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Switzerland

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Overview

Statutory and regulatory M&A framework in Switzerland

The regulatory environment in Switzerland is still very investor friendly for the following three main reasons: limited investment restrictions (a notable exception being the so-called *Lex Koller*; see below); vast flexibility of the parties in the asset or share purchase agreement (e.g. with regard to the R&W, indemnities, disclosure concept, cap, etc.); and low bureaucracy. Below, please find a brief overview of regulations that may be relevant.

Public takeovers by way of cash or exchange offers (or a combination thereof) are governed by the Financial Markets Infrastructure Act (FMIA), which came into force on 1 January 2016 and replaced the respective provisions in the Federal Act on Stock Exchanges and Securities Trading (SESTA) and a number of implementing ordinances. Within this framework, the SIX Swiss Exchange (SIX) is responsible for issuing regulations regarding the admission of securities to listing as well as the continued fulfilment of the listing requirements. The Federal Takeover Board (TOB) and the Swiss Financial Market Supervisory Authority (FINMA) are responsible for ensuring the compliance of market participants with the Swiss takeover regime. Decisions of the TOB may be challenged before the FINMA and, finally, the Swiss Federal Administrative Court.

If a transaction exceeds a certain turnover threshold (turnover thresholds are rather high compared to other European countries: (a) the undertakings concerned together report a turnover of at least CHF 2 billion, or a turnover in Switzerland of at least CHF 500 million; and (b) at least two of the undertakings concerned each report a turnover in Switzerland of at least CHF 100 million) or if a restructuring has an effect on the Swiss market, the regulations of the Federal Act on Cartels and other Restraints of Competition must also be considered.

Any planned combination of businesses must be notified to the Competition Commission (ComCo) before closing of the transaction in case (a) certain thresholds regarding the involved parties' turnovers are met, or (b) one of the involved parties is dominant in a Swiss market and the concentration concerns that market, an adjacent market or a market that is up- or downstream thereof. The ComCo may prohibit a concentration or authorise it only under certain conditions and obligations. The ComCo's decision may be challenged before the Swiss Federal Administrative Court and, finally, before the Swiss Supreme Court.

Further, foreign buyers (*i.e.*, foreigners, foreign corporations or Swiss corporations controlled by foreigners) must consider the Federal Law on Acquisition of Real Estate in Switzerland by Non-Residents (the so-called *Lex Koller*). They must obtain a special permit from cantonal authorities in order to purchase real property or shares in companies or businesses owning real property, unless the property is used as a permanent business establishment.

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 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 offeror to publish a FinSA-compliant prospectus.

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. However, such shareholders have time 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.

In June 2020, the Swiss parliament passed a bill modernising Swiss corporate law, which seeks to update corporate governance by enhancing shareholder rights, facilitating company formation and increasing the flexibility of capital regulations. It also implements the provisions of the Ordinance on Excessive Compensation at legislative level, introduces gender equality guidelines in boards of directors and senior management and imposes stricter transparency rules for companies in the commodity business. The new Swiss corporate law will enter into force on 1 January 2023.

Overview of M&A activity in 2021

The recovery in deal activity after the first lockdown in 2020 continued through 2021, which saw a record year when it comes to deal count: 604 deals, as opposed to 363 in 2020. The most active sectors were the technology, media & telecommunications sector and the industry sector, as well as the pharmaceuticals & life sciences sector.

Private equity investors were involved in almost a third of all deals that took place in Switzerland in 2021 (according to the KPMG Report Clarity on Mergers & Acquisitions 2022 for Switzerland). Swiss private equity firms have expanded their presence, both in Switzerland and abroad.

Significant deals and highlights

The most significant deals of the year were the buyback of Roche shares from Novartis for a consideration of approximately USD 20.7 billion, the tender offer by CSL Limited for all shares in Vifor Pharma Ltd. at a valuation of Vifor Pharma totalling USD 11.7 billion and the merger of TX Markets and Scout24, which has led to one of the largest digital companies in Switzerland with a medium-term goal of going public.

Five IPOs took place in Switzerland in 2021. The biggest IPO was the listing on the SIX Swiss Exchange of PolyPeptide Group AG, one of the world's largest independent contract manufacturers of therapeutic peptides for the pharmaceutical market, with a market capitalisation of CHF 2.53 billion.

An example highlighting both the attractiveness of the industry sector and private equity investors' involvement in dealmaking was the minority acquisition of Breitling SA by Partners Group from CVC Capital Partners.

Key developments

Broadly speaking, the Swiss M&A market and, in particular, the private equity market, seem to be in good shape, in spite of some uncertainties (such as the Russia-Ukraine conflict, the fragile pandemic situation, etc.) that have emerged in the recent past. The following key factors can be identified for this continuing positive trend.

First, although increases of interest rates have been announced, they are still low and the borrowing conditions remain generous, which promotes fundraising and puts pressure on investors to invest. Private equity investors, who tend to be highly leveraged, are benefitting from this environment in particular.

Second, Switzerland remains attractive for investors, with various investment opportunities – notably small and medium-sized enterprises, which must deal with succession planning in the coming years (estimated to be approximately 80,000), are particularly attractive targets for (private equity) investors.

Third, Swiss companies continue to transform and reshape their portfolio through M&A transactions (e.g. by strengthening digital capabilities or focusing on the core business).

Finally, in the field of public M&A, shareholder activists continue to engage in Swiss targets and this trend can be expected to advance, as activist shareholders are becoming more sophisticated and better funded. In a recent case of shareholder activism, 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 payout to minority shareholders following the proposed squeeze-out merger with Schweizer Kraftwerksbeteiligungs-AG in September last year.

Industry sector focus

The COVID-19 pandemic has accelerated the general digitalisation trend. Most companies have digitalised at least part of their business, more and 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.

The year ahead

Despite some uncertainties relating to the macroeconomic situation and the geopolitical environment, we generally expect the Swiss M&A markets to continue to be strong in 2022. Given Switzerland's emergence as one of the predominant crypto hubs of the world, we also see a potential rise in M&A activity involving companies in the blockchain industry.

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Christoph Neeracher is a partner at Bär & Karrer and 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 as a leading lawyer in financial and corporate law. Christoph Neeracher is experienced in a broad range of domestic and international transactions – both sell- and buy-side (including corporate auction processes) – and specialises in private M&A, private equity and venture capital transactions. He furthermore advises clients on general corporate matters and restructurings as well as on transaction finance and general contract matters (*e.g.* joint ventures, partnerships and shareholders' agreements), relocation and migration projects, and all directly related areas, such as employment matters for key employees (*e.g.* employee participation and incentive agreements). In his core fields of activity, he represents clients in litigation proceedings.

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