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Market Intelligence

M&A 2022

Global interview panel led by Eric Swedenburg of Simpson Thacher & Bartlett LLP

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Simpson Thacher & Bartlett LLP, this M&A volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

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About the editor

Eric Swedenburg

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Eric Swedenburg is a Partner at Simpson Thacher & Bartlett LLP, where he is the Global Head of the Firm's Mergers and Acquisitions Practice and a member of the Executive Committee. Eric focuses on representing companies in a wide range of mergers, acquisitions and divestitures, spin-offs, joint ventures and other significant corporate transactions. He also regularly counsels clients on shareholder activism, corporate governance and general corporate and securities law matters. In addition to his work with public companies and special committees of boards of directors, Eric has extensive experience in advising non-public corporations, private equity firms and financial advisors in both US domestic and cross-border M&A transactions across a number of industry verticals.

Some of his recent transactions have included representing SiriusXM in its $3.5 billion acquisition of Pandora, Mars in its strategic partnership with KIND, Dover in the spin-off of Apergy, Genesee & Wyoming in its $8.4 billion sale to affiliates of Brookfield Infrastructure and GIC, and The Mosaic Company in its $2.5 billion acquisition of Vale Fertilizantes. Other clients of his have included Ingersoll Rand, La Quinta, McKesson and Vodafone Group. Among other recognitions of his work, in 2009, *The American Lawyer* named him "Dealmaker of the Year." He is a frequent commentator on M&A issues

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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, as well as transaction finance, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders' agreements) and all directly related areas.

Philippe Seiler has broad experience in M&A transactions in various industries, including, among other things, manufacturing and engineering, IT, watches, 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 focuses on international and domestic M&A transactions in various industries specialising in private M&A and private equity, corporate reorganisations and restructurings, as well as corporate law and general contractual matters, particularly shareholders' agreements. Furthermore, he specialises in the fields of venture capital and start-ups, and assists clients in their ongoing commercial activities.

QUESTIONS

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

M&A deals in Switzerland soared in 2021, which was a record year for M&A deal activity across all sectors. Switzerland's M&A activity started strong in H1 2021 with over 290 deals compared to a mere 140 in the same period in 2020. The momentum of H1 continued in H2 2021, with over 300 deals completed compared to the 200 deals in H2 2020. With a total of over 600 deals in 2021, it's safe to say that 2021 was an extraordinarily strong year for M&A activity in Switzerland. Despite the ongoing fear of the impacts of the covid-19 pandemic in 2021, low interest rates, attractive financing conditions and economic stimulus packages contributed to a record-breaking 2021.

In 2022, the increase that was observed in the prior year continued in the first half of the year. However, negative movement on the stock markets, the prospects of runaway inflation, fears of recession, Russia's invasion of Ukraine and further geopolitical risks certainly dampened the risk appetite of M&A investors. Further, we believe that the first increase of the key interest rate in 15 years on 16 June 2022 by the Swiss National Bank could have a chilling impact on M&A transaction activity in the future, as it is expected that interest rates will undergo further increases (even though the key interest rate in Switzerland is still relatively low). In light of the aforementioned, we expect the total M&A deal activity in 2022 to be lower than it was in 2021 – in particular, we expect a slightly weaker H2 compared to last year's second half.

Swiss small and medium-sized enterprises (SMEs) continue to be attractive targets for investors in H1 2022, especially for European buyers (comprising 61 per cent, with the remainder being primarily North American and Asian buyers). The coming deal activity will most likely increasingly focus on sustainability topics, where we see an increasing trend developing. In our view, key factors for a generally positive trend in Switzerland's M&A activity include, in particular,


Christoph Neeracher


Philippe Seiler


Raphael Annasohn

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Switzerland's stable political and regulatory environment, with barely any investment restrictions in combination with a high number of potential investment opportunities, as well as the remaining relatively low and favourable interest rates and borrowing conditions facilitating the funding of acquisitions.

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

As in previous years, technology, media and telecommunications (TMT) remains a very active M&A sector. As a result of the covid-19 pandemic, many companies have been forced to adapt their digital infrastructure and capabilities. The companies that were supported by this unforeseen situation are now increasingly merging in order to be more competitive globally. Together with the industrial market, these two sectors have accounted for around one-third of all M&A transactions in the first half of 2022 (49 transactions each) and are therefore the best performing sectors in the first half of 2022. Although this period saw a slight decrease in transactions compared to the record year of 2021, the market is still very active. It is notable that inbound transactions (46 per cent of all transactions) have increased, whereas outbound transactions (25 per cent of all transactions) have slightly decreased in comparison to last year. Other sectors – besides TMT and the industrial market – that remained very attractive in 2022 are pharmaceuticals and life sciences, consumer goods and financial services.

The year 2021 also stood out in terms of deal value, soaring to an astounding $170 billion compared to $63 billion in 2020. Most deals had a deal value of up to $250 million (of which about 50 per cent had a deal value of at most $50 million), and deals with a value above $500 million accounted for less than 25 per cent of the total number of deals in 2021. This is in line with previous years as typical transactions are between less than $50 million and $250 million in value.

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

In 2021, the transaction involving Novartis AG selling its stake in Roche Holding AG back to Roche Holding AG for $20.8 billion marked the largest transaction in 2021 in Switzerland. The public takeover of the Swiss-based global pharmaceutical company, Vifor Pharma AG by CSL Limited, a global biotechnology company based in Australia, came in second place in terms of transaction value – with an aggregate equity value for Vifor of $11.7 billion. Additionally, the sale of Lonza's speciality ingredients business by Bain Capital and Cinven at the beginning of 2021 stood out for being a complex carve-out.

Noteworthy transactions in 2021 also include Nestlé SA selling back part of its stake in French cosmetic brand L'Oréal ($10 billion)

and Partners Group Holding AG selling its stake in GlobalLogic Inc ($9.6 billion). The acquisition of Swiss IT Security Group by Triton, the acquisition of a significant minority stake in Breitling AG by CVC Capital Partners and Partners Group – as well as the merger of TX Markets and Scout24, which has brought about one of the largest digital companies in Switzerland – further stood out in 2021.

With respect to the year 2022, the merger between Dutch chemical company Royal DSM and Swiss flavours and fragrance group Firmenich, as announced early in the year, so far marks the biggest transaction – with an estimate value of around €40 billion. The merger will be structured so that DSM shareholders will own 65.5 per cent of the new firm, while the shareholders of Firmenich will initially own 34.5 per cent and receive €3.5 billion in cash.

Notable private equity deals in H1 2022 included the acquisition of SPS Group from Die Schweizerische Post AG (Swiss Post) by AS Equity Partners and the acquisition of SwissQ Consulting by Xebia, a worldwide IT consultancy company and portfolio company of Waterland with offices in the Netherlands.

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 play an important role in determining the type of consideration that is eventually agreed upon.

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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.

Two new acts addressing the financial markets regulation 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

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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 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.

Furthermore, while special purpose acquisition companies (SPACs) are not a new concept (in the US in particular), the Directive on the Listing of SPACs of 18 October 2021 was implemented in Switzerland in December 2021, allowing SPACs to be listed on the SIX Swiss Exchange. Such 'blank-cheque companies' have therefore joined the Swiss 'investor' landscape. According to this directive, the de-SPAC must be completed within three years following the first trading day. While 2020 and 2021 were record years for SPACs in the US market, Switzerland joined the SPAC party late. On 15 December 2021, the first – and so far only – SPAC in Switzerland was listed. Meanwhile, the hype in the rest of the world seems to be decreasing as the competition for good takeover candidates goes up, driving up multiples for sought-after assets. At the same time, US studies show that companies that went public through SPACs performed worse, accordingly dampening the trend. The general reception and success of that financial vehicle is yet to be explored globally and in Switzerland.

The new equity segment Sparks was announced in mid-2021 by the SIX Swiss Exchange for SMEs and consequently approved by the Swiss Financial Market Supervisory Authority. Since October 2021, SMEs can now be listed on the SIX under simplified, SME-specific requirements to receive access to Swiss and international investors with extensive experience and capitalisation. The upside of Sparks also includes an increase in visibility by having to comply with increased regulatory requirements (eg, ad hoc publicity, disclosure of significant shareholdings and financial reporting), as well as in liquidity through tradability of the shares. Until now, raising capital efficiently has been difficult for SMEs. By allowing SMEs to benefit from the advantages offered by SIX, the companies and investors have new opportunities to grow. The first company to list on Sparks was the Swiss portfolio company Xlife Sciences in February 2022, which specialises in the value development and commercialisation of promising early-stage research projects from universities and other research institutions in the healthcare sector. While Xlife Sciences had a stellar stock market debut, the success and demand for the Sparks segment will depend on the response of market participants, particularly banks and investors.

Even if Switzerland is not a member of the European Union, EU directives play an important role in the legal and regulatory landscape in Switzerland. 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 their Swiss business partners to be GDPR-compliant. Therefore, the GDPR affects

numerous Swiss-based companies. Partly in response to the GDPR and its implications, Switzerland is currently undergoing a total revision of the Federal Act on Data Protection of 19 June 1992 (FADP) and its accompanying Ordinance to the Federal Act on Data Protection of 14 June 1993. The goal is to adapt the FADP to technological developments and align it with the GDPR. The revision of the FADP is essential for ensuring that the transfer of data between Switzerland and the EU can continue without further limitations. The new FADP and the associated ordinance are scheduled to enter into force on 1 September 2023, but the corresponding Federal Council resolution is still pending.

In recent years, it has been noted how public opinion has shifted back to a more pro-business approach but with a clear focus on corporate responsibility, as was shown by the initiative on corporate responsibility. This initiative was rejected in November 2020 in Switzerland by the cantons (Council of States) (50.7 per cent of the Swiss people, however, had accepted the initiative) due to its strict provisions. However, the respective counterproposal to the initiative was approved and entered into force on 1 January 2022. This new legislation, which aims at improving the protection of people and the environment, as well as provide transparency for investors on ESG-related topics in a more business-friendly way, will apply for the first time in the financial year beginning in 2023.

In recent years, we have seen a trend in Europe (and globally) that sustainability and environmental protection, as well as social and responsible corporate governance, are gaining importance (ie, environmental social governance or ESG). The new ESG reporting provisions will apply to certain companies depending on their size and importance. Swiss companies that are of public interest will be required to prepare an annual public ESG report covering certain non-financial matters. The obligation to prepare such report applies primarily to listed companies and banks that, together with the domestic or foreign companies they control, have an annual average of at least 500 full-time positions in two consecutive years and exceed a

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balance sheet total of at least 20 million or sales revenue of 40 million Swiss francs. The report addresses non-financial matters such as the business model, the emerging risks relating to environmental, employee and human rights, the due diligence measures taken by the company to address such risks and general ESG concerns. Compared to companies of public interest, SMEs are not yet required to publish such ESG report. However, all companies with their registered office, head office or principal place of business in Switzerland are also subject to additional due diligence requirements if they process or import certain minerals or metals originating from conflict or high-risk areas. Further affected are companies that offer products or services for which there is a reasonable suspicion that they have been manufactured using child labour.

By introducing the new reporting requirements, Swiss companies will need to adapt to changes in the political landscape. Swiss companies that are affected by the new provisions must implement appropriate control mechanisms and measures regarding their supply chains, as well as further precautions to ensure social and environmental

governance. Should the trend of stricter environmental, social and governance reporting continue – as can be seen in the EU – it is advisable for Swiss companies that are not yet subject to the legal regulations to develop and implement ESG concepts at an early stage.

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 opportunities. SMEs in particular, which will need to deal with succession planning over the coming years (estimated to be approximately 90,000), serve as particularly attractive targets for investors. The most active foreign investors for inbound transactions are from the UK, France and Germany, followed by the rest of Europe.

Specific restrictions that apply to foreign buyers are limited. One example 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 general properties not used for commercial purposes, are subject to the Lex Koller. Another restriction could result from restrictions on Foreign Direct Investments (FDI) (see question 9).

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.

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Compared with other jurisdictions, particularly the United States, the number of activist campaigns involving Swiss companies is still moderate. However, reports show that since 2012, shareholder actions in Switzerland have more than doubled, and Switzerland is becoming a key European target for activist shareholders. This trend can be expected to advance as activist shareholders are becoming more sophisticated and better funded.

Even though shareholder activism is still a rather new phenomenon, Swiss companies have been affected by this trend, whereas primarily listed companies are being targeted. Companies at risk of becoming a target may nevertheless be well advised to implement a number of structural defenses, as the adopted corporate law reform further increases shareholder activism due to enhanced shareholders' rights.

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

The general procedure and different stages of a transaction vary substantially from one case to another, depending on, among other things, the seller, the purchaser, the target and the legal form of the transaction envisaged (eg, 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, management presentations usually take place and expert sessions are set up.

In 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 amount of time will normally pass between signing and closing, during which the parties have to fulfil certain obligations and follow specific rules of conduct as set out in the transaction agreement. Of course, the drawdown by buyer of the necessary funding of the purchase price is also often a reason for a staggered signing and closing. The form of the closing itself varies depending on the legal form of the target business and the structure of the respective transaction.

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During the last phase – the post-closing phase – a non-compete clause binding the seller in relation to the target group often becomes relevant, such as certain other obligations of the parties (eg, certain post-closing integration work or the continuation of the business by 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?

On 19 June 2020, after more than a decade of preparatory work, the Swiss parliament finally passed a general reform of the Swiss corporate law that amends the Swiss Code of Obligations (the Reform). The Reform will modernise the corporate governance of Swiss companies by mainly strengthening shareholders' and minority shareholders' rights, and promoting gender equality in boards of directors and senior management.

"The Reform modernises the form in which general shareholders' meetings can be held as it allows the meeting to be held virtually or even abroad"

Noteworthy changes brought by the Reform include the possibility for the general meeting to file a liability claim on behalf of the company, which means that the company itself, rather than the shareholders filing the claim, bears the associated costs. In addition, the time limit for filing an action by a shareholder who did not grant discharge is extended – as is the catalogue of resolutions by the general meeting requiring a qualified quorum. Further, the lowering of thresholds to exercise the minority shareholders' rights will be of particular importance for shareholders' agreements, which preferably will be adapted before the Reform comes into force. Additionally, the Reform also replaces the provisions of the Ordinance against Excessive Compensation, which is applicable to listed companies with only a few changes, thereby incorporating the provisions into Swiss federal law.

Further objectives of the Reform are to make the capital rules more flexible, to facilitate the formation of companies and to revise the rules on corporate restructuring – all of which are tackled by various new or amended provisions in the Swiss Code of Obligations. Further, the Reform reinforces the duty of the board of directors of a Swiss company to monitor the liquidity of the company and to take measures to ensure its solvency.

Also of note is that the Reform modernises the form in which general shareholders' meetings can be held as it allows the meeting to be held virtually or even abroad. Further, resolutions by the general shareholders' meeting can be passed in writing or in electronic form, provided no shareholder requests an oral discussion.

The revised company law will come into force on 1 January 2023. From this date on, companies will have two years to make the changes to their articles of association and organisational regulations such as to be compliant. Overall, we expect the impact of the Reform on private M&A transactions to be limited.

Currently, a partial revision of the Swiss Federal Act on Cartels and other Restraints of Competition (CartA) is in progress. The primary

goal of the revision is to further modernise merger control and to seek harmonisation with international practice, particularly the one of the EU. By changing from the current qualified market dominance test to the internationally recognised Significant Impediment to Effective Competition (SIEC) test, the standard of review of the Swiss Competition Commission is adapted to international practice and to a lower level of intervention thresholds. Under the SIEC test, mergers can be prohibited or subject to appropriate conditions if they lead to a significant impediment to competition. Under the current standard of review, this is only possible if a merger completely eliminates effective competition. The legislative process is still ongoing, and it is currently uncertain when the revised CartA will enter into force.

Further, as part of a counterproposal to the Fair Price Initiative, the scope of the CartA was expanded on 1 January 2022. Since then, in addition to market-dominant companies, smaller, so-called relatively market-powerful companies have also fallen within the scope of the CartA. These are companies on which other firms are so dependent for the supply or demand of goods or services that there are no sufficient reasonable possibilities to resort to alternative sources. The assessment as to whether a company qualifies as such a relative market-powerful company must be made on a case-by-case basis with consideration of the respective market.

Another current notable legislative project is the implementation of an investment control for 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 the financial sector) there is no general investment control for FDI in Switzerland. A parliamentary motion submitted in 2018 aims at creating a legal basis for investment control of FDI in Swiss companies by, among other things, 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.

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In late August 2021, the Federal Council issued a press release in which the broad framework for such an investment control regime was outlined. In May 2022, the draft bill of the framework was issued by the Federal Council for the publication consultation. The draft bill mainly focuses on the following two objectives:

- protecting the public order and security against threats or endangerments in connection with acquisitions of Swiss companies by foreign investors; and
- 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 underlie such requirements in specific sectors that 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 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 a second stage. In any case, 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?

While the covid-19 pandemic had a negative impact on certain economic sectors and citizens' social life all over the world, M&A activity in Switzerland experienced an unexpectedly fast recovery after the first lockdown in 2020, and M&A deal activity developed positively in 2021 as market participants adapted quickly to the new environment (eg, fewer physical and more virtual meetings, and remote signings and closings). M&A deal activity saw a record year in 2021 regarding deal count (604 deals, as opposed to 363 in 2020). M&A deal flow and volume was particularly high in the TMT, industrial markets, and pharmaceuticals and life sciences sectors. We expect the TMT, consumer goods and healthcare sectors to experience an ongoing popularity in 2022 for outbound transactions, and as for inbound transactions, increasing deal activity in the TMT, consumer goods and industrial sectors are expected. The phasing-in of the regulations under the FinIA could lead to increased M&A activity in the financial sector, especially in the asset and wealth management sector. We expect companies to increasingly divest certain assets, divisions or subsidiaries by spin-offs, split-offs and carve-outs. Therefore, we believe that more specialised companies will be traded on the M&A market.

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QUESTIONS

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 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 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 raises interesting and unique questions. A very interesting topic we came 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.