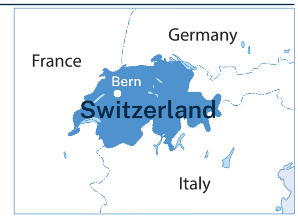
SWITZERLAND



Law and Practice

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1. Legal System and Regulatory Framework

1.1 Legal System

Switzerland is a civil law jurisdiction that is organised on the principle of federalism, giving considerable autonomy to its Cantons (states) and municipalities within the framework of federal law.

In the context of investing in Switzerland, cantonal differences exist in particular with respect to taxation and the organisation of courts. Most other relevant regulations for investing in Switzerland are applied on a federal level. On all three governmental levels, lawmaking in Switzerland is characterised by elements of direct democracy and public votes on policy.

As a non-EU/non-EEA country, Switzerland retains a higher level of legislative independence but its regulatory framework is influenced by international and, in particular, European developments to an increasing degree.

1.2 Regulatory Framework for FDI

Switzerland provides for an investor-friendly regulatory framework and there is currently no general FDI control regime under Swiss law.

Investment controls only apply in certain sectors, particularly for investments in the financial sector and residential real estate. In other sectors, specific additional licensing requirements apply for foreign investors, including in aviation, telecommunications, nuclear energy and radio/television. For further details see **8. Other Review/Approvals**.

However, the implementation of a more comprehensive FDI control regime is currently under deliberation. Earlier in 2022, a draft of a Federal Act on the Control of Foreign Investments was published which aims to prevent takeovers that would endanger public order or security. The draft provides for a notification duty for certain acquisitions, including acquisitions by foreign investors under direct or indirect government control and acquisitions of enterprises in critical sectors or industries (eg, energy and water supply and suppliers in the defence industry), in some cases subject to the target exceeding a turnover threshold of CHF100 million (eg, certain hospitals, central transportation hubs, suppliers in the medical industry and systemically important financial market infrastructures and banks). For further details see **7. Foreign Investment/National Security**.

2. Recent Developments and Market Trends

2.1 Recent Developments and Market Trends

Overall, Switzerland recovered well from the economic slowdown caused by the COVID-19 pandemic and has seen strong levels of inbound investment and M&A activity both in 2021 and 2022. Still, in the second half of 2022 larger sponsor-driven transactions saw a significant slowdown due to difficulties in arranging the necessary debt financing in foreign capital markets. The Swiss market continues to maintain a favourable investment environment based on a highly competitive and innovative economy, political stability and an investor-friendly legal framework.

In line with an international trend that has resulted in more stringent FDI regulations in other jurisdictions, a general FDI screening regime is now under deliberation also in Switzerland, in the form of a draft Federal Act on the Control of Foreign Investments. This trend may well be accelerated by recent political developments, bringing national security concerns to the top of lawmakers' agendas. However, while much remains open at this point as to whether and in what shape the proposed Federal Act on the Control of Foreign Investments will come into force, it seems likely that the new regulations will remain relatively lean compared to other regimes.

Market activity has recently been characterised by growing uncertainty and fears of a recession. Macroeconomic factors like rising interest rates and inflation pose serious challenges, as do global supply chain topics and the war in Ukraine. To date, however, Switzerland has largely managed to live up to its reputation as a safe haven of stability, notably with a lower inflation rate than in neighbouring EU.

3. Mergers and Acquisitions

3.1 Transaction Structures

Key considerations for investors in selecting a transaction structure are often tax-driven. In addition, the nature of the target and specifics of the counterparty also play an important role.

Share Deals

Share deals are the most commonly used transaction structure in Switzerland. The target is usually a Swiss company limited by shares (*Aktiengesellschaft* (AG); *Société anonyme* (SA); *Società anonima* (SA)) or, less frequently, a Swiss limited liability company (*Gesellschaft mit beschränkter Haftung* (GmbH); *Société à responsabilité limitée* (Sàrl); *Società a garanzia limitata* (Sagl)). While share transfers in private companies limited by shares generally do not constitute publicly available information, transfers of shares in limited liability companies need to be published in the commercial register. In particular, Swiss resident individual sellers will usually aim for a share deal in order to achieve tax-free capital gains with their transaction proceeds.

Asset Deals

Asset deals are also common in Switzerland but tend to be used mainly in carve-out deals or distressed situations as well as for transactions where specific risks are attached to a potential target entity that a buyer does not want to take on. Asset deals are usually effected by way of so-called singular succession, whereby specific assets, liabilities and agreements are individually transferred. In addition, the Federal Act on Merger, Demerger, Conversion and Transfer of Assets (Merger Act) provides for a statutory transfer of assets which in practice is mostly used for intragroup transactions, however. With regard to employee matters, please see **10.3 Employee Protection**.

Statutory Mergers

The Merger Act sets out a statutory procedure by which either one legal entity is absorbed by another or legal entities are combined to form a new legal entity, both by way of a single act of law. In practice, these structuring options are rather rarely used outside intragroup transactions. However, the option to squeeze out minority shareholders by way of a merger with cash compensation under the Merger Act can be a useful tool in public takeover transactions if the offeror does not reach the 98% voting rights threshold required for the statutory squeeze-out procedure set out below since a squeeze-out merger only requires 90% of the votes.

Tender Offers

Pursuant to the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FinMIA), investors in public companies generally have a duty to launch a public takeover offer if they cross the threshold of 33⅓% of the voting rights in the target, either alone or acting in concert with other parties. This threshold can be raised up to 49% (opting-up) or the duty may be waived completely (opting-out), both by way of a shareholder resolution amending the target's articles of association. Voluntary takeover offers are also possible and allow for more conditionality than mandatory offers. If offerors manage to obtain at least 98% of the voting rights, the FinMIA provides for a squeeze-out court procedure in order to reach 100%.

3.2 Regulation of Domestic M&A Transactions

Foreign investors considering FDI in Switzerland should be aware of the Swiss merger control regulations, which are set out mainly in the Federal Act on Cartels and other Restrictions of Competition (the "Cartel Act") and the Ordinance on the Control of Concentrations of Undertakings. A notification of a transaction to the Swiss Competition Commission (ComCo) is compulsory if certain turnover thresholds are met. These thresholds are relatively high compared to international standards. See **6. Antitrust/Competition** for further details.

In addition, certain sector-specific regulatory requirements apply also to domestic M&A transactions, eg, in the banking and insurance sector.

Further, acquisitions of listed companies are governed by FinMIA and certain ordinances enacted within the FinMIA framework. They are subject to a number of mandatory provisions aiming to ensure a level playing field, transparency and equal treatment of the shareholders to whom a public takeover offer is addressed. Swiss takeover law applies to Swiss target companies whose equity securities are listed on a Swiss stock exchange as well as foreign target companies whose equity securities have a main listing on a Swiss stock exchange.

4. Corporate Governance and Disclosure/Reporting

4.1 Corporate Governance Framework

Private Companies

As mentioned, the two most commonly used legal entity forms for private companies of a certain size are the company limited by shares (*Aktiengesellschaft* (AG); *Société anonyme* (SA); *Società anonima* (SA)) and the limited liability company (*Gesellschaft mit beschränkter Haftung* (GmbH); *Société à responsabilité limitée* (Sàrl); S*ocietà a garanzia limitata* (Sagl)). Generally, both legal entity forms are available and suitable for FDI and – apart from the publicity of share transfers in limited liability companies – the selection for a particular vehicle is typically driven by tax considerations.

Public Companies

Public companies are almost exclusively established as companies limited by shares which typically have only one share class. However, a limited number of Swiss public companies have issued different share classes, allowing a separation of economic ownership and voting rights to a certain degree.

The Swiss corporate governance framework is based on three main pillars: First, the Swiss Code of Obligations sets out the legal framework for legal entities, including corporate bodies and their roles, shareholder rights and obligations and a minimum set of financial and other reporting obligations. Second, the Swiss Code of Best

Practice for Corporate Governance, which has been established by economiesuisse, the largest umbrella organisation representing Swiss businesses, sets out non-binding recommendations for good corporate standards for Swiss listed companies on a comply-or-explain basis. Third, the Directive on Information relating to Corporate Governance (DCG) of SIX Swiss Exchange is binding on all companies whose equity securities have their primary listing on SIX Swiss Exchange. The DCG requires issuers to make certain key information relating to corporate governance available to investors in an appropriate form. The DCG also follows a comply-or-explain approach, meaning that issuers have to give specific reasons when certain information is not disclosed.

4.2 Relationship Between Companies and Minority Investors

Generally, for Swiss companies limited by shares (*Aktiengesellschaft* (AG); *Société anonyme* (SA); *Società anonima* (SA)) and limited liability companies (*Gesellschaft mit beschränkter Haftung* (GmbH); *Société à responsabilité limitée* (Sàrl); *Società a garanzia limitata* (Sagl)), which are the two most common legal entity forms for companies of a certain size, there are no particular laws/rules governing their relationship with minority investors. However, certain minority interests are protected by the Swiss Code of Obligations and/or the relevant company's articles of association by requiring a qualified majority to pass certain important resolutions (such as, for instance, the introduction of shares with preferential voting rights or restrictions or cancellations of the subscription right) or granting certain shareholder rights already at a percentage of voting rights below 50%. Notably, the Swiss corporate law reform which came into force on 1 January 2023 strengthened minority rights by expanding the list of matters requiring a qualified majority and lowering the applicable thresholds to exercise many shareholder rights such as, for instance, the right to request the calling of a shareholders' meeting or to request the inclusion of an agenda item.

Given that the statutory minority protection rights are mostly limited to information and participation rights, it is common for minority investments in private companies that the investors enter into a shareholder agreement setting out additional minority rights such as board representation or veto rights on a contractual basis.

Minority investors are subject to the reporting obligations for beneficial owners which kick-in at 25% of the voting rights for private companies and 3% of the voting rights for public companies. For further details see **4.3 Disclosure and Reporting Obligations**.

4.3 Disclosure and Reporting Obligations

Given that, so far, Switzerland, has not adopted a general FDI regime, there are no generally applicable disclosure obligations for FDI. For further details see **7. Foreign Investment/National Security**.

Like domestic investors, foreign investors are, however, subject to the reporting obligations for beneficial owners which kick in at 25% of the voting rights for private companies and 3% of the voting rights for public companies. While reporting of major shareholdings in public companies is published on the website of the relevant stock exchange, the register of beneficial owners of private companies is, so far and unlike other jurisdictions, not publicly available. Given the relatively severe sanctions for non-compliance with these obligations, foreign investors are well advised to inform themselves about these duties and the applicable deadlines.

5. Capital Markets

5.1 Capital Markets

The Swiss capital markets are widely considered to be very well developed. Particularly, the two licensed Swiss stock exchanges SIX Swiss Exchange and BX Swiss create an ecosystem with access to equity, hybrid and debt capital for companies of a certain size. Outside public capital markets, domestic and foreign private equity and venture capital funds as well as business angels provide sources of financing primarily against the issuance of equity or hybrid instruments. Traditional debt financing (ie, loans), which is still the most important financing source for smaller and medium-sized companies (other than start-ups), is to a large extent still provided by regulated banks and, in particular, large and medium-sized Swiss banks. This is partly the result of the so-called 10/20 non-bank rules which limit the number of non-bank creditors of Swiss borrowers to avoid adverse withholding tax consequences. These rules have made financing by debt funds less attractive and, therefore, less common than in other jurisdictions, but the number of transactions involving this alternative source of funding have been steadily increasing.

In addition to traditional capital markets, Switzerland has been at the forefront of establishing an ecosystem for financing models based on crypto and distributed ledger technologies (DLT). This includes a dedicated law, the Federal Act on the Adaptation of Federal Law to Developments in Distributed Electronic Register Technology (the "DLT Act"), which came into force on 1 August 2021 and which, inter alia, established a framework for DLT securities and DLT trading facilities. In addition, to date, the Swiss financial regulator FINMA has issued licences to two so-called crypto banks.

5.2 Securities Regulation

The Swiss securities law framework has been fundamentally overhauled by the Swiss Federal Act on Financial Services (FinSA) and the Swiss Financial Services Ordinance which, subject to certain transition periods, came into force on 1 January 2020. The stated objective of this reform was to seek a certain degree of harmonisation with the corresponding framework in the European Union. The FinSA provides for, inter alia, comprehensive rules on the requirement to publish a securities prospectus (including applicable exemptions and recognition of foreign prospectuses).

Foreign and domestic market participants are also subject to the provisions of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FinMIA) and its implementing ordinances, which provide, in particular, for the prohibition of insider dealing and market abuse as well as disclosure obligations for significant shareholders and a framework for mandatory and voluntary tender offers.

5.3 Investment Funds

Generally, foreign investors structured as investment funds are not subject to any regulatory review merely as a result of conducting FDI.

6. Antitrust/Competition

6.1 Applicable Regulator and Process Overview

Swiss merger control is mainly governed by the Federal Act on Cartels and other Restrictions of Competition (the "Cartel Act") and the Ordinance on the Control of Concentrations of Undertakings. The enforcement of merger control law is entrusted to the Swiss Competition Commission

(ComCo). ComCo consists of 11 to 15 members and is supported by the Secretariat of the ComCo, which conducts investigations and prepares decisions.

The Swiss merger control regime does not distinguish between FDI and other types of investments. Any transaction meeting the relevant criteria is subject to the merger control regime. This applies also to foreign-to-foreign transactions.

The following types of transactions constitute concentrations that are subject to merger control:

- the merger of two or more previously independent undertakings; and
- any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof. This may include the acquisition of joint control over an existing joint venture or creation of a new joint venture.

A notification to ComCo is compulsory if the two following turnover thresholds – which are relatively high compared to international standards – are cumulatively met in the financial year preceding the concentration, irrespective of the transaction at hand being a FDI, a domestic or a foreign-to-foreign transaction:

- the undertakings concerned together reported a turnover of at least CHF2 billion, or a turnover in Switzerland of at least CHF500 million; and
- at least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF100 million.

The “undertakings concerned” are, in the case of a merger, the merging undertakings and, in the case of an acquisition of control, the acquiring and the acquired undertakings. When calculating the turnover of an undertaking concerned, the turnover of the entire group (including subsidiaries, parent companies, sister companies and joint ventures) is taken into account whereas turnovers from intragroup business activities are excluded. When calculating the turnover of a target, however, the seller’s turnover can be excluded.

Additionally, a notification of a concentration is compulsory irrespective of any turnover thresholds if an undertaking concerned has been held in a final decision in the past to be dominant in a market and if the concentration concerns such market or an adjacent, upstream or downstream market.

The implementation of a notifiable concentration is prohibited prior to clearance unless ComCo authorises a provisional implementation upon request. The review process is divided into two phases. Phase I starts upon receipt of the complete notification. ComCo is required to notify the parties concerned within one month if it clears the transaction subject to remedies only or if it intends to open phase II proceedings (in-depth investigation). If ComCo issues a comfort letter or if the one-month period expires without any notice from ComCo, the concentration may be implemented. ComCo must complete an opened phase II investigation within four months, subject to any delays caused by the undertakings concerned. Only after conducting phase II proceedings, ComCo can prohibit a notified concentration.

6.2 Criteria for Review

The substantive test currently applicable is a CSDP test (creation or strengthening of dominant position), which allows ComCo to prohibit a notified concentration if the investigation indicates that the following criteria are met cumulatively:

- the concentration creates or strengthens a dominant position which may eliminate effective competition; and
- the concentration does not improve the conditions of competition in another market such that the harmful effects of the dominant position are outweighed.

Only three mergers have been prohibited by ComCo in the past. This is due to the fact that the thresholds for a prohibition are high compared to other jurisdictions.

In 2021, the Federal Council published a draft for an amendment of the Cartel Act. A public consultation procedure regarding the draft was completed in March 2022. As a next step, a potentially reworked draft will be published and submitted to the Swiss parliament. The current draft provides, inter alia, for a replacement of the currently applicable CSDP test by a SIEC (significant impediment of effective competition) test. The revised act is expected to come into force in 2024 at the earliest.

6.3 Remedies and Commitments

A proposed concentration may also be cleared by ComCo subject to certain conditions or obligations only. However, the law does not specify the types of conditions or obligations that may be ordered by ComCo. In practice, remedies will generally be discussed between ComCo and the undertakings concerned. In past practice, both structural and behavioural remedies have been imposed.

6.4 Enforcement

In exceptional cases, a concentration that has been prohibited by ComCo may be authorised by the Federal Council at the request of the undertakings involved if it is necessary for compelling public interest reasons. However, no such request has been submitted to date to the best of the writers' knowledge.

Decisions of ComCo in merger control cases are subject to appeal to the Federal Administrative Court. The respective judgments of the Federal Administrative Court are subject to appeal to the Federal Supreme Court, which can review such judgments with regard to their conformity with the law but is bound by the facts established before the Federal Administrative court unless they are manifestly incorrect or have been determined in violation of the law. The right of appeal is not available to any third parties.

Where a notifiable concentration is implemented without prior notification, ComCo will start the merger control proceedings ex officio. Additionally, the undertaking that was obliged to notify may be fined up to CHF1 million and the responsible individual person(s) may be personally fined up to CHF20,000. The legal effect of any act of implementation that has already been carried out is suspended temporarily and becomes null and void if the merger ends up being prohibited by ComCo. If a prohibited concentration has been implemented or if a concentration is prohibited after its implementation, the undertakings concerned are required to take the necessary steps to restore effective competition.

7. Foreign Investment/National Security

7.1 Applicable Regulator and Process Overview

Switzerland has traditionally been a liberal economy open to foreign investments and there is currently no general FDI control regime under Swiss law. Investment controls only apply in certain sectors, particularly for investments in the financial sector and residential real estate. In other sectors, specific additional licensing requirements apply for foreign investors, including in aviation, telecommunications, nuclear energy and radio/television.

While the Federal Council continues to be opposed to more stringent investment controls, following a parliamentary motion regarding the introduction of an investment control regime the Federal Council initiated a consultation on the basis of a preliminary draft of the Federal Act on the Control of Foreign Investments (FICA).

The draft's stated purpose is to prevent takeovers that would endanger public order or security. It provides for a notification duty for certain acquisitions, including acquisitions by foreign investors under direct or indirect government control and acquisitions of enterprises in critical sectors or industries (eg, energy and water supply and suppliers in the defence industry), in some cases subject to the target exceeding a turnover threshold of CHF100 million (eg, certain hospitals, central transportation hubs, suppliers in the medical industry and systemically important financial market infrastructures and banks).

Notification under the FICA would need to be made to the State Secretariat for Economic Affairs (SECO) prior to the completion of the takeover. Pending approval, the transaction must not be executed. The draft FICA provides for a two-stage review procedure, similar to the Swiss merger control regime (see **6. Antitrust/Competition**). SECO, jointly with other interested governmental units, may approve the transaction directly within one month of the notification or, if an in-depth examination is required, within three months of the initiation of the second phase. If SECO or one of the other involved governmental units opposes the transaction or if a transaction subject to review is considered to be of considerable political significance, the matter can be escalated for review and decision by the Federal Council.

7.2 Criteria for Review

The FDI control regime proposed under the draft FICA applies to all acquisitions by which one or more investors gain direct or indirect control over a target or parts thereof in any of the relevant circumstances or sectors. The criteria and considerations of SECO as per the draft FICA do not vary depending on the nature of the investor or transaction. They include whether the investor has engaged in activities which negatively affected the public order or security in Switzerland or elsewhere, whether the investor has conducted industrial espionage or has been the subject of sanctions, and whether the investor would gain access to security relevant information or sensitive personal data. SECO would also have to take into consideration whether the services, products or infrastructure of the target could be replaced within a reasonable time. The criteria contained in the draft FICA are non-exhaustive, meaning that other considerations could be taken into account to the extent they are relevant to assess whether a transaction could jeopardise public order or security.

7.3 Remedies and Commitments

Under the draft FICA, the FDI review is initiated upon request by the foreign investor but SECO may commence a review procedure ex officio in case of suspected non-compliance with the approval requirement. The foreign investor(s) and other persons involved are obliged to provide information and documents as requested by SECO. Non-compliance with the duty to provide such information during the review can lead to a fine of up to CHF100,000. In case the review is obstructed or information required from foreign authorities is outstanding, the deadlines mentioned above may be extended. Instead of prohibiting a transaction, SECO may grant its approval subject to conditions provided the threat to public order and security can thereby be eliminated.

7.4 Enforcement

Under the draft FICA, for as long as a transaction has not been approved it may not be consummated and the effectiveness of the transaction under civil law is suspended. If a transaction subject to the approval requirement is consummated without the required approval, the Federal Council may order the necessary measures (including a divestment) to restore the lawful state. In addition, a fine of up to 10% of the transaction value may be imposed if:

- a transaction that is subject to approval is consummated prior to the granting of the approval;
- a transaction is consummated based on an approval that was obtained on the basis of deliberate misrepresentation and, following another review procedure, is subsequently prohibited; or
- a measure ordered by the Federal Council to restore the lawful state is not implemented.

8. Other Review/Approvals

8.1 Other Regimes

In the absence of a general FDI screening and approval regime, only sectoral restrictions currently apply, most notably in the real estate and banking sector. The Federal Act on the Acquisition of Real Estate by Persons Abroad (commonly referred to as “Lex Koller”) generally prohibits the acquisition of residential real estate by non-Swiss citizens, subject to certain exceptions (such as for EU citizens with residence in Switzerland). This not only includes direct investment in, or acquisition of, real estate but also the acquisition of shares in a real estate company.

In the financial sector, the establishment of foreign control over a bank or securities firm is subject to a special licence requirement by the Swiss Financial Market Supervisory Authority (FINMA). The granting of the additional licence requires, among other things, that the foreign jurisdictions of the persons holding a qualified participation (ie, at least 10% of the capital or voting rights) grant reciprocal rights. Changes of the foreign holders of qualified participations trigger a new licensing requirement. A bank or securities firm is deemed to be under foreign control if foreigners holding qualified participations directly or indirectly hold more than half of the voting rights or otherwise have a controlling influence.

In other sectors, specific additional licensing requirements apply for foreign investors, including in aviation, telecommunications, nuclear energy and radio/television.

9. Tax

9.1 Taxation of Business Activities

Corporations with statutory seat or place of effective management in Switzerland (Swiss tax-resident corporations) are subject to corporate income tax on their worldwide profits, excluding profits allocated to permanent establishments abroad. Foreign tax-resident corporations pay Swiss corporate income tax on profits attributed to business activities conducted through a permanent establishment or fixed place of business in Switzerland. The corporate income tax rate varies, depending on the Canton, between approximately 12% and 21% (effective tax rate).

Swiss partnerships are generally not subject to taxation but are treated as fiscally transparent for Swiss tax purposes. The activities, income and assets are attributed and taxed at the level of the partners. Non-Swiss-tax-resident partners of a Swiss partnership with a Swiss business operation generally become subject to Swiss taxation on their interest in the Swiss partnership subject to applicable double taxation treaties (the applicable rate is determined by the partner's tax status, individual or corporate). Foreign partnerships doing business through a Swiss permanent establishment or fixed place of business in Switzerland, unlike Swiss partnerships, are taxed in Switzerland like Swiss corporations for their Swiss business activities.

Further relevant taxes for companies doing business in Switzerland are, in particular, value added tax at the standard rate of 7.7%, cantonal real estate gains tax, stamp taxes and securities transfer tax as well as withholding tax. The net equity of Swiss corporations is subject to corporate capital tax (capital tax varies depending on Canton from about 0.001% to 0.53%) and the net assets of a Swiss partnership are taxed at the level of its partners (the applicable rate is determined by the partner's tax status, individual or corporate).

9.2 Withholding Taxes on Dividends, Interest, Etc

Dividends

Dividends and other profit distributions (eg, liquidation proceeds and constructive dividends) made by a Swiss corporation are subject to 35% Swiss withholding tax. Distributions based upon a capital reduction and distributions paid out from reserves of capital contributions are generally not subject to Swiss federal withholding tax, subject to certain restrictions.

Interest

There is generally no Swiss withholding tax on interest payments from a Swiss debtor except for interest paid by financial institutions and on bonds and similar debt instruments (including for loans that are recharacterised as bonds for tax purposes under the so-called 10/20 non-bank rules).

Refund and Tax Treaty Relief

Swiss withholding tax is withheld from the payment from the dividend or interest by the Swiss payer and remitted to the Swiss federal tax administration. Swiss resident investors can request, subject to certain conditions, full refund of the Swiss withholding tax. Foreign investors may be entitled to a full or partial refund of Swiss withholding tax pursuant to the provisions of an applicable double taxation treaty or under the agreement with the EU regarding international automatic exchange of information. Depending on the conditions of the applicable double taxation treaty or the agreement with the EU, the Swiss withholding tax may be fulfilled via notification procedure (instead of payment and refund of the tax). Refunds and notification procedures are subject to anti-abuse rules; in particular, for cross-border payments a strict substance requirement at the level of the foreign payee is applied for withholding tax relief or refund.

9.3 Tax Mitigation Strategies

In addition to internationally competitive tax rates, Swiss tax law provides for various tax planning instruments and strategies to further reduce taxes payable. Usual tax planning measures include the following.

- Participation reduction: Swiss corporations are entitled to a participation relief on dividends from participations that represent at least 10% of the share capital of another company or the rights to at least 10% of the profits and reserves or with a fair market value of at least CHF1 million. The participation relief also applies on capital gains from a disposal of a qualifying participation of at least 10% that was held for at least one year. With the participation relief the corporate income tax liability is reduced by the ratio between the net participation income (including administrative and financing costs) and the total taxable income (resulting in a virtual tax exemption for such dividends and capital gains). A similar participation deduction regime exists for Swiss partnerships or their taxable partners, respectively (with a 10% participation threshold and reduced taxation of the dividend income).
- Tax loss carry-forwards: Tax losses can be carried forward for seven years and can be used against any taxable income. Unlike other jurisdictions, there is no forfeiture of tax losses in case of a change of ownership.
- Immigration step-up: Swiss tax law allows a step-up of hidden reserves, including goodwill, upon immigration of a foreign company to Switzerland with later tax effective depreciation over a period of ten years.
- Other special incentives: Further tax-planning measures such as a cantonal R&D super-deduction and patent box are available.
- Tax rulings: Tax rulings allow for an efficient way to discuss planned structures and transactions with competent tax authorities in advance and obtain legal certainty on the pertinent tax consequences. Tax rulings are commonly used in Switzerland and can be particularly valuable in the context of cross-border structures and investments.

9.4 Tax on Sale or Other Dispositions of FDI

Capital gains of a foreign investor on the disposition of shares of a Swiss corporation or other Swiss assets are generally not subject to Swiss tax, unless the shares or assets are attributable to a permanent establishment or fixed place of business in Switzerland. In addition, certain Cantons levy real estate capital gains tax on the disposition of real estate or shares of a real estate company.

As discussed above, the income of a Swiss partnership is attributed and taxed at the level of the partners. Foreign investors of a Swiss partnership with a Swiss business operation generally become subject to Swiss taxation on their interest in the Swiss partnership and are taxed on the disposition of their Swiss partnership interest (subject to applicable double taxation treaties).

9.5 Anti-evasion Regimes

There are no statutory anti-avoidance rules in Swiss law. However, the Federal Supreme Court has established a general anti-avoidance rule applicable to all Swiss taxes. In accordance with this case law, the tax authorities have the right to tax the taxpayer's structure or transaction based on its economic substance and disregard arrangements or legal structure if the structure or transaction of the taxpayer is unusual or inappropriate, was chosen with the intention to achieve tax savings and would result in tax savings if permitted.

Furthermore, Switzerland generally adheres to the arm's length principle and applies the OECD transfer pricing guidelines.

10. Employment and Labour

10.1 Employment and Labour Framework

Employment relationships in Switzerland are governed by the Swiss Code of Obligations, the Federal Act on Work in Industry, Trade and Commerce (the "Labour Act") and its regulations, collective bargaining agreements (if any), as well as the terms agreed between the parties to an employment agreement. Additional legislations may provide for specific rights or obligations, eg, the Federal Act on Information and Participation of Employees in Undertakings, the Federal Act on Gender Equality, the Federal Act on Data Protection and the Merger Act.

In general, collective bargaining, works council or labour union arrangements are less common in Switzerland than in other jurisdictions. Only some industries (eg, construction, hotels/restaurants) are subject to mandatory collective bargaining agreements, some of which apply to the entire territory of Switzerland while others apply only in certain Cantons.

10.2 Employee Compensation

Employees are usually paid a monthly salary in cash. A statutory minimum salary exists in a few Cantons but not at federal level, except for industries where collective bargaining agreements apply.

It is quite common for Swiss companies to pay variable compensations or bonuses, which can be contractually due or fully discretionary. Equity compensation (be it virtual or not) is most common for management of larger or listed companies or start-ups.

For companies listed at a Swiss stock exchange, the maximum compensation for members of the company's board of directors and management is subject to shareholder approval. Certain kinds of remuneration (severance pay, advance payments, transaction bonuses) are not permitted or only under limited circumstances.

Social security contributions are payable to the state social security institution (covering old age, disability and compensation for military duty and motherhood) by all employees who are employed and working in Switzerland. Employers have to maintain minimum pension benefits in occupational pension benefits schemes in Switzerland. It is possible to maintain additional non-mandatory benefits.

Employee compensation is generally not implicated by a transaction except for customary acceleration provision in equity participation (including phantom stock) plans. In the context of a transaction, key employees are often offered higher compensation, retention bonuses or even equity-related compensation or (re-)investment opportunities.

10.3 Employment Protection

A share deal does not affect the employment agreements as the identity of the employer remains the same and no employee rights are triggered under statutory law by the transaction.

In a transfer of a business or part of a business, as is often the case in asset deals, the employment agreements for all employees engaged in the business are automatically transferred by operation of law. This also applies to transactions governed by the Merger Act (see **3.1 Transaction Structures**). Employees can object to the transfer which results in a termination of the employment relationship after expiry of the statutory notice period. Employees (or the works council, if any) must be informed about the reasons for the transfer and its legal, economic and social implications for the employees. If measures that might affect employees are considered (eg, dismissals or change of terms and conditions of employment agreements), a consultation procedure applies. The law does not provide for specific sanctions for failing to inform or consult in asset deals. However, in transactions that require a filing with the commercial register such as a statutory merger or a transfer of assets under the Merger Act, employees may take legal action before the court to block the entry of the transaction in the commercial register.

Where an asset deal does not pertain to a transfer of a business or part of a business, the employment relationships do not transfer by operation of law and the consent of each individual employee to be transferred is required.

11. Intellectual Property and Data Protection

11.1 Intellectual Property Considerations for Approval of FDI

Under the current regime where FDI controls only apply in certain sectors (mainly the financial and residential real estate sectors), intellectual property is generally not an important aspect for approval of FDI. However, under the FDI control regime proposed under the draft Federal Act on the Control of Foreign Investments (FICA) (see **7. Foreign Investment/National Security**), intellectual property and, more generally, non-tangible assets may become a more important factor in the context of FDI screening.

As noted above, the relevant criteria for FDI review procedures pursuant to the draft FICA which SECO would consider include whether the investor could gain access to security-relevant information as a result of an acquisition, which may include intellectual property. SECO would also need to assess whether the services or products of the target could be replaced within a reasonable time, which may not be the case if such services or products are protected by intellectual property rights. Given that the criteria contained in the draft bill are non-exhaustive, other considerations regarding intellectual property rights could be taken into account.

11.2 Intellectual Property Protections

Swiss law recognises various types of intellectual property rights such as patent rights, rights in trademarks and designs as well as copyright. These rights are governed by federal statutes and international agreements (eg, the Paris Convention, the Berne Convention, the Madrid Protocol, the Patent Cooperation Treaty and the Hague Agreement). In general, the standard of protection of intellectual property rights in Switzerland can be considered very high and there are no particular issues or limitations regarding protection and enforcement.

Patents, trademarks and designs must be registered with the Swiss Federal Institute of Intellectual Property (IPI), while copyright protection does not require registration. It should be noted that software is generally protected only by copyright and not by software patents as in other jurisdictions.

11.3 Data Protection and Privacy Considerations

Data protection is governed by the Federal Data Protection Act (the “Data Protection Act”) and its ordinances. The revised Data Protection Act and related ordinances – which will align Swiss data protection legislation with the GDPR to a greater extent – will enter into force on 1 September 2023 and will have an extraterritorial scope. It will thus apply to data protection matters having an impact on persons in Switzerland even if such matters were initiated abroad.

Compared to other jurisdictions, Switzerland does not have a strong enforcement focus regarding data protection, although this could change under the revised data protection legislation. Under the revised legislation, a number of violations of the Data Protection Act or lack of co-operation with the Federal Data Protection and Information Commissioner can result in criminal fines of up to CHF250,000 against responsible individuals, provided they acted intentionally. In addition, under Swiss civil law the data subject may apply for injunctive relief and may file a claim for damages as well as satisfaction and/or surrender of profits based on the infringement of their privacy.

12. Miscellaneous

12.1 Other Significant Issues

There are no significant issues not covered elsewhere in this chapter.

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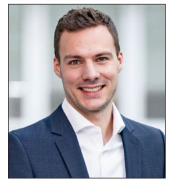

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ADVESTRA

Trends and Developments

Contributed by:
Beda Kaufmann, Alexander von Jeinsen, Daniel Raun and Laurent Riedweg
Advestra **see p.22**

Introduction

Switzerland generally ranks highly in investors' favours and punches above its weight in terms of attracting foreign investments in relation to the country's size and population. This is attributed to multiple factors: Switzerland is often regarded as one of the most competitive and innovative economies in the world with a highly skilled workforce. It offers both political stability as well as an investment-friendly regulatory and legal framework, including an attractive tax environment. Not least, Switzerland's quality of life and convenient location in the centre of Europe can also play a role in attracting key talents, especially for multinationals relocating their global or regional headquarters.

As such, Switzerland's economy has long been strongly interconnected with that of the rest of the world and characterised by a high level of internationalisation. Foreign investments into Switzerland are an important part of the equation.

Market Activity and Trends

Overall, Switzerland recovered well from the economic slowdown caused by the COVID-19 pandemic. There were 75 direct investments into the country from abroad in 2021, putting Switzerland in 16th place in Europe according to EY's Attractiveness Survey Europe 2022. The top three sectors targeted for FDI projects were software and IT services, pharmaceuticals and finance and the top three investing countries were the US, Germany and the UK, according to the survey. KPMG's Clarity on Mergers & Acquisitions 2022 counted 141 M&A transactions involving a foreign buyer and a Swiss target in 2021, with CSL's takeover of Vifor Pharma taking the top spot in terms of value. Of course, as in many other jurisdictions, that year was a standout period for M&A in Switzerland and it remains to be seen what the "new normal" will be with economically uncertain times ahead.

In 2022, notable inbound transactions included the merger between Firmenich and DSM as well as the take private of Valora by FEMSA. Though far smaller in size, another transaction that garnered plenty of attention in Switzerland was US ski resort operator Vail Resorts' investment in the Andermatt-Sedrun destination which marked Vail Resorts' first strategic decision to invest in, and operate, a ski resort in Europe.

With valuations of publicly traded companies coming down in the course of 2022 in Switzerland, there was an expectation to see more public to private transactions involving listed companies. However, obtaining debt financing for deals of a certain size has become more difficult on international capital markets so that many voluntary tender offers by private equity sponsors, while in the making, were ultimately not launched. Not surprisingly, a number of planned IPOs were also put on hold and are now in the pipeline for 2023 or thereafter. Accordingly, the new segment introduced by SIX Swiss Exchange for small to medium-sized enterprises, SPARKS, has yet to register additional listings since its first and only issuer started trading in February 2022. SPARKS is open to companies with a market capitalisation of less than CHF500 million, provided they have at least 50 investors, a share capital of at least CHF12 million and a market capitalisation of freely tradeable shares of at least CHF15 million.

Another newer development in the Swiss equity capital market, the listing of global depository receipts (GDRs), has been met with a keen interest in particular from Chinese issuers. GDRs represent underlying shares which have been deposited with a depository bank and are tradeable securities similar to American depositary receipts (ADRs). The first four Chinese companies listed GDRs on SIX Swiss Exchange in July 2022 and additional issuers have followed since. Further listings are expected in 2023.

In private markets, while M&A activity remains high so far in Switzerland and foreign interest in Swiss targets persists, the market is decidedly less red-hot than it was in 2021. We are therefore observing a tendency towards smaller transactions in terms of deal value (in particular, portfolio add-ons) and somewhat less seller-friendly deal terms.

In a challenging macroeconomic environment, Switzerland has so far largely managed to live up to its reputation as a safe haven of stability, notably with a lower inflation rate than in neighbouring EU. However, concerns about inflation in Switzerland have also led the Swiss National Bank to raise interest rates and put an end to the era of negative interest rates as one of the last central banks in Europe. With financing becoming more expensive than in the recent past and pandemic-related government stimuli drying up, we are now also seeing the uptick in corporate distress situations that has been expected for some time.

Regulatory Environment and Legal Developments

FDI regime under deliberation

Switzerland has traditionally been a liberal economy open to foreign investments and investment controls or specific licensing requirements for foreign investors currently only apply in certain sectors. These sectors include the financial sector and residential real estate as well as aviation, telecommunications, nuclear energy and radio/television.

However, in line with an international trend that has resulted in more stringent FDI regulations in other jurisdictions, a general FDI screening regime is now under deliberation in Switzerland too. But the need for additional regulations remains politically disputed. Following a parliamentary motion, the Swiss Federal Council initiated a consultation on the basis of a preliminary draft of the Federal Act on the Control of Foreign Investments, while making it clear that it saw no necessity for the piece of legislation. Accordingly, the draft turned out to be rather liberal.

The draft’s stated purpose is to prevent takeovers that would endanger public order or security. It provides for a notification duty for certain acquisitions, including acquisitions by foreign investors under direct or indirect government control and acquisitions of enterprises in critical sectors or industries (eg, energy and water supply and suppliers in the defence industry), in some cases subject to the target exceeding a turnover threshold of CHF100 million (eg, certain hospitals, central transportation hubs, suppliers in the medical industry and systemically important financial market infrastructures and banks).

The consultation phase ended in September 2022 and results are expected to be published in the first half of 2023. The ongoing war in

Ukraine will certainly have an impact on further deliberations and is expected to increase political support for the new legislation. It is currently too early to say what a possible timeline for its implementation could be.

Implementation of the OECD minimum tax rate in Switzerland

The Global Anti-Base Erosion Rules published by the OECD provide for a minimum tax rate of 15% for multinational companies with turnover of more than EUR750 million (OECD minimum tax rate). If a country maintains lower tax rates, other countries can impose an additional tax on those undertaxed companies. Switzerland agreed to the OECD minimum tax rate and is currently working on its implementation by way of a supplementary tax for the qualifying multinational companies. As a result, certain companies will bear a higher tax burden but they will be spared additional tax proceedings abroad.

As per today's planning, and assuming the OECD project progresses on the international level as expected, the implementation of the minimum tax is scheduled for 1 January 2024. This is expected to happen by way of a temporary ordinance in a first step, with the envisaged constitutional amendment to follow. It will be interesting to observe how the OECD minimum tax rate impacts foreign investments into Switzerland, if at all.

Corporate law reform

A major reform of Swiss corporate law entered into force in January 2023. The reform addressed a wide array of matters but, in a nutshell, it targets the following three main topics: liberalisation of capital provisions; strengthening of shareholder rights; and new ESG disclosures and obligations.

Among other changes, the new law makes it easier for boards of directors to issue shares by introducing the concept of a capital band. This allows the shareholders' meeting to authorise the board of directors to increase or reduce the share capital within a range of between 50% and 150% of the issued share capital for a period of up to five years. Another novelty is the possibility of a non-Swiss franc denominated share capital.

Further changes include a modernisation of the rules around shareholders' meetings, allowing for both virtual meetings and written resolutions going forward. Additionally, the delisting of companies will require shareholder approval under the new law, with a qualified majority of two thirds of the voting rights and an absolute majority of the capital represented at the relevant general meeting of shareholders being applicable. Shareholder rights are further strengthened by lowering the thresholds required for shareholders to request the calling of a shareholders' meeting and the inclusion of agenda items.

In terms of ESG disclosures and obligations, Swiss listed companies and financial institutions, which over the past two financial years employed more than 500 FTE and had a balance sheet of more than CHF20 million or a turnover of more than CHF40 million will have to report on non-financial matters starting from the 2023 financial year. Swiss companies will also become subject to due diligence requirements regarding their supply chain if they import or treat conflict minerals or offer goods and services that face founded suspicion of child labour and must publish a report on the implementation of these requirements.

Switzerland and the EU/EEA

Switzerland remains a non-EU/non-EEA country and its relationships with the EU/EEA are governed by a complex set of bilateral agreements. Efforts to negotiate a framework agreement, meant to serve as an institutional umbrella for Swiss–EU relations, were terminated in 2021 after years of ongoing talks. This left political sentiment between Switzerland and the EU at a low point and plenty of questions open as to next steps. In 2022 exploratory talks between Switzerland and the EU were taken up in view of reaching a common understanding on how to approach possible new negotiations but it is currently too early to tell when formal negotiations will resume.

At the same time, it is clear that Switzerland's regulatory environment and its legal developments are heavily influenced by developments in the EU. One recent example is the Swiss Federal Council's decision fully to take on the EU sanctions regime in connection with the war in Ukraine. In other matters, while Switzerland maintains its legislative independence, we have seen and are seeing an alignment of Swiss laws with its EU counterparts. In the recent past, this has resulted in a fundamental revision of the capital markets and financial services regulation framework and will continue with respect to Switzerland's revised Federal Data Protection Act, which will enter into force in September 2023. By the same token, the Swiss Cartel Act is currently under revision and expected to introduce the SIEC (significant impediment of effective competition) test for merger control assessments, which is already applied in the EU.

Outlook

Switzerland inevitably seems to be moving towards a more regulated future, with new or revised laws in the pipeline that are expected to, directly or indirectly, affect investing in Switzerland. This trend may well be accelerated by recent political developments, bringing national security concerns to the top of lawmakers' agendas among increased geopolitical challenges.

At the same time, there appears to be an awareness within Switzerland as to the country's role in a globalised economy and thus also its reliance on foreign investments. While much remains open at this point as to whether and in what shape the proposed Federal Act on the Control of Foreign Investments will come into force, it seems likely that the new regulations will remain relatively lean. Similarly, while the SIEC test for merger control assessments that is expected to be introduced with the revised Swiss Cartel Act will allow for more active intervention by the Competition Commission (ComCo), there are currently no efforts being undertaken to lower the comparatively high turnover thresholds subjecting transactions to ComCo review. Lastly, Switzerland's revised corporate law is an example of a piece of legislation that, at least in part, aims to give investors more flexibility when dealing with Swiss companies.

Consequently, it is to be expected that Switzerland will remain an interesting and attractive market for investment opportunities, against the backdrop of tightening regulations.

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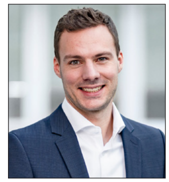

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