

# Private acquisitions in Switzerland: market analysis overview

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Q&A guide to private acquisitions market practice in Switzerland.

The Q&A gives a high level overview of key issues including current major trends, private M&A activity, structuring and documentation in transactions, governing law and arbitration, and reform and future market trends.

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## Market overview

1. What are the current major trends in the private M&A market?

Following record highs in 2018, the Swiss M&A market remained very busy in 2019, although the overall transaction volume (-4.5%) and deal count (-19%) has slightly decreased in 2019 compared to 2018. The M&A activities of Novartis and Roche have substantially contributed to the overall transaction volume, with:

- Novartis' spin-off of Alcon Inc accounting for USD31 billion.
- Novartis' acquisition of The Medicines Company accounting for USD9.7 billion.

- Novartis' acquisition of Xiidra, a prescription dry eye treatment, for USD 3.4 billion upfront and potentially up to USD1.9 billion in milestone payments.

Another landmark transaction was Nestlé's sale of Nestlé Skin Health to a consortium consisting of EQT and the Abu Dhabi Investment Authority for more than USD10 billion.

2019 has also been a busy year in the:

- Industrial sector, with 79 reported transactions.
- Technology, media and telecommunications (TMT) sector, with 54 transactions.

This represents a new high for TMT deals, which is especially noteworthy considering that the announced Sunrise/UPC Switzerland merger failed. Deals in the financial sector have decreased to an all-time low with a reduction both in numbers (-56%) and deal value (-10%). The same is true for M&A in the commodities sector, which reported only 16 deals (-30%) with an overall value short of USD2 billion (-83%).

2. What has been the level of private M&A activity in the previous year?

There are generally fewer public M&A deals than private M&A transactions in Switzerland. Continuing the trend established in previous years, the share of purely domestic private transactions has further decreased and fallen from 19% in 2018 to an all-time low of 16% in 2019. Swiss companies, backed by a favourable financing environment and well-filled war chests, have continued to acquire more foreign companies (173) than vice versa (107). With regard to deal value, Swiss companies spent:

- USD25.6 billion on acquisitions of US companies.
- USD9.5 billion on acquisitions of Western European companies.
- USD2 billion on acquisitions of companies in the Asia-Pacific region.

## Deal structures

3. What are the current trends in the structuring of private M&A transactions?

Share purchases continue to account for the vast majority of Swiss private M&A transactions. However, there has been a slight increase in the number of asset deals in the past 12 to 18 months. One of the main drivers for this increase is most likely the strong growth of M&A activity in the pharmaceuticals and life science sector (+41% in deal numbers in 2019), where the sale of business units or very specific assets is generally more common.

Cash consideration remains the norm, with other forms of purchase price settlement typically only being accepted if they are readily marketable. In the continuing seller-friendly environment, purchase price certainty is typically highly valued by sellers, explaining the wide use of locked box purchase price mechanisms and the decreasing acceptance of purchase price hold-backs or retentions (such as cash escrow or deferred payments). The main alternative mechanism used is a post-closing adjustment of the purchase price based on certain net debt and net working capital targets at closing.

Warranty and indemnity (W&I) insurance is being used very often compared to previous years. In auctions, W&I insurance has almost become the norm.

#### 4. What are the current trends in the terms and documentation of private M&A transactions?

The Swiss private M&A market remains very seller-friendly, accordingly shifting deal terms and granting buyers less flexibility. Current trends include the following:

- Auction procedures are enjoying increasing popularity due to sellers attempting to improve their deal terms, and in particular increase the purchase price.
- In line with the trend to auction procedures, the demand for W&I insurance has grown, as sellers not only aim to reduce their risk exposure but also limit the duration of such exposure. In general, W&I insurance coverage is obtained by the buyer.
- Sellers appear to be less inclined to accept conditions precedent. This is particularly true for general conditions (such as bring-down warranties and material adverse change (MAC) clauses), and also has an effect on specific conditions. Some buyers are willing to take greater risks and therefore do not insist on a full set of conditions precedent, but generally such buyers make greater efforts beforehand to avoid having to rely on such conditions.
- Liability caps continue to decline, with the thresholds/deductibles typically being between 0.5% and 1%, and the overall cap between 10% and 20% of the purchase price, usually excluding fundamental warranties such as authority and title/ownership, for which caps may extend to up to 100% of the purchase price.
- Warranty periods follow the general declining trend, with the general warranty period typically expiring within 12 to 18 months, except for tax, for which a warranty period of the applicable tax statute of limitations plus six months has become market standard in Switzerland.

5. What are the current trends in how private M&A transactions are conducted?

The pressure on costs in connection with (legal) due diligence has further increased. As a result, buyers tend to conduct more work in-house, in particular in areas where the risks are limited and/or manageable and expertise is typically readily available, such as human resources or IT. The use of external counsel is limited to the areas of particular risk for the buyer or in which the main risks are being suspected. This fragmentation of work brings up new challenges for co-ordination and ensuring that there are no gaps or overlap in the work conducted.

The current seller-friendly market environment, with an increased tendency towards auctions:

- Enables sellers to limit their efforts in connection with buy-side due diligence.
- Increases competition between potential buyers.

Although still representing the minority of cases, sellers increasingly impose restrictions on the due diligence process (for example, by limiting the numbers of Q&As and the duration of the process, or postponing access to certain information to a later stage), virtual data rooms are less complete, and answers to Q&As are of a poorer quality than they used to be a few years ago.

## Cross-border litigation and arbitration

6. Is it common market practice for a share purchase agreement to provide for a foreign governing law and/or jurisdiction? If so, in what circumstances does this occur and which governing law and/or jurisdiction are common choices?

Generally, share purchase agreements and other transaction documents are governed by the law of the target's jurisdiction. M&A transactions with Swiss targets are therefore typically subject to Swiss law. In smaller domestic deals, jurisdiction clauses typically provide for dispute resolution before state courts. Larger cross-border deals often provide for arbitration. A reason to opt for arbitration is that Swiss state court proceedings are always held in one of the country's official national languages, while arbitration allows the choice of further procedural languages (such as English). Arbitration also offers confidentiality of the proceedings, as well as a potentially swifter resolution considering that the scope of appeal against arbitral awards is very limited under Swiss law.

7. Is it market practice for an arbitration provision to be included in private M&A documents? Are arbitration clauses enforceable in your jurisdiction? Do local courts respect the choice of jurisdiction in an arbitration clause?

The inclusion of arbitration clauses mostly correlates with the size of the deal, with larger deals containing arbitration clauses more frequently. Likewise, cross-border transactions very often provide for arbitration (*see Question 6*). Swiss statutory law is very arbitration-friendly and Switzerland is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and other conventions fostering arbitration. Arbitration provisions, including the choice of jurisdiction, are therefore generally enforceable in Switzerland if they meet the requirements of Swiss statutory law.

## Recent developments and proposals for reform

8. Have there been any significant recent or proposed legal developments affecting the market that could impact on transactions?

On 1 November 2019, the revised provisions on the identification of beneficial owners in Swiss legal entities entered into force. As part of the worldwide measures to combat money laundering and terrorism financing, the amended provisions now:

- Prohibit the creation of bearer shares for non-listed stock corporations (*Aktiengesellschaften*).
- Force the holders of existing bearer shares to convert remaining bearer shares by 1 May 2021, unless they are willing to accept an automatic conversion by operation of law at that date.

A partial revision of the Swiss Corporate Law (*Aktienrecht*) is still being discussed by Parliament. The main proposed amendments include:

- A further tightening of compliance provisions and say-on-pay regulations.
- A simplification of the incorporation process of stock corporations.
- The introduction of a "capital band" (*Kapitalband*), that is, a range within which the share capital can be determined by the board of directors without consulting the shareholders.
- A general gender quota for board members of listed companies.

However, this revision is not expected to enter into force before 2021.

The General Data Protection Regulation ((EU) 2016/679) (GDPR) continues to impact on Swiss companies, in particular transactions with an international dimension for which applicability and compliance should be considered.

9. What will be the main factors affecting the market next year, and how do you expect the market to develop?

The current crisis caused by the outbreak of the 2019 novel coronavirus disease (COVID-19) may have an impact on the private M&A market in Switzerland and across the world. Decisive factors will be the further course of action of governments and central banks of leading economies, how long the current emergency measures will remain in force, and how successful governments are in supporting their economies during and after the crisis. The Swiss Federal Council has taken comprehensive measures, such as short-time working compensation (*Kurzarbeitsentschädigung*) and emergency loans co-ordinated and secured by the Swiss Government.

However, since Switzerland is a strongly internationally oriented and integrated economy, the success of overcoming any negative impact of the current crisis will depend to a large extent on the international economy. Existing uncertainties (such as the US elections, the trade dispute between the US and China, and Brexit) could intensify and accelerate any effects of COVID-19.

There are currently discussions to introduce foreign investment controls into Switzerland. The main focus of these controls is the strong Chinese M&A activity in the Swiss market over the past few years. However, these discussions have not yet entered a state in which any measures can be expected in the near future.

### Contributor profiles

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**Professional qualifications.** Switzerland, 1996

**Areas of practice.** M&A; private equity, venture capital and capital market transactions; restructurings and reorganisations; commercial and corporate law; tender offers and buyouts.

#### Recent transactions

- Advising the private sellers on the sale of NVT AG to Blue Sail Medical, a leading Chinese medical device company listed on the Shenzhen Stock Exchange.
- Advising Aduno Holding on the sale of cashgate to Cembra Money Bank (SIX:CMBN).
- Advising Oriflame Holding (STO:ORI) on its public takeover by Walnut Bidco.
- Advising DDM Holding (STO:DDM) on its public takeover by Demeter Finance.
- Advising Dana Incorporated (NYSE: DAN) on the acquisition of the Drive Systems Segment from OC Oerlikon (SIX: OERL).

**Languages.** German, English, French

**Professional associations/memberships.** Registered with the Swiss and the Zurich Bar Registry and admitted to practice in the whole of Switzerland; Member of the International Bar Association (IBA) and the American Bar Association (ABA).

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**Professional qualifications.** Switzerland, 2014

**Areas of practice.** Domestic and international M&A; private equity and venture capital transactions; general corporate, commercial and contract law.

### **Recent transactions**

- Advising the Arthur J. Gallagher group (NYSE: AJG) on the acquisitions of Hesse & Partner group and of VERBAG.
- Advising Oriflame Holding (STO:ORI) on its public takeover by Walnut Bidco.
- Advising DDM Holding (STO:DDM) on its public takeover by Demeter Finance.
- Advising DigiCert on the acquisition of the QuoVadis SSL/TLS business from WISeKey (SIX: WIHN).

**Languages.** German, English, Italian, French

**Professional associations/memberships.** Registered with the Swiss and the Zurich Bar Registry and admitted to practice in the whole of Switzerland; Member of the International Association of Young Lawyers (AIJA).

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**Professional qualifications.** Switzerland, 2014

**Areas of practice.** General corporate, commercial and contract law; domestic and cross-border M&A, venture capital and private equity transactions; specialises in regulatory matters and transactions in the fields of life sciences and health care.

### Recent transactions

- Advising DDM Holding (STO:DDM) on its public takeover by Demeter Finance.
- Advising Oriflame Holding (STO:ORI) on its public takeover by Walnut Bidco.
- Advising Ardian (PE) in the acquisition of pharmaceutical company Sintetica SA.
- Advising Recordati in the acquisition of rights for Signifor and Osilodrostat.

**Languages.** German, English

**Professional associations/memberships.** Registered with the Swiss and the Zurich Bar Registry and admitted to practice in the whole of Switzerland.

**Publications.** Lectures and publishes regularly on his areas of practice.

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