

# Market Intelligence

**M&A**  
2019

Global interview panel led by  
Simpson Thacher & Bartlett LLP



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**Published by**

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

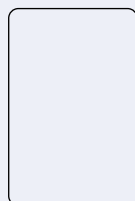
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ISBN: 978-1-83862-197-1

Printed and distributed by Encompass Print Solutions



# Switzerland

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He is experienced in a broad range of national and international transactions, both sell- and buy-side (including corporate auction processes), and in assisting clients in their ongoing corporate and commercial activities. Additionally, he represents clients in litigation proceedings relating to his specialisation.

Philippe Seiler has broad experience in M&A transactions in various industries (inter alia, manufacturing and engineering, IT, watch, real estate and logistics). In addition to large-scale transactions and takeovers, he focuses on small and medium-sized M&A transactions, private equity transactions, management buyouts and outsourcing projects. Furthermore, he specialises in regulatory matters in the fields of life sciences and healthcare.

Raphael Annasohn has broad experience in international and domestic M&A transactions in various industries focusing on private M&A and private equity, corporate reorganisations and restructurings as well as corporate law and general contractual matters, in particular shareholders' agreements. Furthermore, he specialises in the fields of venture capital and start-ups and assists clients in their ongoing commercial activities.

## 1 | What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

While in the first half of 2019 the number of M&A deals with Swiss involvement slightly decreased when compared to the figures in 2018, the overall transaction volume (US\$82.1 billion) is up by 5.3 per cent on a year-on-year comparison (in 2018 there were 168 deals worth a total US\$78 billion). Private equity investors continue to be very active accounting for a third of the biggest M&A transactions year-to-date. In the recent past, some political and economic uncertainties (such as slightly rising interest rates and instability in the Eurozone due to Brexit) have emerged. Nevertheless, the Swiss M&A and in particular the private equity market are still in good shape and continue to grow. We identify the following key factors for this continuously positive trend.

First, the ongoing environment with (still) low interest rates and generous borrowing conditions continues to facilitate the funding of possible acquisitions and puts pressure on investors to invest. In particular, private equity investors, who tend to be highly leveraged are benefiting from this environment.

Second, Switzerland, with its various investment opportunities and no (or very little) investment restrictions, remains attractive for investors – notably small and medium-sized enterprises (SMEs), which will need to deal with succession planning in the coming years (estimated to be approximately 80,000), are attractive targets for investors. The attractiveness of the Swiss M&A market was recently underlined by the 2019 edition of the Global Innovation Index, according to which Switzerland is the world's most innovative country followed by Sweden, the United States, the Netherlands and the United Kingdom.

Third, transformation and portfolio reshaping continues to generate substantial M&A activity – in particular, spin-offs may be attractive targets for both, private equity investors as well as strategic buyers.

## 2 | Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

We see a high level of M&A activity in the healthcare sector with various private equity investors having dedicated healthcare desks for such investments. This trend has, in our view, two main reasons. First, despite some recent changes in the regulatory landscape, the Swiss healthcare sector is still very attractive for investors with growing revenues and, second, there are various buy-and-build possibilities in the healthcare sector that provide for interesting investment opportunities. Other



Christoph Neeracher



Philippe Seiler



Raphael Annasohn

“The Swiss M&A and in particular the private equity market are still in good shape and continue to grow.”



active sectors include technology, media and telecommunications and in particular pharmaceuticals.

Last year was a strong year for SMEs as well, with an increase in the total number of transactions by 16 per cent. Company sales to foreign buyers even reached a new record since 2014; however, foreign acquisitions were less due to the global economic situation (minus 13 per cent compared to 2017).

### 3 | What were the recent keynote deals? What made them so significant?

In May 2019, Nestlé SA sold Nestlé Skin Health SA to a consortium led by the private equity house EQT and a wholly owned subsidiary of the Abu Dhabi Investment Authority for a value of US\$10.2 billion, which was the largest private transaction of the past six months. In addition, in May 2019, Novartis acquired Takeda Pharmaceutical Company Ltd for US\$3.4 billion. Another transaction that stands out so far is the spin-off and listing of Novartis AG's subsidiary Alcon Inc. Alcon's shares were listed at the SIX Swiss Exchange and the New York Stock Exchange and the transaction volume reached a total of US\$ 26.9 billion, making

it the largest transaction in 2019 so far. These transactions are four out of the six transactions worth over US\$3 billion that took place in the first half of 2019 and they are exemplary for the predominant M&A activity in the pharmaceutical industry, which already adds up to a transaction volume of US\$44.8 billion.

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

Generally, 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 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 largely depend on the shareholders involved and their intentions, as well as on the specific transaction type and process.

**5 | How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?**

In 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. As part of a new Swiss legislation aimed at preventing money laundering and tax evasion, any entity acquiring 25 per cent or more of a non-listed Swiss company must inform the latter regarding the acquiring entity's beneficial owner and update such notification in case of changes. In standard private equity structures, the administrative burden of this new legislation can – in our view – be minimised by implementing a practical solution 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. If such individuals cannot be determined, the top executive officer (chairman or CEO) of the general partner, or its ultimate shareholder, respectively, may be disclosed.



An example of EU regulations affecting the regulatory landscape in Switzerland is the General Data Protection Regulation (GDPR). Even if Switzerland is not a member of the EU, the new guidelines are directly applicable to all Swiss-based companies doing business in the EU. In addition, EU companies are asking its Swiss business partners to be GDPR-compliant. Therefore, the GDPR has an impact on numerous Swiss-based companies.

In 2019, Swiss voters adopted the Federal Act on Tax Reform and AHV Financing (TRAF), aiming at the abolition of the arrangements of status companies, which are no longer accepted internationally. This will bring along an increase of the taxation for dividends. For Switzerland to remain an attractive business hub, TRAF includes new tax-related special arrangements for companies (eg, the beneficial treatment of expenditures relating to research and development) resulting in lower corporate tax rates. Overall, TRAF will lead to higher taxes for large corporations, while SMEs will pay fewer taxes than today.

Two new acts will enter into force in the near future, most likely with effect from 1 January 2020: the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). Although primarily addressing the financial services industry, the FinSA in particular could become relevant in the context of M&A transactions, subject also to the provisions of the implementing ordinance, a draft of which has recently been under consultation by the Federal Finance Department and is, therefore, subject to change.

The FinSA contains rules regarding the duty to publish an issuance prospectus in the case of a public offering of securities. It sets out the required content of prospectuses, bringing the requirements in line with international standards and those already applied by SIX Swiss Exchange for listing prospectuses and replacing the outdated rules of the Swiss Code of Obligations, which only required very limited disclosure. If in the context of a public tender securities are offered as consideration, this will likely constitute a public offering under the FinSA and would, in principle, require the offerer to publish a FinSA compliant prospectus. While the FinSA does provide for an exemption from the duty to publish an issuance prospectus in takeover situations, this requires that information equivalent to that contained in an issuance prospectus be available. Under its current practice, SIX Swiss Exchange does not consider offer prospectuses equivalent to listing prospectuses and, absent the introduction of a specific exemption following the consultation procedure, it is doubtful whether the prospectus reviewing body introduced by the FinSA would abandon this practice. Consequently, an offerer offering securities as consideration in a public tender offer would have to issue either an issuance prospectus in addition to the offer prospectus or prepare a document satisfying the requirements of both takeover legislation and the FinSA.

“Even if Switzerland is not a member of the EU, the new GDPR guidelines are directly applicable to all Swiss-based companies doing business in the EU.”

## 6 | Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Switzerland remains highly attractive for inbound investment with plenty of opportunity – notably SMEs, which will need to deal with succession planning over the coming years (estimated to be approximately 80,000), serve as particularly attractive targets for investors. According to a study prepared by Deloitte, cross-border transactions of Swiss SME targets reached a number of 81 sales (representing an increase of 16 per cent, a new record). The number of transactions involving Swiss buyers remained at the same level (70 transactions). The most active foreign investors in these transactions were from Germany and the United States; however, investments from French and Asian investors reinforced significantly. 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 restricts the acquisition by foreigners of real estate properties that are not used for the permanent establishment of a trade, production or other business run in a commercial way, a craftsman's establishment or a free profession (non-commercial properties). In particular, residential properties and unbuilt land and generally properties not used for commercial purposes are subject to the Lex Koller.

## 7 | Are shareholder activists part of the corporate scene? How have they influenced M&A?

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 significantly growing trend towards shareholder activism in Switzerland, as reflected globally and, especially more recently, in Europe. Examples include:

- the settlement of the board of directors of gategroup Holding AG with RBR Capital Advisors during a proxy fight where the parties agreed on the composition of the board of directors;
- the involvement of Cevian Capital Ltd (5.34 per cent) and Artisan Partners Ltd (5.3 per cent) in ABB Ltd, which urged ABB Ltd to sell its power grid business to Hitachi Ltd, one of the largest transactions in 2018; and
- Knight Vinke, which wants to prevent the takeover of Alpiq Ltd by CSA Energy-Infrastructure Switzerland.

To sum up, shareholder activism is still a rather new phenomenon in Switzerland that primarily affects listed companies and is faced with numerous barriers by



Swiss regulation. Companies at risk of becoming a target may nevertheless be well advised to implement a number of structural defences.

## 8 | Take us through the typical stages of a transaction in your jurisdiction.

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, 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

“The first half of 2019 shows an extremely high level of M&A activity in Switzerland and we are fairly optimistic that this trend will continue for the coming 12 months.”

diligence phase), after any questions regarding the offers have been clarified, due diligence and management visits take place and Q&A or expert sessions are organised. The parties then negotiate and finalise 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 of a Swiss transaction agreement depends, among other things, on the presence of the necessary governmental approvals and third party consents, 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 transaction 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), the parties may have agreed on a non-compete clause for the seller or certain obligations, such as continuation of the business, of the purchaser.

**9 | Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?**

A revision of Swiss company law is anticipated. Its primary goal is to adopt into federal law the Ordinance against Excessive Remuneration in Listed Companies and to improve corporate governance for listed as well as non-listed companies. Furthermore, the revision 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. Beyond that, provisions regulating transparency of economically significant companies active in the extractive industries may be introduced. Moreover, in June 2019, the Swiss Federal Assembly adopted the Federal Act implementing the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which will lead to the abolition of bearer shares in Switzerland for companies limited by shares.

**10 | 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?**

The first half of 2019 shows an extremely high level of M&A activity in Switzerland and we are fairly optimistic that this trend will continue for the coming 12 months. Key drivers remain, in particular, the low interest rates and the high cash levels that enable companies to improve their market position. Given the attractive investment

opportunities in Switzerland, we expect further investments of foreign buyers in Switzerland, particularly in the healthcare sector. Swiss SMEs may be attractive targets for aspiring investors and buyers.

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# 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, deal experience and accessibility are certainly the most 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. A very interesting and challenging deal we worked on in the past couple of months was the acquisition of 90 per cent of the shares in Salt's passive mobile infrastructure business from Salt Mobile. Due to high transaction volume the transaction raised complex questions in the fields of corporate, telecom regulatory and tax law.



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**Sector focus**

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