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Switzerland

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Overview

Overview of M&A activity in 2022

The year 2021 was highly productive, setting the stage for a favourable start into 2022 with a high level of optimism. However, this optimism was dampened by the invasion of Ukraine in February 2022 and compounded by ongoing pandemic-related issues. Last year was marked by dominant economic phenomena such as supply chain challenges, global inflation, and general macroeconomic uncertainty.

Despite the gloomy economic situation, the year 2022 ended up being another highly productive year for the Swiss M&A market, with a total of 647 deals being closed with Swiss involvement amounting to an aggregated deal size of USD 138.5 billion. This makes 2022 the second record-breaking year in a row in terms of number of deals. Compared to the 604 deals with an aggregated deal size of USD 169.6 billion in 2021, and the 363 deals with an aggregated deal size of USD 63.1 billion in 2020.

Market environment

The most active sectors in descending order were Industrial Markets (89 deals), Pharmaceuticals & Life Sciences (82 deals) and Consumer Markets (55 deals). Private equity investors were involved in 194 deals that took place in Switzerland in 2022. This means that private equity continues to have great influence on the Swiss M&A market.

In 2022, 283 foreign companies were bought by Swiss purchasers, 152 Swiss companies were bought by foreign acquirers and 127 deals were domestic transactions (Switzerland/Switzerland).

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.

Regulatory process: Public takeovers by way of cash or exchange offers (or a combination thereof) are governed by the Financial Markets Infrastructure Act (FMIA). 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 Swiss Takeover Board (TOB) is 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.

The Financial Services Act (FinSA) primarily addresses the financial services industry and has, in particular, 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.

Investment restrictions: 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.

In addition, in May 2022, the Swiss Federal Council published its preliminary draft for a new law on the control of foreign direct investment. The draft is soon expected to be submitted to parliament for debate. The new law is intended to protect public order and security in the event of takeovers of domestic companies by foreign investors. The preliminary draft focuses on (i) takeovers by foreign investors that are under the direct or indirect control of a foreign state, and (ii) takeovers in certain sectors that are security-critical.

Significant deals and highlights

Among the 647 deals with Swiss involvement, few stand out because of their size. The 10 biggest deals account for CHF 81.5 billion. Two of these will be pointed out below.

In May 2022, DSM and Firmenich announced a cross-border merger-of-equals that united the two iconic companies. The deal value was CHF 20.722 billion. Additionally, in May 2022, Sazka Entertainment entered into a partnership with Cohn Robbins Holdings Corp. to become a publicly listed company on the NYSE, resulting in an enterprise with a value of USD 9.3 billion. The second biggest transaction of the year was the takeover of the Swedish match and tobacco producer Swedish Match AB by the Swiss tobacco group Philip Morris International in May 2022.

While, compared to last year, the number of IPOs has globally dropped by almost half, it has nearly tripled in Switzerland, from five to 14 IPOs.

Noteworthy highlights showcasing the attractiveness of the Swiss financial marketplace include the IPO of Acceleron Industries AG, which went public as a spinoff of ABB with a market capitalization of CHF 1.710 billion, and the two listings of Sunwoda Electronic Co Ltd and Hangzhou Great Star Industrial Co Ltd. on the SIX Swiss Exchange via Global Depository Receipts (GDRs), with a volume of CHF 550 million. The 14 additions that were reported on SIX in 2022 had an aggregated value of over CHF 4.5 billion.

One of the key transactions involving private equity investors was Partners Group's increased investment in Breitling Group.

Key developments

The key development for 2022/2023 was the entering into force of the new Swiss corporate law on 1 January 2023. Although the impact of those changes on the M&A market cannot yet be analysed, we expect the new corporate law to generally have a positive effect. Key changes include, *inter alia*, the following:

Share capital: The share capital of Swiss stock corporations no longer has to be denominated in CHF, but can now alternatively be in EUR, USD, GBP or JPY – provided that the respective currency is the functional currency of the business and the reporting currency used in the financial statements (art. 621 of the Swiss Code of Obligations "CO"). While it is already possible today to prepare financial statements in a currency other than CHF, the amount of distributable equity still needs to be determined in CHF as well. Aligning the share capital with the reporting currency avoids FX discrepancies. The share capital currency can be changed as of the beginning of a financial year by amending the company's articles of association.

Incorporation and capital increases: Under the old law, companies could create authorised capital, empowering the board of directors to issue shares out of such authorised capital during a maximum period of two years. The authorised capital has been replaced by the concept of a "capital band" (art. 653s *et seq.* CO): the shareholders' meeting can, by amending the articles, authorise the board to increase and/or reduce the share capital within a predefined bandwidth of up to 50% of the share capital up- and downwards during a maximum period of five years. Apart from the useful time extension, the capital band essentially follows the rules of authorised capital. It should be noted that it is still possible to create contingent capital for the issuance of shares upon exercise of stock options and convertible bonds. From a tax perspective, the capital band has the benefit that the 1% Swiss stamp duty payable on capital contributions is only due on the net increased amount at the expiry of the capital band. Under the old law, if a company was incorporated or increased its capital and it was intended that the company will acquire assets from a shareholder or a close person, the intended acquisition, including the purchase price, had to be disclosed in the articles and an auditor had to confirm that the price was justifiable. These rules regarding the intended acquisition in kind (*beabsichtigte Sachübernahme*) have been abolished, making incorporations and capital increases faster and more cost-efficient.

Interim dividends: Already under the old law, legal doctrine considered it permissible for a company to disburse interim dividends, i.e., dividends out of earnings of the current financial year, based on an interim balance sheet. However, audit firms were reluctant to provide the required certificate for such interim dividends. New art. 675a CO positively confirms that such interim dividends are permitted.

Shareholders' resolutions: While shareholders' meetings have always had to be held as physical meetings (absent COVID-relief), the reform introduces flexibility by offering a number of additional ways to hold such shareholders' meetings (art. 701 *et seq.* CO) (i.e.,

normal physical meeting (unchanged), physical meeting concurrently at several locations with electronic transmission between such locations, physical meeting with remote participants exercising their (voting) rights electronically, entirely virtual meeting, circular (i.e., written) resolution in wet ink or electronic form).

Board resolutions: The reform eliminates uncertainties around the question if/how electronic board resolutions are permitted, by clearly listing the options to hold board meetings and pass resolutions (art. 713 CO) (i.e., normal physical meetings (unchanged), physical meetings with remote members exercising their (voting) rights electronically, entirely virtual meetings, circular (i.e., written) resolutions in wet ink or electronic form (e-mail etc.), unless a board member requests oral discussion.

Rights of minority shareholders: Shareholders of non-listed companies representing 10% of the capital or votes are entitled to receive requested information in writing from the board (art. 697 para. 2 CO). Shareholders representing 5% of the capital or votes have the right to inspect the books and records of the company (art. 697a CO; previously, this was only possible with the permission of the shareholders' meeting or the board). These information/inspection rights only extend to the information necessary for the exercise of shareholders' rights and are subject to trade secrets and legitimate interests of the Company not to disclose certain information. If shareholders of a non-listed company represent 10% of the capital or the votes (5% of the capital or the votes in case of listed companies), they can request the calling of a shareholders' meeting (art. 699 para. 3 CO). Shareholders of non-listed companies who represent 5% of the capital or the votes (0.5% of the capital or the votes in case of listed companies) are allowed to request the inclusion of agenda items and motions regarding a scheduled shareholders' meeting (art. 699b CO).

Transparency rules: Furthermore, the following new transparency rules take effect under the revised law:

- Companies subject to ordinary audit and active in the exploitation of certain commodities must prepare a report regarding payments to governmental bodies (art. 964d *et seq.* CO; from FY 2022).
- Larger companies with a minimum of 500 FTE and either a balance sheet exceeding CHF 20 million or revenues exceeding CHF 40 million must prepare an ESG report and have it approved by the board and shareholders' meeting (art. 964a *et seq.* CO; from FY 2023).
- Companies (i) importing or processing commodities from conflict regions, or (ii) offering products or services that are under suspicion to have been produced or carried out involving child labour must implement a management system regarding their supply chain, assess risks and have compliance with their duties of care reviewed by an external expert (art. 964j *et seq.* CO; from FY 2023).

Industry sector focus

The IT services sector has emerged as a key focus area for M&A activity in Switzerland. The continued interest in this sector is due to its scalability, high growth rates and business models, which increasingly rely on recurring revenues such as Software as a Service (SaaS). The pandemic has also accelerated digital transformation, creating conditions that will continue to drive innovation and technological adoption.

The rapid pace of change has fuelled growth in IT services companies across all sub-sectors, including cloud solutions, cybersecurity, and SaaS. Despite the strong Swiss franc, Switzerland remains an attractive destination for international and domestic acquirers and private equity firms are showing strong interest in this sector.

The year ahead

During times of uncertainty or market volatility, M&A activity tends to slow down. However, these times can also be opportune moments when valuations become more attractive. Based on our experience, recent deal activity and insights into our clients' current deals, we are optimistic that exciting M&A opportunities lie ahead in the upcoming year, although it is uncertain whether private equity investors will remain as active as in recent years given the higher interest rates.

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