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Corporate M&A 2022

Switzerland: Trends & Developments
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Trends and Developments

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After a Robust Year...

In spite of the concerns fed by successive waves of COVID-19, 2021 was a record year for mergers & acquisitions (M&A) in Switzerland with a lot of activity both in terms of numbers of transactions and deal volume. This reflects a strong activity in the mid-cap and SME area as well as a few large transactions by blue chips in line with global trends.

While there was limited activity among large capitalisations, the year was marked by Novartis AG selling its stake in Roche Holding AG back to Roche Holding AG as well as Nestle SA selling back a part of its stake in the French cosmetic brand L’Oreal, in both cases signalling to investors that they were focusing on their existing strategies. On the public markets, the announced takeover of Vifor Pharma by CSL Behring was another notable transaction in an otherwise quiet year for public M&A in Switzerland.

This marked a change from 2020, where a number of transactions were put on hold facing the spread of the pandemic. The rebound in 2021 reflected renewed confidence in the ability to overcome the challenges posed by COVID-19 notwithstanding the threats created by the spread of each new variant. The trend was driven by a catch-up effect, the low interest rate environment, which provided easy access to funding, and increased pressure by investors for businesses to deliver growth, as well as the positive outlook on economic growth. These forces led to exceptional activity levels by corporate acquirers and private equity funds and their financial sponsors.

Uncertainty Is on the Horizon

The prospects for 2022 are less certain: at the time of writing, the increased geopolitical uncertainty created by the war in Ukraine is foremost in everyone’s minds. Without forgetting the human tragedy it causes, the wider consequences of a war in Europe are hard to predict. Disruption to international trade is expected, which is likely to affect Switzerland and its open economy negatively. At the same time, the challenges posed by the situation may also lead to more integration of production and possibly consolidation within industries.

More generally, as interest rates look to rise for the first time in the United States and become positive in the European Union, the costs of funding acquisitions are likely to increase and dampen the excitement.

At the same time, the trend has yet to reach Switzerland where rates remain at a historical low. Moreover, private equity firms worldwide sit on impressive levels of “dry powder” to fund future acquisitions which is likely to keep the trend going strong in the immediate future. While Switzerland has not yet experienced a wave of special purpose acquisition company (SPAC) initial public offerings (IPOs), it is expected that foreign listed SPACs will further fuel M&A activity in Switzerland as they look for suitable targets for a de-SPAC.

Industry Level Consolidation

At an industry level, there was significant activity in the TMT, healthcare, consumer goods and industrial sector, reflecting largely the substance of the economy, as well as the impact of the digitalisation on economy.

The trend towards more consolidation in financial services is expected to pick up: banks facing increased regulatory costs have for a number of years been under pressure to grow or exit the market. As a response, small banks are looking to focus their offering on their core markets or exit the market altogether. Even larger banks such as Credit Suisse and UBS abandoned certain segments where their foothold was too limited to justify their presence to focus on their core businesses. This trend is expected to continue as the licensing requirements for external asset managers under the Federal Act on Financial institutions of 15 June 2018 is getting closer. External asset managers are now facing the choice of ramping up their internal control framework to meet the new requirements and the regulatory burden it implies, merge with platform providers or discontinue their operations altogether.

SPACs and SPARKS: Interconnection with Capital Markets

Without a doubt, SPACs were the flavour of the day globally in early 2021. Switzerland did not miss the development: several Swiss businessmen and financiers sought to launch a SPAC in foreign jurisdictions. Moreover, SIX Swiss Exchange tried to jump on the bandwagon in spring 2021 and list the first domestic SPAC. FINMA behind the scenes put a temporary stop to the development, however. It took the view that the exchange was not allowed to grant exemptions from the requirements of the listing rules to list and admit shares of SPACs to trading. Instead, it expressed the view that listing of SPACs required dedicated rules.

SIX responded by amending the Listing Rules and issuing a new Directive on Listing of SPACs on SIX Swiss Exchange (RLSPAC) on 18 October 2021, which, after an expedited consultation process and obtaining FINMA approval, entered into force on 6 December 2021.

The new rules require at the time of the IPO additional transparency on among others:

- the potential dilution of the investment of public shareholders in connection with a de-SPAC and the exercise of options granted to sponsors and management;
- detailed information on the founders, the sponsor, as well as the board and management of the SPAC (the “insiders”);
- potential conflicts of interest affecting insiders as well as the lead banks involved in the IPO;
- lock-up arrangements with insiders; and
- the rights of the shares offered to the public in comparison with other classes of shares, in particular, in connection with the liquidation of the SPAC.

Further information will also be required under the listing rules in the event of a de-SPAC to provide the same level of disclosure on the transaction as if a prospectus under the Federal Act on Financial Services of 15 June 2018 was required. This information will need to be published in advance of any shareholder vote on a de-SPAC.

Finally, even after the de-SPAC, the listed company will be subject to enhanced disclosure requirements as it will be required to publish quarterly financial statements instead of the semi-annual ones required from most issuers, unless it published financial statements covering the three financial years before the de-SPAC.

Shortly after the new rules came into force, SIX Swiss Exchange listed its first SPAC. It remains to be seen if, after the frenzy of 2021 quieted down, other issuers will seek to launch a SPAC in Switzerland or if the time lag curbed the enthusiasm for SPACs. In any event, foreign SPACs are becoming an increasing presence in the Swiss M&A scene as they start looking for targets to de-SPAC.

In parallel, the SIX Swiss Exchange sought to open up listing to small and medium enterprises by creating a new segment with a condensed trading window from 3.00pm to 5.20pm followed by a closing auction lasting until 5.40pm called Sparks open to firms 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. While this segment is still in its inception, it may facilitate the access to capital markets and thus create an alternative to funding rounds or an M&A transaction with a large firm or a financial sponsor for firms looking to tap additional capital for growth.

Increased Focus on ESG

In terms of trends and developments for 2022, environmental, social and governance (ESG) related questions are taking an increasing place within the M&A practice in Switzerland.

This development is driven by the expectations of Swiss large caps and their investors, who are expecting more focus and transparency on ESG factors: it is becoming increasingly important for acquirers to review potential targets to ensure that they are in line with their own goals and standards of management. In parallel, financial sponsors are also increasingly asked by their own investors to take a stance in the area and contribute to the development of sustainable finance.

This trend is reinforced by the concerns for greenwashing echoed by a number of investors and foreign regulators. Acquirers are therefore carefully screening potential targets to ensure that their policies and practices are aligned with their own or can be brought up to speed without undue delay. This impacts M&A both at the strategic level and in the execution of transactions

where ESG issues are likely to become part of the pre-acquisition due diligence process.

It is expected that the new rules on non-financial reporting and the due diligence requirements it imposes on large companies will amplify the impact of this development. Indeed, starting 2023, large Swiss listed companies and financial institutions, who 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 need as a matter of corporate law to publish a report on non-financial matters, such as environmental matters, including their objectives regarding CO2 reduction, social questions and labour relations, compliance with human rights and anti-corruption. More generally, Swiss companies will also be required to exercise due diligence regarding their supply chain if they import or treat conflict minerals or offer goods and services that face founded suspicion of child labour and publish a report on the implementation of these duties.

It is expected that these requirements to impact the M&A practice as corporate acquirers will need to report not only on their own practices but also on the practices of targets they have acquired within the reporting period. Consequently, industrial large buyers are likely to address ESG matters and due diligence in the supply chain as part of their acquisition process. This means that even smaller firms that are not subject to these requirements should expect to have questions on these topics from potential buyers and more generally would be well advised to be in a position to deliver convincing answers backed by evidence if they want to tie up with big industrial players.

As a consequence, SMEs and mid-caps that are in the process of putting themselves on the market should engage in a review of their practices and policies in connection with ESG and supply

chain management to bring them up to speed with the level expected from large companies if they want to maximise their ability to achieve a successful transaction with corporate buyers.

Digitalisation and Data Protection

As digitalisation is becoming a driver for growth in the corporate world, the focus on data protection and information security is likely to increase. Depending on the industry and the business model, the ability to manage personal data and ensure the security of data is likely to become a key driver for success and, consequently, be a topic of interest for the M&A process.

While a robust governance and control environment for data protection has been a subject of interest for companies in the financial sector or with a touch point with the EU General Data Protection Regulation, the enactment of the latest revision of the Swiss Federal Act on Data Protection of 25 September 2020, which aligns to a large extent Swiss law with its EU counterpart, should act as a catalyst to increase the focus on data protection in connection with M&A.

Investment Control and Sanctions Compliance

Until recently, Switzerland was an open economy which also translated to a friendly environment for foreign buyers. Except in residential

real estate and a few industries, such as the financial sector, telecoms, energy and aviation, there was no investment control upon an acquisition by foreign investors. Moreover, the policy of neutrality also meant that Switzerland was reluctant to take economic sanctions except to prevent it from being used to avoid the measures ordered in other jurisdictions with a more stringent framework.

Following a political backlash to the acquisition of firms by foreign investors in Switzerland and abroad, the government has announced that it will consider introducing new legislation on investment controls and present a draft bill. Following the war in Ukraine, the chances of this project leading to new restrictions on foreign investments are likely to have increased substantially. However, based on the government's announcement the investment control regime can be expected to be relatively liberal.

Furthermore, Swiss market participants are expected to have an increased focus on sanctions compliance following the war in Ukraine and the decision of the Federal Council to fully take over the EU sanctions regime. More generally, it is also expected that they will hold back from taking additional exposure to the Russian Federation and seek to cut existing ties as a reaction to the situation.

SWITZERLAND TRENDS AND DEVELOPMENTS

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Advestra is a corporate law firm located in Zurich, Switzerland. The team comprises 27 professionals (11 partners, nine fee earners and further staff). The firm advises clients on a broad range of M&A transactions, such as acquisition and divestment transactions (including corporate auctions), public takeovers, mergers, demergers, joint ventures and financing rounds. It further advises on complex restructuring trans-

actions and in situations of financial distress. Clients include private equity and venture capital firms, public and private companies, sovereign wealth funds, entrepreneurs and other investors. Apart from corporate and M&A, Advestra advises clients on capital market transactions (both equity and debt), financing transactions, matters relating to financial services regulatory as well as tax.

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