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Energy & Infrastructure M&A 2024

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Global Practice Guides

Energy & Infrastructure M&A

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INTRODUCTION

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Energy and Infrastructure M&A: An Introduction

This Practice Guide will focus on the current key topics in energy and infrastructure M&A in 2023 and 2024. In this series of articles, legal practitioners from various jurisdictions will analyse the law and practice as well as the trends and developments in the energy and infrastructure markets in their home country.

Global Trends in Energy and Infrastructure M&A

The global energy and infrastructure sectors are undergoing profound changes, driven by technological innovation, the transition to renewable energy, regulatory shifts and evolving investor preferences. M&A has become pivotal in this transformation as companies seek to optimise their portfolios, scale renewable investments and respond to new challenges.

Energy transition accelerating renewable M&A

The global shift towards decarbonisation and net-zero targets is a major catalyst for M&A in the energy sector. Governments worldwide have committed to reducing greenhouse gas emissions, with significant investments in renewable energy projects like wind, solar and energy storage. The move to phase out fossil fuels has also led to divestments in carbon-intensive assets, creating opportunities for M&A in both green and traditional energy spaces.

Renewable energy M&A has surged as large energy companies aim to increase their share of renewable assets. In 2022, renewable energy deals reached record levels as companies raced to align their portfolios with sustainable energy mandates. For example, large oil and gas companies have been acquiring renewable energy assets to diversify away from fossil fuels, while utilities are buying wind and solar projects to meet regulatory requirements and investor expectations.

According to a PWC study, renewable energy M&A deals grew by over 45% from 2021 to 2023, and this momentum is expected to continue as governments push for faster decarbonisation. This trend is particularly evident in Europe, where the European Green Deal is spurring investments in clean energy and energy storage infrastructure, and in the US following the passage of the Inflation Reduction Act, which provides financial incentives for clean energy investments.

Energy storage and grid modernisation

The increasing reliance on intermittent renewable energy sources has driven a parallel demand for energy storage solutions and grid modernisation. Battery storage and other forms of energy storage are critical for integrating renewables into the grid and ensuring stability. M&A activity in the energy storage sector is booming as companies seek to acquire technologies that will help balance supply and demand in renewable-dominant energy markets.

Furthermore, aging energy infrastructure and the need for smart grids to accommodate renewable energy generation and electric vehicles are prompting utilities and investors to pursue M&A opportunities in grid modernisation. The integration of digital technologies such as smart meters, demand response systems, grid management software and AI systems is crucial to enhancing efficiency and resilience.

Looking ahead, M&A in energy storage and grid modernisation is expected to remain strong, driven by technological advancements and increasing regulatory pressures for grid reliabil-

ity. The need for enhanced infrastructure to support the electrification of transport will further bolster this trend.

Consolidation in oil and gas

While the energy transition accelerates, oil and gas companies are also consolidating to improve efficiency and optimise their portfolios. High oil prices, driven by geopolitical tensions (especially the Russia-Ukraine conflict) and global supply chain disruptions, have spurred cash flow surpluses for many oil and gas producers. These companies are using this liquidity to acquire competitors, streamline operations and shift focus towards natural gas and low-carbon energy sources.

In the past two years, the global oil and gas sector has seen significant consolidation, and more M&A in the oil and gas sector is expected as companies look to adapt to long-term market shifts and create economies of scale. Some oil companies are also pursuing M&A in adjacent industries, such as carbon capture and storage (CCS), hydrogen and biofuels, as part of their energy transition strategies.

Private equity's role in infrastructure

Private equity is playing an increasingly vital role in infrastructure development, driven by the sector's need for substantial capital investments in areas such as transportation, energy, telecommunications and water systems. With traditional public funding sources often constrained, private equity provides a flexible, long-term investment model, helping to close financing gaps and accelerate essential infrastructure projects. In addition, the stable, long-term cash flows characteristic of infrastructure assets align well with private equity's objectives, making infrastructure an attractive sector for growth-focused funds seeking stable, inflation-hedged returns over extended periods. This trend is particularly strong in renewable energy, where private equity is backing the development of solar farms, wind parks and energy storage projects.

Private equity's ability to deploy large amounts of capital will be crucial for financing future infrastructure investments. Many institutional investors, such as pension funds and sovereign wealth funds, are also expanding their infrastructure portfolios as they seek inflation-protected assets with steady yields. They are increasingly partnering with private equity firms to access these opportunities.

Looking ahead, private equity involvement in infrastructure M&A is expected to remain strong, with many private equity funds focusing on digital infrastructure, such as data centres and broadband, as well as energy transition assets.

Emerging markets and infrastructure expansion

Emerging markets, particularly in Asia, Africa and Latin America, are experiencing rapid infrastructure development to meet growing energy demand, urbanisation and economic growth. Infrastructure investment is critical for providing reliable energy, improving transportation and building smart cities in these regions.

M&A in emerging markets is set to grow as global investors tap into the increasing need for power generation, transmission and transport infrastructure. For example, energy transition financing in Southeast Asia, such as Indonesia's push for renewable energy, and infrastructure modernisation in Africa will likely drive M&A activity. Furthermore, China's Belt and Road Initiative continues to promote infrastructure investment in developing countries, creating opportunities for cross-border M&A.

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Key Challenges Facing Energy and Infrastructure M&A

Regulatory and policy uncertainty

Regulatory frameworks governing energy and infrastructure vary widely across countries, and policy shifts can have a major impact on deal flow. For instance, the changing regulatory landscape in Europe due to the European Green Deal and new emissions targets presents both opportunities and risks for energy M&A. In the US, policy changes under different administrations, such as tax credits for renewables or restrictions on fossil fuels, can alter the attractiveness of certain sectors for M&A.

Moreover, geopolitical risks, such as the war in Ukraine and escalating tensions between the US and China, are creating new layers of complexity in cross-border deals. As protectionist policies grow and national security concerns rise, foreign investments, especially in critical infrastructure, may face more scrutiny, particularly in sectors like energy, telecoms and transport.

Supply chain and inflation pressures

Global supply chain disruptions, compounded by the COVID-19 pandemic and geopolitical tensions and challenges, are affecting the cost and timing of energy and infrastructure projects. Rising material costs, shipping delays and labour shortages are creating significant challenges for companies looking to acquire new projects or integrate newly acquired assets. These disruptions have also led to increased construction costs and project delays, affecting the overall value proposition for M&A transactions.

Inflationary pressures, particularly in energy and raw materials, are also squeezing margins in both traditional and renewable energy sectors. Rising interest rates in 2023 and the first half of 2024, aimed at curbing inflation, made financing for infrastructure projects more expensive, adding a layer of complexity to M&A negotiations.

Sustainability and ESG considerations

Environmental, social and governance (ESG) factors are becoming increasingly critical in M&A decision-making. Investors, especially institutional ones, are prioritising ESG-compliant assets, and companies with strong ESG credentials are commanding higher valuations. This is particularly evident in the energy transition, where green assets such as wind farms, solar parks and energy storage projects are in high demand.

However, balancing ESG goals with financial returns can be challenging. There is growing pressure to phase out fossil fuel-based assets, but the financial viability of many renewables depends on regulatory support, and achieving large-scale decarbonisation requires significant investment in infrastructure. Players engaged in M&A must navigate these challenges to strike a balance between profitability and sustainability.

Outlook for 2025

As we move towards 2025, several factors are expected to continue driving energy and infrastructure M&A, as follows.

- Renewable energy will remain a focal point for M&A, driven by government mandates, corporate sustainability targets and the increasing competitiveness of renewables compared to fossil fuels. More M&A deals involving energy storage, hydrogen and carbon capture technologies are expected.
- Despite the long-term decline of fossil fuels, high oil prices and the need for scale in a low-carbon future will lead to further consolidation in the oil and gas sector. Companies will con-

tinue to focus on natural gas and low-carbon alternatives to adapt to the energy transition.
- Digital infrastructure, including broadband, data centres and smart grids, will be an attractive target for M&A as economies become more digitalised and energy systems more decentralised.
- Emerging markets, particularly in Asia, Africa and Latin America, will be a hotbed of infrastructure M&A as countries invest in energy, transport and digital infrastructure to support economic growth and urbanisation.

Conclusion

While the global energy and infrastructure M&A landscape presents significant opportunities, companies and investors must navigate a complex array of challenges. By focusing on sustainability, innovation and strategic partnerships, market players will be well positioned to capitalise on the emerging trends shaping the energy and infrastructure sectors through 2025 and beyond.

SWITZERLAND

Law and Practice

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1. Market Trends

1.1 Energy & Infrastructure M&A Market

In 2023, inflation, high interest rates, geopolitical tensions and market uncertainty posed significant challenges to deal activity in Switzerland. These factors led to longer deal processes and added complexity in deal structures. Despite these challenges, the Swiss energy and infrastructure M&A market demonstrated resilience, with increased deal activity in 2023 and year to date compared to 2022. This development is particularly noteworthy given the overall depressed M&A deal activity in Switzerland in 2023, when the number of deals involving Swiss businesses (outbound, inbound and domestic transactions) dropped by 25% compared to 2022.

Deal Activity

M&A activity in Switzerland saw an overall decrease in 2023 and the first half of 2024, compared to 2022. However, energy and infrastructure M&A in Switzerland has shown robust growth, with increased interest in renewable energy and digital infrastructure assets. Inbound deals have risen, with international investors attracted to Switzerland's stable environment and ambitious sustainability targets. Outbound deals have grown, driven by companies expanding renewable portfolios across Europe. Domestically, there has been an increase in deal activity, especially in the hydropower and digital infrastructure sectors.

Navigating Sustainability, Investment and Innovation

The following trends underscore the dynamic and evolving M&A environment in Switzerland's energy and infrastructure sectors, driven by sustainability goals, technological advancements and strategic investments.

- The drive towards renewable energy sources and decarbonisation remains a central theme. Investors are increasingly focusing on assets that align with net-zero objectives, leading to heightened activity in sectors like wind, solar and hydroelectric power. This shift is evident as capital moves away from traditional fossil fuel assets towards sustainable energy projects.
- There is significant emphasis on upgrading and expanding infrastructure to support the energy transition. This includes investments in energy storage solutions, grid enhancements and electric vehicle charging networks.
- Private equity firms and institutional investors are playing a pivotal role in driving M&A activity within the energy and infrastructure sectors. Their involvement is facilitating the financing of large-scale projects and fostering innovation, thereby accelerating the transition to a more sustainable energy landscape.
- The Swiss government's policies and regulatory frameworks are increasingly supportive of renewable energy initiatives. Legislative measures aimed at promoting sustainability and energy security are creating a favourable environment for M&A activities, encouraging investments that align with national energy goals.
- Switzerland continues to attract international investors seeking stable and lucrative opportunities in its energy and infrastructure sectors. Cross-border M&A activities are on the rise, with foreign players investing in Swiss assets. At the same time, Swiss companies are expanding their footprint abroad, reflecting the global nature of the energy transition.

Foreign Direct Investment Screening

Switzerland does not currently have any general foreign direct investment (FDI) screening mechanisms in place. However, certain regula-

tory requirements 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, telecom, radio and television, and nuclear energy.

On 15 December 2023, the Federal Council adopted the dispatch on new legislation regarding investment screening. Under the new draft legislation, investment screening is intended to apply only when a foreign state-controlled investor takes over a domestic company that operates in a particularly critical area, such as electricity grids and production, water supply and transport infrastructure. This means that the takeover of Swiss companies active in such critical areas by a foreign state-controlled investor would need approval, subject to reaching certain turnover thresholds.

Interestingly, the Federal Council has so far been opposed to introducing new FDI control regulations, so that the scope of the draft is narrower compared to similar legislation in other jurisdictions. It will be interesting to follow further discussions on the topic as the legislative process advances in Switzerland against the backdrop of increasingly protectionist tendencies abroad. For now, the regulatory environment regarding investment screening in Switzerland remains favourable for investors.

EU Artificial Intelligence Act

Artificial intelligence (AI) is increasingly influencing the energy and infrastructure sectors, particularly in optimising energy production, enhancing storage systems and managing smart grids. AI plays a growing role in developing smart cities by managing traffic, urban planning and the efficient use of energy and waste. It also assesses infrastructure health and improves the energy efficiency of buildings, contributing to more sustainable and resilient urban environments.

On 1 August 2024, the AI Act came into force in the EU. It is 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 systems by adopting a risk-based approach (eg, the higher the risk of an AI system, the stricter the rules that apply to its development and deployment) and by introducing rules for so-called general purpose AI models. The AI Act will have an 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. At the end of 2023, the Federal Council instructed the relevant federal department to prepare a report on the possible regulatory approaches to AI systems for Switzerland that are particularly compatible with the AI Act and the Council of Europe's AI Convention, which should create the basis to issue a concrete mandate for a Swiss AI regulatory proposal in 2025.

See also **8.1 Significant Court Decisions or Legal Developments** and the Switzerland Trends & Developments chapter in this guide.

2. Establishing a New Company

2.1 Establishing a New Company

The features that make Switzerland one of the most innovative countries in the world include its business-friendly legal framework, which ensures fast and cost-effective incorporations,

making Switzerland an attractive location for incorporating a start-up company. Swiss corporate law provides all the necessary features for a start-up company to operate successfully, particularly to attract initial seed financing and subsequent capital contributions from financial sponsors or strategic investors. Prominent features include different share classes with voting/non-voting structure, as well as dividend and/or liquidation preferences.

The entire incorporation process for a new company typically takes two to four weeks. This timeline depends on various factors, including the canton of the company's intended seat, the country of residence of the investors (especially for opening the required blocked bank account) and the efficiency of the founders in 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 the 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 (GmbH). Both types of entities have a separate legal personality and provide limited liability with their share capital. The minimum share capital to incorporate a corporation is CHF50,000 (partially paid-in) or CHF100,000 (fully paid-in). Investors generally prefer fully paid-in capital in order to have recourse to a higher adhesion substrate.

Alternatively, an entity may also be incorporated as a limited liability company. The main differences from a corporation include 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"). These investors do not require accreditation, professional experience or a specific net worth. They 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 valuable knowledge to help develop a company and promising products.

In terms of investing volume, angel investors are followed by seed and series A funds, corporate ventures and family offices. Over recent years, Switzerland has seen a large increase in seed investments, in terms of both numbers and value.

The documentation for early-stage financing for a start-up company in Switzerland is quite basic. It typically consists of a subscription form (rather than a detailed subscription agreement) to subscribe for newly issued shares resolved at a shareholders' meeting and a basic shareholders' agreement, which may include some form of tag- and drag-along rights.

2.4 Venture Capital

Although the Swiss start-up scene has developed impressively over the last ten years, the venture capital industry is still relatively young in Switzerland. While some sponsors are in their second or third fund generation, many are still in their first round. However, Swiss start-ups are attracting large international investors due to

their attractive valuations and innovative ideas. Generally, foreign venture capital firms primarily provide funds in mid- and late-stage financing rounds.

2.5 Venture Capital Documentation

The Swiss Private Equity & Corporate Finance Association (SECA) has developed a well-regarded set of model documents, which is available on its website. 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 incorporated into a legally binding investment and shareholders' agreement, which outlines the rights, obligations and relationships among the shareholders. Minority shareholders such as start-up investors strive to implement special rights to protect their investment.

2.6 Change of Corporate Form or Migration

In principle, start-ups typically remain in the same corporate form and jurisdiction. If the start-up is incorporated as a corporation in particular, there is no need to change the corporate form at a later stage of venture capital financing. There is no general necessity to change jurisdiction, which rather 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, liquidity events in Switzerland are still primarily conducted through a sale process rather than an IPO. While dual-track processes are sometimes pursued, there is no general trend to initiate a dual-track process from the outset.

In recent years, the number of IPOs at the SIX Swiss Exchange has been relatively low. To address this, the SIX Swiss Exchange launched a new segment for small and mid-cap companies in 2022 to revive the IPO market as an alternative to sale processes. However, the impact has been limited so far. The costs, time and effort required 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. Typically, the decisive factors for a listing abroad include a larger investment base and higher industry/sector valuations. The main advantages of a "home country" listing in Switzerland are:

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

While there are Swiss companies listed on multiple stock exchanges in different jurisdictions, the costs of such multiple listings are generally considered higher than their benefits.

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

A listing on a foreign exchange means that the company will continue to be subject to Swiss corporate law, but will also need to comply with the rules of the foreign exchange. This dual applicability of legal systems may increase complexity in structuring a future sale, especially if there are potential conflicts between domestic and foreign laws. Moreover, Swiss tender offer rules (including squeeze-out rules in the context of tender offers) will not apply to the sale

of a company that is only listed on a foreign exchange. Therefore, additional steps, such as implementing a squeeze-out merger pursuant to the Swiss Merger Act, may be required to successfully achieve a sale of 100% of the company's shares.

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

4.1 Sale as a Liquidity Event (Sale of a Privately Held Venture Capital-Financed Company)

There is no standard rule for whether a sale should be conducted as an auction or through bilateral negotiations. Auctions are typically chosen when investors aim to maximise the purchase price. However, the uncertainties and costs associated with an auction process may deter potential buyers from participating. Bilateral negotiations are usually conducted by strategic investors, which approach the potential targets directly if they see a strategic fit.

4.2 Liquidity Event: Transaction Structure

The sale of a privately held energy or infrastructure company is usually structured as a share purchase where all the shares in the company are sold to the purchaser. However, it has become increasingly popular to give venture capital fund shareholders the option to co-sell or roll over their investment, particularly in connection with sales to financial sponsors. Key members of the management team holding equity in the company are typically required to roll over part of their sale proceeds into the equity of the buyer.

4.3 Liquidity Event: Form of Consideration

The consideration in the sale of a Swiss privately held venture capital-financed company is usually cash. However, certain rollovers for the key management are structured in a way so 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-along and tag-along rights in liquidity events. These rights include provisions on the key terms and conditions that apply to shareholders in case of a sale. The terms are usually heavily negotiated and may detail the representations, warranties and indemnities shareholders are required to provide during a sale. Generally, any such liability is limited to each shareholder's share of the purchase price and is several, not joint with the other shareholders. Drag-along and tag-along rights may also include obligations to enter into escrows or holdbacks.

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

5. Spin-Offs

5.1 Trends: Spin-Offs

In Switzerland, spin-offs are less common in the energy and infrastructure sectors compared to other sectors. However, the evolving landscape in these sectors – driven by the energy transition, decarbonisation and digital transformation – is prompting companies to reconsider their corporate structures and focus on core activi-

ties. Therefore, divestments in the energy and infrastructure sectors are expected in the form of spin-offs.

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, regardless 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 spin-off business remains taxable in Switzerland;
- 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, meaning that an independent business must remain operative within the transferring entity (in addition to the business transferred to the new entity).

If the above 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 a tax-neutral spin-off and, in particular, not as a tax-neutral hive down to a subsidiary.

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, if structured properly. Whether or not independent business operations exist is assessed based on various criteria, as developed by the Swiss tax authorities.

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 if:

- 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”); and
- 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 significant tax savings, if accepted by the tax authority (“effective element”).

Particular attention should be paid to the transfer of tax losses carry-forward 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 carry-forward is possible to the extent that the business will be taken over and continued and that the structure would not be considered as a tax avoidance.

5.4 Timing and Tax Authority Ruling

The timing of a spin-off usually depends on the preparation of the transaction from an operational perspective, and from a tax and legal perspective, including the informing and consultation of employees. 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 transferring the business to the seller), with subsequent sale of the shares in the newco to the buyer); or
- a statutory demerger.

Where there is a transfer of a business with employees, the employer has certain information obligations, and a consultation procedure must be implemented if measures apply that affect the employees. While no specific waiting period applies, 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 standard 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 critical that the tax rulings are obtained 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 four and eight weeks after filing with the Swiss Federal Tax Administration and usually between three and 12 weeks after filing with 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) Energy & Infrastructure Companies

6.1 Stakebuilding

In Switzerland, it is common to acquire a certain stake in a public company before making a public tender offer. The stakebuilding can occur through private transactions or trades on the exchange.

Whenever a shareholder reaches or exceeds a threshold of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔% of votes in the company through an acquisition of shares (or falls below these thresholds through a sale of shares), they must notify the company and the exchange. These thresholds apply to stakebuilding in companies that have their corporate seat in Switzerland and all or parts of their participations listed on a Swiss stock exchange, and also in companies that have their corporate seat abroad but all or parts of their participations listed primarily on a Swiss stock exchange. The notification obligation also applies when:

- shares are bought or sold in concert;
- converting participation certificates or profit participation certificates into shares;
- exercising convertibles or option rights; and
- other changes of the capital of the company and exercise of sale options are effected.

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 or 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 parties controlling the voting rights) must be disclosed. If parties are acting in concert, the aggregate participation, the identity of all members of the group, the type of acting in concert and the representative must also be disclosed. The purpose of the acquisition and the buyer's intention with respect to the company do not need to be disclosed.

If a party publicly announces that it is considering a public tender offer without the legal obligation to submit such offer, the Swiss Takeover Board (*Übernahmekommission*) may, at its discretion, request the potential offeror to either publish a public tender offer within a certain deadline ("put up") or publicly declare to 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, a mandatory offer has to be submitted once a direct or indirect shareholding of 33⅓% is reached. This obligation also arises when the threshold is reached by 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 acquiring a controlling shareholding, or an asset deal acquiring the assets and liabilities of the operational business. Generally, the two typical transaction structures are public tender offers and statutory mergers. The public tender offer structure is usually seen in an international setting (when a (reverse) triangular merger does not work) involving a listed Swiss entity, while statutory mergers are more frequently used in domestic private M&A transactions. Public tender offers are governed by the Swiss Financial Market Infrastructure Act and the relevant ordinances. Statutory mergers are governed by the Swiss Merger Act.

6.4 Consideration: 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 where a stock-for-stock exchange offer is made.

In mergers, a cash compensation is possible and common, as a combination of shares and cash (where the cash compensation must not exceed 1/10 of the fair market value of the shares), as a right to choose between shares or cash compensation, or by stating 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 must be equal to or higher than:

- the stock exchange price, which corresponds to the volume weighted average price (VWAP) during the 60 trading days 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 months before the preliminary announcement or the offer prospectus, considering all agreements concluded during that period, regardless of the transaction's closing.

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 has to pay a compensation due to the type of the condition, in which case it has to implement all reasonable measures to ensure that the condition is satisfied.

Swiss public M&A transactions commonly involve conditions to:

- secure the acquisition of control (minimum acceptance levels);
- protect the substance of the target company, including material adverse change clauses; and
- 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.

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

6.6 Deal Documentation

In Switzerland, it is common for the bidder and the target company to enter into a transaction agreement in connection with a takeover, supported by the target company's board of directors. Such transaction agreement typically contains the following undertakings by the target company:

- co-operation undertakings with respect to access to information, publication of financial statements, and 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 respect to competing offers or related inquiries;
- joint press releases;
- obtaining a fairness opinion;
- the 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, typically limited to fundamental representations and warranties (due incorporation, accuracy of information, valid issuance of shares, no violation of any contractual or constitutional obligations).

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

6.7 Minimum Acceptance Conditions

Minimum acceptance conditions requiring the bidder to directly or indirectly own a certain number of target company shares after the offer period are permitted and common in voluntary public tender offers (see **6.2 Mandatory Offer**). A threshold of 66⅔% of 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 66⅔% or less are reasonable in principle;
- thresholds of 66⅔% or more are only reasonable in specific situations; and
- thresholds of 90% are reasonable for holding offerings.

With a 66⅔% majority, a shareholder can control all important decisions of a Swiss target company according to Swiss law, unless the articles of incorporation 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.

- If the bidder holds more than 98% of the voting rights, the squeeze-out can be effected through court proceedings. The bidder must 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 by court order, with compensation payable by the bidder, and re-issued to the bidder. Subsequently, the board of directors of the target company may request the delisting of the company's 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 merging parties to enter into a merger agreement, 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 within two months

from 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) must confirm the availability of the necessary funds. For debt-financed offers, the executed financing documentation (not just 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 must correspond to the offer conditions. Offers conditioned on obtaining financing are not permitted, as the financing documentation must be available in executed form 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 the support of a transaction, the bidder and the target company may enter into a transaction agreement and agree on deal protection measures. Typical deal protection measures include:

- 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 subject to the fiduciary duties of the board of directors of the target company, and must not be overly restrictive. Break-up fees and reverse break-up fees are generally limited up to the amount covering reasonable costs incurred by 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, there are several statutory governance rights depending on the exact shareholding:

- a shareholding of more than 50% allows the bidder to pass shareholders' resolutions, unless Swiss law or the company's constitutional documents prescribe a qualified majority; and
- a shareholding of 66⅔% 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 liquidation entitlements;
- transfer restrictions on the issued shares, 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

by tendering their shares into the offer or by selling their shares before the offer is announced.

The nature of these undertakings depends on whether the underlying agreement contains any conditions regarding 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 condition, 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: 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. This review must be completed within "a short period of time" – typically it takes around three weeks. As part of the review, the Swiss Takeover Board ensures that the terms of the offer comply with Swiss law, including:

- compliance with the best price rule;
- the conditions of the offer;
- the fairness opinion on the offer price; and
- the provisions of the transaction agreement with the target company.

Before the publication of the offer, the bidder usually publishes a pre-announcement. While not mandatory, this practice is common. The offer prospectus must be published within six weeks of the pre-announcement. The timeline for the tender offer is set 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 can choose between the initial offer and the competing offer. To facilitate this choice, the Swiss Takeover Board consults with the parties involved to co-ordinate the timelines of both offers. It may set 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 between 20 and 40 business days. The Swiss Takeover Board may shorten this period upon the bidder's request if the bidder already holds a majority of voting rights and the board of directors' report is published in the prospectus.

The offer period can 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 justified by overriding interests.

In the past, extensions have been granted during administrative proceedings with the Swiss Administrative Supreme Court, to review the launch of a partial offer during an ongoing primary offer, and for synchronisation with a foreign public tender offer. Extensions may also be granted if regulatory or antitrust approvals are not obtained before the offer period expires.

7. Overview of Regulatory Requirements

7.1 Regulations Applicable to Energy & Infrastructure Companies

Several activities in the energy and infrastructure sectors are regulated at the federal and/or the cantonal level in Switzerland, as follows.

Energy Production and Distribution

- Renewable energy projects: regulatory approvals are required for solar, wind, hydroelectric and geothermal projects, including compliance with environmental standards, land use and grid integration.
- Nuclear energy: strict regulations govern the operation, safety and eventual decommissioning of nuclear plants, overseen by the Swiss Federal Nuclear Safety Inspectorate (ENSI).
- Electricity distribution and grid access: the Federal Electricity Commission regulates transmission and distribution activities, including tariffs, grid access and capacity management.

Environmental and Sustainability Compliance

- Carbon emissions and climate goals: energy companies are subject to carbon reduction targets and emissions regulations under Switzerland's climate policies and the CO_2 Act.
- Environmental Impact Assessments (EIAs): infrastructure projects must complete an EIA, covering air quality, water protection, noise control and wildlife preservation.
- Waste and hazardous materials management: regulations cover the disposal, storage and handling of hazardous materials, especially relevant to industrial energy projects.

Digital Infrastructure and Data Security

- 5G network deployment: telecoms providers must comply with health and safety standards, electromagnetic emission regulations and cybersecurity protocols.
- Data centres: operators are required to comply with data protection regulations, particularly around critical infrastructure security and data privacy.

Public-Private Partnerships and Government Oversight

- Transportation infrastructure: public-private partnerships for roads, railways and airports must adhere to federal and cantonal regulations on financing, construction standards and operational safety.
- Electric vehicle charging infrastructure: regulatory guidelines ensure that charging stations meet requirements regarding technical standards, interoperability and accessibility.

Water and Waste Management Infrastructure

- Water supply and sanitation: projects are regulated by the Swiss Water Protection Act, ensuring quality control, pollution prevention and sustainable water resource management.
- Waste disposal and recycling infrastructure: facilities are subject to environmental regulations regarding pollution control, recycling quotas and waste management practices.

Regulatory Bodies

Given the strategic importance of these sectors, the regulatory landscape is well structured, with various bodies overseeing different aspects of energy production, distribution, environmental protection and infrastructure development. Such bodies grant the necessary permits and ensure compliance with energy and environmental laws, as follows.

- The Swiss Federal Office of Energy (SFOE) is the primary regulator for the energy sector in Switzerland, and oversees policies related to energy efficiency, renewable energy, energy grids and the overall implementation of the Energy Strategy 2050. Companies involved in power generation (including renewables), transmission and distribution often need to comply with SFOE guidelines.
- The Swiss Electricity Commission (ElCom) is the independent regulatory authority responsible for overseeing Switzerland's electricity market. It monitors electricity tariffs, oversees the operation of electricity grids and ensures compliance with the relevant energy and electricity laws. Companies involved in electricity generation or transmission are subject to ElCom's supervision.
- The Federal Office for the Environment (FOEN) oversees environmental protection, ensuring that companies comply with regulations related to air quality, water protection, biodiversity and waste management. This is particularly relevant for companies developing large-scale infrastructure projects like wind farms, hydropower plants or transmission lines.
- The Swiss Federal Nuclear Safety Inspectorate (ENSI) is responsible for ensuring the safe operation of nuclear power plants, radiation protection and the decommissioning of nuclear facilities. Companies operating in this space need to comply with ENSI's stringent safety standards.
- In addition to federal regulations, companies often need to obtain approvals from cantonal and local authorities, particularly in areas such as construction permits, land use planning and environmental impact assessments. Each canton may have specific regulations that apply to energy and infrastructure projects.
- The national grid operator Swissgrid is responsible for the operation, maintenance and expansion of the transmission grid, and acts as a key intermediary between energy producers and consumers.

The duration of proceedings required to obtain the necessary permits and approvals depends on the specific case and typically on the complexity of the matter.

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 confined to the banking/financial services and real estate sectors. In 2023, the Federal Council published its revised proposal for FDI regulations, according to which governmental authorisation may be required for the acquisition of certain Swiss energy and infrastructure targets, such as electricity grids and production, water supply and transport infrastructure, provided that specific turnover thresholds are met and the intended acquirer qualifies as a foreign state investor.

Interestingly, the Federal Council itself has so far been opposed to the introduction of new FDI control regulations. Specifically, the Federal Council maintains that it is not aware of any past transactions that would have jeopardised Switzerland's public order or national security. It will be interesting to follow further discussions on this topic as the legislative process advances in Switzerland against the backdrop of increasingly protectionist tendencies abroad.

7.4 National Security Review/Export Control

In principle, there is no national security review of acquisitions in the energy and infrastructure sectors in Switzerland, but certain regulations apply. For instance, acquisitions in the nuclear energy sector are subject to specific scrutiny to ensure compliance with safety and security standards. In addition, transactions involving critical infrastructure may be reviewed on a case-by-case basis to assess potential risks.

Currently, Switzerland has restrictions in place against more than 20 countries and certain organisations, which restrict the transfer of goods and payments and include certain notification obligations. These restrictions need to be assessed on a case-by-case basis at the time of a transaction.

7.5 Antitrust Regulations

Swiss antitrust regulations must be considered whenever two or more previously independent companies merge, when a company acquires direct or indirect control of one or more previously independent companies, or when two or more undertakings acquire joint control over an undertaking they did not previously 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.

Regardless of the turnover, a notification obligation is triggered if one of the companies involved in the transaction has held a dominant position in the Swiss market and the takeover or 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. This obligation is triggered at the signing of the transaction and must be completed prior to the transaction's completion.

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, employees (or their representative body) must be informed about the reason and the legal, economic and social consequences of the transaction. If measures affecting the employees are intended, the employees must be consulted on these measures and given the opportunity to comment and propose alternatives. Employees have the right to reject the transfer of their individual employment relationship, in which case their employment would be terminated. However, employees or their representative body do not have a binding vote on the transaction itself.

7.7 Currency Control/Central Bank Approval

There is no currency control regulation nor requirement for approval by the Swiss National Bank for M&A transactions.

8. Recent Legal Developments

8.1 Significant Court Decisions or Legal Developments

There are several legislative processes that could affect energy and infrastructure M&A transactions in Switzerland. Some of these laws are already in effect, while others are still under discussion in the legislative process.

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 the flexible structuring of M&A transactions. In particular, interim dividends are now explicitly permitted under Swiss law, and allow the avoidance of "cash for cash" payments so that the liquidity management after the acquisition can be improved. In addition, 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.

In May 2023, the Federal Council published a revised draft amendment to the Swiss Cartel Act. Among other changes, it proposes a new substantive test for the Swiss Competition Commission (ComCo) to assess whether or not to prohibit a transaction subject to merger control review. The current creation or strengthening of dominant position (CSDP) test would be replaced by the significant impediment of effective competition (SIEC) test, aligning with international practice. Importantly, the draft amendment does not propose lowering the turnover thresholds required for compulsory notification of a transaction to ComCo. These thresholds remain relatively high compared to international standards, which is generally favourable from a deal-making perspective.

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 compatibility with EU law (GDPR). The compliance of the target company with the newly introduced law should be observed, and the data disclosure during the transaction process should also take the new data protection act into consideration.

See also **1.1 Energy & Infrastructure M&A Market** regarding FDI screening and the EU Artificial Intelligence Act, and the Switzerland Trends & Developments chapter in this guide.

9. Due Diligence/Data Privacy

9.1 Energy & Infrastructure 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 the applicable law and contractual obligations, particularly 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, the bidder and 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, need-to-know basis. Information that is sensitive 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 the right to receive the same information.

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, the processing must be based on one or several reasons provided for in the DPA. In the context of a due diligence exercise, the seller and the buyer may usually rely on the legal basis of safeguarding their legitimate interests. Nevertheless, the seller and the buyer must comply with the general principles that apply to any processing of personal data, as follows:

- 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; and
- 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 33⅓% (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 the parties have reached a definitive agreement. The offer is made public by way of an offer prospectus.

In the case of a hostile bid, a bidder may publicly announce the intention to acquire the target's shares. In such scenario, 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. However, if information exists that is deemed equivalent in 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 to mergers, spin-offs and similar transactions, provided the information is deemed equivalent in content to a prospectus.

10.3 Producing Financial Statements

In a stock-for-stock transaction, bidders must disclose the last three years' financial statements of the company whose stocks are being offered.

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; and
- must apply equal treatment to all shareholders (so-called fiduciary duties).

These fiduciary duties apply in the event of a business combination and other forms of M&A transactions.

There is no general definition of what constitutes the "best interest of the company". In recent years, Swiss scholars have debated whether such definition includes only the shareholders' interests (shareholder approach) or whether the interests of other stakeholders must also be considered (stakeholder approach). Despite these discussions, in business combinations, a company's interests should encompass not only value growth and fair shareholder compensation but also the interests of other stakeholders. Directors have discretion to weigh these different interests as they deem appropriate.

The principle of equal treatment of the shareholders must always be observed, as long as it does not contradict the company's best interest. For Swiss companies whose shares are at least partly listed in Switzerland, the Swiss takeover rules already take this principle into account (eg, by stipulating the best price rule so that all shareholders may sell their shares for the same price). The Swiss takeover law further stipulates the principle of equal treatment of different bidders. Extensive exclusivity agreements with individual potential buyers that prevent the board of the target company from negotiating with other potential buyers are likely to 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. This approach helps to avoid conflicts of interest and can streamline the transaction process. While certain tasks may be delegated to the special or ad hoc committee, important strategic decisions (eg, granting due diligence to a party or deciding to defend the company) must be made 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, the board is actively involved in the negotiations with potential buyers. It is the board's responsibility to review the proposal of a potential buyer. At this stage, the board is guided by 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 proceed, the shareholders will have the final decision on whether or not to accept the offer.

The Swiss takeover law further specifies the role of the board of a listed target company once a public tender offer has been made. The board must prepare a report for the shareholders outlining its position on the offer. In addition, the board is prohibited from entering into legal transactions that might significantly alter the company's assets or liability (eg, the sale or acquisition of assets representing more than 10% of the total assets or contributing more than 10% to the company's profitability). This restriction limits the board's ability to take defensive measures at this stage. However, certain defensive measures may still be taken, such as actively seeking a "white knight" (while considering the principle of equal treatment of different bidders), conducting PR communications or convening an extraordinary shareholders' meeting to decide on defence measures.

Shareholder litigation challenging the board's decision to recommend a particular transaction is uncommon in Switzerland. However, qualified shareholders (holding at least 3% of the voting rights of the target company) may participate in proceedings before the Takeover Board and are eligible to challenge its rulings. There have been past cases where qualified shareholders have challenged the Takeover Board's rulings.

11.4 Independent Outside Advice

It is common for the board to obtain financial, legal or other advice during an M&A transaction, to ensure it has sufficient expertise and acts with due care.

The Swiss Takeover Board mandates obtaining a fairness opinion if not at least two members of the target company's board are free of conflicts of interest. However, obtaining fairness opinions is also customary in business combinations without conflicts of interest, as they help the board legitimise its position when rejecting or recommending the acceptance of a public tender offer.

Trends and Developments

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Energy & Infrastructure M&A in Switzerland: An Introduction

Market activity

M&A activity in Switzerland saw an overall decrease in 2023 and the first half of 2024, compared to 2022. However, energy and infrastructure M&A in Switzerland has shown robust growth, with increased interest in renewable energy and digital infrastructure assets. Inbound deals have risen, with international investors attracted to Switzerland's stable environment and ambitious sustainability targets. Outbound deals have grown, driven by companies expanding renewable portfolios across Europe. Domestically, there has been an increase in deal activity, especially in the hydropower and digital infrastructure sectors.

Switzerland's ambitious carbon neutrality goals for 2050 are prompting a shift toward renewable energy, which has led to an increase in M&A deals focused on wind, solar and hydropower assets, as well as emerging energy technologies such as battery storage and hydrogen. Local and international market players are actively acquiring or partnering with Swiss firms to establish a foothold in the clean energy market. Noteworthy recent activities in the electric vehicle (EV) value chain in Switzerland include:

- ABB E-mobility's spin-off and pre-IPO financing;
- Shell's investment in EVPass (charging network); and
- Electra's Swiss market entry with EUR200 million financing from Energy Infrastructure Partners and plans to deploy over 600 public charging stations in Switzerland.

Utilities are investing in new technologies related to batteries and hydrogen to support the country's energy transition goals and improve grid reliability. Switzerland's hydropower industry continues to see investment and consolidation as companies look to optimise their portfolios. As renewable energy production increases, market players are also investing in energy storage solutions, particularly in pumped-storage hydroelectricity and battery storage, to manage intermittent supply from wind and solar energy. M&A in energy storage is expected to grow as companies seek to balance supply and demand and improve grid stability.

Switzerland's aging infrastructure requires upgrades in areas such as transport, utilities and digital connectivity. Recent M&A activity has included deals focusing on modernising transport and utility infrastructure, supported by private capital and government initiatives. While modernisation offers substantial invest-

ment opportunities, it also presents challenges in integrating new technologies and managing complex project logistics. Investors must assess the viability and costs of updating older assets with modern technologies such as smart grids, 5G and fibre-optic networks. In addition, these projects often require extensive collaboration with government entities, which can lead to bureaucratic hurdles and prolonged negotiation timelines. Looking ahead, more deals are anticipated, especially in areas related to digital infrastructure, such as data centres, fibre-optic networks and smart grid technologies.

Strategic partnerships and joint ventures between Swiss companies and foreign investors, particularly from neighbouring European countries, have become common, allowing different market players to pool resources and expertise. These collaborations are often centred around renewable energy projects and digital infrastructure, with an emphasis on expanding energy efficiency and connectivity within Switzerland and across Europe. Furthermore, with the anticipated gradual phase-out of nuclear energy, energy companies are increasingly looking for opportunities to diversify their power generation portfolios.

Private equity and institutional investors have increased their role in the energy and infrastructure sectors, attracted by the steady, predictable cash flows that energy and infrastructure assets provide. In recent years, several private equity firms have invested in both renewable energy assets and essential infrastructure in Switzerland. Their presence is expected to grow, with acquisitions aimed at capitalising on Switzerland's infrastructure transition and demand for sustainable energy solutions.

Key drivers in Swiss energy and infrastructure M&A

Energy transition

M&A activity in Switzerland's energy and infrastructure sectors is largely driven by the "4 Ds" of the energy transition: decarbonisation, digitalisation, decentralisation and deregulation.

- Decarbonisation: the shift to a sustainable, low-carbon economy is a major driver. Switzerland aims for net-zero greenhouse gas emissions by 2050, moving away from fossil fuels to renewable energy sources like solar, wind, hydropower and biomass. The Swiss CO_2 Act includes carbon pricing and tax exemptions for emission reductions, and the Emissions Trading System (ETS) allows participation in the international carbon market.
- Digitalisation: new digital technologies, data analytics and smart systems are optimising energy production, distribution and consumption. Artificial intelligence (AI), big data and predictive analytics are used in energy forecasting, optimising renewable energy output and reducing grid inefficiencies. AI-driven algorithms help grid operators to manage fluctuating energy supplies by predicting weather patterns and solar or wind generation capacity.
- Decentralisation: Switzerland is moving away from large, centralised power plants to smaller, localised energy systems. Digital platforms enable consumers to produce and sell their own energy through small-scale renewable installations like solar panels on buildings. Local energy communities are forming, allowing co-operative energy production, storage and distribution.
- Deregulation promotes competition, increases efficiency and fosters innovation in Switzerland's energy markets. The Swiss Electricity Supply Act sets the framework for market

liberalisation, allowing larger consumers to choose their electricity providers. The long-term goal is to extend this choice to all consumers, creating a more competitive energy market.

Cross-border M&A and integration

Switzerland's geographic location in the heart of Europe and its interconnectedness with the European Union (EU) energy market make cross-border M&A particularly important. Despite not being an EU member, Switzerland is part of the European electricity market, which enables the country to import and export energy through its integration with the European power grid.

Swiss energy companies are increasingly pursuing acquisitions and partnerships with European counterparts to access renewable energy assets and participate in cross-border energy trading. This trend is expected to continue as Switzerland further integrates into the European energy market, driven by the EU's decarbonisation goals and the growing importance of interconnected, renewable-based energy systems.

In addition to cross-border energy deals, Swiss infrastructure companies are active in expanding their footprint in neighbouring countries. Swiss-based utilities and infrastructure investors are targeting investments in energy networks, transport infrastructure and digital infrastructure across Europe and beyond, leveraging Switzerland's expertise in engineering and sustainable development.

Sustainability and ESG-driven investments

Environmental, social and governance (ESG) factors play a central role in shaping M&A activity in Switzerland, particularly in the energy and infrastructure sectors. Investors and companies are increasingly prioritising acquisitions that align with sustainability goals, focusing on green assets and technologies that contribute to the country's energy transition.

Switzerland's robust financial sector is also playing a critical role in ESG-driven M&A. Many financial institutions, asset managers and private equity firms are increasingly integrating ESG criteria into their investment decisions, driving demand for clean energy and sustainable infrastructure assets. Swiss institutional investors, including pension funds and insurance companies, are particularly active in acquiring infrastructure assets that provide long-term, stable returns while meeting ESG standards.

Sustainability-driven M&A is also visible in Switzerland's construction sector, where companies are investing in energy-efficient buildings, smart cities and sustainable transport infrastructure. The government's focus on achieving climate neutrality is encouraging private sector investment in green infrastructure, creating opportunities for M&A in energy-efficient technologies and smart building systems.

Digital infrastructure and smart grids

Switzerland is leading the way with the digital transformation of its energy and infrastructure sectors. The increasing use of digital technologies, such as smart grids, digital energy platforms and data centres, is transforming how energy is produced, distributed and consumed. These technologies enable better integration of renewable energy, improve energy efficiency and enhance the resilience of energy networks.

M&A activity in Switzerland's digital infrastructure sector has been growing, with companies investing in smart grid technologies, energy management systems and digital platforms that

support the integration of decentralised renewable energy sources.

In addition, the demand for data centres and related digital infrastructure is increasing, driven by the growth of cloud computing, digital services and the need for secure data storage. Switzerland's political stability, advanced digital ecosystem and reputation for strong data privacy regulations make it an attractive location for data centre investments. M&A in this sector is expected to grow as companies seek to expand their digital capabilities and meet the rising demand for digital services.

Electric mobility and infrastructure investments
The electrification of transport is another key trend shaping Switzerland's infrastructure sector. As the country works towards reducing its carbon footprint, the demand for EVs is growing, spurring investments in EV charging infrastructure. Companies are engaging in M&A activity to acquire EV charging networks and related technologies, positioning themselves for the growing market for electric mobility.

The Swiss government is also supporting the development of EV infrastructure through policy incentives and public-private partnerships. This is leading to more investments in smart charging solutions, which allow for better integration with the electric grid and renewable energy sources. M&A in this space is likely to accelerate as both established energy companies and new entrants vie, for market share in the electric mobility sector.

Key challenges in Swiss energy and infrastructure M&A

Regulatory and policy uncertainty
While Switzerland's regulatory environment is generally favourable for business, uncertainties around energy policies and regulations can pose challenges for M&A in the energy and infrastructure sectors. For example, Switzerland's decision to phase out nuclear power creates long-term uncertainties regarding how the country will meet its energy needs, particularly during periods of low renewable generation.

Switzerland's relationship with the EU adds another layer of complexity. As Switzerland is not an EU member state, its energy policies must align with European standards to ensure continued access to the European energy market. Changes in EU energy regulations or Swiss–EU relations could affect cross-border M&A activity and investments in Switzerland's energy sector.

Supply chain and material costs
Global supply chain disruptions and rising material costs have affected infrastructure projects worldwide, including in Switzerland. The increased cost of raw materials such as steel, copper and aluminium, which are essential for renewable energy projects and infrastructure development, can increase the cost of acquisitions and reduce the profitability of projects.

The ongoing shortage of skilled labour in the construction and energy sectors is also creating challenges for companies looking to scale up their operations. This could slow down M&A activity as companies face difficulties in executing new projects and integrating acquired assets.

High valuations and competition for sustainable assets
The global push for clean energy and sustainable infrastructure has led to increased competition for high-quality assets, particularly in the renewable energy space. Swiss companies are

competing with international investors, including private equity firms and institutional investors, for access to prime renewable energy projects and infrastructure assets. This increased competition is driving up asset prices, making it more challenging for companies to find attractive acquisition opportunities at reasonable valuations.

Regulatory and other developments

2050 Energy Strategy

Following the 2011 Fukushima disaster, Switzerland decided to phase out nuclear energy. Coupled with global energy sector changes and Switzerland's 2015 Paris Agreement commitment to halve greenhouse gas emissions by 2030, this required an energy system overhaul. The Federal Council's 2050 Energy Strategy addresses these challenges with the following objectives:

- promote renewable energy in Switzerland;
- reduce dependency on fossil energy from abroad and ensure security of supply;
- reduce energy consumption and greenhouse gas emissions;
- increase energy efficiency;
- phase out nuclear energy; and
- achieve net-zero emissions by 2050.

One of the main focuses of the 2050 Energy Strategy is on expanding solar energy, wind energy, hydropower and biomass energy. Hydropower is the most important renewable energy source in Switzerland, accounting for nearly 60% of its total electricity production. Switzerland has a well-developed infrastructure of run-of-the-river plants, reservoir plants and pumped storage systems, making it a leader in hydropower. Biomass energy (which includes energy from organic materials like wood, agricultural waste and biogas) plays a crucial role in reducing waste and decentralising electricity and heat production. It can be used for heat production and electricity generation, and even as a renewable fuel.

In light of the 2050 Energy Strategy, the following laws and regulations support Switzerland's goals of supply security, energy efficiency and climate change mitigation, while fostering technological and economic growth through innovation.

- The Swiss Energy Act promotes efficient energy use and renewable energy development to reduce reliance on non-renewable resources. Key aspects include:
  - (a) promoting solar, wind, hydropower and biomass energy;
  - (b) encouraging energy-saving measures for individuals and companies;
  - (c) introducing subsidies for energy-efficient renovations and renewable energy installations; and
  - (d) setting energy efficiency targets for buildings, industry and appliances.
- The Swiss Electricity Supply Act ensures a reliable, secure and environmentally friendly electricity supply. Essential elements include:
  - (a) market liberalisation, allowing larger consumers to choose their electricity providers;
  - (b) regulating grid access and ensuring non-discriminatory access for all participants;
  - (c) mandating Swissgrid to ensure long-term grid reliability and security; and
  - (d) setting rules for fair competition and pricing to protect consumers.
- The Swiss CO_2 Act aims to reduce greenhouse gas emissions by 50% by 2030 compared to 1990 levels. Important features include:

(a) introducing a CO_2 tax on fossil fuels and other incentives to reduce fossil fuel consumption;
(b) participating in international emission trading schemes; and
(c) setting specific targets and measures for buildings, transport and industry to lower emissions.

- The Swiss Energy Research for the Energy Transition (SWEET) Funding Programme supports Switzerland's transition to a sustainable, low-carbon energy system by 2032. Managed by the Swiss Federal Office of Energy (SFOE), it funds interdisciplinary and collaborative research projects focused on energy efficiency, renewable energies, energy storage and grid security. In August 2024, the RECIPE (Resilient Infrastructure for the Swiss Energy Transition) consortium, led by ETH Zurich, received funding under the SWEET Funding Programme. The consortium will analyse hazards posed to Swiss energy infrastructure by the energy transition and climate change, proposing measures to increase resilience.

There are also several legislative processes that could affect energy and infrastructure M&A transactions in Switzerland. Some of these laws are already in effect, while others are still under discussion in the legislative process.

Swiss Climate and Innovation Act

This was approved by Swiss voters in June 2023 and aims for net-zero greenhouse gas emissions by 2050, with interim targets of a 75% reduction by 2040 and an 89% reduction for the period 2041–2050. To support this transition, the legislation provides financial incentives for individuals and businesses to adopt climate-friendly technologies, including replacing fossil fuel-based heating systems with renewable alternatives. It also allocates up to CHF200 million annually over ten years to support companies investing in innovative, climate-friendly technologies. The Swiss government is finalising the implementation framework to ensure a smooth roll-out of these measures, with the legislation expected to come into force on 1 January 2025.

EU Electricity Agreement

In March 2024, the Swiss Federal Council approved a definitive negotiating mandate to commence discussions with the EU on an electricity agreement. The aim is to integrate Switzerland into the EU's internal electricity market, enhancing grid security and legal certainty. Negotiations are ongoing, with both parties aiming to conclude them by the end of 2024.

Federal Act on a Secure Electricity Supply from Renewable Energy Sources

On 9 June 2024, Swiss voters approved the Federal Act on a Secure Electricity Supply from Renewable Energy Sources. The legislation aims to ensure the long-term stability, reliability and sustainability of electricity supply through enhanced infrastructure, renewable energy integration and grid resilience. By promoting investment in modern energy technologies and strengthening grid security measures, the statute seeks to protect consumers from disruptions and support the transition to a more resilient, low-carbon energy system. The legislation aligns with broader energy security and climate objectives, balancing economic growth with environmental responsibility. It is expected to come into force on 1 January 2025.

Lifting ban on new nuclear power plants

In August 2024, the Swiss Federal Council announced plans to lift the ban on constructing new nuclear power plants, which has been in place since 2017. This decision aims to enhance energy security and meet climate objectives

amid rising electricity demand and geopolitical uncertainties. The government intends to submit legislative amendments by the end of 2024, with parliamentary discussions expected in 2025.

Foreign direct investment (FDI) screening

Switzerland does not currently have any general FDI screening mechanisms in place. However, certain regulatory requirements 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, telecom, radio and television, and nuclear energy.

On 15 December 2023, the Federal Council adopted the dispatch on new legislation regarding investment screening. Under the new draft legislation, investment screening is intended to apply only when a foreign state-controlled investor takes over a domestic company that operates in a particularly critical area, such as electricity grids and production, water supply and transport infrastructure. This means that the takeover of Swiss companies active in such critical areas by a foreign state-controlled investor would need an approval, subject to reaching certain turnover thresholds.

Interestingly, the Federal Council has so far been opposed to introducing new FDI control regulations, so that the scope of the draft is narrower compared to similar legislation in other jurisdictions. It will be interesting to follow further discussions on the topic as the legislative process advances in Switzerland against the backdrop of increasingly protectionist tendencies abroad. For now, the regulatory environment regarding investment screening in Switzerland remains favourable for investors.

EU Artificial Intelligence Act

AI is increasingly influencing the energy and infrastructure sectors, particularly in optimising energy production, enhancing storage systems and managing smart grids. AI plays a growing role in developing smart cities by managing traffic, urban planning and the efficient use of energy and waste. It also assesses infrastructure health and improves the energy efficiency of buildings, contributing to more sustainable and resilient urban environments.

On 1 August 2024, the AI Act came into force in the EU. It is 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 systems by adopting a risk-based approach (eg, the higher the risk of an AI system, the stricter the rules that apply to its development and deployment) and by introducing rules for so-called general purpose AI models. The AI Act will have an 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.

At the end of 2023, the Federal Council instructed the relevant federal department to prepare a report on the possible regulatory approaches to AI systems for Switzerland that are particularly compatible with the AI Act and the Council of Europe's AI Convention, which should create the basis to issue a concrete mandate for a Swiss AI regulatory proposal in 2025.

See also **1.1 Energy & Infrastructure M&A Market** and **8.1 Significant Court Decisions or Legal Developments** in the Switzerland Law and Practice chapter in this guide.

Outlook

Looking ahead to 2025, several factors are expected to shape M&A activity in Switzerland's energy and infrastructure sectors.

- The energy transition will remain a key driver of M&A activity as Swiss companies continue to invest in renewable energy projects and divest from fossil fuels. More acquisitions of wind, solar and hydroelectric assets are expected, both domestically and across Europe, as companies align with Switzerland's climate goals.
- M&A in digital infrastructure, including data centres, smart grids and energy management platforms, is expected to grow as Switzerland enhances its digital capabilities. Companies will continue to invest in technologies that improve energy efficiency, optimise grid performance and enable the integration of distributed energy resources.
- The rise of EVs and the need for charging infrastructure will create new opportunities for M&A in the transport and energy sectors. Swiss companies are likely to invest in EV charging networks and smart charging solutions, positioning themselves for the future of electric mobility.
- Private equity firms will continue to play a major role in Swiss infrastructure M&A, particularly in the renewable energy, digital infrastructure and transport sectors. These investments will be driven by the long-term, stable returns that infrastructure assets provide, as well as increasing demand for sustainable investments.

Switzerland's energy and infrastructure sectors are poised for significant growth in M&A activity as the country continues its transition to a low-carbon, digitalised economy. While challenges such as regulatory uncertainty and competition for assets persist, the outlook for 2025 remains positive, as continued investments in renewable energy, digital infrastructure and electric mobility are expected.

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