



# M&A IN SWITZERLAND

Christoph Neeracher is a partner at Bär & Karrer and co-head of the private M&A and private equity practice group. He is recognised as one of the preeminent private M&A and private equity attorneys at law in Switzerland and a leading lawyer in financial and corporate law by *IFLR 1000* (2011–2016), *Chambers Europe* and *Chambers Global* (2010–2016), and *The Legal 500* (2012–2016), among others.

Christoph is experienced in a broad range of domestic and international transactions, both sell-side and buy-side (including corporate auction processes). He advises clients on general corporate matters and corporate restructurings, as well as on transaction finance and general contract matters, relocation and migration projects, and all directly related areas such as employment matters for key

employees (eg, employee participation and incentive agreements). In his core fields of activity he represents clients in litigation proceedings.

Philippe Seiler is an associate at Bär & Karrer. He has a broad experience in M&A transactions in various industries, including healthcare, manufacturing and engineering, IT, watch, real estate, logistics and pharmaceutical and biotechnology.

Philippe not only covers large transactions and takeovers, but also focuses on small- and medium-sized M&A transactions, private equity transactions, management buyouts and outsourcing projects. In addition, Philippe focuses on reorganisations and restructurings, general contract and commercial law, real estate transactions as well as healthcare law.

# “The Swiss M&A market and, in particular, the private equity market seem to be in good shape, in spite of some geopolitical uncertainties.”

*GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?*

**Christoph Neeracher & Philippe Seiler:** Compared to 2016, M&A activity in the first half of 2017 has shown an overall marked stability. Although transaction volume has dropped marginally on a year-on-year comparison, deal activity remains at a high level. That said, the number of transactions involving private equity investors increased, particularly in the second quarter of 2017, with 31 deals recorded. Accordingly, of the 10 largest transactions conducted in Switzerland in the first half of 2017, no fewer than three involved a private equity buyer. Thus – broadly speaking – the Swiss M&A market and, in particular, the private equity market seem to be in good shape, in spite of some geopolitical uncertainties (such as Brexit), which have emerged in the recent past. The following key factors can be identified for this continuingly positive trend. Firstly, despite new regulations on capital outflows, the appetite of Chinese investors for investment opportunities in Switzerland has not shown signs of waning in 2017 with the acquisitions of Dufry and of Glencore’s oil products and logistics business, and we estimate that Chinese buyers will increase their activity in the Swiss M&A market in the future. Secondly, the ongoing availability of transaction financing at attractive interest rates and generous borrowing conditions continue to facilitate the funding of potential acquisitions, and puts pressure on investors to invest. Private equity investors, who tend to be highly leveraged, are in particular benefiting from this environment. Thirdly, Switzerland remains attractive for investors with various investment opportunities – notably small- and medium-sized enterprises, which will need to deal with succession planning in the coming years (estimated to be approximately 80,000), are particularly attractive targets for (private equity) investors.

*GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?*

**CN & PS:** Transactions involving industrial and consumer goods companies have been particularly frequent. Other active sectors include technology, media and telecommunications, healthcare, pharmaceuticals and life sciences and financial services.

2016 was a strong year for the commodities sector as well, with a deal value increase of 297 per cent compared to 2015, notwithstanding the fact that there was the same number of deals compared to 2015 in this sector. In the industrial market sector, stability returned to a certain extent after the SNB’s decision to remove the Swiss franc/euro minimum exchange rate at the beginning of 2015. In the industrial sector, the number of deals increased by 54 per cent, while the deal values decreased by the same number compared to 2015.

Activity in the power and utilities market has been rising by 148 per cent in deal values compared to 2015.

*GTDT: What were the recent keynote deals? What made them so significant?*

**CN & PS:** In February 2017, US-based Johnson & Johnson announced their takeover of the Swiss biotech company Actelion for a deal value of approximately US\$30 billion. Following the acquisition of Syngenta by ChemChina in 2016, this was already the second ‘blockbuster’ deal on the Swiss M&A market within a year, and one of Switzerland’s five largest transactions of all time. Then, in May 2017, Clariant and Huntsman announced their intention to merge, in a cross-border all stock merger structured as a reverse triangular merger, with Clariant remaining as the parent company. The new company, which will be called ClariantHuntsman, will have an enterprise value of approximately US\$20 billion. Another striking deal so far in 2017 is the acquisition of Breitling, one of the last independent Swiss luxury watch manufacturers, by CVC Capital Partners, a deal that is symbolic of the dominance of private equity players on the Swiss M&A market.

*GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?*

**CN & PS:** Generally speaking, consideration may either consist of cash, shares, securities or a combination thereof. Cash settlements tend to be more frequent, as share deals are usually only accepted by the seller if the shares given as

consideration are readily marketable, as is the case especially for publicly listed companies. Tax considerations also typically play an important role in determining the type of consideration that is eventually agreed upon.

The type of consideration accepted will in each case depend largely on the shareholders involved and their intentions, as well as on the specific transaction type and process.

**GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?**

**CN & PS:** Over the past few years, regulation has become a central strategic aspect of M&A deals. The complexity of the regulatory environment – and thus the requirements and costs for market participants – are increasing, while the strategic scope is getting smaller. Even if Switzerland is not a member of the European Union, European directives play an important role in impacting the Swiss market. In particular, the following regulations are noteworthy: as part of a new Swiss legislation, which aims at preventing money laundering and tax evasion, any entity acquiring 25 per cent or more of a non-listed Swiss company must inform the target of the identity of the acquiring entity's beneficial owner and provide updates of any changes thereto. In standard private equity structures, the administrative burden of this new legislation can – in our view – be minimised by implementing a practical solution which is compliant with the rules. As, typically, the general partner takes the relevant decisions regarding the fund and its portfolio companies, the individuals controlling the general partner (respectively controlling the ultimate shareholder of the general partner) should be disclosed as beneficial owners in the sense of this regulation. If such individuals cannot be determined, the top executive officer (chairman or CEO) of the general partner, respectively of its ultimate shareholder, may be disclosed.

A new law approved by Swiss voters in 2013, which is intended to limit so-called 'fat-cat' salaries has been introduced for companies publically listed on a Swiss stock exchange. The law introduces a range of mandatory rules on transparency and compensation that have in turn increased administrative costs for companies. Violation of the law may, in extreme cases, have criminal law consequences. The law requires the articles of association to include rules on additional remuneration for the board and senior management. Furthermore, the aggregate compensation of the board of directors and the senior management must now be approved by the annual general meeting. The voting rules at the shareholders' meeting have been overhauled, which strengthens the role of the independent proxy advisers.



Christoph Neeracher



Philippe Seiler

# “Switzerland remains highly attractive for inbound investment with plenty of opportunity – notably small- and medium-sized enterprises (SMEs).”

**GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?**

**CN & PS:** Switzerland remains highly attractive for inbound investment with plenty of opportunity – notably small- and medium-sized enterprises (SMEs), which will need to deal with succession planning over the coming years, serve as particularly attractive targets for investors. According to a study prepared by Deloitte, the first half of 2017 was a steady period for Swiss SME transactions. As in past years, the majority of transactions involving Swiss SMEs were cross-border (63 per cent). The most active foreign investors in these transactions were from North America and Japan. Specific restrictions that apply to foreign buyers only are limited. One such restriction is the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (Lex Koller), which states that a special permit is needed whenever a foreign citizen acquires, directly or indirectly (ie, by purchasing shares of a company) real property, without using said property as a permanent business establishment.

**GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?**

**CN & PS:** Traditionally, shareholder activism has not been a part of Switzerland’s corporate scene, due to the rights of minority shareholders being quite limited.

However, in recent years there has been a growing trend towards shareholder activism in Switzerland, as reflected globally and, especially more recently, in Europe. Examples include the involvement in the ultimately rejected Monsanto bid for Syngenta, the replacement of several board members of Gategroup by RBR Capital Advisors AG or the challenge to the merger between Holcim and Lafarge.

To sum up, shareholder activism is still a rather new phenomenon in Switzerland, with numerous barriers posed by Swiss regulation. Companies at risk of becoming a target may

nevertheless be well advised to implement a number of structural defences.

**GTDT: Take us through the typical stages of a transaction in your jurisdiction.**

**CN & PS:** The general procedure, as well as the different stages, vary substantially from one case to another, depending on, *inter alia*, the seller, the purchaser and the legal form of transaction envisaged (share deal, asset deal, mixed share and asset deal or statutory merger). Generally speaking, however, a typical Swiss M&A transaction consists of the following stages.

In the first stage (preparation phase), the seller and its advisers prepare the sale documentation as well as the marketing material.

In the next phase (marketing phase), the executive management or, more often, a professional financial intermediary, instigates first contact with potentially interested parties. The potential bidders are required to sign a non-disclosure agreement and receive an information memorandum containing key information. Based on this information, the bidders might decide to make a non-binding offer to the seller.

In the third phase (due diligence phase), after any questions regarding the offers have been clarified, due diligence and management visits take place and Q&A sessions are organised. The parties then finalise and negotiate the transaction agreement, which is usually drafted according to international standards, in a fourth phase (negotiation, signing and closing phase).

Upon completion of this process, the parties will sign the transaction agreement. As the closing often depends on the presence of the necessary governmental approvals or third party consent, a certain lapse of time will normally pass between signing and closing, during which time the parties have to fulfil certain obligations and follow specific rules of conduct as set out in the agreement. The form of the closing itself varies depending on the legal form of the target business and the form of the respective transaction.

Concerning the last phase (post-closing phase), parties may have agreed on non-competes

# THE INSIDE TRACK

*What factors make mergers and acquisitions practice in your jurisdiction unique?*

Switzerland's stable political system, globally-orientated and liberal economy, highly skilled workforce and efficient legal environment, as well as a traditionally mild tax regime and relatively low bureaucracy, create an excellent environment, not only for private equity, but also for business in general.

*What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?*

Competence, experience and accessibility are all crucial for successfully completing complex transactions.

*What is the most interesting or unusual matter you have recently worked on, and why?*

Every deal naturally raises interesting and unique questions. One of the most challenging deals that we have been working on over the past few months was the acquisition of iconic luxury watch manufacturer Breitling by CVC Capital Partners. The deal raised questions in every field of law and involved multiple jurisdictions across the globe.

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for the seller or certain obligations, such as continuation of the business, of the purchaser.

*GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?*

**CN & PS:** A revision of Swiss company law is anticipated. The revision will serve to improve corporate governance for listed as well as non-listed companies, will introduce more flexibility with regards to company foundation and capital and will adapt the rules on companies limited by shares to the new accounting legislation.

Furthermore, provisions regulating transparency of economically significant companies may be introduced.

*GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?*

**CN & PS:** It is expected that deal activity levels will continue to rise in the second half of 2017. The continued low interest rates on offer and the high cash levels that enable companies to improve their market position will surely impact the M&A market. Swiss SME may be attractive targets for such aspiring investors and buyers.