taken. In a statutory merger, the employee representative committee / employees of both the absorbing and the absorbed entities must be consulted before the shareholders' meetings resolve on the merger.

The former employer and the acquirer are jointly and severally liable for any claims of an employee which fell due prior to the transfer or which fall due between the transfer and the date on which the employment relationship could normally be terminated or is terminated following refusal of the transfer.

The aforementioned rules do not apply to a private share deal or a public takeover offer. Employers cannot circumvent these rules by dismissing employees following which the acquirer re-hires them on different terms and conditions. Upon completion of the transfer, the acquirer may change terms and conditions of employment either by (i) mutual consent or (ii) terminating the current employment contract and at the same time offering new terms effective from the expiry of the individual notice period.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

(a) The amended Swiss Data Protection Act is expected to come into force in 2020, largely reflecting the regulatory content of the EU General Data Protection Regulation (GDPR). This will have a substantial impact on legal due diligence concerning also solely domestic M&A transactions (already a reality when it comes to M&A transactions involving EU companies or subsidiaries). Not only will sufficient data protection and compliance by the target company be a vital topic to be addressed within a thorough buy side due diligence review. Also, the transmission and sharing of documents for valuation and due diligence purposes via datarooms and AI document review tools have to be compliantly structured with respective agreements.

(b) The CO is about to be amended, tightening the transparency rules, following the implemented recommendations of the Groupe d'action financière (GAFI). The new legislation provides, in particular, that bearer shares are only permitted if the company has listed equity securities on a stock exchange or if the bearer shares are structured as intermediated securities ("Bucheffekten") and deposited with a custodian designated by the company in Switzerland or entered in the main register. If neither of these two exceptions applies to a company, it must convert its bearer shares into registered shares within 18 months of the entry into force of the new law, which is expected to happen early 2020. Furthermore, penal provisions are being introduced in order to further sanction non-compliance with this legislation.

(c) The validity of share transfers (without written assignment declaration) on the blockchain is currently one of the most discussed legal topics in the Fintech sector. De lege lata, the transfer of ownership of registered shares has to occur in written form, which is missing in a DLT transaction. The well-known advantages of this technology (speed, security, low transaction costs, no complications with international transactions, no intermediary, etc.) could soon also influence and be part of M&A deals. On 22 March 2019, the Federal Council opened consultation on the "Federal Act on Adapting Federal Law to Developments in Technology of Distributed Electronic Registers". With this mantle act, the Federal Council intends to make selective adjustments to various existing federal laws. These amendments are intended to adapt federal law to the recent developments in technology. The respective legislative process implementing regulation that will enable share transfers on the blockchain is ongoing. It is planned that the report on the consultation as well as the explanatory statement ("Botschaft") of the Federal Council on this federal act will be published before the end of 2019, which – however – seems to be quite ambitious.

(d) A fund for qualified investors (Limited Qualified Investment Fund, L-QIF) is about to be introduced into the Collective Investment Schemes Act, which does not require approval by the FINMA. This should improve the attractiveness of Switzerland as a fund centre and facilitate the market launch of innovative products. The consultation period ends on 17 October 2019.

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Sebastian P. Weber specializes in cross-border and domestic mergers & acquisitions (M&A) with a focus on private equity and venture capital transactions of all sizes. He assesses the legal opportunities & risks and negotiates & drafts share purchase agreements and ancillary agreements (e.g. shareholders' agreements) as well as all other agreements relating to his specialization.

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Sebastian P. Weber has an education in both law and economics, which allows him to expertly recognize and consider the economic aspects in his work as an Attorney at Law. In addition, he has a broad knowledge in other areas of law such as employment, intellectual property, real estate and competition. His mission is to support the clients as a responsive confidant with high-quality legal services so that they can focus on their core business.

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Professional associations/memberships

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About VISCHER

We effectively support our clients in a solution-oriented manner in legal, tax and regulatory matters. Our lawyers, tax experts and notaries are organized in the specialist practice teams listed below, each led by an experienced partner. This enables us to individually tailor our services to meet the requirements of the individual project in the most effective manner. Our offices are located in Zurich, Basel and Geneva, the three largest business centers of Switzerland. Independence is a key factor for the optimal protection of client interests. We therefore put great value on a very high conflict of interest standard that is no longer obvious in the international legal industry. In order to also remain independent in cross-border transactions, we have built up our own global network of foreign law firms enabling us to select our foreign attorneys based exclusively on the requirements of the individual mandates and without having to take into consideration the instructions of a law firm group or a network organization.

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- Private Clients
- Private Equity & Venture Capital
- Public Sector & Regulatory
- Real Estate
- Restructuring & Insolvency
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