SWITZERLAND

Law and Practice

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1. Transaction Activity

1.1 Private Equity Transactions and M&A Deals in General

The anticipated economic recovery following the pandemic did not materialise in 2023. Despite robust performance in 2022, the year 2023 was merely average in terms of transaction numbers and marked the second lowest transaction volume of the past decade. Swiss entities engaged in 484 transactions amounting to USD72.2 billion. Even within a ten-year comparative framework, 2023 is notable for its low transaction volume, surpassed only by the year of the COVID-19 outbreak in 2020. The most significant transaction was the USD17.3 billion merger between Bunge and Viterra, followed by Roche's acquisition of Telavant, a biotech company for around USD7.3 billion. In terms of transaction numbers, 2023 was an average year in a ten-year comparison but did not reach the exceptionally high levels of the preceding two.

Entering 2024, the M&A landscape continued to face significant challenges. By mid-year, global deal volumes were 30% lower than in the first half of 2023, impacted by uncertainties and delayed interest rate reductions in the United States. The Swiss State Secretariat for Economic Affairs (SECO) forecasts modest economic growth of 1.1% for Switzerland in 2024, consistent with the IMF's global forecast of 2.9%, both below historical averages. Contributing factors include the lingering effects of the pandemic, geopolitical conflicts, and tight monetary policy in many countries, all of which hinder a robust recovery.

Notwithstanding these challenges, there is optimism for the Swiss M&A market in 2024. Stakeholders are encouraged by improving macroeconomic and political conditions, and a resolution to interest rate uncertainties. Private equity firms are under pressure to increase their activity, leveraging substantial "dry powder" for investments and benefiting from improved access to debt financing. This sets the stage for a potential catch-up effect, with deferred M&A projects from 2023 likely to come to fruition in 2024.

Positive indicators have emerged, with deal values increasing by 5% in the first half of 2024 and the announcement of 33 "mega-deals", representing a 22% year-on-year increase. Additionally, the Swiss fund market achieved an all-time high of CHF1.5 trillion in the first quarter. Thorough preparation and renewed confidence are essential to revitalising M&A activities: as deal preparation accelerates and confidence returns, the Swiss M&A market is poised to regain momentum.

1.2 Market Activity and Impact of Macro-Economic Factors

In 2023, the most active sectors in the Swiss M&A market were industrial markets; technology, media, and telecommunications (TMT); and pharmaceuticals and life sciences. The industrial goods sector accounted for 98 transactions with a deal volume of approximately USD6 billion, representing 20% of all transactions. This is the first since the coronavirus crisis that the industrial goods sector has surpassed the TMT sector as the most active in M&A activity.

The TMT sector, with 76 transactions and a deal volume of slightly over USD1.1 billion, experienced a significant decline compared to the previous year's 124 transactions and nearly USD15 billion in volume. Pharmaceuticals and life sciences maintained their third-place position from the previous year, with 72 deals but a volume of nearly USD25 billion.

Looking ahead, several macroeconomic factors could restore confidence and boost M&A activity. Despite the uncertain timing, the need for M&A is more pronounced, driven by pent-up selling pressure, particularly from private equity firms. Rapid technological advancements and the disruptive impact of artificial intelligence (AI) make M&A a strategic imperative for companies seeking growth and business model reinvention in a low organic growth environment. Increased preparations for sales and vendor due diligence indicate a potential influx of quality assets to the market in the near future.

However, the M&A landscape remains complicated by ongoing global tensions, including conflicts in Ukraine and the Middle East, and strained US-China relations. The rise of AI as a global trend in 2023 has positioned pioneering technologies as crucial to business operations. In addition to standard due diligence, both buyers and sellers should carefully prepare for IT integration or separation to accelerate success and create long-term value. Consequently, M&A activity is expected to increase, albeit unevenly across sectors.

2. Private Equity Developments

2.1 Impact of Legal Developments on Funds and Transactions

In general, private transactions are not extensively regulated in Switzerland and the parties have great flexibility in determining the transaction structure as well as the contractual framework. Compared to public M&A transactions, which are highly regulated, private M&A transactions are less densely governed and many provisions of the Swiss Code of Obligations of 30 March 1911 that would apply to share or asset transfers can be excluded in favour of a contractual framework.

However, financial and corporate regulations have increased in recent years. In this respect, it should also be noted that even though Switzerland is not a member of the European Union, EU directives and regulations still have an important impact on Swiss policy-making.

Data Protection and Privacy

An example of EU regulations affecting the regulatory landscape in Switzerland is the General Data Protection Regulation (GDPR). Even though Switzerland is not a member of the EU, the guidelines are directly applicable to all Swiss-based companies doing business in the EU, as the scope includes all businesses processing personal data of EU data subjects (eg, employees), or organisations that monitor the online behaviour of EU data subjects (eg, customers). In addition, EU companies are asking their Swiss business partners to be GDPR-compliant. Therefore, the GDPR has a major impact on numerous Swiss-based companies.

The Federal Act on Data Protection of 19 June 1992 (FADP), and the supporting Ordinance to the Federal Act on Data Protection of 14 June 1993 (DPO), has undergone a complete overhaul in Switzerland, partially in reaction to the GDPR and its ramifications. The purpose of the reform was to update the FADP to align with technological advancements, to ensure compliance with the GDPR and to maintain unrestricted data flow between Switzerland and the EU. The revised FADP, along with the associated legislation, has been in effect since 1 September 2023, without a transition period.

SPACs

Special purpose acquisition companies (SPACs) had record years in the USA in 2020 and 2021. In Switzerland, the Directive on the Listing of SPACs was put into effect in December 2021, allowing SPACs to be listed on the SIX Swiss Exchange. As a result, these "blank-cheque firms" have entered the Swiss "investor" market. This directive requires that the de-SPAC process be completed three years after the initial trading day. Otherwise, the SPAC has to be dissolved and liquidated, respectively, and the converted bond mandatorily repaid.

The first and sole SPAC in Switzerland was listed on 15 December 2021. Two years after listing, the company successfully found a suitable takeover target with a capital base of approximately CHF200 million. In December 2023, the target company's shares were listed on the SIX Swiss Exchange. There has not been an additional SPAC listed in Switzerland since.

Sparks

The Swiss Financial Market Authority (FINMA) approved the new SIX Swiss Exchange equity section "Sparks" in 2021. Since October 2021, SMEs have been eligible to list on the SIX under streamlined, SME-specific regulations, to get access to Swiss and foreign investors with sufficient financial means and experience. The benefits of Sparks also include enhanced liquidity due to the tradability and visibility of the shares, with the company needing to adhere to more stringent regulatory standards (such as ad hoc advertising, disclosure of large shareholdings, and financial reporting). Businesses and investors have additional chances to expand by enabling SMEs to take advantage of SIX's benefits. In February 2022, the first SME was listed in the new "Sparks" equity section of the SIX Swiss Exchange. Due to the limited number of stock market entries the SIX launched the "Sparks" IPO Academy for the second time in early 2023, with 15 potential stock market candidates participating. The Six Swiss Exchange is actively filling its pipeline in anticipation of the next stock market upswing.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

Regulatory Reform

As mentioned in **2.1 Impact of Legal Developments on Funds and Transactions**, private M&A transactions are not extensively regulated in Switzerland as there is no specific act regulating the acquisition of privately held companies. The main legal source is the Swiss Code of Obligations, which provides quite a liberal framework for transactions. Currently, Swiss law provides for only very limited restrictions on foreign investment (for example, the banking sector or the purchase of residential real estate): foreign investors, financial sponsors, and sovereign wealth investors are, broadly speaking, in most cases not restricted or treated differently from domestic investors.

However, following international developments, this may change in Switzerland. An initiative to establish an approval authority for transactions subject to investment control (motion 18.3021 Rieder) was approved by the Swiss Parliament in March 2020, instructing the government to create a legal basis for controlling foreign investments, with the aim of safeguarding Switzerland's public order and security.

In May 2022, a first draft of the Investment Review Act (IPG) was published, encompassing investments by state-owned foreign inves-

tors in general, as well as investments in specific sectors by any foreign investor, regardless of whether it is controlled by a foreign state or a private entity. The publication of the first draft of the Investment Review Act was followed by a consultation period which lasted until September 2022.

In May 2023, the Federal Council took note of the results of the consultation on the new law on investment screening. The proposal has faced widespread scepticism, primarily due to concerns about its potential negative impact on Switzerland's attractiveness as a business destination. Consequently, the Federal Council has instructed the Federal Department of Economic Affairs, Education and Research (EAER) to prepare a substantially revised draft that aligns with Switzerland's international obligations and to present it to the Parliament.

According to the revised draft instructions provided by the Swiss government, the scope of investment review will be significantly limited. It will only be applicable when a foreign state-controlled investor acquires a domestic company operating in critical sectors such as defence equipment, electricity production and transmission, or health and telecommunication infrastructures. This reduced scope of the revised draft will significantly limit the adverse effects on companies compared with the initial draft. The Swiss Federal Council has directed the EAER to prepare the corresponding revised draft by the end of 2023. At the time of writing, there is no further development in the decree of the Investment Review Act (IPG).

The Foreign Subsidies Regulation

The new EU Foreign Subsidies Regulation (FSR) regime directly impacts Swiss companies with sales in EU member states, particularly if they are planning transactions in the EU or participate in public tenders there. Swiss companies should anticipate reporting obligations if certain thresholds are met and may also face ex officio investigations by the European Commission if they operate within the EU.

Subsidies from Swiss public bodies (the federal government, cantons, municipalities, etc) are considered grants under the FSR. This includes special tax breaks, individually granted support, and pandemic related assistance provided to individual companies. Additionally, Swiss companies must account for subsidies received from non-EU countries worldwide.

As a result, numerous M&A transactions and public tenders involving Swiss companies in the EU will likely need to be reported under the FSR. Companies should systematically collect information on all financial contributions or subsidies received globally and on a group-wide basis, noting whether these contributions were received under market conditions. This data is essential for assessing the reportability of corporate transactions or public tender offers under the FSR and for preparing a defence if subjected to an ex-officio investigation.

Real Estate

One exception to the liberal legal framework in Switzerland is the acquisition of real estate. Swiss law restricts the acquisition of real estate that is not permanently used for commercial purposes (non-commercial property), such as residential or state-owned property, undeveloped land or permanently vacant property (the Lex Koller). Legal entities with their corporate seat outside Switzerland are deemed as foreign under the regulations, regardless of who controls them. Further, legal entities with their corporate seat in Switzerland are deemed as foreign if they

are controlled by foreign investors. The law takes a very economic view to determine whether a Swiss entity is foreign controlled; namely, it looks through the entire holding and financing structure, but it is strictly formal as soon as an entity with its corporate seat outside Switzerland is involved.

ESG

The topics of sustainability and environmental protection, as well as social and responsible corporate governance, have gained increased attention and importance in Europe (and throughout the world) over the past few years (criteria of environmental social governance, ESG). With the introduction of ESG reporting requirements as of 1 January 2022, Switzerland has followed the trend and has introduced stricter ESG requirements for Swiss companies.

Depending on their size and significance, certain companies will be subject to the new ESG reporting requirements.

Swiss businesses that are of public interest must create an annual, public ESG report that addresses non-financial issues. The requirement to create such a report primarily pertains to listed companies and banks that, together with the domestic or foreign businesses they control, have an average of at least 500 full-time positions annually over the course of two years and have sales revenue exceeding CHF40 million or a balance sheet total of at least CHF20 million. The report discusses non-financial issues such the business strategy, newly developing threats to the environment, employees, and human rights, as well as the due diligence steps the firm has made to address ESG issues.

Compared to companies of public interest, SMEs are not yet compelled to issue such an ESG report. However, additional due diligence obligations apply if companies (including SMEs) with their registered office, head office, or primary place of business in Switzerland process or import specific minerals or metals originating from conflict or high-risk regions. Similar due diligence obligations apply to Swiss companies that provide goods or services for which there is a plausible suspicion that child labour was used in their manufacturing. SMEs are exempt from the due diligence obligations regarding child labour if their balance sheet totals, sales revenue and full-time employees fall below certain statutory thresholds.

It is anticipated that the due diligence obligations regarding child labour will be the most relevant obligation for private equity firms intending to invest in certain businesses. Moving forward, it is highly recommended that private equity buyers also focus on the new reporting requirements when conducting a due diligence analysis of an acquisition target.

With effect from 1 January 2024, the executive regulation on climate reporting for large Swiss enterprises was enacted. Publicly traded companies, banks, and insurance firms with a minimum of 500 employees and either a balance sheet total of at least CHF20 million or an annual turnover exceeding CHF40 million are now mandated to publicly disclose information on climate-related matters.

The mandatory public reporting must encompass both the financial risks associated with the entity's climate-relevant activities and the impact of the entity's business operations on the climate. Furthermore, entities are required to disclose their targets for reducing both direct and indirect greenhouse gas emissions and to outline their strategies for achieving these targets.

4. Due Diligence

4.1 General Information

The vast majority of legal due diligences are conducted on an exception basis only (ie, only highlighting red flags). Only in specific cases are summaries or overviews produced (eg, overview of key terms of the important business contracts, the employment agreements with key employees or lease overviews). The typical scope of a legal due diligence covers corporate matters, financing agreements, business agreements, employment (excluding social security and pension), real property/lease, movable assets, intellectual property (IP)/IT (review of an IP portfolio and contracts from a legal perspective), data protection and litigation. Compliance and regulatory topics are included to the extent relevant for the specific business.

4.2 Vendor Due Diligence

Vendor due diligence is not a customary feature in private equity transactions in Switzerland. However, it is conducted in complex and large-scale transactions to expedite and facilitate the sales process. Recently, there has been an increase in the frequency of sales preparations and vendor due diligence.

The result of a vendor due diligence is typically a report which summarises material legal key terms as well as highlighting certain red flags. The vendor due diligence reports are often used as a starting point for the buyer's own legal due diligence and to define the focus of the buyer's own due diligence. However, vendor due diligence reports usually do not fully replace a buyer's own due diligence – even if reliance is granted (which is typically the case).

5. Structure of Transactions

5.1 Structure of the Acquisition

Most acquisitions of Swiss target companies by private equity funds are carried out by Swiss law-governed share purchase agreements with jurisdiction in Switzerland. In the case of a reinvestment or a partial sale, a shareholders' agreement is concluded in connection with the transaction.

The terms of the acquisition are different between a privately negotiated (one-on-one) transaction and an auction sale, as the "hotter" the auction, the more seller-friendly the terms of the acquisition agreement. This relates to the price certainty (locked-box v closing adjustment), transaction certainty (conditions precedent (CP), hell or high-water clause, etc) as well as the liability concept (warranty and indemnity (W&I) insurance, cap, specific indemnities, etc).

5.2 Structure of the Buyer

Given the extensive flexibility in Switzerland, a wide array of transaction structures is observed. The predominant structure for private equity funds to invest in or acquire a Swiss target company involves the establishment of a special purpose acquisition vehicle, commonly referred to as NewCo or AcquiCo. The AcquiCo may be held either directly or, predominantly for tax or financing purposes, through another special purpose vehicle located in Switzerland or abroad. In anticipation of an exit and the associated potential liabilities, the fund typically refrains from becoming a party to the acquisition or sale documentation.

The acquisition structure is generally influenced by considerations of tax efficiency and financing, such as the tax-efficient repatriation of dividends, the application of double taxation treaties, and

ensuring a tax-exempt exit. A Swiss-domiciled seller or manager reinvesting in the AcquiCo may realise a tax-free capital gain upon the sale of AcquiCo during an exit. In an auction process, meticulous consideration of tax implications can provide a significant advantage to a bidder.

5.3 Funding Structure of Private Equity Transactions

Swiss transactions are typically still, at least partially, debt-financed. Due to negative interest rates in recent years, banks have been more inclined to finance transactions, and the financing conditions have remained favourable for funding investments in Swiss companies. Although rising interest rates and lower debt ratios may make it more challenging for private equity firms to secure financing for large acquisitions, borrowing conditions remain relatively generous. Investors exhibit considerable flexibility regarding transaction financing, as Swiss corporate law imposes only limited restrictions on a company's debt-to-equity ratio. However, from a Swiss tax-law perspective, de facto limitations exist due to thin capitalisation rules.

In the context of the security package provided in connection with a debt-financed transaction, it is crucial to adhere to the restrictions on upstream and cross-stream guarantees, as well as other security interests granted by the target to the parent or an affiliate (other than a subsidiary). At the time of signing, it is standard practice in Swiss transactions for the buyer to provide sufficient proof of funds, ideally in the form of a binding term sheet with the finance provider.

Regarding the equity portion of the purchase price, sellers typically request a customary equity commitment letter directly from the fund. However, such equity commitment letters are usually not to the direct benefit of the sellers but to that of the purchaser.

Traditionally, most private equity deals in Switzerland have been majority investments. However, given the current "investment plight," there is an increasing trend towards minority investments by private equity funds.

Over the past two years, M&A financing has significantly improved. Recently, access to debt financing has also seen notable enhancement, further supporting the anticipated rebound in private equity activity in 2024. The United States and European high-yield bond and leveraged loan markets are set to nearly double the amounts raised in 2023. In the first half of 2024, USD151 billion in high-yield bonds were issued, compared to USD176 billion for the entirety of 2023, while USD359 billion in leveraged loans were issued, compared to USD379 billion in 2023.

5.4 Multiple Investors

Club deals or syndicates of several private equity funds are primarily seen in larger transactions. In the context of private transactions, the parties have vast flexibility in structuring such club deals. The relationship among the club participants is in most cases governed by a shareholders' agreement.

In the context of public transactions, other rules apply to such co-investments, and the club participants are most likely to be qualified as acting in concert regarding the mandatory takeover rules (see also **7. Takeovers**).

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

The two predominant forms of consideration structures used in private equity transactions in Switzerland are the locked-box mechanism and the net working capital (NWC)/net debt adjustment as per closing. In the current (still) seller-friendly environment, a locked-box mechanism has been used in the majority of the transactions in order to give price certainty to sellers. However, the strongly influenced sellers' market in recent years, is seen to be slightly shifting towards a more balanced approach. Discussions which were not possible in the past few years – for example, regarding closing conditions or purchase price adjustments – have become more common again.

Earn-outs and vendor loans have been seen less often recently but are not uncommon. Given that, earn-outs especially are usually used in cases where the seller remains as an employee of the target company post-closing, in which case, however, certain restrictions from a Swiss tax-law perspective may apply.

6.2 Locked-Box Consideration Structures

Due to the current sellers' market, locked-box pricing mechanisms are often combined with an interest payment or cash flow participation, respectively, for the period between the locked-box date and actual payment of the purchase price (ie, closing), and buyers tend to accept longer periods between the locked-box date and closing.

Leakage, however, is typically not subject to interest and will be compensated on a Swiss franc to Swiss franc basis (unless considered permitted leakage).

6.3 Dispute Resolution for Consideration Structures

For locked-box consideration structures, it is unusual to have a dispute resolution mechanism in place because, in general, a one-off payment at closing is agreed, which has the effect that any leakage since the locked-box date is being considered and added to the consideration. Therefore, no additional dispute resolution mechanism is necessary.

Regarding completion accounts consideration structures, however, dispute resolution mechanisms are indeed common. Specifically, so-called appraiser mechanisms are agreed upon. If such a mechanism comes into use, a designated expert, mostly likely an auditing firm, determines the final and binding completion accounts and determines the adjustment of the purchase price in accordance with the respective agreement, if any.

6.4 Conditionality in Acquisition Documentation

The typical level of conditionality in Swiss private equity transactions is usually limited to the mandatory regulatory conditions, which are reflected in the transaction documentation as conditions precedent to closing. These typical regulatory conditions are approvals from regulating bodies; ie, a merger filing with the local competition authority, which evaluates whether the transaction would violate antitrust regulations, but also industry-specific regulations need to be considered; eg, licences in the pharmaceutical sector. Especially in transactions involving multiple jurisdictions, possible merger and foreign direct investment filings need to be taken into

consideration and might significantly prolong the period required to close after signing.

Depending on the transaction, it can be quite common to have further conditions such as financing or third-party consent. The latter in particular can be critical; eg, if the target has material agreements in place which are essential for the business and which contain change-of-control provisions, but the buyer has a strong interest in keeping such agreements in place, even after the transaction (eg, supply/customer or lease agreements).

Furthermore, material adverse change provisions, so-called MAC clauses, were quite often in use in the past; however, these have been used less lately. This is because sellers rarely accept these types of clauses in view of the transaction certainty in the current seller-friendly environment.

6.5 "Hell or High Water" Undertakings

In the current (still) seller-friendly market, with a high number of auction sales, "hell or high water" undertakings are often included in the merger clearance closing conditions.

6.6 Break Fees

In public M&A transactions, break fees are not uncommon, but are only allowed by the Swiss Takeover Board if the amount of the break fee is proportionate and if it serves the purpose of lump-sum compensation for damages and does not constitute an excessive contractual penalty. In any case, a break fee is not allowed to restrict shareholders significantly in their freedom to accept or not accept an offer and/or deter potential competing offerors. The amount of the break fees is in most cases significantly less than 1% in relation to the transaction amount. For private M&A transactions, however, break fees are an unusual instrument, since there are other mechanisms to keep the buyer indemnified due to a breach of contract. Reverse break fees are relatively rarely seen in private equity transactions since sellers often insist on actual financing proof.

6.7 Termination Rights in Acquisition Documentation

Usually, a private equity seller or buyer can terminate the acquisition agreement prior to closing if the conditions precedent to closing have not been met until a certain agreed date (ie, longstop date). A typical longstop date is often set at around 6–12 months from the date of signing, but it can vary depending on factors such as deal complexity, size, negotiations between parties, required regulatory approvals and other relevant considerations. Other than that, Swiss acquisition agreements typically do not contain any (ordinary) termination rights. However, under Swiss law, under certain conditions there is a possibility to terminate a share purchase agreement in the event of a severe breach of the agreement; any such termination right is usually – to the extent permissible – excluded as regards a breach of representations or warranties. In such a case of a termination, compensation for damages may be claimed.

6.8 Allocation of Risk

The typical methods for the allocation of risks are (i) representations and warranties for general (unidentified) risks and (ii) indemnities for specific risks identified during due diligence; eg, tax liabilities or pending litigation. In addition, with respect to risk allocation, there is a current trend towards so-called quasi-indemnities, which are representations and warranties that are excluded from disclosure and the general cap, but still subject to the other limitations, such as the notification obligation, de minimis, threshold/

deductible, damage definition, etc. In addition, risks can be allocated through the purchase-price mechanism as well as certain covenants.

Even though the details of risk allocation depend on the leverage and negotiating power of the buyer or seller, these methods are used regardless of whether the buyer or seller is a private equity fund.

6.9 Warranty and Indemnity Protection

The standard share-purchase agreements usually contain a catalogue of representations and warranties, covering the following (but not limited to those) areas: capacity, title to shares and corporate existence, shareholder loans, financial statements, ordinary course of business, material agreements, employment and social security, real estate, assets, environment, intellectual property, compliance with law, litigation, insurance and tax. In terms of limiting warranties, private equity sellers tend to limit these representations and warranties as much as possible while requesting buyers to take up a buyer policy W&I insurance.

With regard to disclosure of the data room, as a matter of principle, all information provided in the data room is considered as disclosed and therefore known, which is taken by the seller as an occasion to exclude any liability for what has been fairly disclosed.

In recent years, the use of warranty and indemnity (W&I) insurance in private M&A transactions has seen a significant increase in Switzerland. In the prevailing sellers' market, buyer-side policies are predominantly employed. These policies serve to bridge the "liability gap" when sellers are prepared to provide representations and warranties but seek to cap their liability at a level deemed insufficient by buyers. W&I insurance can augment the overall coverage available to buyers, thereby rendering transactions more agreeable for both parties.

6.10 Other Protections in Acquisition Documentation

As far as other protections go, indemnities for fundamental, business warranties and tax matters are extremely often provided by the seller. Depending on the actual wording of such indemnity clauses, these clauses are mostly designed as guarantees, which oblige the seller to indemnify and compensate the buyer fully for any damage, irrespective of the fault of the seller. It should be noted that, under Swiss law, the sole usage of terms such as "indemnification" do not constitute this effect. Whether the indemnity clause has an effect as a guarantee depends decisively on the formulation and design of the clause. Further, other kinds of guarantees – such as guarantees of a parent or group company, personal guarantee or bank guarantee – can be seen.

Furthermore, W&I insurances have been enjoying increasing popularity lately. However, such an insurance is subject to certain conditions, such as a positive due diligence. W&I insurances have another positive effect, in so far as a private equity bidder in an auction sale that would offer a W&I insurance might have a competitive advantage compared to other bidders, and therefore higher chances of winning the auction.

6.11 Commonly Litigated Provisions

While it is common that disputes in general arise from private equity transactions, it is rather uncommon that these disputes are litigated before ordinary courts or by arbitration. The Swiss approach for dispute resolution in connection with private equity transactions in general are settlements. However, in most cases it

is subject to a careful contract drafting to reflect potential conflicts in the contracts during the drafting process and to agree on dispute resolution mechanisms at an early stage.

The provisions from which most disputes arise are consideration mechanisms as completion accounts, consideration provisions and representations and warranties.

7. Takeovers

7.1 Public-to-Private

In recent years, the number of public-to-private transactions has been relatively limited, due to the lingering effects of the pandemic, geopolitical conflicts, and tight monetary policy in many countries, all of which have hindered a robust recovery of the global economy. However, given the large number of long-term commitments of private equity funds and the vast investments of private capital in public companies, we have started to see increased interest in public tender offers, including public-to-private transactions, some of which may materialise in the second half of 2024 or in early 2025.

In the context of a public-to-private Swiss M&A deal, the target company, a publicly traded entity, assumes a pivotal role as the acquisition target for the bidding party seeking to take it private. The target company's board of directors plays a critical function in assessing the acquisition proposal and acting in the best interests of the company and its shareholders. Their responsibilities encompass a thorough review of the acquisition terms, conducting due diligence, and engaging in negotiations with the bidder to ensure an equitable and advantageous outcome for the shareholders.

In buyouts of publicly listed companies, the key documentation to be prepared includes the following:

- a pre-announcement of the tender offer (public advertisement);
- an offer document outlining the offer to the shareholders of the target company; and
- a report of the target's board of directors.

7.2 Material Shareholding Thresholds and Disclosure in Tender Offers

The Financial Market Infrastructure Act (FinMIA) provides for a number of thresholds that trigger a notification and disclosure obligation, in the event that a private equity fund (PE fund) (directly, indirectly or in concert with a third party) reaches, falls below or exceeds a certain percentage of voting rights in a listed company. The relevant thresholds are 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights in a public company, irrespective of whether they are exercisable or not. If these thresholds are met, the PE fund must then notify the company, as well as the competent disclosure office within four trading days.

It should also be noted that financial intermediaries who acquire or dispose of shares or acquisition or sale rights on behalf of third parties are not subject to this notification duty.

Furthermore, aside from the disclosure obligation concerning significant interests in listed companies, there is a specific notification requirement for non-listed Swiss companies. Any person, who alone or by agreement with third parties acquires shares in a non-listed Swiss company and thus reaches or exceeds the threshold of 25% of the share capital or voting rights, is obligated to disclose to the company the identity of the ultimate beneficial owner within one month

of the transaction. Failure to comply with this notification requirement within the one-month period will result in the suspension of membership rights, including voting rights, and forfeiture of monetary rights, such as dividend rights, until the required notice is provided.

7.3 Mandatory Offer Thresholds

Under Swiss law, a mandatory offer is to be made, when an investor directly, indirectly or acting in concert with third parties acquires equity securities which (together with the equity securities already owned (if any)) exceed the threshold of 33⅓% of the voting rights of the target company, whether exercisable or not. However, the shareholders' meeting of the target companies may either (i) raise this threshold up to 49% of voting rights – the so-called opting up – or (ii) decide that an offeror shall not be bound by the obligation to make a public takeover offer – the so-called opting out; both of these have to be reflected in the articles of association accordingly.

7.4 Consideration

In private M&A transactions, consideration may consist of either 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 (which would be the case with listed companies). Tax considerations also typically play an important role in determining the type of consideration that is eventually agreed upon.

For public M&A transactions, the consideration can also be paid in cash or in securities or a combination thereof. However, Swiss corporate and takeover law demands equal treatment of all shareholders, which imposes certain restrictions on the offeror. Offering cash consideration to specific majority shareholders while offering securities to minority shareholders would not be allowed. In mandatory and change-of-control offers (see **7.3 Mandatory Offer Thresholds**), the offer price must meet the minimum price rule. This rule requires that the offer price be at least equal to the 60-day volume-weighted average price (VWAP) if the stock is liquid, or the highest price paid for securities of the target company by the bidder(s) in the 12 months before the offer, whichever is higher. If the target shares are not deemed liquid from a takeover law perspective, the 60-day VWAP is replaced by a valuation to be provided by the review body. However, in partial tender offers or public tender offers for target companies with an opting-out provision in their articles of association, the minimum price rule does not apply, and the bidder is free to set the offer price (the best-price rule, however, applies).

In conclusion, the type of consideration accepted will in each case largely depend on the individual circumstances of the transactions; eg, the shareholders involved and their intentions or the type of transaction. However, cash consideration has historically been, and is still, more frequent than a consideration in securities.

7.5 Conditions in Takeovers

The permissibility of conditions that may be attached to a public takeover offer depends on whether it is a voluntary or a mandatory offer.

With respect to mandatory offers, the competent authority only deems a limited number of conditions permissible, in particular a condition that there are no injunctions or court orders prohibiting the transaction and/or that necessary regulatory approvals will be granted, as well as conditions ensuring the ability of the offeror to exercise the voting rights (ie, entry in the share register, abolishment of any transfer/voting restrictions).

Regarding voluntary takeover offers, the legal framework for conditions is more liberal, meaning that voluntary takeover offers may contain conditions which include minimum acceptance thresholds and no material adverse change (MAC) conditions. However, generally, it is not permitted for takeover offers to be conditional on the bidder obtaining financing, except for necessary capital increases in the bidder in connection with an exchange offer (*Umtauschangebot*).

The most common conditions are that the necessary approvals from regulatory bodies will be granted, such as merger control filings with the relevant competition commission, or other specific approvals from supervisory authorities in regulated sectors; eg, the bank or pharmaceutical sector.

7.6 Acquiring Less Than 100%

In a privately held company, a private equity buyer can, in general, secure additional governance rights by concluding a shareholders' agreement (eg, veto rights, the right to appoint the majority of the members of the board of directors or certain rights connected to dividends, as well as rights of first refusal, call options, drag-along rights, etc). The extent of the governance rights under a shareholders' agreement, however, is primarily subject to negotiations.

In a public company, the possibilities to conclude a relationship agreement are limited, because if the shares covered by the agreement constitute an aggregate participation of more than a third, the signatories would generally be considered as a group, which would trigger the obligation of a mandatory offer. Moreover, it is not always necessary to formalise the investors' influence further: depending on the shareholding structure; ie, if the structure is very fragmented with many shareholders, 30% of the voting rights may be sufficient to secure decisive control in the company.

Regarding a squeeze-out in a public company mechanism, under Swiss law an investor has two options:

- under the FinMIA, a bidder holding 98% of the voting rights of the company may, within three months upon expiry of the offer period, file for the cancellation of the remaining shares against compensation in the amount of the offer price to the respective minority shareholder in a statutory squeeze-out procedure before the competent court (*Kraftloserklärung*); or
- by way of a squeeze-out merger, if the bidder holds less than 98% but at least 90% of the voting right, against compensation in accordance with the Swiss Merger Act. The threshold to initiate a squeeze-out merger is lower; however, it carries a higher litigation risk than the cancellation procedure.

7.7 Irrevocable Commitments

Irrevocable commitments to tender shares are not enforceable under Swiss tender offer rules in case of a competing offer and the Swiss Takeover Board thereby establishes a level playing field for competing offers. According to Swiss takeover law, shareholders must be free to accept a superior competing offer.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Equity incentivisation of the management is very common in Swiss transactions since it is an extremely suitable instrument for retaining the management team in the long term and may also be attractive from a (Swiss) tax law per-

spective. Although the equity incentivisation of the management depends to a great extent on the individual transaction, the typical management stake varies between 3% to 10%. Ideally, management gets to invest on the same terms as the investor to provide even more attractive conditions to the managers (see also **8.2 Management Participation**). Furthermore, the individual structure of the management participation is very much tax-driven.

8.2 Management Participation

In Swiss transactions, there are two predominant structures for management incentive schemes: the "strip investments" and "sweet equity". In the case of the former, managers invest on the same terms and conditions as the financial investor, whereas in the case of the latter, managers receive a certain discount and/or different share classes. A sweet equity incentive scheme could, for example, be structured as follows: managers receive all ordinary shares while the financial investor receives a mix of ordinary shares and preferred shares with a fixed interest (or alternatively provides a shareholder loan). This leads to a certain envy ratio in favour of the managers. However, it should be noted that Swiss tax law sets rather narrow limits with respect to tax-exempt capital gains on sweet equity. To have "skin in the game" and to align fully the managers' interests with those of a financial investor, managers are generally asked to finance a substantial part of their investment with equity; ie, roughly 50% or more.

8.3 Vesting/Leaver Provisions

Equity participations of managers are usually subject to customary good and bad leaver provisions, which are mostly tied to the termination of the manager's employment or mandate agreement, or other events related to the manager personally (death, insolvency, divorce, etc). Leaver events typically trigger call/put options, whereby the leaver qualification has an impact on the purchase price (ie, in the case of a bad leaver, the purchase price is a lower percentage of the fair market value).

Vesting provisions, either time and/or performance-based, are also common practice in management participations. Vesting provisions may vary depending on the parties involved and the kind of leaver events that have been agreed. In practice, the most commonly seen arrangements involve time-based vesting with monthly or quarterly vesting over four years, a one-year cliff and end of vesting if the employment ends. The lapse of time together with the leaver event will then collectively have an impact on the purchase price (ie, portion of unvested shares are sold at a lower price versus portion of vested shared).

Furthermore, the parties often agree on a certain lock-up period (eg, three to five years) during which the manager may not transfer their shares and/or are limited with regard to the termination of their employment relationship (ie, a manager will be considered a bad leaver except in the case of a termination by the manager for good reasons or by the company without good reasons). After expiry of that lock-up period, the manager may also terminate the employment relationship without good reason and is still considered to be a good leaver. For the determination of a good reason, reference is usually made to the provisions of Swiss statutory employment law (Articles 340c and 337 of the Swiss Code of Obligations), indirectly including Swiss case law. Hence, a manager is typically considered to have good reason to terminate the employment relationship in the case of, for example, a material salary cut by the employer for no objective reasons or in the case of severe harassment at

work. No good reason would be attributed to the manager if, for example, the employer has delayed making a salary payment.

In addition, the breach of provisions of a related agreement also commonly triggers good and bad leaver provisions; eg, if the manager materially breaches an investment agreement, corporate regulations of the company, or their employment or mandate agreement, the manager will be considered a bad leaver.

8.4 Restrictions on Manager Shareholders

One of the most common restrictive covenants in Switzerland – which are part of the equity package and the employment contract – is the non-compete and non-solicitation undertakings during the time of the manager's investment and for up to three years thereafter. In particular, if the manager is simultaneously invested in the group as a shareholder and thus has various information and governance rights, a non-compete undertaking may be justified, even for the time after the manager has ceased to be an employee/director of the company.

However, based on Swiss statutory law, non-compete and non-solicitation undertakings may not exceed three years following the end of the employment relationship or the manager's exit as a shareholder. Further, they also need to be geographically limited as they otherwise would be considered an excessive undertaking on the part of the manager (eg, to the areas where the manager could harm the company with his or her knowledge). Excessive non-compete and non-restriction undertakings may be reduced by the court in the event that they are challenged, and the courts have broad discretion in doing so. The enforceability of non-compete and non-solicitation undertakings is often increased by stipulating contractual penalties for the manager or triggering bad leaver provisions in the case of a breach by the manager.

8.5 Minority Protection for Manager Shareholders

Managers who are not re-investing sellers generally have limited minority-protection rights. The most common minority-protection right is the right of the manager to participate on the same terms and conditions as the investor in an exit, which is ensured through drag- and tag-along rights.

However, depending on the negotiating power of management, additional minority-protection rights (such as veto rights, board-representation rights or anti-dilution protection) have been seen.

9. Portfolio Company Oversight

9.1 Shareholder Control and Information Rights

The level of control of a private equity fund largely depends on the type of investment; ie, whether it invests as a minority shareholder or a majority/sole shareholder.

Typically, private equity shareholders taking non-control positions seek protection via restrictions of the transferability of the shares, tag-along rights, and put options, as well as certain governance rights, usually including the appointment of a representative on the board of directors and certain veto and information rights, which are, however, limited to fundamental rights with respect to the protection of their financial interest (dissolution, material acquisitions or divestures, capital increases, no fundamental change in business, etc).

In the case of a majority stake in the company, the private equity shareholder has extensive control over the company; ie, the majority in the board of directors and only limited restrictions due to veto rights to any minority shareholders. In addition, usually, protection rights regarding the shareholding of the company will be implemented (in particular, transfer restrictions, right of first refusal, and drag-along rights, as well as call options on the shares of the minority shareholders) to have maximum flexibility, in particular with regard to a possible exit.

9.2 Shareholder Liability

As a general principle, under Swiss law there is a separation between a company and its shareholders, and the shareholder may not be liable for the actions of the company.

However, according to case law, under special, limited circumstances the legal independence of the company and its exclusive liability are considered abusive and therefore unlawful, and consequently the controlling shareholder might be held responsible (piercing the corporate veil).

Further, a private equity investor or an individual acting for it may be considered as a de facto director of the company (eg, in the case of a material decisive operational influence) and, consequently, be bound by directors' duties as well as held responsible for possible damages resulting from a breach of those duties.

Lastly, a private equity investor that (solely or jointly) controls a portfolio company which has infringed competition law could be made jointly and severally liable for paying the resulting fine, as, in Switzerland, holding companies tend to be found to be jointly and severally liable for the antitrust fines of their subsidiaries. Private equity investors should, therefore, implement a robust compliance programme in their portfolio companies to avoid antitrust law infringements.

10. Exits

10.1 Types of Exit

In private equity transactions, the exit strategy is a critical consideration, often assessed by investors prior to committing capital. The primary exit mechanisms for successful portfolio companies are trade sales and IPOs. These strategies may be pursued individually (single track) or in combination, structured as double- or triple-track processes. The double-track or triple track-track approach (simultaneously pursuing an IPO and a sale process), are significantly influenced by prevailing market conditions. When an IPO is contemplated, it is frequently accompanied by a trade sale (auction) process. However, a complete exit at the time of listing, involving the sale of all shares held by the PE seller, is generally not feasible through an IPO. Consequently, the PE seller must divest the remaining shares incrementally or through block trades.

10.2 Drag and Tag Rights

Drag rights or drag-along provisions/mechanisms are common in private equity transactions in Switzerland, as an investor typically wants to ensure that, in the case of an exit, potential buyers may acquire 100% of the shares in the target company, which increases the attractiveness of the sale. Hence, unless the potential buyer intends to continue (eg, with the investment of managers) the drag-along right will typically be utilised within the course of a transaction.

The threshold to trigger the drag-along mechanism usually relates to the shareholding of the investor but is usually at least 50%.

In accordance with the high frequency of drag-along rights, tag-along rights are also very common, especially for the management shareholders, while they are less common for institutional co-investors. As tag-along rights are typically subordinated to drag-along rights, and due to the fact that the retention of management shareholders will regularly be addressed at an earlier stage of the transaction, as well as in view of the deal certainty, the utilisation of such rights by the management shareholders is rather rare.

Even though it may depend on the leverage of the negotiating parties, the threshold to exercise the tag-along rights is usually also at least 50%.

10.3 IPO

On an exit by way of a Swiss initial public offering (IPO), the underwriters require sponsors and other large shareholders to enter into lock-up arrangements, usually for a period of six months after the IPO. For the company, its directors and managers, however, often a lock-up of 12 months is agreed. After the lapse of the lock-up, the sponsor will sell down shares, depending on prevailing market conditions pursuant to “dribble-out” trading plans or by way of accelerated book buildings or block trades to single buyers. Typically, such lock-ups are put in place for shareholders holding more than 3% of shares in the company.

While, in Switzerland, shareholders’ agreements are typical and usually terminated upon the IPO, relationship agreements concluded post-IPO are quite unusual. Nevertheless, the conclusions of a few relationship agreements have been seen recently. Such arrangements may include board-appointment rights and joint sell-down or other “orderly market” arrangements.