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Technology M&A 2025


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Switzerland: Law & Practice

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Switzerland: Trends & Developments

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Trends and Developments

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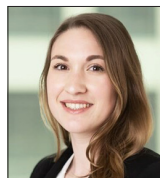
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Law & Tax

Deal Activity and Market Insights

In general, cross-border M&A activity in Switzerland has seen a shift from inbound transactions to more outbound transactions since mid-2022, alongside a slight overall decline. The strong Swiss franc made foreign targets more attractive for Swiss investors, while Swiss companies became more expensive for foreign investors. This also affected the Swiss TMT sector – even though M&A activity in the Swiss TMT sector remained resilient to the global trend of reduced deal activity in the first half of 2023 (reaching record deal volumes, according to PwC), it followed the overall trend in the first half of 2024, recording a sharp decline compared to the previous year.

As in previous years, the share of foreign investors in Swiss TMT deals is higher than in other sectors, highlighting the sector's generally more international outlook. Furthermore, M&A activity in the Swiss TMT sector is driven by buyers from outside the TMT sector. This marks a significant difference to other sectors, particularly as the majority of transactions in Switzerland are completed by buyers from the same sector. This trend towards out-of-sector buyers in the TMT market can be explained by the persisting need for companies to drive innovation and advance digitalisation and is expected to continue.

Private equity and financial investors were very active in the Swiss TMT M&A market in the first half of 2024, accounting for around two-thirds of all transactions. This is significantly higher than the global average, highlighting the strong appeal of TMT for financial sponsors. With pressure on the sell-side to divest long-term assets, and significant funds available on the buy-side, private equity is expected to continue to drive deal activity in the coming year.

In 2024, the Swiss TMT sector witnessed several notable M&A, including:

- EQT's majority stake in Acronis, a leading Swiss cybersecurity and data protection platform for managed service providers and IT departments;
- Cadence Design Systems' acquisition of BETA CAE Systems International AG, a leading system analysis platform provider of multi-domain, engineering simulation solutions; and
- Swisscom's majority stake in Camptocamp, one of the leading Swiss companies in the development and integration of open-source solutions.

Software companies as main drivers

Technology companies, especially software companies and IT service providers, are at the forefront of M&A activity in the Swiss TMT sec-

tor. The attractiveness of the country as a business location and the many new tech companies constantly emerging from the highly active start-up community are likely to be the main reasons for this strong interest in Swiss tech companies.

Outlook

In the first half of 2024, the Swiss TMT sector was unable to resist the global trend of declining deal activity, unlike the previous year. A number of challenges – including higher interest rates, the strength of the Swiss franc, turbulence in the financial sector and ongoing global geopolitical tensions – led to a climate of uncertainty in the markets.

Despite this challenging background, Switzerland's resilient economy, stable political landscape and investor-friendly regulatory framework remain conducive to M&A-activity. In addition, the ongoing trends towards innovation and digitalisation – as well as the disruptive impact of advances in AI and the associated need to transform business models – are expected to drive growth and deal activity in the Swiss TMT sector. With recession fears easing and inflation stabilising, M&A activity may gradually pick up next year.

Deal Structures and Other Key Aspects in Tech M&A

Earn-out clauses

The adequate valuation of a target company can be challenging in technology deals, especially with regard to start-ups that have only been operating for a few years and can therefore only provide limited financial metrics. In such cases, the estimation of the target company's performance depends to a great extent on future forecasts. At the time the deal is closed, there is often a great degree of uncertainty regarding the development of the company and the success of

the digital technology or digital business model. This uncertainty can result in valuation gaps and different price expectations between the seller and the buyer.

To tackle this uncertainty and close the gap, M&A agreements in technology deals often include earn-out clauses. The earn-out is a performance-related, variable purchase price component, which is paid in addition to a fixed base price. The performance indicators can be defined by the parties. Often financial performance indicators such as net income or operating cash flow are used. This way, the earn-out depends on actually generated revenues and can thus compensate for uncertainties with regard to future returns.

By using an earn-out mechanism, the seller and the buyer share opportunities as well as risks after the acquisition. Such a mechanism can be beneficial for both the seller and the buyer. From the seller's perspective, the earn-out is a way of maximising the proceeds of the sale without having to discount the purchase price due to the buyer doubting the value of the target company. For the buyer, it can ensure a more accurate valuation of the target company and reduce uncertainty about its future. In constellations where the seller continues to be involved in the company beyond closing, an earn-out can further incentivise the seller to maintain and improve the performance of the business during the earn-out period.

Due diligence

The general scope of the due diligence to be performed in a technology M&A deal needs to be determined on a case-by-case basis. However, in addition to the typical issues such as legal, tax, economic and financial conditions, there are also issues that require special attention during

the due diligence process in a technology M&A transaction. Specifically, these include IP, software and IT in general, and employees.

The core value of tech companies naturally lies in their intangible assets. IP due diligence therefore plays a central role and usually involves determining the portfolio and extent of IP owned by the target. Legal IP due diligence often goes along with technical due diligence of the target's IP, especially in technology-driven industries. A clear understanding of the technology in question is necessary for the determination of what IP rights may and should be in place. IP due diligence should also cover prior, current or emerging disputes in connection with the company's IP portfolio.

During the due diligence process, the software owned and used by the target company needs to be identified. The purpose of this is to determine the type of the software, the identity of its developers, and the ownership of the software claimed by the target, as well as to verify the licensing of the software and to assess the legality of the efforts to market it.

Corporate IT environments are becoming increasingly complex, not least owing to the rise of AI. In this context, IT due diligence is becoming crucial. The goal is to ensure that risks such as system vulnerabilities and data breaches are identified early. It is also important to ensure that the integration or divestiture process does not disrupt critical business processes.

As regards employees, the due diligence will include a review of the employment contracts – in particular, those of the founders and other key employees. In the context of IP and technology, it is critical to determine the existence of any employee-generated IP or technology. As part of

the due diligence process, the ownership rights to such intangible assets must then be clarified. According to Swiss employment law, inventions and designs produced by the employee in the course of the employee's work for the employer and during the performance of the employee's contractual obligations belong to the employer. Furthermore, the employer may acquire inventions and designs created by the employee in the course of the employee's work for the employer – but not during the performance of the employee's contractual obligations – against reasonable compensation.

However, if the employee creates works protected by copyright, it is necessary to distinguish between software and other copyrighted works. If software is created by an employee while discharging professional duties and in fulfilling contractual obligations, the Swiss Copyright Act grants exclusive rights to the employer. Regarding other works protected by copyrights, the so-called creator principle is applicable and the rights are not automatically transferred to the employer. For more details on copyrights and information on how to deal with works protected by copyrights created by contractors or other third parties, including software, please refer to the subsection on IP protection later in this article.

Another aspect to consider is that technology transactions frequently involve a strong wish on the part of the buyer to continue collaborating with the seller. This is a way to secure key competencies and know-how and also an effective tool to implement a non-compete clause under Swiss law. Typically, in such cases, the seller remains in a management position.

IP protection

As discussed in the foregoing subsection on due diligence, IP rights are the primary reason for acquiring a technology company and thus require special attention. Specifically, the determination of the scope and ownership of IP rights can be challenging. In addition, transferability must be ensured, considering the different types of IP rights. If the target company owns IP rights in different jurisdictions, the possible differences in the rules governing the transfer of IP rights must be taken into account.

Identifying and listing the IP rights in scope requires an understanding of the types of rights and intangibles. Under Swiss law, a distinction must be made between registered and non-registered IP rights. Trade marks, patents and designs are common registered IP rights in Switzerland. Registration in the applicable registers entitles the owner to exclusive rights.

Unregistered IP rights are more challenging to identify and inventorise. In this category, copyrights are the most relevant rights. Copyrights are particularly valuable in relation to software. There is no register of copyrighted works in Switzerland. Instead, according to the so-called creator principle, the Swiss Copyright Act grants exclusive rights to the natural person who created the work. Unlike other jurisdictions, Switzerland does not have a general work-for-hire doctrine applicable to third-party contractors and employees, whereby the client or employer obtains the IP rights resulting from the performance of the contract. Exceptions apply to the creation of software by employees as described in the foregoing subsection on due diligence.

In the case of copyrighted works other than software created by an employee, copyright usually vests in the employee who has created the work,

not in the employer. The latter obtains a licence to use the work generated by the employee, but only to the extent that this is required by the purpose of the employment; this does not include a transfer of ownership of the copyrighted work. To avoid legal uncertainty, the employment agreement should set out the extent of the rights transferred.

Particular attention must also be paid if external contractors or other third parties are involved in the creation of work protected by copyright. It is essential to contractually clarify the scope of the rights the company needs in the work – ideally, full copyright.

In order to ensure the transfer and continued use of key IP rights after a transaction and to protect the buyer from potential damages and liabilities, it is essential that the share or asset purchase agreement contains a detailed set of representations and warranties and indemnification mechanisms. The precise content of the representations and warranties will be based on several factors, including the results of the due diligence process.

If uncertainty remains after the due diligence process as to the scope, ownership or transferability of certain IP rights, IP liability insurance may be another risk mitigation tool. Such insurance can help companies cover the costs of litigation associated with enforcing or defending patents, trade marks or copyrights. It can also help protect policyholders against third-party infringement claims.

Regulatory and Other Developments

Data protection

On 1 September 2023, the new Swiss Data Protection Act (“revDPA”) came into force. The aim of the revDPA was, on the one hand, to modern-

ise Swiss data protection law and, on the other hand, to bring it into line with EU law – in particular, with the EU GDPR. Companies that were already compliant with the GDPR had only minimal adaptations to implement under the revDPA.

Especially in technology M&A deals involving large databases, data protection is becoming increasingly important. The target company's compliance with the newly enacted law needs to be monitored. Transfer and processing of personal data in the context of a due diligence exercise should also be made to comply with the revDPA. Failure to comply with the revDPA may result in criminal sanctions against the individuals involved.

Swiss–US Data Privacy Framework

Switzerland's new Data Protection Act, effective since 1 September 2023, allows personal data to be transferred to foreign countries without additional safeguards – provided that those countries maintain an adequate level of data protection. The Swiss Federal Council is responsible for determining which countries meet this standard and publishes a corresponding list in Annex 1 of the Data Protection Ordinance.

In July 2023, the EU and the USA implemented the EU–US Data Privacy Framework. To align with this, the Swiss Federal Council introduced the Swiss–US Data Privacy Framework (the “Swiss–US DPF”) on 14 August 2024. With effect from 15 September 2024, and limited to companies specifically certified under the Swiss–US DPF, the USA will be added to the list of countries with an adequate level of data protection. This decision will facilitate the transfer of personal data, allowing data to be transferred to participating US companies without further action (eg, agreeing on EU Standard Contractual Clauses).

Foreign direct investment screening

Currently, Switzerland does not have any general foreign direct investment (FDI) screening mechanisms in place. However, FDI controls apply to certain industries and sectors (eg, banking and real estate). Several additional business activities require a governmental licence and the licensing conditions include specific requirements regarding foreign investors. Examples of such business activities are aviation, telecommunications, radio and television and nuclear energy.

In the adoption of a corresponding motion, the Swiss Federal Council published a preliminary draft for a new law on FDI screening and initiated its consultation in May 2022. Most of the participants in the consultation process rejected this draft, arguing that restricting international investment would be harmful to the economy, given that it would weaken Switzerland's position as a business location. Based on these results, in mid-December 2023, the Swiss Federal Council adopted the dispatch of the Investment Screening Act with a significantly reduced scope of application.

Under this new draft legislation, takeovers of domestic companies operating in a particularly critical area by foreign state-controlled investors will require authorization – provided that certain de minimis or turnover thresholds are exceeded. These critical sectors include defence equipment, power grids and production, and water supply, as well as healthcare, telecommunications and transportation infrastructure.

Compared to equivalent legislation in other jurisdictions, the scope of the published draft is rather narrow. However, the Swiss Federal Council still opposes the introduction of an investment screening mechanism, arguing that the cost-benefit ratio is unfavourable, existing regulations

are sufficient, and that it is not aware of any past takeovers by foreign investors that would have jeopardised or threatened public order or security in Switzerland.

Nevertheless, in September 2024, the Swiss National Council voted in favour of the new Investment Screening Act following the proposals of its Committee for Economic Affairs and Taxation, which even extended the original draft. Specifically, the Swiss National Council decided that investment control should also apply to non-state investors and that – apart from public order and security – the supply of essential goods and services should explicitly be protected.

Furthermore, according to the Swiss National Council, the Swiss Federal Council should be given greater leeway to make other companies subject to authorisation if necessary. The draft Investment Screening Act is currently being discussed by the Council of States and is not expected to come into force until 2026.

Partial revision of the Swiss Cartel Act

In May 2023, the Swiss Federal Council adopted a dispatch to partially revise the Swiss Cartel Act, aiming to implement three parliamentary initiatives. The main focus of this revision is to modernise Swiss merger control by replacing the current qualified market dominance test with the Significant Impediment to Effective Competition (SIEC) test, aligning it with international standards.

The SIEC test would lower the threshold for regulatory intervention, making it easier for authorities to step in. This change is expected to make Swiss merger control procedures more time-consuming and burdensome owing to the increased role of economic evidence. Larger transactions in the technology sector could be

particularly affected. However, this revision still requires approval from the Swiss Parliament.

EU Artificial Intelligence Act

With the EU Artificial Intelligence Act (the “EU AI Act”), the first-ever legal framework on AI that aims to provide AI developers, deployers and users with clear requirements and obligations regarding specific uses of AI came into force on 1 August 2024. The regulations will be phased in to give companies time to adapt their AI systems to different risk profiles, where necessary. Like the GDPR, the EU AI Act has extraterritorial reach and will not only be applicable to a Swiss company that makes an AI system available in the EU market but will also apply if the output generated by the AI system of a Swiss company is used in the EU.

Currently, Swiss law does not specifically regulate AI systems. However, in November 2023, the Swiss Federal Council has instructed the Federal Department of the Environment, Transport, Energy and Communications to prepare a report on the possible regulatory approaches to AI systems for Switzerland that are particularly compatible with the EU AI Act and the Council of Europe’s AI Convention, which should form the basis for a concrete mandate for an AI regulatory proposal in 2025. As a result, it is expected that Switzerland will soon regulate the use and application of AI.

Swiss innovation fund

In June 2022, the Swiss Federal Council made a directional decision to establish a Swiss innovation fund. This fund was intended to improve the financing of start-ups during their growth phase, especially in the area of digitalisation. However, instead of taking further steps towards realisation, the Federal Council decided not to pursue

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the matter further for the time being in spring 2023.

In June 2023, a motion was submitted to push for the implementation of an innovation fund through parliamentary channels. The Swiss Federal Council rejected this motion, arguing that there was insufficient room for manoeuvre owing to the tight financial situation. However, during the autumn session of 2023, the Council of States referred the motion to the preliminary advisory committee.

The implementation of such an innovation fund would increase the maturity of the Swiss venture capital market, strengthen its resilience and thus improve Switzerland's attractiveness as a business location. The actual implementation of such a fund remains to be seen.

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