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CHAMBERS GLOBAL PRACTICE GUIDES

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# Technology M&A 2025

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**Switzerland: Law & Practice**

Marco Toni, Gilles Pitschen and  
Leonard Baumann  
Loyens & Loeff

**Switzerland: Trends & Developments**

Marco Toni and Lara Pafumi  
Loyens & Loeff



# SWITZERLAND



## Law and Practice

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Law & Tax

## 1. Market Trends

### 1.1 Technology M&A Market

Numerous challenges such as higher interest rates, a strong Swiss franc, turbulence in the financial sector, and ongoing global geopolitical tensions affected deal activity in 2024. This also impacted M&A activity in the Swiss TMT sector, which saw a significant decline in the first half of 2024 compared to the previous years. However, it is noteworthy that private equity and financial investors remained highly active in the Swiss TMT M&A market, accounting for a significantly higher share of deals compared to the global average. This underscores the sector's attractiveness to financial investors.

### 1.2 Key Trends

In the TMT sector, the ongoing need for companies to transform their businesses, drive innovation and enhance digitalisation – particularly with advances in AI – remains a key growth driver. While cross-border M&A activity in Switzerland in general could see a shift from inbound to more outbound transactions since mid-2022, there has been a strong interest from foreign investors in Swiss IT service providers. Compared to other sectors, TMT deals in Switzerland have a higher proportion of foreign investors, highlighting the generally more international orientation of the sector. Given Switzerland's attractiveness

as a business location and the many tech start-ups that are constantly emerging from the highly active start-up community, software companies and IT service providers have been popular targets for inbound transactions.

In terms of regulatory trends potentially affecting M&A activity in the tech industry, the new Swiss Data Protection Act ("revDPA") and recent developments in the field of foreign direct investment (FDI) screening as well as AI are particularly worth mentioning. The revDPA modernises Swiss data protection law, aligning it with EU law – in particular, the EU General Data Protection Regulation (GDPR).

Given that Switzerland has no general FDI screening mechanisms in place, a consultation process on a preliminary draft of a new law on FDI screening took place in 2022. Based on the rejective results of this consultation process, the Federal Council adopted a significantly reduced scope for the Investment Screening Act in mid-December 2023. The draft legislation is currently being debated in the Swiss Parliament. A particularly controversial issue is whether private, non-state investors should also be subject to FDI control.

The EU Artificial Intelligence Act (the "EU AI Act"), which came into force on 1 August 2024,



has an extraterritorial reach similar to the GDPR. This means it applies to Swiss companies whose AI systems are available or used in the EU. In contrast, Swiss law does not yet specifically regulate AI – a report on AI regulatory approaches is expected in 2025, indicating future regulation in Switzerland.

## 2. Establishing a New Company, Early-Stage Financing and Venture Capital Financing of a New Technology Company

### 2.1 Establishing a New Company

Among other features that make it one of the most innovative countries in the world, Switzerland offers a business-friendly legal framework ensuring fast and cost-effective incorporations. Therefore, Switzerland is an attractive location in which to incorporate a start-up company. Swiss corporate law offers all the relevant features required for a start-up company to operate successfully – notably, with regard to initial seed financings and subsequent capital contributions from financial sponsors or strategic investors. Different share classes with voting/non-voting structure, dividend and/or liquidation preferences are some of these prominent features.

The entire incorporation process for a new company typically requires two to four weeks, depending on – among other things – on the canton of the company's intended seat, the country of residence of the investors (particularly for opening the required blocked bank account), and the efficiency of the founders of delivering the necessary documents. Unless the founders choose a partnership with full personal liability, an initial capital contribution is required to establish a new company (see 2.2 Type of Entity for required capital amounts).

### 2.2 Type of Entity

Entrepreneurs are typically advised to incorporate an entity in the form of a corporation (*Aktiengesellschaft*) or a limited liability company (*Gesellschaft mit beschränkter Haftung*). Both types of entities are endowed with a separate legal personality and provide for a limited liability with its share capital. The minimum share capital to incorporate a corporation is CHF50,000 (partially paid-in) or CHF100,000 (fully paid-in), whereas investors naturally favour a fully paid-in capital to have recourse to a higher adhesion substrate. An entity may also be incorporated as limited liability company. The main difference towards a corporation constitutes a lower minimum share capital requirement of CHF20,000, the disclosure of the shareholders in the commercial register, and somewhat limited flexibility in terms of capital-raising features.

### 2.3 Early-Stage Financing

As professional investors such as venture capitalists usually expect recurring annual revenues, early-stage financing is typically provided by family and friends as well as wealthy individuals (“angel investors”). They do not require an accreditation (or another qualification), professional experience, or net worth. In fact, these are private individuals investing their own money into a start-up and – unlike professional venture capitalist investors – do not get paid for making the investment. Ideally, angel investors provide knowledge with which to develop a company and successful products.

In terms of investing volume, angel investors are followed by seed and series A funds, corporate ventures and family offices. After a large increase during recent years, the number of seed investments fell by approximately 5% in the past year (from 166 to 157). In terms of value, the medi-

an investment amount in seed rounds fell from CHF1.5 million to CHF1.2 million.

With regard to early-stage transactions, the median investments amount to approximately CHF2.4 million. The documentation for early-stage financing for a start-up company in Switzerland is usually rather basic, comprising a subscription form (rather than a written subscription agreement) for newly issued shares resolved at a shareholders' meeting and a basic shareholder's agreement (including tag- and drag-along rights, if any).

## 2.4 Venture Capital

Although the Swiss start-up scene has developed impressively during the past ten years, Switzerland's venture capital industry is still relatively young. Some of the sponsors are in their second or third fund generation, but a lot are still in their first round. However, Swiss start-ups are attracting large international investors, owing to attractive valuations and innovative ideas. In general, foreign venture capital firms foremost provide funds in mid- and late-stage financing rounds.

The government may provide funds that grant loan guarantees for investments in start-ups operating in technologies that are in the public interest. By way of example, the technology fund promotes innovative technologies that reduce greenhouse gas emissions, support the use of renewable energy, and increase energy efficiency. Companies and start-ups developing such technologies can benefit from loan guarantees by encountering fewer hurdles to get the necessary financing in place.

## 2.5 Venture Capital Documentation

The model documentation of the Swiss Private Equity and Corporate Finance Association

(SECA) has developed into a well-regarded set of documents that are available on its website. In general, there is substantial standardisation in terms of the documentation. Primarily, a term sheet lays out the financial terms of the investment and forms the basis for implementing an equity investment. These terms may subsequently be implemented into a legally binding investment and shareholders' agreement – the purpose of which is to outline the rights, obligations, and relationships among the shareholders. Minority shareholders such as start-up investors strive to implement special rights by which to protect their investment.

## 2.6 Change of Corporate Form or Migration

In principle, start-ups continue to stay in the same corporate form and in the same jurisdiction. Specifically, if the start-up is incorporated as a corporation, there is no need to change the corporate form in a later stage of venture capital financing. A general need to change jurisdiction is not apparent; rather, this is subject to the start-up's long-term strategy and goals.

## 3. Initial Public Offering (IPO) as a Liquidity Event

### 3.1 IPO v Sale

Generally, a liquidity event in Switzerland is still run through a sale process, rather than through an IPO. Dual-track processes are sometimes pursued, but there is no general trend to have a dual-track process at the outset. In fact, there are only a few technology companies listed on the Swiss stock exchange (the "SIX Swiss Exchange"), despite the large increase of technology companies in Switzerland.

In the past few years, the number of IPOs at the SIX Swiss Exchange has been rather low. Therefore, in 2022, the SIX Swiss Exchange launched a new segment for small and mid-caps to revive the IPO market as an alternative to sale processes. However, the effects have been limited so far. The costs, time and efforts for an exit via an IPO remain significantly higher than via a sale process.

## 3.2 Choice of Listing

A Swiss company is most likely to list in Switzerland unless it has specific interests in listing in another country. Usually, the decisive factor for a listing abroad would be a larger investment base and higher industry/sector valuations. Currently, such trends are not noted in Switzerland. The main advantages of a “home country” listing in Switzerland are:

- the efficiency of the listing procedure and listing maintenance; and
- the avoidance of heavier regulatory burdens and additional exposure to litigation risks in multiple jurisdictions.

In general, although there are Swiss companies that are listed on multiple stock exchanges in different jurisdictions, the costs of such multiple listings are usually considered higher than their benefits.

## 3.3 Impact of the Choice of Listing on Future M&A Transactions

A listing on a foreign exchange will have the effect that the company will continue to be subject to Swiss corporate law but must, in addition, comply with the rules of the foreign exchange. This dual applicability of legal systems may lead to increased complexity in structuring a future sale, especially in case of potential conflicts between domestic and foreign law.

Moreover, the Swiss tender offer rules (including squeeze-out rules in the context of tender offers) will not apply to a sale of a company that is only listed on a foreign exchange. Therefore, additional steps, such as the implementation of a squeeze-out merger pursuant to the Swiss Merger Act, may be necessary to successfully achieve a sale of 100% of the shares in the company.

## 4. Sale as a Liquidity Event (Sale of a Privately Held Venture Capital-Financed Company)

### 4.1 Liquidity Event: Sale Process

There is no typical rule for a sale being run as an auction or in a bilateral negotiation. Auctions are usually chosen if the investors are keen to maximise the purchase price. However, the uncertainties and costs of an auction process may keep potential buyers from participating in the auction. Bilateral negotiations are usually conducted by strategic investors that approach potential targets directly if they see a strategic fit.

### 4.2 Liquidity Event: Transaction Structure

Usually, the sale of a privately held technology company is structured as a share purchase whereby all the shares in the company are sold to the purchaser. Key members of the management holding equity in the company are usually required to roll over part of their sale proceeds in the equity of the buyer.

### 4.3 Liquidity Event: Form of Consideration

The consideration in a sale of a Swiss privately held venture capital-financed technology company is usually cash. Certain rollovers for the key management are structured in a way that



the management holding equity in the company is paid with a mix of cash and equity.

#### 4.4 Liquidity Event: Certain Transaction Terms

Customarily, shareholders' agreements between the founders and venture capital investors provide for drag- and tag-along rights in relation to liquidity events. Such drag- and tag-along rights contain provisions on the key terms and conditions that apply to shareholders in case of a sale event or a public listing. The terms of such provisions are usually highly negotiated and may contain more or less detailed provisions on what representations, warranties and indemnities the shareholders are required to give in a sale process. In general, any such liability is limited to each shareholder's share in the purchase price and is several – rather than joint – with the other shareholders. Obligations to enter into escrows or agree to hold-backs may also be contained in the drag- and tag-along rights.

The use of warranty and indemnity (W&I) insurance is growing in Switzerland. W&I insurance is now generally an accepted instrument among professional players in the market.

## 5. Spin-Offs

### 5.1 Trends: Spin-Offs

Usually, Swiss privately held venture capital-financed technology companies pursue one coherent business and are therefore not in a position to spin off a business. Therefore, spin-offs for such companies are rather unlikely. However, if a company has different lines of business that do not all match the strategic fit of a buyer, a spin-off may be the preferred structure.

### 5.2 Tax Consequences

Spin-offs can be structured as tax-neutral reorganisations at the corporate level (including a so-called holding spin-off) if certain requirements are fulfilled – irrespective of the execution under civil law (eg, asset deal, two-step demerger or statutory demerger). The most important requirements for Swiss tax purposes are that:

- the tax liability in Switzerland continues;
- the values previously relevant for income tax are taken over;
- one or more businesses or parts of businesses are transferred; and
- the legal entities that exist after the spin-off continue to operate a business or part of a business.

It should be noted that, especially in the case of tax neutral spin-offs, the key element is the so-called double business requirement.

If the above-mentioned conditions are fulfilled, the tax neutrality of spin-offs also applies to the shareholders, provided there will be no gain in the nominal value or so-called capital contribution reserves (for individuals).

There is no blocking period for Swiss tax purposes, provided the spin-off qualifies as tax neutral spin-off.

### 5.3 Spin-Off Followed by a Business Combination

In principle, and bearing in mind that a tax-neutral spin-off is based on the requirement of two separate businesses without being subject to a blocking period, a spin-off immediately followed by a business combination should be possible for Swiss tax purposes.

It should always be considered whether the general rules for tax avoidance may be applicable to the case at hand. Generally, tax avoidance would be assumed where a legal arrangement chosen by the parties involved appears to be unusual (“*insolite*”), improper or outlandish – or, in any case, completely inappropriate to the economic circumstances (“objective element”) – if, in addition:

- it can be assumed that the chosen legal arrangement was made abusively merely in order to save taxes that would be due if the appropriate circumstances were in place (“intention to avoid”; “subjective element”); and
- the chosen course of action would actually lead to a significant tax savings, if accepted by the tax authority (“effective element”).

Particular attention should be paid to the transfer of tax losses carryforward as part of the spin-off and subsequently the transfer of such tax losses carried forward and the offset with taxable profit of the acquiring business. In general, the offset of tax losses carryforward is possible to the extent that the business will be taken over and continued and that the structure would not be considered as tax avoidance. For completeness purposes, however, it should be noted that a contribution of a business followed by an upstream merger could trigger adverse Swiss tax consequences.

## 5.4 Timing and Tax Authority Ruling

The timing of a spin-off usually depends on the preparation of the transaction from tax and legal perspectives as well as from an operational perspective. From a legal perspective, a spin-off may be structured in different ways, including via:

- a direct business transfer by means of an asset deal (“singular succession”) or as a bulk transfer pursuant to the Swiss Merger Act (“universal succession”);
- a two-step demerger (transferring the business to a newly incorporated subsidiary (“newco”) and selling the shares in the newco to the buyer); or
- a statutory demerger.

In the case of a transfer of a business with employees, the employer has certain information obligations and – if measures apply that affect the employees – a consultation procedure must be implemented. Although no specific waiting period applies for the employees’ information and consultation, it is usually recommended to inform and consult the employees at least one month prior to the effective date of the spin-off.

From a tax perspective, it is best practice to file advance tax rulings with:

- the competent cantonal tax authority for corporate income tax and annual capital tax purposes – ie, the cantonal tax authority responsible for the assessment of corporate income tax and annual capital tax of the company; and
- the Swiss Federal Tax Administration for the purposes of Swiss withholding tax and stamp duties (usually levy and refund).

It is imperative that the tax rulings are filed prior to the implementation of the spin-off, as a confirmation will only be granted for transactions that have not yet occurred. Depending on the complexity of the spin-off, a confirmation can usually be obtained between three and six weeks after filing from the Swiss Federal Tax Administration and usually between three and 12 weeks after filing from the cantonal tax authorities – although

this varies largely between the different cantonal tax authorities.

The preparation and completion of a spin-off usually takes six to 12 months.

## 6. Acquisitions of Public (Exchange-Listed) Technology Companies

### 6.1 Stakebuilding

In Switzerland, it is common to acquire a certain stake in a public company prior to making a public tender offer. The stakebuilding can take place as a private transaction or through trades on the exchange.

Whenever the relevant shareholder reaches or exceeds a threshold of 3%, 5%, 10%, 15%, 20%, 25%, 33.3%, 50% or 66.6% of votes in the company through an acquisition of shares (or falls below such thresholds as a result of a sale of shares), the relevant shareholder has to notify the company and the exchange. These thresholds apply to stakebuilding in:

- companies having their corporate seat in Switzerland and having all or parts of their participations listed on a Swiss stock exchange; and
- companies having their corporate seat abroad, but which have all or parts of their participations primarily listed on a Swiss stock exchange.

The notification obligation also applies when shares are bought or sold in concert and when converting participation certificates or profit participation certificates into shares, when exercising convertibles or option rights, when there are

other changes in the capital of the company, and when exercising sale options.

The notification duty is triggered by the creation of the right to acquire or dispose of the equity securities – ie, upon conclusion of the binding transaction. In the event of capital increases or decreases, the duty is triggered by the publication in the Swiss Official Gazette of Commerce. The indication of an intended acquisition or disposal and similar proposals do not trigger the notification duty, as long as there are no legal obligations to execute the transaction imposed on any of the parties.

When the notification duty is triggered, the beneficial owners of the equity securities (the party ultimately controlling the voting rights) have to be disclosed. In addition, in the case of parties acting in concert, the aggregate participation, identity of all members of the group, the type of acting in concert, and the representative must be disclosed as well.

If a party publicly announces that it considers a public tender offer without the legal obligation to submit such offer, the Swiss Takeover Board (*Übernahmekommission*) may at its discretion ask the potential offeror either to publish a public tender offer within a certain deadline (“put up”) or to publicly declare that it will abstain from submitting an offer or from stakebuilding in excess of the threshold triggering a mandatory offer (see **6.2 Mandatory Offer**) within six months (“shut up”).

### 6.2 Mandatory Offer

Under Swiss public takeover laws, once a direct or indirect shareholding of 33.3% is reached, a mandatory offer has to be submitted – unless the articles of incorporation of the company provide for a valid opting out. This obligation also arises

when the threshold is reached by several persons acting in concert.

### 6.3 Transaction Structures

A public company in Switzerland can be acquired through a public tender offer, a statutory merger, a share deal through which a controlling shareholding is acquired, or an asset deal whereby the assets and liabilities of the operational business are acquired. In general, the two typical transaction structures are a public tender offer or a statutory merger. Whereas the public tender offer structure is usually seen in an international setting (in case a (reverse) triangular merger does not work) involving a listed Swiss entity, statutory mergers are used more in domestic private M&A transactions. Public tender offers are governed by the Swiss Financial Market Infrastructure Act and the relevant ordinances thereto. Statutory mergers are governed by the Swiss Merger Act.

### 6.4 Consideration and Minimum Price

In voluntary offers, the acquisition may be structured as a cash or stock-for-stock transaction or a combination thereof. In public tender offers, it is mandatory to offer a cash consideration in the event a stock-for-stock exchange offer is made.

In mergers, a cash compensation is possible and common either as a combination of shares and cash (in which case, the cash compensation must not exceed one-tenth of the fair market value of the shares), a right to choose between shares or cash compensation, or by agreeing in the merger agreement that only a cash compensation is offered.

The price offered in a public tender offer has to comply with a strict minimum price rule. The price has to be equal or higher than either:

- the stock exchange price that corresponds to the volume weighted average price (VWAP) during the 60 trading days' period before the preliminary announcement or the offer prospectus; or
- the highest price paid by the bidder (or any person acting in concert with the bidder) during the 12-month period before the preliminary announcement or the offer prospectus, which takes into account all agreements concluded during that period, independent of the closing of such transaction.

Contingent value rights are not a common feature in public M&A transactions in Switzerland.

### 6.5 Common Conditions for a Takeover Offer/Tender Offer

Offer conditions are permitted for voluntary offers if:

- the bidder has a justified interest;
- the satisfaction of a condition cannot be (substantially) influenced by the bidder; and
- the bidder must pay a compensation due to the type of the condition – in which case, has to implement all reasonable measures to ensure that the condition is satisfied.

The following types of conditions are common in Swiss public M&A transactions:

- conditions to secure the acquisition of control (minimum acceptance levels);
- conditions to protect the substance of the target company, including material adverse change clauses; and
- conditions to secure the completion of the transaction, such as approvals by authorities, amendments to articles of incorporation, entry in the shareholders' register, and/or control over the board.

If a bidder is subject to a mandatory offer (see **6.2 Mandatory Offer**), offer conditions are limited to regulatory approvals and registration as shareholder in the share register.

## 6.6 Deal Documentation

In Switzerland, it is common to enter into a transaction agreement between the bidder and the target in connection with a takeover, which is supported by the board of directors of the target company.

The transaction agreement would typically contain the following undertakings of the target company:

- co-operation undertakings with regard to access to information, publication of financial statements, notice of relevant events/violation of covenants/actions threatening the completion of the transaction;
- non-solicitation of other offers (no-shop undertakings);
- future management structure;
- information obligation with regard to competing offers or related enquiries;
- joint press releases;
- obtaining a fairness opinion;
- fulfilment of specific offer conditions;
- reasonable best efforts to solicit the tender of the shares;
- compliance with takeover regulations;
- convocation of shareholders' meeting to elect new board members appointed by the bidder;
- registration of the bidder in the share register after completion;
- conduct of business undertakings; and
- payment of a break fee if certain covenants, laws, regulations or conditions are violated.

It is also common to include representations and warranties in a transaction agreement. These are

normally limited to fundamental representations and warranties (due incorporation, accuracy of information, valid issuance of shares, and no violation of any contractual or constitutional obligations).

In the case of mergers, it is mandatory to enter into a merger agreement between the merging entities, and the Swiss Merger Act prescribes a mandatory minimum content. There are no specific obligations of the target company and it is not common to provide any representations and warranties.

## 6.7 Minimum Acceptance Conditions

Minimum acceptance conditions prescribing that the bidder (after the expiry of the offer period) directly or indirectly owns a certain number of target company shares are permitted and common in voluntary public tender offers (see **6.2 Mandatory Offer**). In principle, a threshold of 66.6% of the outstanding target shares is usually accepted by the Swiss Takeover Board. However, there is no specific control threshold for minimum acceptance conditions, as long as such thresholds are not unreasonably high. Based on case law of the Swiss Takeover Board, the following general rules apply, subject to a case-by-case analysis:

- thresholds of 50% are reasonable for partial offerings;
- thresholds of 66.6% or less are in principle reasonable;
- thresholds of 66.6% or more are only reasonable in specific situations; and
- thresholds of 90% are reasonable in case of holding offerings.

With a 66.6% majority, a shareholder is able to control all important decisions of a Swiss target company according to Swiss law, unless the

articles of incorporation would stipulate different voting thresholds.

## 6.8 Squeeze-Out Mechanisms

If a bidder does not achieve a shareholding of 100% after a public tender offer, it may squeeze out the remaining minority shareholders. The squeeze-out mechanism depends on the ownership threshold, as follows.

- If the bidder already holds more than 98% of the voting rights, the squeeze-out can be effected through court proceedings. In this case, the bidder would file a respective squeeze-out request within three months after the end of the additional offer period. The shares of the minority shareholders will be cancelled upon a court order against a compensation payable by the bidder and re-issued to the bidder. Subsequently, and after the general meeting of shareholders has resolved a delisting, the target company may request the delisting of its shares. Often the delisting process is already initiated in parallel to the squeeze-out procedure.
- If the bidder holds more than 90% but less than 98%, the squeeze-out can be effected through a statutory squeeze-out merger. In this case, the bidder (or one of its affiliates) is merged with the target company. This requires the entering into of a merger agreement between the merging companies, approval by the general meeting of shareholders of both companies, a report by the board of the merging companies outlining the reasons for the merger, a report by a Swiss qualified auditor reviewing the merger documentation, and a filing with the commercial registers where the two companies are registered. Following registration of the merger, the transferring company will be deleted from the commercial register and the minority

shareholders will receive a cash compensation. The adequacy of the compensation can be challenged during a period of two months following the publication of the merger in the Swiss Official Gazette of Commerce.

## 6.9 Requirement to Have Certain Funds/ Financing to Launch a Takeover Offer

Upon publication of the offer prospectus in connection with a public tender offer, the bidder must confirm that the funds required to finance the takeover will be available on the settlement date. Under Swiss public takeover laws, an independent review body (auditor) has to confirm the availability of the necessary funds. In the case of debt financed offers, the executed financing documentation (and not only a term sheet) should be available, as the financing banks will issue their commitment letters only under such documentation.

The permissibility of conditions and covenants in the financing documentation are admissible but limited and need to correspond with the offer conditions. Offers conditional on obtaining financing are not permitted, as the financing documentation must be available in executed form already at the time of publishing the prospectus.

There is no certain funds requirement in a statutory merger.

## 6.10 Types of Deal Protection Measures

To secure support for a transaction, the bidder and the target company may enter into a transaction agreement and agree on deal protection measures. Typical deal protection measures are:

- the undertaking of the board of directors of the target company to support the deal;
- non-solicitation provisions; and



- matching rights and break fees.

These measures are all subject to the fiduciary duties of the board of directors of the target company and, therefore, must not be overly restrictive. Break-up fees and reverse break-up fees are generally limited up to the amount of coverage of reasonable costs incurred at the level of the bidder. Punitive break fees are not admissible and transaction agreements must contain a break right in case a better competing takeover offer is announced.

## 6.11 Additional Governance Rights

If a bidder cannot obtain 100% ownership of a target company, the following statutory governance rights apply, depending on the exact shareholding.

- A shareholding of more than 50% of the voting rights allows the bidder to pass shareholders' resolutions, unless Swiss law or the constitutional documents of the company prescribe a qualified majority.
- A shareholding of 66.6% of the voting rights allows the bidder to pass resolutions requiring a qualified majority (eg, delisting).

In addition, Swiss law recognises the following governance instruments:

- super-voting shares or preference shares granting preferential dividend and/or liquidation entitlements;
- transfer restrictions on the shares issued allowing the board of directors (and indirectly the bidder through the relevant board representatives) to reject new shareholders (eg, competitors); and
- veto rights at board level.

## 6.12 Irrevocable Commitments

In Switzerland, it is common to obtain irrevocable commitments from key shareholders of the target company to support the transaction, either through tendering their shares into the offer or selling their shares before the offer is announced.

The nature of these undertakings depends on whether the underlying agreement contains any conditions with regard to the success of the offer. Such conditions allow the shareholder to withdraw from the tender or sale if a better competing offer is announced at a later stage. In the absence of such conditions, withdrawal would not be possible.

Depending on the exact timeline, the details of the agreement must be disclosed in the offer prospectus, and the price paid affects the minimum offer price (see 6.4 Consideration and Minimum Price).

## 6.13 Securities Regulator's or Stock Exchange Process

Mandatory and voluntary public tender offers are reviewed by the Swiss Takeover Board prior to publication of the offer. The review by the Swiss Takeover Board has to be completed within "a short period of time" and normally takes around three weeks. As part of the review, the Swiss Takeover Board verifies whether the terms of the offer are in compliance with Swiss law. This includes compliance with the best price rule, the conditions of the offer, and the fairness opinion on the offer price, as well as the provisions of the transaction agreement with the target company.

Prior to the publication of the offer, the bidder normally publishes a pre-announcement. The publication of a pre-announcement is not mandatory but is common. The offer prospectus

has to be published within six weeks following the pre-announcement. The timeframe for the tender offer is determined by the bidder and disclosed in the pre-announcement or offer prospectus based on the deadlines set forth in the Ordinance of the Swiss Takeover Board (see **6.14 Timing of the Takeover Offer**).

If a competing offer is announced during the offer period, the shareholders are free to choose between the earlier offer and the competing offer. To enable this free choice, the Swiss Takeover Board would consult the parties involved and co-ordinate the timeframes of both offers. Specifically, it may determine a maximum offer period and limit the deadlines for amendments of the offers.

## 6.14 Timing of the Takeover Offer

Under Swiss takeover laws, the general offer period is at least 20 business days and is a maximum of 40 business days. The offer period may be shortened by the Swiss Takeover Board upon request of the bidder if the bidder already holds a majority of voting rights and the report of the board of directors is published in the prospectus.

The offer period may be extended up to 40 business days if an extension has been reserved in the offer. A longer extension requires the approval of the Swiss Takeover Board and is granted if this is justified by superseding interests.

In the past, an extension has been granted while administrative proceedings were pending with the Swiss Administrative Supreme Court, so as to review the launch of a partial offer during an ongoing primary offer and for synchronisation with a foreign public tender offer. It is also possible for an extension to be granted if regulatory/

antitrust approvals are not obtained prior to the expiry of the offer period.

## 7. Overview of Regulatory Requirements

### 7.1 Regulations Applicable to a Technology Company

In principle, there are no specific regulations in Switzerland when setting up and starting a technology company. Certain exceptions apply to telecommunication, radio/TV, fintech, insurtech and biotech companies.

### 7.2 Primary Securities Market Regulators

The primary securities market regulators for public M&A transactions in Switzerland are the Swiss Financial Market Supervisory Authority (FINMA) and the Swiss Takeover Board.

### 7.3 Restrictions on Foreign Investments

There are limited restrictions on foreign investments in Switzerland. Currently, these only exist in the banking/financial services and real estate sectors.

However, a motion was submitted to the Swiss Federal Council to develop a legal basis for FDI control in 2018. In 2021, the Swiss Federal Council determined the main aspects of such FDI control, which would entail a notification and approval requirement for investments by foreign governments or related investors. On 15 December 2023, the Swiss Federal Council adopted the dispatch on the draft legislation relating to FDI control (the so-called Investment Screening Act). The draft legislation intends to prevent takeovers of Swiss companies operating in critical sectors by foreign state-controlled investors if such takeover could threaten public order or security. Critical sectors include defence, dual-

use goods, electricity, water supply, health, telecommunications, and transport infrastructure. The State Secretariat for Economic Affairs (SECO) would be the competent authority for this process.

The Swiss Parliament is currently debating the draft legislation. Notably, there are controversial discussions surrounding whether private, non-state investors will also be subject to FDI control. The Investment Screening Act is expected to come into force in 2025 at the earliest.

## 7.4 National Security Review/Export Control

In principle, there is no national security review of acquisitions in Switzerland.

Currently, Switzerland has restrictions in place against 26 countries or certain organisations, which restrict the transfer of goods and payments and also include certain notification obligations. The applicable restrictions need to be assessed on a case-by-case basis at the moment of a transaction.

Export control regulations apply to all military goods and arms as well as dual-use goods, technologies and software that may be used for civil and military purposes. The applicable restrictions are mainly governed by the Federal Act on Military Goods and the Federal Act on the Control of Dual-Use Goods, Specific Military Goods and Strategic Goods (and ordinances issued in this context). Export of such goods, technologies and software are subject to governmental permits.

## 7.5 Antitrust Regulations

Swiss antitrust regulations have to be taken into account whenever two (or more) previously independent companies merge, in the case of

transactions through which a company acquires direct or indirect control of one (or more) previously independent companies or in the case of transactions whereby two or more undertakings acquire joint control over an undertaking that they previously did not jointly control. A merger control notification obligation is triggered if:

- the companies concerned have a joint turnover of at least CHF2 billion worldwide or a turnover of at least CHF500 million in Switzerland; and
- at least two companies have an individual turnover of at least CHF100 million.

Irrespective of the turnover, a notification obligation is triggered if one of the companies involved in a transaction has held a dominant position in the Swiss market and the takeover/business combination concerns either the same market, an adjacent market or an upstream or downstream market.

The notification must be made to the Swiss Competition Commission. The obligation is triggered at signing and must be made prior to completion of the transaction.

## 7.6 Labour Law Regulations

Generally, Swiss labour law regulations in connection with M&A transactions are rather lenient. There is no involvement of employees and/or works councils in public takeover offers. In the case of a statutory merger or an asset deal constituting a business transfer, the employees (or the employees' representative body) must be informed about the reason and (legal, economic and social) consequences of the transaction. If the intent is to implement measures that affect the employees concerned, the employees need to be consulted on those measures and they can comment and propose alternative meas-

ures. Employees are also granted the right to reject the transfer of their individual employment relationship – in which case, the employment would be terminated. However, employees or the employees' representative body (if any) do not have a binding vote on the transaction itself.

## 7.7 Currency Control/Central Bank Approval

There is no currency control regulation or approval by the Swiss National Bank for M&A transactions.

## 8. Recent Legal Developments

### 8.1 Significant Court Decisions or Legal Developments

There are a number of legislative reforms that (could) have an impact on technology M&A transactions in Switzerland. Some are already in force, while others are still being debated in the legislative process.

On 1 August 2021, Switzerland was one of the first countries in the world to introduce legislation on distributed ledger technology. Such legislation includes civil law but also regulatory provisions with the aim of enabling the use of distributed ledger technologies in a trusted environment.

As part of the Swiss corporate law reform, which came into force on 1 January 2023, new legal provisions have been introduced that provide opportunities for flexible structuring of M&A transactions. Specifically, interim dividends are now explicitly permitted under Swiss law. They make it possible to avoid “cash for cash” payments so that the liquidity management after the acquisition can be improved. Additionally, a capital fluctuation band can now be introduced,

allowing the board of directors to increase or reduce capital within a certain range. This enables the board of directors to issue shares as acquisition currency.

Additionally, the revised Swiss data protection law came into force on 1 September 2023. One of the main goals of the new law was to achieve the compatibility with EU law (GDPR). Data protection in general becomes more important, especially in technology M&A deals involving large databases. The compliance of the target company with the newly introduced law should be observed and also the data disclosure during the transaction process should take the new data protection law into consideration.

The Swiss Cartel Act is currently being revised. The Swiss Federal Council adopted a dispatch on the partial revision of the Swiss Cartel Act that is currently in deliberation in the Swiss parliament. The core element of this revision is the modernisation of Swiss merger control. By changing from the current qualified market dominance test to the Significant Impediment to Effective Competition (SIEC) test, the antitrust test standard will be adapted to international practice. The introduction of the SIEC test allows for a lower threshold for regulatory intervention. Swiss merger control proceedings are expected to be more time-consuming and burdensome owing to the increased role of economic evidence. This could have an impact on the larger transactions in the technology sector. However, this revision is still subject to the approval of the Swiss Parliament.

Furthermore, a new draft legislation to screen FDI in Switzerland has been adopted by the Swiss Federal Council in December 2023 and is currently being deliberated in the Swiss Parliament. Specifically, it is debated whether FDI

control on incoming cross-border investments will also apply to private, non-state investors. Depending on the final scope of the new legislation, it could make investments in Switzerland – including the technology sector – less attractive. The new legislation is not expected to come into force before 2026.

Finally, it is worth noting that the EU AI Act entered into force on 1 August 2024. With its extraterritorial reach, similar to the GDPR, it also applies to Swiss companies whose AI systems are available in the EU or whose AI-generated output is used in the EU. Currently, Swiss law does not regulate AI. However, in November 2023, the Federal Council mandated the Federal Department of the Environment, Transport, Energy and Communications to prepare a report on AI regulatory approaches that are compatible with the EU AI Act and the Council of Europe's AI Convention. This indicates that Switzerland will soon regulate the use and application of AI.

## 9. Due Diligence/Data Privacy

### 9.1 Technology Company Due Diligence

Publicly listed companies are allowed to provide due diligence information as long as the provision of such information is in the best interest of the company and complies with applicable law and contractual obligations – in particular, with insider trading rules, ad hoc disclosure obligations, confidentiality undertakings, data privacy obligations, and the principle of equal treatment of shareholders. The permissibility of any disclosure of due diligence information must be analysed on a case-by-case basis in relation to the specific information and bidder, as well as the intended transaction and its implications for the company.

Before any confidential information is disclosed, the company should ensure that the bidder has entered into appropriate non-disclosure undertakings and that the due diligence information is only disclosed on a limited and need-to-know basis. Information that is sensible from a commercial or antitrust perspective should be disclosed to clean teams only.

The company has no general obligation to provide due diligence information to potential or actual bidders. However, if a company has provided or will provide due diligence information to actual or potential bidders, all actual (but not other potential) bidders have a right to receive the same information.

The level of technology due diligence depends on the specific IP portfolio. Generally, a company may be allowed to disclose IP information that is already public in the relevant IP registers. However, particular attention should be paid in relation to trade secrets and other commercially valuable confidential information, including source codes. In technology companies, such information is likely to qualify as insider information and therefore may not be disclosed in connection with a due diligence.

### 9.2 Data Privacy

Any processing of personal data of Swiss data subjects must comply with the provisions of the Swiss Federal Data Protection Act (DPA). Generally, it is noted that – on the one hand – the processing must be based on one or more of the legal bases provided for in the DPA. In the context of a due diligence exercise, the seller and the buyer usually may rely on the legal basis of safeguarding their legitimate interests. On the other hand, the seller and the buyer must comply with the following general principles that apply to any processing of personal data.

- The processing of personal data must be made in good faith and must be proportionate.
- Personal data may only be used for the purpose(s) specified at the time of its collection.
- Both the fact that personal data is being collected and the purpose of the processing must be apparent to the relevant data subject – moreover, the data must be accurate and data security must be ensured.

Finally, specific requirements apply for transfers of personal data abroad and for the processing of particularly sensitive personal data.

## 10. Disclosure

### 10.1 Making a Bid Public

A requirement to launch a public tender offer applies if the target's shares are listed on a Swiss stock exchange and more than 33.3% (or a higher threshold up to 49% as stipulated in the target company's articles of incorporation) of the voting rights are acquired by the bidder (mandatory bid), unless there is an opting-out clause. Otherwise, a bid will usually only be made public after parties have reached a definitive agreement. The public offer is made public by way of an offer prospectus. In the scenario of a hostile bid environment, a bidder may publicly announce the intention of an acquisition of a target's shares. In such case, the hostile bidder may be required to announce a public offer under the "put up or shut up" rule.

### 10.2 Prospectus Requirements

The publication of a prospectus is required by any person making a public offer for the acquisition of securities or seeking the admission of securities for trading on a trading venue. Provided that

information exists that is deemed equivalent in terms of content to a prospectus in connection with shares offered in a stock-for-stock takeover, a prospectus may not need to be published. A similar exception applies in connection with a merger, spin-offs and the like – again, provided information exists that is deemed equivalent in terms of the content of a prospectus.

### 10.3 Producing Financial Statements

The prospectus contains detailed information on the company's assets, financial position and earnings as well as on the type, price and prospects of the shares. Companies listed on a stock exchange and larger undertakings must prepare financial statements in accordance with a recognised financial reporting standard.

### 10.4 Disclosure of Transaction Documents

The prospectus for a public tender offer needs to be submitted to the Swiss Takeover Board for review and clearance.

## 11. Duties of Directors

### 11.1 Principal Directors' Duties

In general, the directors of a Swiss company:

- have a duty of loyalty towards the company;
- must always pursue the company's best interest with due care (so-called duty of care); and
- apply equal treatment to all shareholders (so-called fiduciary duties).

This also applies in the event of a business combination and other forms of M&A transactions.

There is no general definition of what falls under the "best interest of the company". In recent years, it has been discussed among Swiss



scholars whether this includes only the shareholders' interests (shareholder approach) or if the interests of other stakeholders must also be considered (stakeholder approach). Despite these discussions, in business combinations, a company's interests should not only encompass value growth and fair shareholder compensation but also the interests of other stakeholders. It is up to the directors to weigh these different interests in a way that seems appropriate.

The principle of equal treatment of the shareholders must always be observed, as long as this does not contradict the company's best interests. For Swiss companies whose shares are at least partly listed in Switzerland, Swiss takeover law already takes this principle into account (eg, by stipulating the best price rule so that all shareholders may sell their shares for the same price). Swiss takeover law further stipulates the principle of equal treatment of different bidders. Extensive exclusivity agreements with individual potential buyers not allowing the board of the target company to negotiate with other potential buyers may likely be unlawful in light of this principle.

## 11.2 Special or Ad Hoc Committees

Swiss listed companies often establish a special or ad hoc committee in the context of M&A transactions. The establishment of such a committee is a way to avoid conflicts of interest but can also be beneficial in streamlining the transaction process. Even if certain tasks might be delegated to the special or ad hoc committee, important strategic decisions (eg, granting due diligence to a party or the decision to defending the company) must be passed by the full board, excluding the principal directors with conflicts of interest.

## 11.3 Board's Role

Prior to the launch of a public takeover offer of the buyer, the board is actively involved in the negotiations with potential buyers. It is the task of the board of the target company to review the proposal of a potential buyer. At this stage, the board is guided by the question of whether it is in the best interest of the company to continue the takeover process. If the board concludes that the offer is not in the best interest of the company, it may abandon the negotiations. However, if the board decides to continue with the process, the shareholders will have the final decision on whether to accept the offer or not.

Swiss takeover law further specifies the role of the board of a listed target company as soon as a public tender offer has been officially made. Specifically, the board must prepare a report for the shareholders setting out its position in relation to the offer. Furthermore, the board is not allowed to enter into legal transactions that might significantly alter the assets or liability of the company (eg, the sale or acquisition of assets representing more than 10% of the total assets or contributing to more than 10% to the profitability of the company). This limits the option to take defensive measures at this stage. However, certain defence measures might still be taken by the board, such as actively looking for a "white knight" (always taking into consideration the principle of equal treatment of different bidders), PR communications, or convening an extraordinary shareholder's meeting to decide on defence measures.

Shareholder litigation challenging the board's decision to recommend a particular transaction is not common in Switzerland. However, qualified shareholders (holding at least 3% of the voting rights of the target company) may be parties to proceedings before the Swiss Takeover Board

and are eligible to challenge its rulings. There have been cases in which qualified shareholders challenged the rulings of the Swiss Takeover Board in the past, but this is often not necessary in friendly takeovers anyway.

## 11.4 Independent Outside Advice

It is common for the board to obtain financial, legal or other advice in the context of a M&A transaction. This allows the board to ensure the availability of sufficient expertise and to act with due care.

The Swiss Takeover Board imposes the obligation to obtain a fairness opinion if at least two members of the board of the target company are not free of conflicts of interest. However, obtaining fairness opinions is also customary in business combinations where no conflicts of interests exist, as they allow the board to legitimise its position when rejecting or recommending accepting a public tender offer.

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