

Mergers & Acquisitions 2024

13th Edition

Contributing Editors:

**Lorenzo Corte &
Denis Klimentchenko**

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

TABLE OF CONTENTS

Preface

Lorenzo Corte & Denis Klimentchenko

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Expert analysis chapter

- 1 Addressing ESG considerations in the M&A context**
Geoffrey P. Burgess, Andrew M. Levine, Patricia Volhard & Ulysses Smith
Debevoise & Plimpton LLP

Jurisdiction chapters

- 31 Belgium**
Luc Wynant & Koen Hoornaert
Van Olmen & Wynant
- 41 Cyprus**
Elias Neocleous, Demetris Roti & Costas Stamatou
Elias Neocleous & Co LLC
- 48 Denmark**
Sune Westrup & Lars Lühjohan
Mazanti-Andersen LLP
- 58 Germany**
Dr. Thomas Schnülle-Weingart, Dr. Christoph Trautrimms & Daniel Herper
FPS Fritze Wicke Seelig Partnerschaftsgesellschaft von Rechtsanwälten mbB
- 67 Indonesia**
Robbie Julius, Abadi Abi Tisnadisastra,
Yasmin Nariswari & Farhan Kharismatyaka
ATD Law in association with Mori Hamada & Matsumoto
- 77 Italy**
Marco Gubitosi
Legance – Avvocati Associati
- 94 Japan**
Yohsuke Higashi & Yuma Adachi
Mori Hamada & Matsumoto
- 106 Mexico**
Mariano Acebal De Rivas & Rubén Velázquez Rodríguez
Velázquez, Acebal & Asociados, S.C.
- 112 Norway**
Ole K. Aabø-Evensen
Aabø-Evensen & Co Advokatfirma

- 132 Romania**
Simona Reithofer & Bianca Grigorie
Oglindă & Partners
- 142 Switzerland**
Mariel Hoch & Christoph Neeracher
Bär & Karrer AG
- 148 United Kingdom**
Michal Berkner & Heloise Waudby
McDermott Will & Emery
- 166 USA**
Sam Snider & Nathan L. Mihalik
McDermott Will & Emery

Switzerland

Mariel Hoch

Christoph Neeracher

Bär & Karrer AG

Overview

Overview of M&A activity in 2023

The year 2023 started with a cautious M&A market in Switzerland due to global recession fears and rising interest rates. Deal activity notably shifted towards mid-market transactions, as companies prioritised strategic acquisitions and the optimisation of their portfolios, with an emphasis on transformation, digitalisation and sustainability. This strategy mirrored a cautious yet forward-thinking approach, considering the geopolitical and economic challenges as well as rising energy prices.

Although deal volume dropped compared to 2022, the Swiss M&A market demonstrated its resilience in 2023. By the end of the year, Swiss entities (as targets, acquirers or divestors) were involved in 537 transactions, with a total deal value of USD 50 billion (deals with known values as per *Mergermarket*). This represented a decline compared to 2022, which saw 616 transactions and a total deal value of USD 60 billion (deals with known values as per *Mergermarket*).

Market environment

The Swiss M&A market in 2023 was characterised by a shift towards mid-market deals, driven by strategic development and a focus on alternative funding and value creation. This trend was a departure from the large, eye-catching megadeals of previous years, which had declined since their peak in 2021. Instead, companies pursued growth through strategic acquisitions and selective divestitures, positioning their portfolios for future success. However, 2023 still saw some big public and private deals, demonstrating the continued vitality and dynamism of the market, namely the merger between Credit Suisse and UBS, which marked a significant event in the Swiss banking industry with a deal volume of USD 3.4 billion, or the purchase of the Swiss business of Zur Rose Group by Medbase.

The most active sectors in descending order were industrial markets (105 deals), technology (96 deals) and healthcare (73 deals). Private equity investors were involved in 133 deals that took place in Switzerland in 2023. There was a decrease in transaction

volume with Private Equity involvement in Swiss deals compared to the record years of 2021 and 2022.

In 2023, 238 foreign companies were bought by Swiss purchasers (in 2022: 260), 143 Swiss companies were bought by foreign acquirers (in 2022: 149) and 107 deals were domestic transactions (Switzerland/Switzerland; in 2022: 137).

Statutory and regulatory M&A framework in Switzerland

The regulatory environment in Switzerland to date continues to be investor-friendly for the following three main reasons: limited investment restrictions (a notable exception being the Federal Law on Acquisition of Real Estate (the so-called *Lex Koller*), as well as the draft bill of the Investment Screening Act; 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 December 2023, the Swiss Federal Council published a draft bill for the Investment Screening Act. The proposed legislation aims to prevent foreign takeovers of Swiss companies that could threaten public order or security, particularly when such takeovers involve entities active in critical industries and are by foreign state-controlled investors. However, it is expected to have a limited impact due to its narrow scope, which is focused on takeovers by foreign state-controlled investors in specific sectors such as defence, electricity, health and telecommunications. Such a bill would represent a significant shift from Switzerland's traditionally investor-friendly regulatory landscape and it is not yet clear whether and when it will enter into force.

Significant deals and highlights

Among the 537 deals with Swiss involvement, few stand out because of their size and historical meaning. The 10 biggest deals account for USD 37 billion (in 2022: USD 40 billion).

The Swiss banking landscape witnessed a historic consolidation with the merger of two of its largest banks, Credit Suisse and UBS in March 2023. The acquisition of Credit Suisse Group AG by UBS Group AG was legally completed on 12 June 2023 with a value of USD 3.4 billion.

In May 2023, the biopharmaceutical industry saw a significant acquisition with Ironwood Pharmaceuticals entering into a definitive agreement to acquire Switzerland-based drug developer VectivBio. The acquisition was valued USD 1 billion and was completed in December 2023.

Compared to last year, the number of IPOs in Switzerland has slightly decreased from 14 to 10, which is in line with the global trend. Noteworthy highlights showcasing the attractiveness of the Swiss financial marketplace include the IPO of Sandoz, which went public as a spinoff of Novartis with a market capitalisation of USD 10.4 billion, and the listings of Will Semiconductor Co., Ltd. and Supcon Technology on the SIX via Global Depository Receipts (GDRs), with a volume of approx. USD 445 million and USD 566 million. The 10 additions that were reported on SIX in 2023 had an aggregated value of over USD 13 billion.

Key developments

The key development for 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 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 foreign exchange 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).

Delisting equity security: In addition, under the new law, the shareholders’ meeting is now explicitly responsible for delisting the equity securities of listed companies (art. 698 para. 2 no. 8 CO). The resolution of the shareholders’ meeting on the delisting requires a qualified majority and thus the approval of at least two-thirds of the votes represented and the majority of the par value of the shares represented (art. 704 para. 1 no. 12 CO).

Board resolutions: The reform eliminates uncertainties around the question of 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.

Additionally, the healthcare sector continued to be active, with companies seeking to expand their capabilities and enhance their service offerings through strategic acquisitions.

The year ahead

During times of uncertainty or market volatility, M&A activity tends to slow down to the lowest volume in a decade. 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.

**Mariel Hoch****Tel: +41 58 261 55 99 / Email: mariel.hoch@baerkarrer.ch**

Mariel Hoch is a partner in the corporate and M&A department at Bär & Karrer. Her practice focuses on domestic and cross-border public tender offers and mergers, general corporate and securities matters, including proxy fights, hostile defence matters and corporate governance. She also represents clients in M&A-related litigations. She has advised a broad range of public and private companies and individuals, in Switzerland and abroad, in a variety of industries including healthcare, pharmaceuticals, technology, financial services, retail, transportation and industrials.

**Christoph Neeracher****Tel: +41 79 619 98 53 / Email: christoph.neeracher@baerkarrer.ch**

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

Bär & Karrer AG

Brandschenkestrasse 90, CH-8002 Zurich, Switzerland

Tel: +41 58 261 50 00 / URL: www.baerkarrer.ch



Global Legal Insights – Mergers & Acquisitions

provides analysis, insight and intelligence across 13 jurisdictions and with one expert analysis chapter, covering:

- Overview
- Significant deals and highlights
- Key developments
- Industry sector focus
- The year ahead

globallegalinsights.com