

Market Intelligence

M&A
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Global interview panel led by Simpson Thacher & Bartlett LLP

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Switzerland

Christoph Neeracher specialises in international and domestic M&A transactions (focusing on private M&A and private equity transactions, including secondary buyouts, public-to-private transactions and distressed equity), transaction finance, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders' agreements) and all directly related areas. 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?

Although deal pipelines promised a solid start to 2020, the covid-19 pandemic has impacted the Swiss economy as elsewhere (Switzerland's GDP fell by 8.2 per cent in the second quarter of 2020, after decreasing by 2.5 per cent in the previous quarter), alongside the Swiss M&A market, bringing many planned and ongoing transactions to a halt and causing a decline in both the number of deals and the overall transaction volume. This decline, however, started to recover in the fourth quarter of 2020, resulting in a moderate overall decline in deal volume of 4.6 per cent for 2020 compared to 2019.

The increase that was observed towards the end of 2020 continued in the first half of 2021, resulting in a high deal activity with heavy involvement of Swiss small and medium-sized enterprises (SME). On a year-on-year comparison, transaction volume has increased by 62.5 per cent (117 transactions in H1 2021 compared to 72 transactions in the first half of 2020). In view of the returning confidence in the economy, Swiss SMEs remain attractive targets for investors also in H1 2021, especially for European buyers (81 per cent compared to the remainder being primarily North American and Asian buyers) and we also expect private equity investors to continue to be very active in Switzerland with a focus on SMEs in the industrial, technology, media and telecommunications (TMT), and consumer goods sectors.

In our view, the following were key factors for this positive trend and rather quick recovery: first, Switzerland's stable political and regulatory environment with barely any investment restrictions in combination with a high number of potential investment opportunities; second, low interest rates and generous borrowing conditions facilitating the funding of acquisitions; and third, transformation and portfolio reshaping generating substantial M&A activity.

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

As 2021's best-performing sector in Switzerland so far, TMT has been seeing very high levels of M&A activity, accounting for a quarter of all Swiss outbound transactions and almost a fifth of all Swiss inbound transactions in the first half of 2021. Another sector with high activity levels is the consumer goods sector making up for approximately a fifth of Swiss transactions (both outbound and inbound). The covid-19 pandemic has also seemingly only accelerated the general digitalisation trend. Most companies have digitalised at least part of their business, more and



Christoph
Neeracher



Philippe
Seiler



Raphael
Annasohn

“Swiss SMEs
remain
attractive
targets for
investors.”

more people are using digital channels and will probably keep doing so after the pandemic, and remote working has become customary.

Another industry that stands out is the healthcare sector, where M&A activity levels remain at a high level thanks to the attractiveness of growing revenues in the Swiss healthcare sector and the many buy-and-build opportunities providing for interesting investment opportunities.

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

The sale of GlobalLogic, Inc from Partners Group Holding AG and Canada Pension Plan Investment Board to Hitachi, Ltd valued at US\$9.6 billion marked the largest M&A transaction in the first half of 2021 in Switzerland. Another big-ticket transaction with Swiss involvement in 2021 includes the recent merger of TX Markets and Scout24 Schweiz's online marketplaces to form a leading Swiss group spanning the real estate, vehicle, financial services and general marketplace sectors. To this end TX Group, Ringier, la Mobilière and General Atlantic formed a joint venture thus creating one of the largest digital companies in Switzerland, which on the medium-term pursues the goal of going public.

In 2021, other noteworthy transactions include the acquisition of Franke Water Systems AG, an international manufacturer of intelligent water solutions for residential bathrooms, residential kitchens and commercial washrooms by Equistone Partners Europe, the sale of Unilode Aviation Solutions, the global market leader in specialty aviation infrastructure, from EQT Infrastructure II fund to Basalt Infrastructure Partners, as well as the acquisition of the Swiss leading cyber security service provider Swiss IT Security Group by Triton Fund V from Ufenau Capital. The Swiss IT Security Group deal can be seen as an example for the high activity in the TMT sector.

Other notable deals in 2021 included the US\$250 million investment of CVC Capital Partners in Acronis, the global operator in cyber protection, and the partnership of CVC Capital Partners with the International Volleyball Federation (FIVB).

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.

As of 1 May 2021, bearer shares were largely abolished in Switzerland. Since the effective date, bearer shares are only permitted for listed companies or if the bearer shares are structured as intermediated securities. If companies had not converted their bearer shares into registered shares by 30 April 2021, they were

compulsorily converted by law. Shareholders holding bearer shares and failing to notify the company about such bearer shares by 1 May 2021 are not allowed to be entered into the company's share register. As a consequence, the membership rights of these shareholders are suspended, and the property rights, forfeited. However, such shareholders have until 31 October 2024 to be entered in the share register by court order. After this deadline, their bearer shares will become null and void. From a company perspective, the abolishment of bearer shares has, among others, the following implications: companies must ensure that shareholders which failed to notify the company are prevented from exercising their shareholder rights. Furthermore, the company's articles of association had to be amended and companies had to consider whether the transferability of the converted shares shall be restricted or not.

An important amendment in Swiss corporate law implemented in November 2019 concerns the regime for the disclosure of the beneficial owner of shareholders acquiring, alone or together with third parties, more than 25 per cent in a Swiss company. These amendments removed some of the uncertainty surrounding the old rules regarding the reporting on beneficial ownership, which were introduced as part of the global effort to combat money laundering and the financing of terrorism as well as to facilitate international processes for the automatic exchange of information among tax authorities. Specifically, the amendments clarify that, where there is no beneficial owner (ie, no natural person exercising direct or indirect control over the acquiring shareholder by analogy with the consolidation rules of Swiss accounting law), which is frequently the case in private equity structures, the shareholder must make a negative declaration to this effect.

Even if Switzerland is not a member of the European Union, EU directives play an important role. An example of EU regulations affecting the regulatory landscape in Switzerland is the General Data Protection Regulation (GDPR), which is 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. Accordingly, the Swiss lawmaker is already working on a reform of the Federal Act on Data Protection, which is expected to come into force in mid-2022.

Two new acts addressing the financial markets regulation have entered into force in January 2020: the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). Although primarily addressing the financial services industry, the FinSA in particular has become relevant in the context of certain M&A transactions, as it sets out rules regarding the duty to publish an issuance prospectus in the case of a public offering of securities. It specifies the required content of prospectuses, bringing the requirements in line with international standards and those already applied by

“The most active foreign investors in these transactions were from Germany and the United Kingdom, followed by the rest of Europe.”

the 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 offer, securities are offered as consideration, this constitutes a public offering under the FinSA and generally requires the offerer to publish a FinSA compliant prospectus.

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. The most active foreign investors in these transactions were from Germany and the United Kingdom, followed by the rest of Europe.

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 businesses 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 significant trend of growing shareholder activism in Switzerland, as reflected globally and, especially more recently, in Europe.

Compared with other jurisdictions, particularly the United States, the number of activist campaigns involving Swiss companies is still moderate. However, with more than 65 shareholder actions since 2013, Switzerland is a key European target for activist shareholders. This trend, however, can be expected to advance, as activist

shareholders are becoming more sophisticated and better funded. In a recent case of shareholder activism from last year, a group of shareholders around Veraison Capital AG, a Swiss activist shareholder, and Cobas Asset Management, a Spanish investor, pushed at an extraordinary general meeting aiming to replace five of the board members, including the CEO of ARYZTA AG. As a result, two board members resigned voluntarily, and the chairman of the board held out the prospect of his resignation. Other 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 sued Alpiq Ltd over its pay-out to minority shareholders following the proposed squeeze-out merger with Schweizer Kraftwerksbeteiligungs-AG in September last year.

To sum up, shareholder activism is still a rather new, although increasing 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, as the adopted corporate law reform could further increase shareholder activism.

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 preparation phase, the seller and its advisers prepare the sale documentation and marketing materials. This is followed by a marketing phase in which the seller's financial adviser, or less often the target's executive management, initiates first contact with potential bidders. The latter are then required to execute a non-disclosure agreement in order to receive further information in the form of an information memorandum. Thereupon, bidders may decide to make a non-binding offer, which is followed by the due diligence phase for selected bidders. In this stage, in addition to document review, usually management presentations take place and expert sessions are set up.

In a fourth phase (the negotiation, signing and closing phase), the parties negotiate and finalise the transaction agreement, which is usually drafted according to international standards. Upon completion of this process, the parties will sign the

transaction agreement. As the closing of a Swiss transaction agreement depends on, among other things, 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 other obligations, such as the 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?

In June 2020, the Swiss parliament passed a bill modernising Swiss corporate law, for which the effective date has not yet been determined, however, it is not expected to come into force before 2023. The corporate law reform seeks to modernise corporate governance by enhancing shareholder rights and promoting gender equality in boards of directors as well as in senior management. It also replaces the provisions of the Ordinance on Excessive Compensation with only a few changes. Furthermore, it aims to facilitate company formation, makes capital rules more flexible and reforms the rules on corporate restructurings. Finally, it introduces certain disclosure requirements for commodity firms. The reforms concern Swiss corporate law in many areas, although most changes are modest. Nevertheless, Swiss companies should review these amendments in order to identify required changes in their governance. Also, they should assess whether they may benefit from the flexibility under the corporate law reform (eg, under the more flexible capital provisions or modernised decision-making by way of a virtual shareholders' meetings and written or electronic shareholders' resolutions).

As a result of its strict provisions, the initiative on responsibility of corporations having their seat in Switzerland for violations of internationally recognised human rights and environmental standards was rejected in November 2020. However, due to the rejection, the counterproposal was approved, which also aims to improve the protection of people and environment, but in a more business-friendly way.

Another current notable legislative project is the implementation of an investment control for foreign direct investments (FDI). To date, except for certain sector-specific limitations and requirements (eg, in telecommunications, radio and TV broadcasting, nuclear energy and aviation, as well as in the financial sector) there is no general investment control for FDI in Switzerland. The parliamentary

“A current notable legislative project is the implementation of an investment control for foreign direct investments.”

motion submitted in 2018 aims to create a legal basis for investment control of FDI in Swiss companies, among other things, by establishing an approval authority for the transactions subject to investment control. In the meantime, such motion has been approved by both the Council of States and the National Council. In late August 2021, the Federal Council issued a press release, in which the broad framework for such an investment control regime was outlined. The draft bill, which is expected to be issued for public consultation by the end of March 2022, will mainly focus on the two objectives of (1) protecting the public order and security against threats or endangerments in connection with acquisitions of Swiss companies by foreign investors and (2) preventing substantial distortions of competition deriving from acquisitions by foreign state or state-related investors. In particular, investment control will apply through notification and approval requirements for investments that lead to the acquisition of control of a domestic company. Furthermore, a distinction will be made regarding the type of investor: while every change of control-investment by a foreign state, state-owned or state-related investor will have to be reported and approved, the investments by private foreign investors will only undergo such requirements in specific sectors, which are yet to be defined. The actual approval

process is to be designed as a two-stage procedure. In a short first stage, it is to be evaluated, if a further in-depth screening of the investment is necessary. If no concerns arise for a specific investment during this first stage, the transaction can be completed. Otherwise, further screening will be conducted by the authorities. In any case, however, the bill will also include a provision allowing for cooperation as well as mutual exemptions from investment control with other states.

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?

After a decrease in M&A deal activity in 2020 by roughly a quarter compared to the same period of 2019, induced by the covid-19 pandemic, a recovery of the economy could already be observed towards the end of 2020. This recovery continued through the first half of 2021, which, on one hand, lead to a notable increase of deal activity. On the other hand, the catch up of several transactions that were postponed or suspended because of the covid-19 pandemic further had a positive effect and is likely to continue. Against this background, we expect the upward trend to continue in the coming year.

With regard to certain sectors, we expect the TMT, consumer goods and health-care sector to experience an ongoing popularity for outbound transactions, and as for inbound transactions, an increasing deal activity in the TMT, consumer goods and industrial sector are expected. This is of course all conditional upon the covid-19 pandemic not worsening again and thereby creating more uncertainty.

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The Inside Track

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

Switzerland's stable political system, globally oriented 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 M&A, but also as a business environment in general.

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

Competence, deal experience, accessibility and pragmatism are certainly the most crucial factors for successfully completing complex M&A transactions.

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

Every deal of course raises interesting and unique questions. A very interesting topic we have come across in a recent matter was the involvement of a foundation as selling shareholder which ultimately required intense exchange with and approval by the competent foundation authority.

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