The surging European deal market has seen hostile bids return to Switzerland — a phenomenon that has coincided with a major overhaul of the country's takeover regime. Urs Gnos and Ueli Sommer report

Renewing hostilities

Compared with 2004, Swiss M&A activity increased in 2005. In recent years, hostile public takeovers have been rare, but this changed towards the end of 2005. Among the most notable transactions were the intended acquisition of flooring group Forbo by CVC Capital Partners, which failed due to the resistance of a minority shareholder, and the takeover battles for Saia-Burgess Electronics and Leica Geosystems.

Mergers

On 1 July, 2004, the Federal Law regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities (the Merger Act) came into force, establishing — among other things — the legal framework for mergers.

Pursuant to the Merger Act, the merging companies have to enter into a merger agreement. The supreme management and supervisory bodies of the merging companies have to establish a merger report. A specially-qualified auditor is to review the merger agreement, the merger balance sheet and the merger report(s). The shareholders of the merging companies must approve the merger, which must be registered with the competent registers of commerce. Upon registration, the merger becomes legally effective, all assets and liabilities of the acquired company are transferred to the acquiring company by operation of law and the acquired company is deleted from the register of commerce. The shareholders of the acquired company become shareholders in the acquiring company.

Pursuant to the Merger Act, the merger agreement can set forth a distribution of cash or other compensation, or, subject to certain conditions, even a compulsory compensation, instead of shares in the acquiring company to the shareholders of the acquired company (squeeze-out merger). The Merger Act further contains provisions for the protection of creditors and employees.

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Asset deals

The Merger Act provides also for transfers of assets and liabilities or parts thereof of one legal entity to another legal entity by operation of law. As asset deals under the Merger Act become effective only upon registration — when all documentation becomes publicly available — most asset deals are still effected under the alternative legal regime (also referred to as a traditional asset deal), which was already available before the Merger Act entered into force.

A traditional asset deal requires that each asset is transferred and each liability is assumed separately in accordance with the usual formalities for the transfer of ownership or the assumption of liability. If a traditional asset deal is used, agreements and governmental authorisations can only be transferred with the consent of the contractual third party or the relevant governmental authority, except for employment agreements (subject to the opposition of the employee) and certain insurance and rental agreements (subject to conditions). It is disputed among scholars whether this also applies to transfers of assets and liabilities under the Merger Act.

Public takeovers

The Federal Act on Stock Exchange and Securities Trading and the relevant ordinances provide the basic framework for public tender offers of Swiss resident companies with at least one class of equity security listed on a Swiss exchange, or non-Swiss target companies listed on a Swiss exchange, if the management of the target is in Switzerland (subject to conditions).

Anyone who acquires — directly, indirectly or acting in concert with third parties — equity securities which, when added to the securities already owned, exceed the threshold of 33% of the voting rights of a Swiss company listed in Switzerland, is normally obliged to submit a tender offer for all listed securities of the target. This applies unless the target's articles of incorporation raise this threshold to 49% (opting up) or eliminate the obligation to submit a tender offer (opting out).

If, after the tender offer period, the bidder holds more than 98% of the voting rights of the target, the bidder may request a squeeze-out of the remaining shareholders. An alternative would be a squeeze-out merger, as provided by the Merger Act, although this would require a 90% majority of the voting rights of the acquired company.

The Swiss Takeover Board (TOB) recently held that an acting in concert is given if several business partners each acquire a similar number of shares in a target, agree on and implement a common business strategy through board membership and pursue their common goals over a period of years. The amendment of shareholder agreements (whether in respect of the participating shareholders or material terms) can also lead to the establishment of a new group.

The existence of approvals from antitrust authorities or the valid completion of a capital increase of a bidder for the financing of a tender offer are considered permissible conditions subsequent. The replacement of the board of directors of the target or the removal of statutory transfer restrictions, meanwhile, are considered permissible conditions precedent. It is permissible that the bidder makes its offer conditional upon the acquisition of a minimum number of shares of the target, provided that the threshold is not too high. Otherwise, the fulfilment of such a condition would be at the sole discretion of the bidder.

Although an agreement between the target and the bidder on a compensation, in case the tender offer fails, is in principle deemed to be permissible, it is held by the TOB that such an agreement can limit the freedom of action of the shareholders to accept the offer. It must therefore be determined on a case-by-case basis whether the shareholders see themselves as compelled to accept the offer in order to prevent loss of value — a situation which would render the compensation not permissible.

The TOB further held that the launch of a share buy-back programme by a target during an offer period is not deemed to be an unlawful defence measure. However, the target would be obligated to publish full details of the buy-back programme — so that the shareholders may make an informed decision. The modification of employment agreements of the target's management during the offer period may be regarded as an obstacle to a bidder and therefore constitute an unlawful defence measure (subject to exceptions).

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