The Mergers & Acquisitions Review

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PREFACE

As highlighted by the previous edition of *The Mergers & Acquisitions Review*, following the height of the covid-19 pandemic that tested the resilience of companies, the first half of 2021 had begun to tell a promising story for the M&A markets. This promise was realised with 2021 becoming a year for the record books with US$5.9 trillion in deals, a 62 per cent lift from 2020 and the highest value amount in more than a decade. Deal total also rose 0.4 per cent to 34,128.[1]

The figures for the first half of 2022 predictably dropped from 2021's record levels but the overall picture still remains a positive one. The value of global M&A transactions has dropped 21 per cent when compared to the record high of the first half of 2021, but deal values still broke US$2 trillion.[2] The decrease is understandable given macro events such as inflation, interest rates and the Ukraine war, which have created a more challenging market.[3]

Again, the Americas were the leading market for deal value in the first half of 2022 with a total of US$1.1 trillion from 4,771 deals. While these figures represent a 30.7 per cent and 18 per cent decrease, respectively, year-on-year, these figures should be put into the context, whereby not only was 2021 a record-breaking year, but by the fourth quarter activity was already beginning to normalise. In this respect, what has been witnessed to date in 2022 is a correction to more sustainable levels.[4] Across the Americas, the leading sectors for the first half of 2022 were technology, media and telecoms (1,712 deals totalling US$471 billion), energy, mining and utilities (316 deals totalling US$102.6 billion) and real estate (58 deals totalling US$96.6 billion).[5]

European dealmaking has experienced a similar decline in deal count with figures falling 19.7 per cent from 6,182 in the first half of 2021 to 4,963 in the first half of 2022. However, this decline was most prominent in the second quarter, following the invasion of Ukraine and as companies began to take a more risk off approach.[6] Interestingly, deal value has barely slipped at all and, in fact, rose quarter-on-quarter in the second quarter. Over the first half of 2022, there was €579 billion worth of transactions, down by only 6.5 per cent on last year. Private equity again played a large part in maintaining these values, with Blackstone Group

1 Bakertilly, 'Global dealmakers 2022: M&A market update'.
2 AllenOvery, 'M&A Insights H1 2022'.
3 ibid.
4 Mergermarket, 'Deal Drivers: Americas HY 2022'.
5 ibid.
6 ibid.

being particularly active in the megadeal for Atlantia (€42.7 billion) and the recapitalisation of logistics business Mileway (€21 billion).[7] Of the 10 largest deals across the EMEA, private equity accounted for no fewer than half.[8]

The year 2022 has been challenging and will likely continue to be so, with the Ukraine conflict showing no signs of end, inflation biting across the continent and cost of the living crisis drawing major attention. However, the M&A markets have thus far withstood these challenges, with dealmaking and value returning to a 'normal' level, following the heights of 2021. Should the M&A markets continue to remain resilient, the remainder of 2022 may follow the positive outlook displayed in the first half of 2022.

I would like to thank the contributors for their support in producing the 16th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 35 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
November 2022

7 ibid.
8 ibid.

Chapter 32

SWITZERLAND

Andreas Rötheli and Hans-Jakob Diem[1]

I OVERVIEW OF M&A ACTIVITY

Following a record-level of deal activity in the year 2021, a decline was noticeable during the first six months of 2022, with 281 transactions with a Swiss party involvement being announced, the third highest number ever, only beaten by the first and second halves of 2021. In terms of transaction volume, the overall value of announced deals amounted to US$84 billion, which exceeds the average transaction volume of the past 10 years. However, as a result of the global macroeconomic developments, a significant downturn in deal activity was observed in the third quarter of 2022. It remains to be seen to what extent the uncertainties will persist and impact the M&A activity in 2023.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The statutory corporate law set out in the Swiss Code of Obligations (CO) is the main source of law for private M&A transactions. The CO provides the legal framework for both share deals as well as asset deals and applies to private and public companies. Statutory mergers, demergers, conversions and transfers of assets and liabilities are governed by the Federal Act on Merger, Demerger, Transformation and Transfer of Assets (Merger Act).

The rules governing public takeover or exchange offers in Switzerland are contained in the Financial Market Infrastructure Act (FMIA) and its specifying ordinances – the Financial Market Infrastructure Ordinance (FMIO), the FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA) and the Takeover Ordinance of the Swiss Takeover Board (TOO). The FMIA and the implementing ordinances apply to all public takeover or exchange offers for participations in companies domiciled in Switzerland whose equity securities are listed in whole or in part on a stock exchange in Switzerland and all public takeover or exchange offers for participations in companies domiciled abroad whose equity securities are primarily listed in whole or in part on a stock exchange in Switzerland. Companies listed on the SIX Swiss Exchange (SIX) are also bound by the Listing Rules, the Directive on Ad-hoc Publicity, the Directive on Management Transactions and the Directive on Delisting, among others, which are issued by SIX.

It should be pointed out that, under Swiss takeover law, a shareholder is required to make a mandatory offer if that shareholder (alone or in concert with others) directly or indirectly exceeds 33⅓ per cent of the voting rights in a listed company. However, an issuer

1 Andreas Rötheli and Hans-Jakob Diem are partners at Lenz & Staehelin.

may adopt a higher threshold of up to 49 per cent (opting-up) or may opt-out from the tender duty regime entirely by including a respective clause in its articles of association. Approximately one-quarter of all SIX-listed issuers have adopted such a full opting-out.

In a mandatory offer as well as in a voluntary change-of-control offer, the offer consideration must comply with the 'minimum price rule'. Under the minimum price rule, the offer price must at least be equal to the market price (defined as the 60-day volume weighted average price, VWAP (60-day)) or, if higher, the highest price paid by the bidder (or any affiliate or person acting in concert) in the 12 months preceding the tender offer. The minimum price rule does not apply if the target company has validly introduced an opting-out and therefore is not subject to the mandatory offer rules. In addition to the minimum price rule, any public tender offer must comply with the best price rule. Under the best price rule, a bidder has to increase the offer price if, during the tender offer period or within six months after completion of the tender offer, the bidder (or any affiliate or person acting in concert) acquires shares in the target at a price exceeding the offer price.

In addition to the above-mentioned laws, depending on the business and transaction set-up, various other laws and rules regularly play an important role in Swiss M&A, such as the Federal Act on the Acquisition of Real Estate by Persons Abroad (FL, better known as Lex Koller; see Section IV for further information on the Lex Koller), the Federal Act on Cartels and other Restraints of Competition (CartA) and industry-specific laws and regulations (e.g., the Aviation Act and the Telecommunication Act).

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Various general reforms relating to corporate law that will have an impact on M&A practice have recently come into force or have been passed. On 1 January 2022, the indirect counter-proposal to the Responsible Business Initiative and the corresponding ordinance on the specification of the new due diligence requirements in the areas of child labour as well as minerals and metals from conflict zones (conflict minerals) entered into force. In essence, the new rules in the Swiss Code of Obligations (CO) provide for new reporting requirements on 'non-financial matters', especially in the areas of the environment, social responsibility and human rights, and new due diligence and reporting requirements relating to conflict minerals and the prevention of child labour throughout the supply chain. The new due diligence obligations in the area of conflict minerals and child labour apply in principle to any company domiciled in Switzerland whose business area can potentially come into contact with conflict minerals or child labour, either by importing minerals or metals containing tin, tantalum, tungsten or gold from conflict or high-risk areas or processing them in Switzerland, or by offering products and services for which there are reasonable grounds to suspect that they have been produced or provided by employment of child labour. The reporting obligations on non-financial matters only apply to major listed companies and regulated financial entities providers that have at least 500 fulltime employees and either a balance sheet total of 20 million Swiss francs or sales revenue of 40 million Swiss francs. The affected companies will be granted a transitional period of one year to adjust to the new obligations; that is, they will apply for the first time to the 2023 financial year (or the financial year beginning in 2023). The first reports based on the new regulations must therefore be prepared for the first time in 2024 with reference to the financial year beginning in 2023.

On 19 June 2020, the Swiss Parliament finally adopted the text of a general corporate law reform, thereby ending a process that had started almost two decades ago. The main aspects of this CO reform include numerous changes to 'traditional' corporate law, which will enter into force on 1 January 2023, such as:

a the incorporation of the mostly unchanged rules of the Ordinance against Excessive Compensation in Public Companies (Minder Ordinance) into the CO. The Minder Ordinance contains, among other things, provisions governing the compensation of the board of directors and the executive board or the composition of the board of directors of listed companies;

b increased flexibility with regard to the share capital, which can now be denominated in a foreign currency – shares can have a par value below one cent;

c the introduction of a 'capital band' to give companies more flexibility to increase and reduce their share capital within this capital band;

d clarification regarding requirements for distributions out of capital reserves and interim dividends;

e abolishment of the rules regarding the intended acquisition in kind in connection with an incorporation or a capital increase;

f the possibility to hold shareholders' meetings abroad or by electronic means (virtual or hybrid meetings); and

g the enhancement of shareholders' rights in terms of better corporate governance.

The reform provides for a welcome modernisation and clean-up of Swiss corporate law in many areas, which is thus expected to have a positive impact on the Swiss M&A practice. Certain other new provisions reflect overall social changes (gender equality, transparency for companies exploiting natural resources) and can also be observed across other jurisdictions. From the viewpoint of companies, shareholders and in particular M&A practitioners, the increased flexibility regarding share capital, the facilitation of distributions, the utilisation of digitalisation and the strengthening of shareholders' rights are largely welcomed. Further positive steps are that certain restrictions with questionable benefits, such as special rules for acquisitions of assets in connection with capital increases or incorporations and the ban on interim dividends, have been abolished. For public companies, the possibility to hold virtual shareholders' meetings is welcomed, and the means available to shareholders to exercise influence on the shareholders' meeting have been expanded (e.g., by reducing the thresholds for shareholder proposals). Whether the general fine-tuning in connection with shareholders' and minority rights (e.g., largely increased information rights) will in practice turn out to be in the right balance remains to be seen. In summary, it can be expected that the CO reform as a whole will have a positive impact on Swiss M&A practice.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In Switzerland there are currently no generally applicable rules that prohibit or require screening of foreign investments because of national interest, as have been enacted in various other jurisdictions. As a result, foreign investments are at present generally hampered neither by significant barriers nor by substantial discriminatory effects on foreign investments. That said, foreign investments in companies operating in certain regulated industries and sectors, such as banking services, telecommunication, nuclear energy, radio and TV or aviation, will require governmental approval or state-licensing. While in principle no distinctions are made between foreign and domestic applicants, the granting of certain state licences to foreign investors may among other things depend on whether reciprocal rights are granted in the country of the respective investor. Moreover, certain local permissions and authorisations are regulated on cantonal (state) level and need to be assessed on a case-by-case level as to whether such permissions or authorisations might depend on the nationality or foreign residence or domicile of the applicant.

A relevant restriction applicable to foreign investments is the 'Lex Koller'. It provides for a general authorisation requirement if a non-Swiss individual or company intends to acquire real estate in Switzerland. However, this obligation does not apply, which is decisive for M&A transactions, if the real estate serves as a permanent establishment of a commercial, manufacturing or other business conducted in a commercial manner, or the conduct of a handcraft business or a liberal profession. Hence, if a foreign investor is interested in acquiring a company that owns real estate in Switzerland, it must always be assessed whether the real estate in question qualifies as such an exempted permanent establishment. Should this be the case, the acquisition is possible without approval.

Recent developments suggest that Switzerland might divert from the liberal path and follow other jurisdictions towards a foreign investment control regime. Led by the Swiss Parliament, the Federal Council has recently published a preliminary draft legislation for consultation seeking to introduce foreign investment control in Switzerland.

The preliminary draft legislation provides for a cross-sector as well as a sector-specific review of control acquisitions. The cross-sector review is intended to cover acquisitions by foreign investors that are directly or indirectly controlled by a state entity. A sector-specific review is proposed to be introduced for acquisitions in certain sectors without restrictions to the type of investor covered (i.e., also including private foreign investors). The draft distinguishes between acquisitions of companies:

a in sectors traditionally deemed relevant for national security, such as the defence industry, operation of power plants or the supply of important security-relevant IT systems for Swiss authorities; and

b with revenues of 100 million Swiss francs or more that operate in other sectors in which risks to public order or security cannot be completely ruled out.

The latter includes, for example, universities, hospitals or pharmaceutical companies. A general exemption (*de minimis*) is proposed for acquisitions of small domestic companies (with less than 50 full-time employees and annual sales of less than 10 million Swiss francs in the previous two business years). The preliminary draft legislation provides for a two-stage approval procedure with a one-month preliminary review and a three-month additional review period. If no decision is taken within the applicable time periods (which may be extended under certain circumstances), the acquisition is deemed approved.

Substantively, the transactions subject to review are examined as to whether they endanger or threaten public order or security. According to the preliminary draft legislation, this is the case, for example, if the foreign investor is engaged in activities that have a detrimental effect on the public order or security of Switzerland or other states, or if significant distortions of competition result from the acquisition. The consultation period for the bill lasted until 9 September 2022. On this basis, the Federal Council will now prepare the draft legislation and probably submit it to Swiss Parliament in 2023. The law is not expected to enter into force before 2024.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As in the previous years, the TMT sector (technology, media and telecommunications) had great momentum in Switzerland in 2021 and 2022. The TMT sector together with the Industrial Markets accounted for one-third of all transactions as well as one-fourth of the transaction volume being attributable to these sectors in the first half of 2022. With regard to transaction volume, however, the 10 largest M&A deals accounted for almost 80 per cent of the entire transaction volume of the first half of 2022.

As regards the boom of SPAC initial public offerings (IPOs), Switzerland is still lagging behind other European markets and certainly the United States. That said, in 2021 there was the first SPAC listing in Switzerland (VT5 Acquisition Company AG). The SIX Swiss Exchange was ready to list the first SPAC and Swiss corporate law allows for the implementation of many of the typical SPAC features. However, the Swiss regulatory authority FINMA requested in March 2021 that SIX prepares and issues separate rules for SPACs, which SIX has in the meantime prepared. That said, in practice, US SPACs have already been quite frequently considered as an alternative to a classical IPO by Swiss companies that intend to go public.

Contrary to previous years, there were more new listings than delistings on SIX in 2021. There were two delistings (Sunrise Communications Group AG and Rapid Nutrition plc), one SPAC, three IPOs (SKAN Group AG, Montana Aerospace AG and PolyPeptide Group AG) and one new listing of a spin-off (medmix AG). The trend reversal has continued in 2022. To date, nine IPOs, one listing through reverse takeover (Kinarus Therapeutics Holding AG) and one new listing of the spin-off Accelleron AG have been completed and further IPOs or new listings have been announced.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

As in other jurisdictions, acquisitions in Switzerland are financed either by equity (or hybrid equity in the form of deeply subordinated shareholder loans) or by debt or, frequently, by a combination of equity and debt.

The structure of a debt package will typically vary as a function of, among other things, the required leverage.

Where low leverage is sufficient, the debt package will often consist of senior debt only. Such senior debt usually takes the form of a term loan. If, in addition to the acquisition loan, there is a need to refinance existing target debt or if there are working capital needs, the senior lenders will often also provide a working capital facility.

Where a higher leverage is sought, the senior debt may be increased by creating first lien and second lien senior debt, and junior debt is added on certain transactions. Such junior debt can consist of one or several layers (e.g., mezzanine debt and high-yield debt) and it may provide for an in-kind payment component, in addition to or in lieu of cash interest.

VII EMPLOYMENT LAW

Where shares of the target company are acquired, the agreements between the target and its employees are not affected. This may be different if the employment agreements of the target and acquiring companies provide otherwise. However, this would not be customary in Switzerland.

Where the (business) assets are purchased, Swiss law provides that the employment agreements will pass automatically as a result of the transfer of the business to the purchaser, provided that the employee does not object to the transfer. If a collective bargaining agreement exists in the transferred business, the acquirer is bound to accept it for at least one year, unless it expires for other reasons prior to that date.

The employee may object to the transfer. Accordingly, the purchaser who needs a particular employee is best advised to obtain the employee's consent prior to or simultaneously with the agreement to purchase the business.

If the employee objects to the transfer, the employment is deemed to be terminated on the expiry of the statutory termination period. Until such time, the purchaser and the employee are required to carry out the terms of the employment agreement.

Prior to the transfer of the business, the employee representatives, or all employees if there are no appointed representatives, are to be informed of the transfer, its reasons and its legal, economic and social consequences. If the transfer involves measures that concern the employees, the employees' representatives must be consulted prior to the decision on such measures.

VIII TAX LAW

i Asset deals

Asset deals tend to be more favourable for buyers, as a step-up in basis is allowed. By contrast, share deals are beneficial for sellers, in particular for individual sellers, as individuals are not subject to tax on gains arising from private assets, but are subject to income tax on dividends.

Asset deals permit the company to record part of the purchase price as goodwill. Payment in excess of the assets' market value is recorded as goodwill; goodwill can be depreciated.

ii Share deals

Taxation of the seller

From the perspective of corporate sellers, capital gains realised by Swiss-resident companies may benefit from participation relief if the participation fulfils the required conditions (i.e., participation of 10 per cent or more and a holding period of at least one year).

Share deals are particularly beneficial for individual sellers, as Swiss-resident individuals are not subject to capital gains tax on gains arising from private assets, but are subject to income tax on dividends.

However, for individuals resident in Switzerland, special attention must be paid to the rules concerning indirect partial liquidation and transposition during share deals involving sales by individuals resident in Switzerland, as tax-free capital gains can be retroactively reclassified as taxable participation income.

The criteria for indirect partial liquidation are as follows:

a the sale of at least 20 per cent of the share capital in a Swiss or foreign company to a third party;

b the shares are transferred from the seller's private assets to a company or to the acquirer's business assets (in the case of acquisition by an individual);

c the target company has commercially distributable reserves at the moment of the transfer and assets beyond those required to run the business; and

d these assets are distributed to the acquirer during the five years following the acquisition.

Generally, indirect partial liquidation can be avoided by adding a clause to the share purchase agreement that prevents distributions during the five years following the transfer.

Taxation of the purchaser

From the purchaser's perspective, acquisitions can be carried out using a local or foreign entity. An acquisition in and of itself does not trigger withholding tax.

When the purchaser is a Swiss company, the purchase price is recorded in the books of account at the share value. This value cannot be decreased (unless the market value decreases).

Furthermore, in the case of a leveraged acquisition, the absence of consolidated taxation for company groups means that interest on the acquiring company's debt cannot be deducted by the target company if the latter does not have operating income. Additionally, the Swiss tax authorities may treat debt push-down strategies in a leveraged acquisition as tax avoidance. Withholding tax also must be considered when structuring a leveraged acquisition with a Swiss borrower, as withholding tax is levied on bonds and certain non-bank loans requalified as bonds under the 10/20 non-bank rule.

When using a foreign parent company to hold a Swiss company, investors should ensure that the foreign parent company is located in a jurisdiction that has a Double Taxation Treaty (DTT) with Switzerland to reduce or eliminate withholding tax on dividend distributions. Otherwise, it is advisable to use an intermediary holding company located in a jurisdiction that has a DTT with Switzerland, provided it complies with the criteria for treaty exemption.

In international situations, investors should also be aware of the 'Old Reserves Theory'. Under this theory, if a foreign shareholder transfers shares in a Swiss company to a shareholder located in a jurisdiction with a more favourable DTT, withholding tax may continue to be levied on distributable reserves at the same rate applicable to a tax resident of the first jurisdiction if at the time of the transfer the company had commercially distributable reserves and assets not economically required.

Attention must also be paid to 'liquidation by proxy' in the event of an acquisition in which a Swiss entity acquires a Swiss target entity that was previously held by non-Swiss resident shareholders who were ineligible for a withholding tax refund with respect to dividends paid by the Swiss target entity. In accordance with the Swiss anti-avoidance rules, were that entity to be partially or totally liquidated shortly after the sale, it is possible that the Swiss acquiring company would be ineligible for a withholding tax refund.

IX COMPETITION LAW

i Scope of legislation

Transactions that are subject to merger control are as follows:

a statutory mergers of previously independent enterprises;

b acquisition of control over a previously independent enterprise or parts thereof, including through the acquisition of equity interests or the conclusion of agreements – acquisitions of minority shareholdings are not subject to merger control, except for any contractual arrangements or factual circumstances conferring factual control on the minority shareholder; and

c acquisition of joint control over an enterprise (joint venture).

There are three different types of joint ventures caught by merger control:

a acquisition of joint control over an existing enterprise;

b acquisition of joint control over an existing joint venture if the joint venture performs all the functions of an autonomous economic entity on a lasting basis; and

c creation of a new joint venture if the joint venture performs all the functions of an autonomous economic entity on a lasting basis and if the business activities from at least one of the controlling enterprises are transferred to the joint venture.

The Competition Law defines control as the ability to exercise a decisive influence on the activity of another enterprise by acquiring its shares, or in any other manner. In particular, this ability is deemed to exist if an enterprise is in a position to determine the production, prices, investments, supply, sales or distribution of the profits of the other enterprise. Control is also assumed if major aspects of a company's business activity or its general business policy may be decisively influenced. Whether control is actual or potential, direct or indirect, *de jure* or *de facto* is irrelevant.

ii Thresholds, triggers and approvals

The test applied to mergers is based on turnover. Two turnover thresholds must be reached cumulatively: for the last business year prior to the merger, the enterprises concerned must have reported an aggregate turnover of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs, and at least two of the enterprises involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million Swiss francs. These monetary amounts are relatively high compared to other jurisdictions. Turnover is calculated on a consolidated basis but excluding intra-group business.

In the case of insurance companies, the gross annual insurance premiums are taken into account for the purpose of determining the relevant thresholds.

The turnover calculation for banks and financial intermediaries is based on gross income.

X OUTLOOK

Following a strong rebound in 2021, which may be associated with the weakening of the covid-19 pandemic's effects and related economic recovery, M&A activity has declined in the first semester 2022 owing to worldwide instability resulting from the war in Ukraine, including global supply chain issues, growing inflation and overall increased market volatility.

While deal values are expected to decrease overall based on increasing financing costs, the outlook for M&A activity in Switzerland, however, remains positive, both in terms of outbound perspectives, in relation to certain cyclical factors, such as the weakening of numerous currencies against the Swiss franc, and in terms of inbound perspectives due to the country's enduring assets, namely political and economic stability. These factors appear ever more important to notoriously risk-averse M&A investors in the current state of affairs.

Appendix 1

ABOUT THE AUTHORS

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Andreas Rötheli heads the corporate and M&A practice group of Lenz & Staehelin in Geneva. He regularly advises on international and domestic transactions, including private equity buy-outs, venture capital investments, transactional real estate and corporate governance matters. Andreas is consistently recommended by many rating agencies in his practice areas.

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