The Acquisition and Leveraged Finance Review

Editor
Christopher Kandel

Law Business Research

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For further information please email
Nick.Barette@lbresearch.com

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PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
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SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

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EDITOR'S PREFACE

Acquisition and leveraged finance is a fascinating area for lawyers, both inherently and because of its potential for complexity arising out of the requirements of the acquisition process, cross-border issues, regulation and the like. It can also cut across legal disciplines, at times requiring the specialised expertise of merger and acquisition lawyers, bank finance lawyers, securities lawyers, tax lawyers, property lawyers, pension lawyers, intellectual property lawyers and environmental lawyers, among others.

The Acquisition and Leveraged Finance Review is intended to serve as a starting point in considering structuring and other issues in acquisition and leveraged finance, both generally but also particularly in cases where more than just an understanding of the reader's own jurisdiction is necessary. The philosophy behind the sub-topics it covers has been to try to answer those questions that come up most commonly at the start of a finance transaction and, having read the contributions, I can say that I wish that I had had this book available to me at many times during my practice in the past, and that I will turn to it regularly in the future.

Many thanks go to the expert contributors who have given so much of their time and expertise to make this book a success; to Nick Barette, Gideon Roberton and Shani Bans at Law Business Research for their efficiency and good humour, and for making this book a reality; and to the partners, associates and staff at Latham & Watkins, with whom it is a privilege to work. I should also single out Sindhoo Vinod and Aymen Mahmoud for particular thanks – their reviews of my own draft chapters were both merciless and useful.

Christopher Kandel
Latham & Watkins
September 2014

Chapter 19

SWITZERLAND

Lukas Wyss and Maurus Winzap[1]

I OVERVIEW

Although there have been signs of improvement, the Swiss market for leveraged acquisitions generally remained static during 2013.[2] However, there have recently been a number of remarkable transactions in Switzerland that either closed successfully or went through an intense bidding process or feasibility study phase. Such transactions included leveraged buyouts of large private and public Swiss targets, as well as a substantial number of smaller buyouts.

Large Swiss acquisition finance transactions are usually arranged through the London or US market and are placed with banks and institutional investors. Almost all large leveraged acquisition financing transactions in the Swiss market during 2013 and the start of 2014 were structured in a similar way. Like many other jurisdictions, these structures included either the placement of acquisition term-loan tranches with institutional investors (rather than banks), the issuance of high-yield notes or both.

In some transactions, bridge financing was provided to facilitate the acquisition process and the closing mechanics, and taken and refinanced by the high-yield notes financing as soon as possible after closing.

Debt packages for large leveraged acquisition finance transactions varied, *inter alia*, depending on the volume and leverage required. The transactions consisted of either senior debt only; or senior debt and one or several layers of junior debt.

In most cases, the debt package was completed by a (revolving) working capital facility lent at the target level and structured as super senior debt. The super senior level derives from the structural preference and is usually also reflected in intercreditor arrangements.

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1 Lukas Wyss and Maurus Winzap are partners at Walder Wyss Ltd.

2 Source: Ernst & Young.

Smaller Swiss domestic acquisition finance transactions, on the other hand, are often financed by Swiss banks, including Swiss cantonal banks and smaller financial institutions. These financings are usually held by the banks on their balance sheet until full repayment. Such transactions are also seen as a means of strengthening relationships.

II REGULATORY AND TAX MATTERS

i Regulatory matters

The mere providing of acquisition finance does not by itself trigger a licensing requirement under Swiss laws. A licensing requirement would only be triggered if lenders would refinance themselves by means of accepting money from the public or via a number of banks. Lending into Switzerland on a strict cross-border basis is currently not subject to licensing and supervision by the Swiss Financial Market Supervisory Authority.

ii Tax matters

The tax structuring of acquisition finance transactions is more challenging in particular due to the Swiss Non-Bank Rules.[3]

10/20 Non-Bank Rules

When structuring a syndicated finance transaction involving Swiss borrowers to comply with the Non-Bank Rules, the usual approach is to limit the number of non-banks (investors) to 10. This approach is obviously not feasible in larger leveraged acquisition finance transactions, where term-loan tranches or notes are placed outside of the banking market. Accordingly, funds under these transactions may not be raised by a Swiss borrower or issuer, but rather through a top-tier acquisition vehicle incorporated abroad in a jurisdiction that has a beneficial double tax treaty with Switzerland (for the purposes of up-streaming dividends without withholding). Given the generally beneficial double

3 The Swiss Non-Bank Rules comprise two rules: the Swiss 10 Non-Bank Rule and the Swiss 20 Non-Bank Rule. The Swiss 10 Non-Bank Rule defines, *inter alia*, the circumstances in which a borrowing by a Swiss borrower or issuer will qualify as 'collective fundraising' (similar to a bond). If the borrowing qualifies as collective fundraising, interest payments on the borrowing will be subject to Swiss withholding tax at 35 per cent.

Under these Rules, withholding tax will be triggered when either a lending syndicate consists of more than 10 non-bank lenders (Swiss 10 Non-Bank Rule) or a Swiss obligor has, on aggregate (that is, not in relation to a specific transaction only), more than 20 non-bank creditors (Swiss 20 Non-Bank Rule).

For the purposes of the Non-Bank Rules, a financial institution qualifies as a bank (whether the financial institution is Swiss or non-Swiss) if it is licensed as a bank and it performs genuine banking activities with infrastructure and personnel of its own.

Breach of the Swiss Non-Bank Rules can result in Swiss withholding taxes becoming applicable. Such taxes would have to be withheld by the Swiss obligor and may (depending on any applicable double taxation treaty) be recoverable in full or partially by a lender.

tax treaty between Switzerland and Luxembourg, typical structures often involve multi-level acquisition vehicles incorporated in Luxembourg.

If funds raised by a non-Swiss borrower are on-lent within the group to a Swiss target company, this may be regarded as circumvention by the Swiss Federal Tax Administration (SFTA). This is especially relevant if the Swiss target company guarantees and secures the acquisition financing. However, the SFTA has previously considered and approved structures that have included these structural elements by way of binding tax rulings. Nevertheless, the process must be carefully structured, with due consideration of the time needed for the tax rulings.

If the transaction includes a (revolving) working capital facility lent directly to the (Swiss) target companies, compliance with the Swiss Non-Bank Rules can only be achieved by limiting the number of non-banks to 10. To ensure the acquisition debt portion of the financing (which typically has more than 10 non-banks as lenders or noteholders) does not affect the working capital facility, it is key to structure these facilities in a manner that ensures that they qualify as separate financings for purposes of the Non-Bank Rules. Against this background, loss sharing provisions and similar (equalisation) provisions contained in intercreditor arrangements must also be carefully structured or confirmed by the SFTA (by way of a tax ruling) against the Swiss Non-Bank Rules.

Deductibility of interest expense

Under Swiss tax law, for income tax purposes interest incurred at the level of the acquisition vehicle is not available for set off against income generated at the Swiss target company level. This is because there is generally no tax consolidation under Swiss tax law (either in Swiss domestic or cross-border situations). However, there are means to (indirectly) 'push down' the acquisition debt portion, particularly if the existing debt can be refinanced at the target level. For the purposes of the Swiss Non-Bank Rules, this would need to be structured as a downstream loan from the acquisition vehicle to the target level (or by refinancing the existing debt at the target level, although that would result in a limitation of the number of non-banks to 10 for that portion of the debt in any event). However, given the on-lending of the proceeds of the acquisition debt, the Swiss Non-Bank Rules would have to be carefully addressed.

Alternatively, an (indirect) pushdown can be achieved by way of an equity-to-debt swap, where equity (freely distributable reserves or even share capital that can be reduced) is distributed (but not actually paid out) and then converted into a downstream loan. In recent transactions, additional pushdown of debt potential has been created by some post-acquisition restructuring steps (such as group internal sales of assets generating additional earnings and respective debt capacity).

If such a pushdown can be achieved, some of the interest incurred on the acquisition debt can be brought to the target company level and may become available for set off against income generated at the target level. The security package structure can also be improved in connection with such pushdown.

III SECURITY AND GUARANTEES

i Standard security package at closing

In leveraged acquisition finance transactions involving Swiss target companies, the acquisition debt portion usually benefits from the share pledge over the top Swiss target company. In most cases, the security package is completed by other security provided by the acquisition vehicle, such as security over:

a claims and rights under the share purchase agreement;
b claims and rights under due diligence reports;
c claims and rights under insurances (in particular, M&A insurances, if any); and
d bank accounts.

Share pledge

Under Swiss law, shares in stock corporations and limited liability companies can be pledged by written agreement and if share certificates have been issued handing over the certificate to the pledgee (duly endorsed or assigned (as applicable) in blank in the case of registered shares). While issuance and handing over of the certificates are not perfection requirements, it is generally considered to bring the pledgees into a factually stronger position in the case of enforcement. In addition, it is standard that any transfer restrictions in the target company's articles of association are removed. Provisions in the articles of association limiting the representation of shareholders at shareholders' meetings to other shareholders must also be lifted to ensure full flexibility when getting control over the shares. Given the lack of control over the target company pre-closing, it is generally standard to accept the issuance of certificates and the amendment of the articles of association to become conditions subsequent.

Claims and receivables

Claims and receivables (claims under the share purchase agreement, insurance claims, claims under due diligence reports, etc.) can be assigned under Swiss law for security purposes by means of a written agreement between assignor and assignee. The agreement must specify the relevant claims and can cover future claims as well, provided claims are described in a manner that allows clear identification upon such claims coming into existence. However, it must be noted that claims arising post-bankruptcy with a Swiss assignor would no longer be validly assigned and would be trapped in the bankrupt estate.

While assignability is generally given under Swiss law in the case that the underlying agreement is silent on or explicitly allows for an assignment, it is important that the underlying agreement does not contain a ban on assignment (*pactum de non cedendo*). Therefore, during the pre-signing phase, the parties must ensure that all relevant documents do not contain any restrictions on assignment (particularly the share purchase agreement, insurances, etc.) and, for clarity purposes, it is even recommended that important agreements explicitly allow for an assignment for security purposes to financing parties. The same applies for any due diligence reports, although getting the benefit through reliance will also be satisfactory in most circumstances (either directly deriving from the report or through additional reliance letters).

Although the requirement to notify third-party debtors (such as the sellers) is not a perfection requirement under Swiss law, it is strongly recommended that such parties are notified of the assignment for security purposes and the transaction as a whole, because a third-party debtor might, pre-notification, validly discharge its obligation by paying to the assignor.

Bank accounts

Security over Swiss bank accounts is typically provided by pledging the claims the account holder has against the account bank. An assignment for security purposes would also be possible (and would even be a slightly more direct security right), but account banks have become increasingly concerned in the past two years about know your customer and beneficial owner identification issues, because the assignment is, legally, a full legal transfer, while the pledge only provides for a limited right *in rem*. Again, a notification of the account bank is not a perfection requirement, but it is standard in the Swiss market to notify the account bank and seek confirmation from it that it waives all priority rights it may have in relation to the bank accounts on the basis of its general terms and conditions and otherwise. Such confirmation should also outline the mechanics on blocking the account upon further notification.

Timing of providing security on closing

The security provided by the acquisition vehicle can be entered into and perfected pre-closing, except for the share pledge, which can only be perfected upon closing of the transaction, immediately after the acquisition of the shares by the acquisition vehicle. From a Swiss point of view, there is nothing that would make it overly burdensome or impossible to perfect the security as soon as the transaction is completed or closed. However, some items (such as the amendment of articles of association or notices) will have to become post-closing items, but, as described above, that does not prevent perfection of the security interest as such.

ii Standard target-level security package

Security is typically granted by the Swiss target companies. The target-level security package is similar to fully-fledged security packages in other jurisdictions and may include, *inter alia*, security over:

a shares in subsidiaries;
b trade receivables;
c intercompany receivables;
d insurance claims;
e bank accounts;
f intellectual property; and
g real estate.

See above for a description of security over most of these assets.

Real estate

Security over real estate is typically taken by way of taking security over mortgage certificates. A mortgage certificate is issued either in bearer or in registered form or, since

January 2012, is available in a paperless version and creates a personal, non-accessory claim against the debtor, secured by a property lien. Unless pre-existing mortgage certificates are available, the creation of new mortgage certificates requires a notarised deed and registration of the mortgage certificate in the land register. Once created, the mortgage certificates will be transferred for security purposes under a written security agreement without further notarisation or entry into the land register (except in the case of paperless mortgage certificates).

One important tax point has to be considered, as interest payments to non-Swiss resident creditors of loans secured by Swiss real estate are subject to withholding tax at source, unless the lender is located in a jurisdiction that benefits from a double tax treaty with Switzerland providing for a zero rate. Accordingly, in the case of a Swiss borrower, it must be ensured that only 'Swiss treaty lenders' will be secured by real property in order to avoid the risk of withholding tax applying on interest payments. Swiss treaty lenders are persons that:

a have their corporate seat in Switzerland or are lending through a facility office (which qualifies as a permanent establishment for tax purposes) in Switzerland, and that are entitled to receive any payments of interest without any deduction under Swiss tax law; or

b are lenders in a jurisdiction having a double tax treaty with Switzerland providing for a zero per cent withholding tax rate on interest payments.

In particular due to these tax issues, security over real estate is normally only considered if there is substantial real estate located in Switzerland.

In the case of a foreign borrower (such as a foreign acquisition vehicle), the issue basically remains the same, but it can be considered to apply for an exemption through a tax ruling application. While such tax ruling has been obtained very recently in a few cantons, the process of getting such ruling in other cantons might be quite lengthy and therefore costly (and the outcome is possibly vague). Without a satisfactory tax ruling, real estate located in Switzerland cannot be granted as security due to the risk of potential withholding tax on interests payments.

Intellectual property

Under Swiss law, security over intellectual property is typically taken by way of pledge. A written pledge agreement is required, in which the intellectual property right must be specified. As a matter of Swiss law, no registration is required for the valid perfection of the pledge over intellectual property. However, if not registered, the intellectual property may be acquired by a *bona fide* third-party acquirer, in which case the pledge would become extinct. While a Swiss law pledge over foreign intellectual property is valid as a matter of Swiss law, it should be double-checked whether validity of the security interest would also be recognised under relevant foreign law, or whether – as an example – registration would be a perfection requirement. Accordingly, with regard to foreign intellectual property of certain importance and value, it is advisable to register the pledge in the relevant register. Security agreements typically provide for a registration obligation for the pledge over important intellectual property on day one and for all other intellectual property upon the occurrence of an event of default.

Difficulties in taking security over moveable assets

Due to strict repossession requirements under Swiss law, it is difficult to get security over moveable assets (such as inventory or equipment) without substantially disturbing the daily business of the security provider. There are structuring solutions around this issue (such as pledge holder structures or OpCo or PropCo structures), but these solutions are usually only implemented in situations where there is a specific focus on a specific asset (raw materials with substantial value, larger car fleets, aircraft parts, etc.).

Timing of providing target-level security

Unless there is some cooperation from the seller to start preparing target-level security pre-closing (and depending on exact release mechanics from existing financings), target-level security might only be available post-closing, and it is usually agreed that target-level security might be completed as a condition subsequent.

iii Financial assistance and up and cross-stream security

Standard upstream limitations will apply to Swiss target-level guarantees and security. These limitations might affect the security substantially, particularly in situations of financial distress. However, if structured properly and if using all available mitigants, such limitations are generally accepted by investors and lenders.

If the structure also includes a downstream loan from the acquisition vehicle to the Swiss target companies (often used for tax purposes as a pushdown of debt and for the repatriation of the cash flows), the Swiss target company can provide (unrestricted) security to secure such downstream loan, because it would secure its own debt rather than parent debt. Accordingly, this would not qualify as upstream security. The acquisition vehicle in turn might provide security over the downstream loan, along with the (unrestricted) security package securing such downstream loan. From a Swiss corporate law perspective, there is a good chance that upstream limitations would not apply to that security structure. However, such a security structure should be discussed with the SFTA in the light of the Swiss Non-Bank Rules.

IV PRIORITY OF CLAIMS

i Statutory priority of claims

Upon bankruptcy over a Swiss entity, certain creditors would benefit from statutory priority:

a secured claims are satisfied with priority directly out of the enforcement proceeds; any surplus will be shared among (unsecured) creditors generally, and any shortfall would be treated as a third-class claim; and

b claims incurred by the bankruptcy or liquidation estate or during a debt restructuring moratorium with the administrator's consent rank above unsecured claims.

In relation to unsecured claims, there are three priority classes: the first class mainly consists of certain claims of employees as well as claims of pension funds; the second class

consists of claims regarding various contributions to social insurances and tax claims; and the third class consists of all other unsecured claims.

ii Contractual structuring of priority of claims

Within the third class, creditors and the debtor are free to contract on the ranking of such claims among themselves. Typically, in Swiss acquisition finance transactions, the priority of claims among various debt investors is reflected on the basis of intercreditor arrangements rather than on the basis of structural subordination. It should be noted, however, that in larger transactions, the acquisition structure is most often set up outside Switzerland. In addition, where the investor base would expect a structural subordination, such structure is implemented, but rather for marketing purposes.

Under Swiss law, intercreditor arrangements that provide for the priority of claims are generally binding on the parties involved and also on insolvency officials of an estate. However, given that there are hardly any relevant precedents, it cannot be excluded that an insolvency official would treat all non-secured creditors indiscriminately as third-class creditors, and consider the priority of payments as a mere arrangement among creditors of the estate in relation to their respective claims in relation to the estate and pay them out on a *pro rata* and *pari passu* basis. In such case, the parties to the intercreditor arrangement may have to rely on the redistribution by the creditors among themselves.

iii Equitable subordination

The concept of equitable subordination is neither reflected in codified Swiss law nor well established in Switzerland. Even though there are no conclusive precedents, equitable subordination is generally only discussed in connection with shareholder loans. It is unclear whether the holding of a very small equity stake would be sufficient for a qualification of a loan as shareholder loan. It would appear that the terms of the loan and the circumstances under which it has been granted are more relevant than the specific percentage of shareholding. Against this background, it can be concluded that a loan granted in proportion to the shareholding of a small shareholder (together with all other shareholders) could be problematic, while the holding of a portion in a larger (syndicated) loan (at arm's length) by a bank seems to be unproblematic, even if that bank would hold an equity stake in the relevant Swiss company.

Basically, a parent company will be treated as any other third-party creditor of such Swiss subsidiary in the framework of a Swiss bankruptcy proceeding. The risk of a shareholder loan being deemed to be either subordinated against all other (non-subordinated) creditors, or to be treated like equity (in which case, the parent company would only be satisfied together with all other equity contributors), arises only under very specific circumstances.

Elements that could be relevant are:

a that the shareholder loan is granted in a situation where the Swiss subsidiary is already over-indebted;

b that the parent company had (or should have had) knowledge of the over-indebtedness of its Swiss subsidiary while granting the shareholder loan;

c that the granting of the shareholder loan resulted in the Swiss subsidiary having upheld its business activities, and accordingly in a deferral of the opening of bankruptcy proceedings over the Swiss subsidiary; and

d that the deferral of the opening of bankruptcy proceedings results in a (potential) damage of other creditors of the Swiss subsidiary.

A few scholars suggest applying a stricter regime (*per se* subordination of shareholder loans in bankruptcy; application to the concept to third-party loans, etc.), but it must be noted that court decisions where the concept of equitable subordination has been applied are fairly rare and, accordingly, that concept cannot be regarded as well established as such. Therefore, we see little room for the application of such concept, in particular where loans are granted on an arm's-lengths basis and to Swiss companies that are not over-indebted.

V JURISDICTION

The submission by a Swiss company to the exclusive jurisdiction of the courts of England or any other non-Swiss forum is generally binding on such Swiss company. It should be noted, however, that under Swiss law, jurisdiction clauses may have no effect as regards actions relating to, or in connection with, insolvency procedures that, as a rule, must be brought before the court at the place of such insolvency procedure. Furthermore, contractual submissions to a particular jurisdiction are subject to the mandatory provisions on the protection of consumers, insured persons and employees pursuant to the Lugano Convention, the Swiss Federal Private International Law Act (PILA) and such other international treaties by which Switzerland is bound. Pursuant to the PILA and the Lugano Convention, Swiss courts may also order preliminary measures even where they do not have jurisdiction over the substance of the matter.

Enforceability in Switzerland of a foreign judgment rendered against a Swiss company is subject to certain limitations set forth in (1) the Lugano Convention, (2) such other international treaties under which Switzerland is bound and (3) the PILA. In particular, a judgment rendered by a foreign court may only be enforced in Switzerland if:

a (in the case of (2) and (3) and, in certain exceptional cases, (1), the foreign court had jurisdiction;

b the judgment of such foreign court has become final and non-appealable or, in the case of (1), has become enforceable at an earlier stage;

c the court procedures leading to the judgment followed the principles of due process of law, including proper service of process; and

d the judgment of the foreign court on its merits does not violate Swiss law principles of public policy.

In addition, enforceability of a judgment by a non-Swiss court in Switzerland may be limited if the Swiss company can demonstrate that it was not effectively served with process (a service of process on the Swiss company will have to be made in accordance with the Hague Convention).[4]

4 Hague Convention of 15 November 1965 on service of judicial or extrajudicial documents abroad in civil and commercial matters.

VI ACQUISITIONS OF PUBLIC COMPANIES

While the financing of public takeover transactions generally involves the same structural considerations as other leveraged acquisition financing transactions, a number of additional, specific elements arising from the public takeover regime must be considered. One of the main challenges to overcome under Swiss law is that the Swiss takeover board would not allow an acceptance threshold for the public takeover that is as high as the level of control needed to proceed with a squeeze-out of minority shareholders and gain 100 per cent control over the target. In the context of financing a leveraged public takeover this is a challenge, because there is a chance that the bidder will be stuck with a majority stake only (i.e., less than 100 per cent).

i Structuring of public tender offers and options for squeeze outs

Under Swiss law, a public tender offer may contain only limited conditions and, in the event that these conditions are satisfied, the bidder is obliged to complete the transaction. One of the permitted conditions is to include an acceptance threshold (that is, the requirement to complete the transaction when a certain percentage of shares are tendered to the bidder). However, an acceptance threshold of more than two-thirds (66.66 per cent) will require approval from the Swiss takeover board. Although there are good chances that this threshold can be pushed to 75 per cent, it is unlikely that the takeover board will accept any threshold above 75 per cent.

Following the completion of a public tender offer (that is, after the lapse of the additional acceptance period), the bidder has the following options available to gain 100 per cent control over the target:

a squeeze-out merger: under Swiss merger law, a minority squeeze-out is available if the majority shareholder holds at least 90 per cent of the Swiss target shares. A squeeze-out merger is usually perfected by merging the Swiss target company with a newly incorporated (and 100 per cent owned) affiliated company (preferably a sister company incorporated for this purpose). The process for merging the two companies would take three to six months. However, minority shareholders have appraisal rights and can block the recording of the merger in the commercial register, which may delay the closing of the merger and, hence, the entire process. In addition, given the appraisal rights of minority shareholders, it is important to kick off the merger process (and the entering into of the merger agreement) only six months after the lapse of the additional acceptance period in order to eliminate any risk of being in conflict with the 'best price rule'. Under the best price rule, if the bidder acquires target shares in the period from the publication of the offer until six months after the additional acceptance period at a price that exceeds the offer price, this price must be offered to all shareholders; hence, there is a risk that through the appraisal rights that shareholders have in the merger process, a higher price may be determined, which potentially must be offered to all shareholders (also retroactively); or

b squeeze-out under Swiss takeover law: if, following a public tender offer, the bidder holds 98 per cent or more of the Swiss target shares, a squeeze-out of minority shareholders can be initiated. This process takes two to three months and involves a court ruling. The 98 per cent level must be reached within three

months after the additional acceptance period has expired. Contrary to a squeeze-out merger, minority shareholders have no appraisal rights, as they receive simply the offer price. Similarly, blocking the recording in the commercial register is not possible, as the commercial register is not involved.

Following the completion of a public tender offer, if the bidder holds less than 90 per cent of the Swiss target shares, no squeeze-out is available. Although the bidder can try to buy additional shares over the market (the best price rules will have to be closely monitored), or an additional public tender offer may be launched, there is no absolute certainty that the bidder will get to 90 per cent. Once the 90 per cent threshold is reached, a squeeze-out merger will become available again.

ii Certain funds requirements

Under Swiss law, certain funds requirements can be summarised as follows:

a certain funds must be available on the launch of the offer (i.e., publication of the final offer and the offer prospectus), and certain funds must be confirmed by a special auditor (it is, however, prudent for a bidder to ensure certain funds upon pre-announcement of the offer already, because the bidder must proceed with the offer within six weeks of the pre-announcement being published); and

b the offer prospectus must provide for financing details and confirmation from the special auditor.

Typically, only the very basic terms of the financing will have to be disclosed in the offer prospectus, and it would not be necessary to disclose details on pricing and fees and similar commercial terms.

Given the certain funds requirements, the financing may only contain limited conditions precedent. The Swiss takeover board has issued guidelines in this respect (it should be noted that supervisory authorities and courts are not bound by such guidelines, but the guidelines are still generally considered an important indication) and, according to these, the following conditions are generally acceptable:

a conditions that match conditions contained in the offer;

b material legal conditions relating to the bidder, such as status, power, authority, change of control;

c conditions relating to the validity of finance documents, in particular security documents and the creation of security thereunder;

d conditions relating to material breaches of agreements by the bidder, such as *pari passu*, negative pledge, no merger, non-payment; and

e material adverse changes in relation to the bidder.

Generally, however, market and target material adverse change clauses are not permitted.

iii Consequences on financing and further considerations

Potential financing structures

Given the required structure of a public tender offer, the financing must be available and committed even though it is not absolutely certain that the bidder will ever get

100 per cent control over the target. This situation is quite challenging from a financing perspective. This challenge could be approached in two ways:

a one approach could be to simply apply a more conservative overall leverage; however, this does affect the overall economics of the transaction considerably, and will ultimately influence the bid price and the chances of the tender offer being successful; or

b alternatively, two different financing structures could be prepared.

The difficulty in preparing two financing structures is that parties would only know which structure materialises upon the lapse of the additional acceptance period; hence, it might be challenging for the arrangers and book-runners, as there will only be a limited amount of time available between the lapse of the additional acceptance period and the close of the transaction for purposes of marketing the financing transaction.

If the bidder holds at least 90 per cent of the Swiss target's shares, the period from the first drawdown to the point where the bidder would control 100 per cent would still take a couple of months. In the squeeze-out merger scenario, it is prudent to wait until the best price rule has lapsed before entering into the merger agreement, as this would eliminate the risk of a successful appraisal action having retroactive effect on the offer price in the public tender offer (violation of the best price rule). Accordingly, it can be expected that the merger will be completed within eight to 10 months after the lapse of the additional offer period, but it is prudent to add an additional two months, as a minority shareholder could potentially delay the process.

Interim period

During the time period when minority shareholders are in the structure, access to target-level cash flows would be limited because it is difficult to structure upstream loans to a majority shareholder in a manner compliant with the principle of 'equal treatment of shareholders', and any leakage of dividends to minority shareholders should be avoided (this is true for two reasons: first, any leakage to minority shareholders would result in the bidder incurring a cash drain; and second, if the market ever found out that there is a chance that dividends would be paid in the interim (and any person involved in the structuring of the financing knew about this), it would be a bad sign for the success of the tender offer). Therefore, the transaction will require some overfunding to ensure a proper debt servicing during the post-closing period, when target-level cash flows are not available.

Furthermore, target-level security is not available in the interim period, because that would again raise questions under the principle of 'equal treatment of shareholders'.

In addition, while the Swiss target company is still publicly listed, it is subject to *ad hoc* publicity obligations and, accordingly, information can only be provided to all investors at the same time, and any pre-information for selected investors might raise concerns. Availability of information to majority shareholders and banks might also be limited due to the concept of equal treatment of shareholders.

Delisting

As seen, the squeeze-out options are limited and are essentially only available if the bidder controls 90 per cent or more in the Swiss target company. However, it should

be considered whether a delisting of the Swiss target company would already be feasible in a scenario where the majority shareholder controls less than 90 per cent. SIX Swiss Exchange's delisting directive was recently amended, and the period between announcement of the delisting and the last trading day will be set by SIX Swiss Exchange between three and 12 months. However, such period may be shortened if delisting occurs following a takeover process.

VII OUTLOOK

The most important expected change of law that will affect lending in Switzerland generally (and in particular leveraged acquisition finance transactions) relates to Swiss withholding tax. Switzerland is about to consider fundamental changes to its withholding tax system. Under a new law proposed by the Federal Council on 24 August 2011, the current deduction of 35 per cent by the issuer of bonds on interest payments at source will, if effected, be substituted for a respective deduction by Swiss paying agents (subject, in principle, to an exception for foreign investors). The scope of the withholding tax will be broadened, and encompasses not only bonds and facilities of a Swiss issuer or borrower but also bonds and facilities issued by a foreign issuer or borrower (including, unlike under the current system, bonds and facilities issued by a foreign subsidiary guaranteed by the Swiss parent company) if the interest is paid by a Swiss paying agent. However, interest payments to persons that are not individuals (e.g., interest payments to companies) will, in principle, be excluded from the withholding tax (and an affidavit procedure will be introduced allowing, under certain circumstances, a Swiss paying agent to make an interest payment to a person resident outside Switzerland without a withholding tax deduction). This change should discourage foreign bond and facilities issuances by Swiss groups and is supposed to enhance the Swiss market. It remains to be seen what the exact impact of the proposed changes will be on the 10/20 Non-Bank Rules in general and, more specifically, on the structuring of leveraged acquisitions in Switzerland.

Appendix 1

ABOUT THE AUTHORS

LUKAS WYSS

Walder Wyss Ltd

Lukas Wyss is a partner in the banking and finance team of Walder Wys. He advises banks, insurers and other companies in connection with a broad variety of finance transactions, capital market transactions and, more generally, in regulatory, securities and corporate law matters. In finance, he focuses on corporate debt finance, leveraged finance, acquisition finance, asset finance (including real estate finance) as well as structured finance and securitisation. He has advised banks in some of the largest acquisition finance transactions in the first half of 2014.

Mr Wyss was educated at Zurich University and Lausanne University (*lic iur* 2000) and Columbia University, New York (LLM 2006, James Kent Scholar). He was admitted to the Zurich Bar in 2002. Before joining Walder Wyss in 2007, he gained working experience as a district court law clerk (Meilen, ZH) and as attorney at major law firms in Zurich and New York.

Mr Wyss speaks German, English and French. He is registered with the Zurich Bar Registry and admitted to practise in Switzerland.

MAURUS WINZAP

Walder Wyss Ltd

Maurus Winzap is a partner in the tax team of Walder Wyss. He focuses on domestic and international tax issues, particularly in corporate reorganisations, restructurings, structured finance, acquisitions and divestments. Other areas of expertise include tax planning for collective capital investments and cross-border relocations. He lectures and publishes regularly in the field of taxation. Mr Winzap is a lecturer in international tax at the Swiss Institute of Taxation and a member of the board of examiners for the Swiss certified tax expert exams. He is the chair of the organising committee of the 69th congress of the International Fiscal Association (IFA), which will take place in

Switzerland 2015. In addition, he is a member of the executive board of the Swiss Tax Law Association (Swiss branch of IFA).

Mr Winzap received his degree in law from the University of Zurich in 1997 and his master's of law from the University of Virginia in 2002. He was admitted as a Swiss certified tax expert in 2004.

Mr Winzap speaks German and English. He is registered with the Zurich Bar Registry and admitted to practice in all Switzerland.

WALDER WYSS LTD
Seefeldstrasse 123
8034 Zurich
Switzerland
Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
lukas.wyss@walderwyss.com
maurus.winzap@walderwyss.com
www.walderwyss.com