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Venture Capital 2024

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Switzerland: Law & Practice and Trends & Developments
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SWITZERLAND

Law and Practice

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1. Trends

1.1 VC Market

For financing rounds, the list of most sizeable transactions in 2023 is headed by the following:

- cleantech start-up Atlas Agro, with its USD325 million financing round with Macquarie Asset Management to build industrial scale green nitrogen fertiliser plants;
- medtech company Distalmotion, with its USD150 Series F financing round led by Revival Healthcare Capital; and
- Noema Pharma, a clinical stage biotech company, which in its Series B financing round raised CHF103 million from existing and new investors.

With respect to exit transactions, the top three in terms of transaction value include the following:

- the acquisition of blockchain software solutions company nchain by Ayre Group, with a total investment value of up to CHF500 million;
- Boehringer Ingelheim's acquisition of T3 Pharmaceuticals, specialising in bacterial cancer therapy, at up to CHF450 million (including milestone payments); and
- digital asset custody and tokenisation provider Metaco's acquisition by Ripple for USD250 million.

Oculi's listing on the Nasdaq following the business combination agreement with special purpose acquisition company European Biotech Acquisition Corp was the only IPO in the venture capital market during that period. Oculi is a Lausanne-based biotech company focusing on eyecare.

(Numbers by Swiss Venture Capital Report 2024 published by startupticker.ch and SECA – Swiss Private Equity & Corporate Finance Association.)

1.2 Key Trends

In 2023, a record number of financing rounds of Swiss start-ups were observed but a significant drop both in the amount of capital invested (–34.8%) and number of exits (–43%) vis-à-vis the record year 2022. However, despite this sharp decrease, the 2023 numbers were still significantly above pre-pandemic levels both with respect to capital invested and number of exits speaking for the resilience of the sector.

The downturn in financing condition was particularly noticeable in growth stage transactions which saw an increase of 14% in number of transactions but with the total transaction volume almost halved compared to the previous year. In comparison, early stage investment volume was more or less stable (but distributed among a larger number of transactions, too). For seed investments, both the investment volume and the number of transactions decreased, but at moderate levels (–13% and –5%, respectively).

As a consequence, down-rounds and bridge financing transactions, the latter often via convertible loans from existing investors, or even restarts or other attempts to clean-up cap tables, were prevalent throughout the year. Despite the record number of financing rounds closed, an increasing number of transactions were observed failing in later stages of the process. A further trend saw rather advanced companies fundraising at pre-downturn level but compensating investors for the additional risk taken by them (with such valuation) by issuing warrants.

(Numbers by Swiss Venture Capital Report 2024 published by startupticker.ch and SECA – Swiss Private Equity & Corporate Finance Association.)

1.3 Key Industries

Traditionally, venture capital activity in Switzerland has been driven by ICT, fintech and biotech companies, which in previous years together accounted for two thirds to three quarters of the total investment volume. A steep drop of investment volumes both in the ICT (–69%) and the fintech (–53%) sector was observed in 2023. Again, the lack of and significantly reduced investment volumes in growth rounds contributed heavily to the unfavourable development of these sectors. On the other hand, almost half of the exit transactions in 2023 concerned ICT and fintech companies. It may well be that the difficult financing environment accelerated exit timelines in some instances.

With ICT and fintech on the decline and biotech companies only slowly recovering from the 2022 slump in investment volume, cleantech companies with slightly above CHF600 million invested took the lead for the first time in terms of investment volume per sector. At the same time, investments in the medtech sector have caught up with those in the ICT, too. Whilst these latest spikes in investment value are to a large extent driven by the mega rounds of Atlas Agro and Distalmotion, respectively, the number of financing rounds has also increased by a third in the cleantech sector and remained stable in the medtech sector vis-à-vis 2022.

At a lower level, investment in the micro-nano sector is also on the rise, a trend mainly driven by numerous start-ups in the robotics segment.

(Numbers by Swiss Venture Capital Report 2024 published by startupticker.ch and SECA – Swiss Private Equity & Corporate Finance Association.)

2. VC Funds

2.1 Fund Structure

To date, venture capital funds managed and/or marketed in or from Switzerland typically have not been set up in Switzerland but in a foreign fund jurisdiction due to certain tax disadvantages and/or barriers to cross-border marketing of Swiss funds or other factors affecting managers' and investors' preferences.

If no exemption applies, venture capital fund structures established in Switzerland pooling assets from multiple investors generally qualify as collective investment scheme pursuant and subject to the Collective Investment Schemes Act (CISA) and its implementing ordinance, the Collective Investment Schemes Ordinance (CISO). In particular, investment companies in the form of a Swiss company limited by shares are not subject to the CISA if they are listed on an exchange in Switzerland or if only qualified investors pursuant to CISA are entitled to participate in the registered shares of an unlisted investment company. However, such exempt investment companies are subject to and must comply with the Anti-Money Laundering Act (AMLA) and are required to affiliate with a self-regulatory organisation (SRO) if not subject to supervision by the Swiss Financial Market Supervisory Authority FINMA (FINMA). Furthermore, a group of venture capital investors may pool their investments without qualifying as a collective investment scheme if they meet the criteria of an investment club according to Article 1a CISO, which requires that the membership rights are set out in the relevant constitu-

tive document for the investment club's chosen legal status, the members or selected members take the investment decisions, the members are informed about the status of the investments on a regular basis, and the number of members does not exceed 20.

Fund structures subject to CISA may be open-ended and closed-ended. Open-end funds may be set up as contractual funds (FCP) or as investment companies with variable capital (SICAV). CISA distinguishes four types of open-end funds based on the type of investment:

- securities funds;
- real estate funds;
- other funds for traditional investments; and
- other funds for alternative investments.

Each type of fund follows a different set of rules regarding permitted investments, investment restrictions, investment techniques and disclosure requirements. According to the FINMA's current practice, an FCP or SICAV investing more than approximately 30% of its total assets in venture capital or other alternative investments needs to be set up as an "other fund for alternative investments".

Closed-end funds may be set up as investment companies with fixed capital (SICAF) or as partnerships for collective capital investment (LPCI). Since the introduction of SICAFs in 2007, none have been authorised in Switzerland, mainly owing to the unfavourable tax treatment that leads to taxation at both the company and the investor level. An LPCI is a special form of limited partnership whose sole objective is collective capital investment and which is reserved to qualified investors, similar to limited partnership fund structures in other jurisdictions. At least one member bears unlimited liability (general partner), while other members (limited partners) are liable only up to a specified amount (limited partner's contribution). General partners must be companies limited by shares, with their registered office in Switzerland. Limited partners must be qualified investors according to CISA. An LPCI may only manage its own investments and conducts investments in risk capital. The investments in companies or projects can take the form of equity capital, lending or mezzanine financing. Those very few funds subject to CISA with venture capital investments have been set up and authorised as LPCI.

As of 1 March 2024, a new fund type, the Limited Qualified Investor Fund (L-QIF), which is exempt from any authorisation, approval and product supervision by FINMA and, therefore, significantly reduces set-up costs and time to market, has been introduced in the CISA/CISO. The L-QIF must be managed by a supervised Swiss fund management company or manager of collective assets and set up as one of the above-mentioned forms of Swiss collective investment schemes, except for the SICAF, which is not a permitted legal form for an L-QIF. The L-QIF is open only to qualified investors and provides for very liberal investment rules and risk diversification requirements to encourage innovation, similar to unregulated fund structures in other jurisdictions, such as the Reserved Alternative Investment Fund (RAIF) in Luxembourg. This flexible new fund structure (eg, in the form of an LPCI) could be an efficient structuring solution also for venture capital funds.

2.2 Fund Economics

Fund Principals, as an investment manager or adviser to the venture capital fund, may charge a management fee and/or performance fee to the fund in accordance with the applicable provisions under CISA/CISO and the fund regula-

tions. As an investor in their own venture capital fund, Fund Principals may participate in the economics of the fund only in accordance with the principle of equal treatment of all investors, which applies on the share class rather than the fund level. The rules of conduct of the Asset Management Association Switzerland AMAS, which are recognised by FINMA as a minimum standard, specify the principle of equal treatment of investors and stipulate that fund management companies and other "fund institutions" must manage collective investment schemes in accordance with the principle of relative equal treatment, according to which objectively justified differentiations are permitted (eg, rebates to all investors meeting defined objective criteria). However, there are no established or evolving market standards in Switzerland with respect to key terms for Fund Principals.

2.3 Fund Regulation

Please see **2.1 Fund Structure**.

2.4 Particularities

As mentioned in **2.1 Fund Structure**, venture capital funds managed and/or marketed in or from Switzerland are typically not set up in Switzerland but in a foreign fund jurisdiction. It remains to be seen if the newly introduced unregulated fund type L-QIF will be used to set up venture capital funds also in Switzerland.

3. Investments in VC Portfolio Companies

3.1 Due Diligence

Before investing in a company, VC investors would often conduct a legal, financial, commercial and tax due diligence, whereby the scope of such due diligence varies depending on the stage of the company, the size of the investment, and the industry and market in which the relevant company operates. In a legal due diligence, key areas that are generally covered include the following:

- title;
- employment;
- social security and pensions;
- tax;
- material agreements;
- intellectual property; and
- compliance and regulation.

3.2 Process

The timeline of a new equity financing round in a company depends on several factors, such as the complexity of the transaction, the due diligence process and the dynamics between the parties. In average it takes about two to four months from signing of the term sheet until the registration of the capital increase in the commercial register. By contrast, the timeline for convertible loan rounds tends to be significantly shorter. Generally, the company and the lead investor are each represented by separate counsel but there are also (rare) instances where joint counsel is engaged to streamline the process and save costs. As a financing round in a Swiss entity requires the involvement of the existing shareholders – such as for the approval of the relevant capital increase, the waiver of statutory and contractual pre-emptive rights, and renegotiation of the shareholders' agreement including the rights of the existing investors – it is advisable to involve them sufficiently early in the process.

3.3 Investment Structure

Whereas a Swiss start-up would typically be incorporated with common shares only, preferred shares are commonly used in later financings, in particular from a seed or Series A stage

onwards. Preferred shares are entitled to a liquidation preference in the event of a liquidation or sale of the company, ensuring that they receive a certain amount before any distributions are made to common shareholders. In most instances, a one-time non-participating liquidation preference is granted. Other rights that are typically linked to preferred shares are as follows:

- conversion rights;
- (special) pre-emptive subscription rights;
- down-round protection rights; and
- blocking/veto rights in relation to certain material corporate resolutions or a potential drag-along event.

3.4 Documentation

Certain key documents outline the terms of the investment typically used in a financing of a Swiss start-up. Depending on the parties involved and the complexity of the transaction, the specific documents may vary, but the most common documents include the following.

- *Term Sheet* – This is a generally non-binding document (with certain exceptions, such as for exclusivity and costs) that sets forth the key details of an investment and the rights of the involved parties. It serves as a basis for negotiations and helps the parties to agree on the key terms before working with more detailed documents.
- *Investment Agreement* – The investment agreement is entered into by the investors, existing shareholders and the company. It sets out:
  (a) the specific terms of the investment, including the investment amount as well as the number and category of shares issued;
  (b) details and steps in relation to the closing;
  (c) the representations and warranties given by the parties; and
  (d) the remedies in case of a breach.
- *Shareholders' Agreement* – The shareholders agreement governs the relationship between the shareholders upon completion of the investment. It includes provisions governing:
  (a) the corporate governance, including board appointment, and veto and information rights;
  (b) pre-emptive subscription rights;
  (c) sale and liquidation preference and conversion rights;
  (d) down-round protection rights;
  (e) non-compete and non-solicitation provision; and
  (f) the restrictions on share transfers as well as drag-along and tag-along rights.

The Swiss Private Equity & Corporate Finance Association (SECA) provides model documentation for VC investments, including the aforementioned documents. However, the SECA templates are generally not considered as reflecting the market standard, and most law firms that are active in the market use their own templates.

3.5 Investor Safeguards

To protect their investment, VC investors often secure certain key terms in a downside scenario, such as liquidation or a down-round. Besides the liquidation preference (see **3.3 Investment Structure**), such terms include the following.

- *Anti-dilution adjustments* – Anti-dilution provisions serve to protect investors from dilution of their stake in the company in subsequent rounds of financing at lower valuations. Most commonly, a broad-based weighted average adjustment would be agreed which would be effected by the issuance of additional shares of the same category at nominal value to the

affected parties. Sometimes, the issuance of such shares is subject to pay-to-play provisions.
- *Pre-emptive subscription rights* – Pre-emptive subscription rights give investors the opportunity to maintain their ownership percentage in the company by purchasing additional shares on a pro-rata basis before they are offered to other investors. In the majority of cases, such right is limited to the investors' pro-rata portion and gives neither a general pre-emptive right prevailing over existing shareholders nor the right for any overallocation of non-exercised subscription rights.
- *Control or veto rights* – VC investors often have control rights to influence key decisions on the shareholder as well as on the board level.
- *Vesting and claw-back* – In order to ensure the founders' and other key personnel's commitments vis-à-vis the company, VC investors often require that such persons are bound by (reverse) vesting provisions structured as call-options applicable in case of an early termination of the employment or service relationship.

3.6 Corporate Governance

Investors often ask for the right to appoint one or more representatives to the company's board of directors. Board representation allows the investors to influence key strategic decisions (often investor directors have veto rights in relation to certain strategic decisions), and monitor the management as well as the activities of the company. The day-to-day management of the company is typically delegated to the executive board members/the management in accordance with the terms of organisational regulations. If an investor is not allowed (eg, for regulatory or tax reasons) or otherwise unable to appoint a board member, it is also possible to appoint a board observer having the same information and participation rights as a board member, but no voting rights.

3.7 Contractual Protection

In a financing round, a VC investor would generally ask for representations and warranties from the company and/or the founders covering, inter alia:

- ownership and qualification;
- due authorisation;
- financial statements and subsequent events;
- insurance;
- compliance;
- intellectual property;
- material agreements;
- employment, social security and pension;
- litigation; and
- no broker's fee.

In most financing rounds, a fair disclosure concept is agreed, whereby the documents included in a virtual data room are generally deemed disclosed vis-à-vis the investors. In some instances, the representing parties may be asked to provide a disclosure letter. Swiss law imposes restrictions on the payment of damages resulting from an investment by the company. Hence investors would typically be indemnified by virtue of a compensatory capital increase, which means the issuance of additional shares of the category initially subscribed at nominal value.

4. Government Inducements

4.1 Subsidy Programmes

There are numerous government-backed initiatives providing non-dilutive funding or government-guaranteed loans to Swiss start-ups such as the Innosuisse programme and the Swiss

Technology Fund, which may also provide an indirect incentive for equity investment. However, there are no sizeable programmes directly subsidising equity investment in Swiss start-up companies.

4.2 Tax Treatment

The tax treatment of an investment in start-up/VC fund portfolio companies is generally the same as the tax treatment in any other company.

Stamp Duty

Equity contributions to Swiss companies are subject to a 1% issuance stamp duty payable by the company. The issuance of newly created shares up to CHF1 million are exempt therefrom.

Capital Contribution Reserves

To the extent such contributions exceed the nominal value of shares created, they can be earmarked as capital contribution reserves allowing for their redistribution to shareholders without triggering Swiss withholding tax and income tax on the level of investors holding their shares as private assets. These capital contribution reserves need to be reported to and confirmed by the Swiss Federal Tax Administration (SFTA).

Dividend Distribution

Dividend distributions not made out of or in excess of such confirmed capital contribution reserves (which are rarely made in the context of VC portfolio companies) would be subject to 35% Swiss withholding tax.

Refund of Swiss Withholding Tax

Swiss withholding tax will be fully refundable or creditable to a Swiss tax resident corporate and individual shareholder (as well as to a non-Swiss tax resident corporate or individual shareholder who holds the shares through a Swiss branch office) if such a recipient is the beneficial owner of the distribution received and said income is recognised in the income statement or reported in the income tax return of the recipient. Shareholders who are not resident in Switzerland for tax purposes (and who do not conduct a trade or business through a Swiss branch office) may be entitled to a full or partial refund of Swiss withholding tax if the country in which such a recipient resides for tax purposes has concluded a double tax treaty (DTT) with Switzerland and further conditions of such a DTT are met. Under certain circumstances, a full refund is also conceivable under the Agreement between the European Union and the Swiss Confederation on the automatic exchange of financial account information to improve international tax compliance (AEI Agreement Switzerland-EU).

Capital Gains

Upon a sale of their shares, foreign resident investors are generally not subject to Swiss capital gains tax or withholding tax according to Swiss domestic law and applicable DTT. Furthermore, gains resulting from the sale of shares are generally tax free for Swiss resident founders and Swiss-based non-professional private investors (individuals). For Swiss resident professional or corporate investors, capital gains derived from the sale of shares are generally subject to corporate income tax and capital losses are tax-deductible. The participation exemption applies to capital gains derived from a disposal of a qualifying participation of at least 10%, provided that the minimum holding period of one year is met and leads to a virtual tax exemption of such qualifying capital gains. However, recaptured depreciations (the difference between the acquisition costs and book value) on such qualifying participations are subject to ordinary taxation. Tax losses may be carried forward for the next seven years.

Convertible Loans (CLAs)

Convertible loans (CLAs) are instruments frequently used to provide start-ups with funding in Switzerland. If a CLA qualifies as a private loan, the SFTA does not levy withholding tax on interest payments. The interest payments due to the lender are subject to income or profit tax.

However, if a company issues CLAs (for an amount of more than CHF500,000 in total) and applies the same terms (interest, conversion discount, currency, term, etc) on these CLAs to more than ten (non-bank) lenders or issues CLAs with different terms to more than 20 (non-bank) lenders in total (so-called 10/20-non-bank-rules), the SFTA qualifies the CLAs as convertible bonds and levies withholding tax on the interest payments when the interest is due.

Furthermore, the SFTA in practice generally also qualifies the convertible discount as an interest payment and levies income and withholding tax on it if the 10/20 non-bank rules are not observed, unless it qualifies the CLA as a “classic” CLA. Pursuant the current practice of the SFTA, a CLA with a conversion discount of more than 20% no longer qualifies as a “classic” CLA. For the refund of the withholding tax, see above.

Upon conversion of a CLA, stamp duty will be due (see above) on the amount that is converted to equity.

Furthermore, Swiss withholding tax is due irrespective of the qualification as a convertible bond, if the interest is requalified as a constructive dividend. This is the case if the loan CLA is held by an existing shareholder or a related party and the interest on the CLA is not at arm’s length according to the rules set out by the SFTA (the SFTA publishes safe haven rates every year) or if the company is thinly capitalised for tax purposes. An exception may apply to PIK interest (ie, interest that is paid in the form of additional shares upon conversion of the CLA instead of a cash settlement).

4.3 Government Endorsement

See **4.1 Subsidy Programmes**.

5. Employment Incentives

5.1 General

The long-term commitment of the founders and other key employees to the venture is crucial for the success and the sustainable development of the company. This commitment is often procured by offering key employees equity or virtual equity in the company. An (virtual) equity participation ensures that the interests and efforts of the relevant beneficiary are aligned with the long-term success of the company. In some instances, start-up would also grant monetary performance-based incentives: in particular, bonuses to its key personnel. Non-compete and non-solicitation arrangements with key personnel, which serve to protect the company’s intellectual property and trade secrets as well as the relationship with both customers and other personnel, are prevalent in Switzerland.

5.2 Securities

Swiss companies use various instruments to incentivise their key personnel. The most prevalent ones are share plans, stock options plans and virtual share plans. In a share plan, beneficiaries are granted shares and thus directly and immediately participate in the equity capital of the company. In a stock option plan, the employees are granted the right to acquire employee shares within a defined period (exercise period) at a certain price (exercise) price. Often companies would opt to implement a virtual share plan,

which means that the beneficiaries are granted virtual shares only, which reflect the value of a certain category of share (typically common stock), and, from a monetary perspective, generally equates their holders to the holders of such category of (real) shares. However, holders of virtual shares neither hold a stake in the company nor have any shareholder rights.

The main advantage of share and stock options plan is the leeway for tax-optimisation (see **5.3 Taxation of Instruments**). However, they create an increased administrative burden due to the need for rulings and discussion with the tax authorities, certification obligations vis-à-vis tax authorities and the financing and structuring of the corresponding option and share issuance, respectively. In addition, as the relevant beneficiaries become shareholders with full voting and information rights, it will have to be ensured that they are set in an appropriate governance framework, including a shareholders' agreement that outlines their rights and obligations. Virtual share plans, on the other hand, are quick, cheap and easy to implement and maintain. However, in most instances they are not the most tax-optimised option.

5.3 Taxation of Instruments

As a general rule, for Swiss tax residents, capital gains from the sale of privately held shares are tax-free under Swiss law. However, this does not apply to capital gains from the sale of privately held employee shares of beneficiaries (ie, shares which are transferred to the employee in connection with the employment relationship), unless it can be proven that such transfer occurred at fair market value (which is typically not the case with non-listed shares).

In practice, employee shares are rewarded at a recognised formula, which is often pre-agreed with the authorities and which typically leads to a moderate valuation of the relevant shares at the time of their acquisition or exercise of options to determine the taxable salary component. In case of an exit, the same formula will be used to determine the part of the exit price which is deemed tax-free, hereby using the most recent financial parameters at exit for the purpose of the formula. Accordingly, a relevant beneficiary can then benefit from a tax-free capital gain in an amount corresponding to the difference between the formula value at the date of acquisition and the formula value calculated based on the same valuation method at the time of the disposal. Any additional increase in value ("excess profit"; "*Übergewinn*"), ie, the difference between the actual exit price and the formula value at the time of the disposal, constitutes taxable income.

As per the current tax practice in the cantons, the "excess profit" will also be treated as a tax-free capital gain after a holding period of five years. Considering the above-mentioned principles, key factors when structuring a share and/or a stock option pool thus include the determination of formula that is equally suitable at the time of grant and at the time of exit, and finding an appropriate (reverse) vesting schedule, thereby taking into consideration the timing of a potential exit as well as the development of the financial parameters used for the purpose of the formula until then.

On the other hand, monetary benefits from virtual share plans are fully taxable and subject to social contributions at the time of their payment, ie, generally a liquidity event. No tax-free capital gains can hence be derived from virtual stock option plans.

The applicable tax rate varies depending on the canton and municipality where such employee

is based and generally does not have a major impact on the structuring of an incentive pool at the company level.

5.4 Implementation

Typically, the investors will insist that, as part of the financing round, an incentive programme will be set up or a current programme be increased, to ensure that a reasonable and unallocated pool is available to cover the company's needs for a reasonable period following closing. Main terms and size of the pool are then agreed in the financing round documentation. It is hereby possible to wholly or partially consider this pool/its increase as pre-existing for the calculation of the share price of investors based on a fully diluted pre-money valuation or to agree that the relevant dilution shall be borne by all shareholders (including new investors).

6. Exits

6.1 Investor Exit Rights

The shareholders' agreements provide for certain exit rules relating to trade sale or IPO transactions, often through covenants to pursue such a transaction if approved by the board or by a qualified majority of the shareholders. IPO-related clauses usually cover registration rights in case of US listings as well as lock-up undertakings (often 6–18 months and depending on underwriting recommendation or requests).

The shareholders' agreement also typically provides for a set of transfer restrictions applicable to all shareholders, including:

- a prohibition on encumbrances;
- right of first offer or refusal of existing shareholders;
- co-sale rights (tag-along) and co-sale obligations (drag-along); and
- call options of the company and/or other shareholders (eg in case of an insolvency event with respect to a shareholder, transfer or encumbrance of shares in breach of transfer restrictions or other material breaches of the shareholders' agreement, in all instances excluding transfers explicitly permitted or provided for in the shareholders' agreement such as, eg, affiliate transfers).

The tag-along right is usually limited to a pro-rata portion in case the respective sale transaction does not trigger a change of control. There are also instances where the pro-rata tag along is restricted to certain categories of shareholders or excluded altogether. Typically, the approval of a qualified majority of all shareholders as well as a majority of preferred shareholders is required to trigger the drag-along obligation Sometimes the latter majority will not apply if proceeds from the sale exceed a certain threshold (eg, two or three times the issue price in the last financing round).

In case of a trade sale, investors holding preferred shares are entitled to their respective liquidation preference (see **3.3 Investment Structure**) with later stage preferred shares often ranking senior to those issued in previous rounds, provided that they may instead opt for distribution of proceeds on an "as-if converted" basis, if distributions due to common shares exceed the preference amount for the respective class of preferred shares.

Whereas it is rather uncommon to grant investors the right to trigger an exit alone, it is from time to time agreed that investors will have a preferred liquidity upon expiration of a certain period (eg, by carve-outs from the tag-along

and right of first refusal provisions) and/or that they may request that exit options (trade sale or IPO/listing) are at least evaluated with the help of external advisers upon expiration of such a period.

In case of late-stage projects, the shareholders' agreement would typically also include specific provisions facilitating any IPO or listing.

6.2 IPO Exits

IPOs of Swiss start-ups are rather rare when compared with trade sale exits. After a record of 11 IPOs in 2021, the number of IPOs dropped to four and one in 2022 and 2023, respectively.

Whilst Swiss start-ups still frequently seek out US trading venues (NYSE and Nasdaq) for their IPO, SIX Swiss Exchange, including Sparks, its stock market segment for fast-growing small and medium-sized companies newly introduced in 2021, has gained some traction.

In case of an IPO, mostly primary shares are being offered and listed, occasionally combined with exit (sale) opportunities at the IPO for select investors (secondary tranche). Lock-up undertakings limit quick exits for remaining shareholders affiliated with the issuer (mostly key employees, founders, and certain other main shareholders).

6.3 Pre-IPO Liquidity

Particularly late-stage start-ups often and regularly conduct orchestrated secondary rounds, typically as part of or in connection with financing rounds to accommodate the request for liquidity of early-stage investors and sometimes also founders and other employees. Respective shares are often purchased by new investors at a certain discount to the price applied in the financing round. Occasionally, such shares are also converted into the preferred shares issued in such round.

7. Regulation

7.1 Securities Offerings

The Swiss Financial Services Act (FinSA) provides that a prospectus must be published for a public offering of securities in Switzerland or for securities to be admitted to trading on a Swiss trading venue. As a general rule, such prospectus needs to be approved by an accredited prospectus review body (currently there are two, managed by SIX Swiss Exchange and BX Swiss, respectively).

An offering is deemed public (and no longer private) if it is directed to the general public, ie, not clearly limited to a predetermined, relatively homogeneous group of investors. However, there are various exemptions from the prospectus requirement even if an offering qualifies as public offering. For example, no prospectus requirement applies if:

- the offering is limited to persons qualifying as professional clients according to FinSA;
- the offering is targeting fewer than 500 potential investors;
- the offering is for securities with a minimum denomination of more than CHF100,000 or requires investors to subscribe for securities for at least that amount;
- the total value of the offering does not exceed CHF8 million within a rolling 12-month period; and
- securities are offered by an employer or affiliated company to current or former members of the board, executive management or their employees.

Crowd financings aside, it is therefore usually possible to structure venture capital financing rounds and secondary transactions in a manner that does not trigger the prospectus requirement. In larger projects with an international investor base, secondary transactions are often made compliant with US securities law.

7.2 Restrictions

Competition Law and Merger Control

The Swiss Cartel Act provides for a notification obligation to the Swiss competition commission (CompCo) in case of one or several investors obtaining sole or joint control over a Swiss company, provided that: (i) the relevant turnover thresholds are met; or (ii) CompCo has previously established that at least one of the investors concerned holds a dominant position on a certain market in Switzerland and the investment concerns that or a neighbouring market.

Joint control does not necessarily require a majority in terms of voting rights or board representation but may also be achieved through sufficiently broad veto rights (as commonly seen in shareholders' agreements) if these are granted to individual investors or a specific group of investors in a manner that no longer allows for changing majorities.

The turnover thresholds are met if in the business year preceding the investment either (i) one of the investors reached a total turnover of at least CHF2 billion or a turnover in Switzerland of at least CHF500 million or (ii) at least two investors reached a turnover in Switzerland of at least CHF100 million, in each case applying a group perspective.

Therefore, the application of merger control regulations should be carefully assessed, in particular when dealing with strategic investors or their venture arms. Furthermore, competition law issues may also arise with respect to non-compete and non-solicitation undertakings in shareholders' agreements.

FDI Regulation

Switzerland has so far not implemented a comprehensive foreign investment control regime. In December 2023, the Swiss Federal Council published a draft for a Federal Act on the Control of Foreign Investments, which has yet to pass parliament (and a potential referendum). The scope of the draft legislation is limited to investment by state-controlled foreign investors in certain particularly critical industries. Furthermore, the draft envisages turnover thresholds.

In addition, there are restrictions that can impact foreign investment in certain specific sectors already in force today. For example, the Federal Act on the Acquisition of Real Estate by Persons Abroad (Lex Koller) provides for restrictions on the (direct or indirect) acquisition of real estate that is not used as a permanent establishment of a commercial, manufacturing or other business by non-Swiss persons or entities, which may affect the sale or issuance of shares to foreign investors in certain instances. As another example, pursuant to the Federal Act on Banks and Savings Banks, additional authorisation from the Swiss Financial Market Supervisory Authority (FINMA) is required if a Swiss bank becomes foreign-controlled after its establishment.

Financial Market Regulation

Broadly speaking, financial services regulations may impose restrictions and regulatory requirements on venture capital investment structured as collective investment schemes or on activities that go beyond the realm of corporate financing and qualifying as financial services.

Trends and Developments

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Walder Wyss Ltd is one of the most successful Swiss commercial law firms. With a dynamic presence in the market, the firm specialises in corporate and commercial law, banking and finance, intellectual property and competition law, dispute resolution and tax law. With more than 280 legal experts and six locations, Walder Wyss provides its clients with a seamless one-stop shop, personalised and high-quality services in all language regions of Switzerland. The firm has a dedicated, fully integrated start-up desk composed of around 20 senior lawyers (including partners) advising on VC-related matters (all relevant areas of law).

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Investment Structure and Deal Terms

As for many other jurisdictions, Swiss start-ups in the recent past had to deal with a more difficult environment for attracting investors and obtaining financing. Whereas certain start-ups tried to bridge such period with bridge financing transactions, often structured via convertible loans and/or mainly internal rounds, others (in particular, low-performing start-ups or start-ups with a rather long fundraising history) have faced down-rounds or even fire sales, re-starts or other attempts to clean-up cap tables to increase attractiveness for the future. Such clean-up and re-starts were often structured as pay-to-play transactions in which existing investors not participating with fresh money ceased to be part of the cap table, and were often accompanied by very investor-friendly terms. By contrast, the terms in less problematic projects remained rather company- and founder-friendly.

Also as a result of increased experience of projects ending up in difficulties in attempting to obtain further financing, or even failing, the market now tends to focus more on provisions in the shareholders' agreement dealing with the respective scenarios, with the aim of increasing their enforceability.

A further trend has been observed, with rather advanced companies fundraising at pre-downturn level but compensating investors for the additional risk taken by them (by investing at such valuation) by issuing warrants, entitling new investors to invest additional amounts in the future at the current valuation or even a discount.

Shift in Investor Focus

On the investors' side, the trend seems to be to shift the focus from growth towards profitability. In that connection, particularly larger investors aimed to get additional comfort about the future profitability of the start-ups during the due diligence phase. The same applied in relation to the ability to apply business models in other markets and achieve profitability there. This trend often resulted in longer due diligence exercises and an increase of the related costs, which had to be partially borne by the start-ups at closing.

In the life sciences sector, the failure to reach milestones is now typically leading to a renegotiation of the milestone investment, whereas before it was rather common for investors to waive the milestone.

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Investment Funds Regulation

With respect to fund structure, it remains to be seen whether the Limited Qualified Investor Fund (L-QIF) – newly introduced as of 1 March 2024 and exempt from any authorisation, approval and product supervision by the Swiss Financial Market Authority FINMA whilst providing for very liberal investment rules and risk diversification requirements – will gain some market traction in the venture capital segment.

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