Testing the mettle

As Switzerland's legal market faces similar reversals to the world at large, regulatory shifts, geopolitical flux and technological advancements are keeping partners on their toes

GEORGIA TUXFORD AND ZOE JAMES

In the words of Patrik Peyer, managing partner of Niederer Kraft Frey (NKF): 'As the Swiss legal market confronts these multifaceted challenges, the resilience and adaptability of legal practitioners become crucial in shaping a forward-looking legal landscape.'

'The legal market is always developing in parallel to the general economic situation,' says Bär & Karrer's Susanne Schreiber, who co-heads the firm's tax team. In Q1, Switzerland's annual inflation rate rose to a high of 3.4% in February, 0.6% up on December 2022. In Q2, things started to look up with rates decreasing to 2.6% in April. Since then, rates have been on a steady decline, remaining at 1.7% for both September and October 2023. Interest rates, too have stabilised. Since July 2023, the Swiss National Bank has kept its policy rate at 1.8%, providing a sense of stability to the Swiss economy. Following these economic trends, there are several trends practitioners have seen regarding the work that's been done. For example, practice areas such as litigation and tax were extremely busy this year while areas like M&A and capital markets saw a decrease in deal volume compared to previous years. Banking and finance and real estate and construction remained stable throughout 2023.

The M&A market in Switzerland has experienced a noticeable shift, deviating from the robust trends in previous years. At the beginning of 2023, there was a discernible slowdown in M&A activity with deal volumes on a steep decline. Tino Gaberthüel from Lenz & Staehelin, who heads the corporate and M&A team and co-heads the capital markets team, highlights that: 'The rate of transactions that do not get to a signing or don't progress is above average, one reason being differing valuation expectations. Overall processes take a lot longer.' Schreiber reports that the firm 'saw a slowdown on certain M&A activities like private equity funds, which are less active both on the sell and the buy side'.

Despite the slow start to the year, Gaberthüel notes that 'market activity has picked up significantly since Q2'. Still, he notes that there has been a dearth of mega-deals: 'The large ticket deals are not yet on the map, meaning parties may assess potential opportunities, but they have not happened yet.' For Peyer this increase in mid-market deals 'underscores the resilience and adaptability of businesses in navigating the economic landscape'. Lawyers predict that mid-market deals will continue to dominate in 2024, and firms on the whole remain cautiously optimistic that they will have a busy year in corporate M&A.

There were some positive signs towards the end of the year. Gaberthüel highlights Partners Group's acquisition of infrastructure-sector inspections provider ROSEN Group, with reported value as high as $4bn, as one transaction that stands out. The deal was announced in November and is expected to close in the first half of 2024, pending regulatory approval.

While the transactional market is slower than in previous years, M&A-related litigation has experienced a discernible increase. 'After Covid, there was a general dip in arbitration and litigation matters, as companies were being more cautious, this has picked up fully since quite some time now,' says Caroline Clemetson, a partner in Schellenberg Wittmer's banking and finance department in Geneva and Zürich and a member of the firm's management committee. Now, activity in disputes 'has picked up fully'. Gaberthüel offers an

'In neighbouring countries, they say real estate is dead. In Switzerland, there is still a lot of activity.' Susanne Schreiber, Bär & Karrer

explanation of this trend: 'When valuations go down or there is uncertainty, there is willingness for potential disputes post-closing.'

In other practice areas, commodities work has remained a focus for Geneva-based firms, despite a sanctions-induced slowdown in work for Russian clients. Advisory services have also seen increased activity, driven by ongoing developments in regulatory frameworks.

Tax work was particularly busy in 2023, defying initial expectations of a slowdown due to the pandemic. The EU Tax Action Plan, comprised of 25 initiatives aimed at fostering fairer and simpler adaptive taxation, triggered a rise in tax audits and administrations involving intricate procedural work. Although Switzerland is not an EU member, it is entwined with EU developments, witnessing a surge in tax litigation and controversy. In addition, transfer-pricing complexities have escalated, promoting tax authorities to form specialised teams, which in turn has had an impact on unprepared businesses. Traditional tax work closely tied to M&A transactions faces uncertainty amid rising interest rates, and economic indicators hint at an impending recession, leading companies to defer projects and focus more on internal reorganisations. Another notable trend is an increase in successful taxpayer outcomes in litigation, challenging the conventional dominance of tax authorities in such cases. Firms anticipate that these trends will continue through to 2024.

'Even real estate survived,' says Schreiber. 'In neighbouring countries, they say real estate is dead. In Switzerland, there is still a lot of activity.' Despite difficulties in real estate and construction across Europe, the Swiss market maintains transactional activity, albeit at a lower level than in previous years. Institutional investors shedding portfolios and challenges in meeting construction demands due to employment-related issues from the Covid pandemic contribute to this trend. Higher interest rates in Switzerland correlate with decreased real estate prices, creating a mismatch between seller and buyer expectations. However, many in the market expect the gulf in expectations to narrow, and forecasts suggest a resurgence in activity, with smaller but more frequent transactions. Price decreases have been lower in residential housing, buoyed by immigration. The Der Schweizerische Ingenieur- und Architektenverein (SIA), supported by public procurement authorities, has been a hot topic this year. Public law considerations, too, have come to the fore, with increasing debates over how to align construction with action on issues such as noise pollution, climate change, and city planning. Many in the market expect real estate and construction work to maintain stability into 2024, keeping law firms in Switzerland actively engaged.

In contrast, equity capital markets work is, in Gaberthüel's words, 'an area that's been very quiet'. Gaberthüel mentions that 'there haven't been any IPOs this year in Switzerland', reflecting a cautious approach from market participants. The subdued nature of capital markets has prompted legal professionals to adapt to a less bustling environment, emphasising the need for strategic diversification in response to the evolving dynamics of the financial market.

A SHOTGUN MARRIAGE – UBS ACQUIRES CREDIT SUISSE

On 19 March 2023, the Swiss market experienced a seismic shift with the announcement that UBS was acquiring Credit Suisse for CHF 3bn ($3.2bn) in an all-stock deal brokered by the Swiss government and FINMA. This unexpected development sent shockwaves through the financial sector, reshaping the Swiss banking landscape. This takeover marked a significant consolidation of two major players, raising concerns in many areas of law. Previously, in the corporate banking and corporate lending space, Swiss companies had two potential relationships. Now, they have one: UBS. Companies must think about whether to form a relationship with another bank – and, if so, which. In this way, the merger could lead to a re-evaluation of existing banking relationships, and has introduced a new level of uncertainty regarding the continuity of financial services. The merged entity's approach to lending and banking practices are likely to become a focal point for corporate clients as they continue to navigate the ever-shifting terrain of financial services.

The merger will likely impact the strategies used in public takeovers, with the shift to one dominant market player in the banking world shifting the negotiating dynamics between acquiring and target companies, with fewer banks capable of exchanging shares against consideration. The integration of the two financial giants' operations has also triggered concerns about job security, potentially leading to an increase in employment work. It is not all negative, however. Gaberthüel highlights that this merger could bring new opportunities for ex-employees. 'Looking at investment banking,' he says, 'there is room for other players, such as international banks or smaller boutique financial advisers, to take on people who used to work at Credit Suisse.'

Law firms have also stood to benefit from the UBS acquisition of Credit Suisse. The complexity of this deal, as well as its implications, have required the involvement of various firms to keep up with the increasing demand for legal services generated. Firms involved included Walder Wyss acting as lead counsel to Credit Suisse and Bär & Karrer advising UBS, with Schreiber noting that the firm was 'also selected to work on the integration, which keeps us busy'. Homburger also advised on various aspects of the deal. Other firms, such as Buis Bürgi, Quinn Emanuel Urquhart & Sullivan (Schweiz), and LALIVE, have been supporting clients in challenging

‘Financial service providers are also now obligated to include ESG topics in the training and professional development of their client advisers.’

Nicolas Piérard, Borel & Barbey

the write-down of the AT1 bonds issued by Credit Suisse. The potential employment law issues could present opportunities for law firms to provide counsel on workforce restructuring, layoffs, and related litigation.

Despite the tumult of the Credit Suisse collapse, Swiss lawyers argue that the overall banking and finance market has maintained stability, reflecting the country’s reputation for financial security. This may change, however. ‘It’s still difficult to assess what the implications will be,’ says Gaberthüel. ‘It’s still too early.’

REGULATION AND REFORM: REVVING THE ENGINE FOR 2024

While the UBS-Credit Suisse merger takes centre stage, other notable legislative developments and initiatives are occurring on the sidelines. ‘There are various impending legal and regulatory changes in Switzerland that will impact the work of commercial law firms,’ says Peyer.

The New Federal Act on Data Protection (nFADP) entered into force on 1 September 2023, taking a risk-based approach to the methodology of data protection by companies. Under this new legislation, the processing of personal data of natural persons is included, and not that of legal entities, with the scope of sensitive data extended to include genetic and biometric data. The jurisdictional scope of the act now encompasses data processors and controllers external to Switzerland who receive data from within the country.

Furthermore, the principles of privacy by design and privacy by default have also been introduced, which require companies to reduce the risk of privacy breaches during data processing, as well as to ensure that personal data is only processed for its relevant purpose. Additionally, all data controllers and data processors need to keep records of processing activities (ROPA), bringing Swiss law closer into line with article 30 of the GDPR, which does not apply to Swiss companies outside of operations in the EEA. This record includes the purposes of data processing and recipients of data alongside an array of other requirements for the purpose of transparency and accountability. ‘It is implementing the same GDPR principles in Switzerland,’ says Clemetson. This alignment also enables the free flow of data between Switzerland and the EU to be maintained, ensuring that Swiss companies remain competitive.

Precisely what kind of work the nFADP will generate in 2024 remains to be seen. For Schreiber, it has ‘brought come clarity’ after ‘a very long preparation period’. While international clients were already familiar with European regulations, Schreiber notes that the act has already led to work in ‘advice and continued review’. ‘The main point is that it’s real now.’

Transparency is a key theme here – and the nFADP is not the only development that enhances transparency in the Swiss landscape. The Swiss government has recently initiated consultations regarding the reform of its anti-money laundering framework. This reform proposes the introduction of beneficial ownership reporting requirements for companies and the extension of due diligence rules to consultancy companies. Clemetson states that ‘they want to introduce transparency of UBOs for companies in Switzerland, this is a big project, but this is not yet in force’.

SOLIDIFYING SUSTAINABLE FINANCE IN SWITZERLAND

‘ESG is a topic in Switzerland that is everywhere,’ says Schreiber. ‘The more pressure from the regulatory side, the more the companies are forced to implement ESG measures, whether they want it or not.’ Integrating ESG aspects into investments through vehicles such as green bonds and administering climate-friendly policies are of increasing significance, as well as the management of risks and opportunities around sustainability issues. In parallel with this, the emergence of ESG rating agencies and emphasis on corporate accountability requires businesses to adopt an ESG-aware mindset.

Nicolas Piérard, partner at Borel & Barbey, describes the current ESG landscape in the financial sector: ‘The Swiss Bankers Association has issued new Guidelines, the legal basis of which is the Financial Services Act. Clients will be

FIRMS WITH THE MOST LEGAL 500 RANKED LAWYERS OF ALL LEVELS IN SWITZERLAND

asked about their ESG preferences, and then offered appropriate products and services. The Guidelines also set out obligations for the provision of information, documentation and accountability when establishing the client's ESG preferences. The scope is to make sustainability themes – in other words ESG factors and energy efficiency - an integral part of the advisory sessions with private clients. According to the latest report published by Swiss Sustainable Finance, total sustainable investment volumes climbed to almost CHF 2,000 billion in Switzerland in 2022.

Piérard also highlights that 'Financial service providers are also now obligated to include ESG topics in the training and professional development of their client advisers. For Swiss large, listed companies reporting on environmental issues and specifically CO_2 targets (but also social issues, staff issues, respect for human rights, and the fight against corruption) is already expected and the subject of a first mandatory non-financial report in 2024.'

And more regulation may well be on the horizon. 'There's a big discussion going on with the Federal Department of Finance as to whether there will be regulation or not,' comments Clemetson. 'Federal Council communicated recently that they are giving the industry until February to see whether they need to adapt the self-regulation; if not, they will regulate with an ordinance in Switzerland.'

SANCTIONS ARE HERE TO STAY

The impact of the ongoing Russia-Ukraine war was also a major theme. 'Switzerland cannot issue its own sanctions regime as it is a neutral country,' notes Clemetson. Instead, Swiss regulation has implemented EU sanctions. For Clemetson, this has been effective: 'As sanctions are being respected and implemented in the various companies, it has had an impact the same way it does in the UK, or in the EU.'

Piérard observes that 'national and international sanctions are relevant and challenging for a large number of Swiss companies, especially for the commodities trading companies and for the financial sector. The reputational risk is important for banks considering the increased interest of the media for sanctions-related matters. The State Secretariat for Economic Affairs (SECO) implements the Embargo Act and the separate ordinances based on this act. Due to the substantial increase of sanctions against Russia between February and August 2022, the challenge was to help clients, mainly in the financial services industry, to take immediate steps to implement necessary processes. Information and guidance made available by SECO have proved to be useful in practice to provide updated advice in a quite complex and changing environment.'

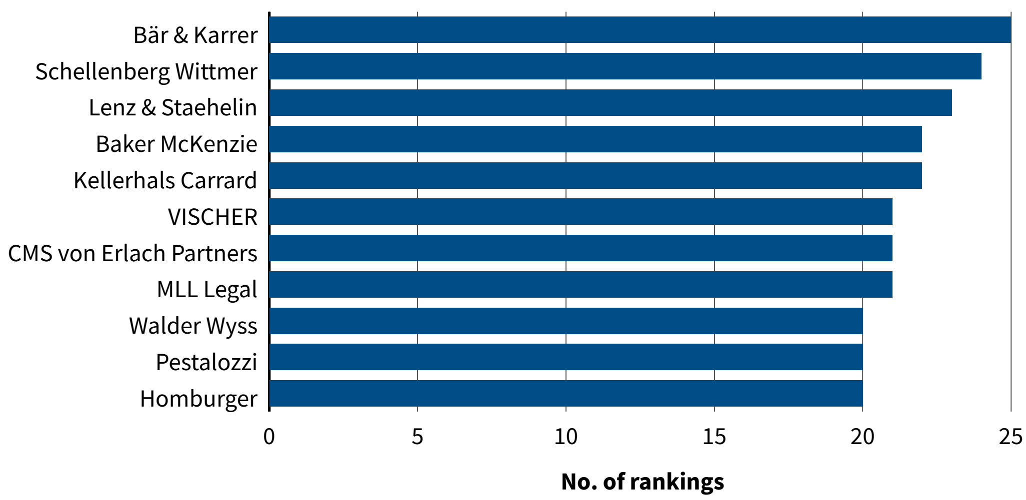
While the outcome of the Russia-Ukraine conflict remains to be determined, these sanctions will remain in place for the foreseeable future. And what consequences may emerge from the Israel-Palestine conflict remains to be seen. This geopolitical turmoil adds a layer of complexity and challenge to the current markets and businesses will need to navigate carefully moving forwards.

OFFICE POLITICS: NAVIGATING EMPLOYMENT TRENDS AND OFFICE DEVELOPMENTS

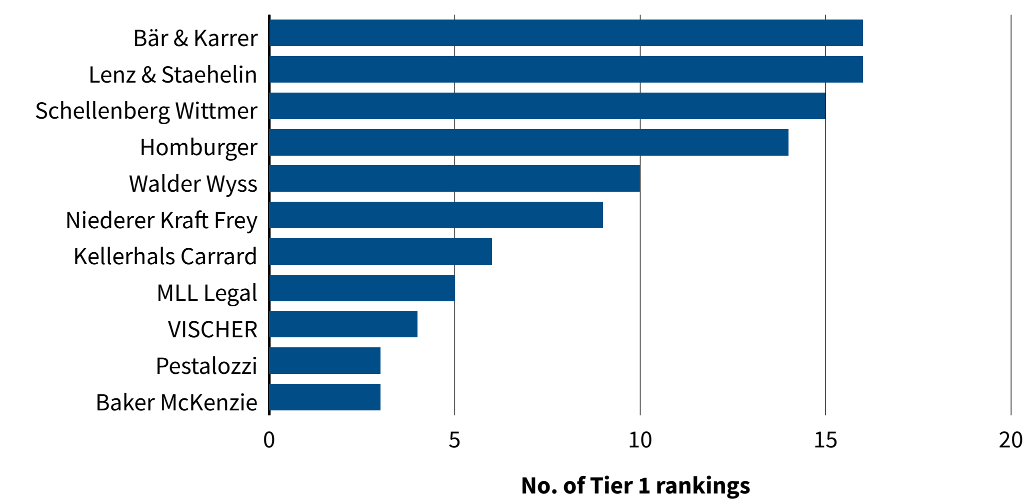
In January 2019, the new Swiss Foreign Nationals and Integration Act (FNIA) entered into force. The underlying rationale of this new act was to facilitate access to the Swiss labour market. It did so by implementing several measures to curb the administrative hurdles faced by workers from third countries seeking work in Switzerland. This was in response to the shortage of qualified personnel in the Swiss market. The cantons are afforded a wide margin of discretion with regards to decision making within the labour market. Despite unemployment falling from 4.3% to 4.2% in Q3 2023, the lack of specialised workers remains a problem. Following this, firms have seen an increase in immigration-related mandates. These trends in the Swiss labour market are affecting not just the work firms are doing but the firms themselves, with many reporting that they have been struggling to find qualified lawyers to build up their teams.

This is not the only factor influencing firms' hiring processes. Gaberthüel mentions that: 'Over the past 10 to 15 years, what has changed considerably is that first contact with future associates starts at university where they come in as summer interns at the end of the bachelor studies before doing their master's degree.' This differs to the traditional hiring processes, whereby firms would find associates, who have already completed both degrees, through first-year position applications. Gaberthüel points to the risk that this process may make it more difficult for smaller firms to find lawyers, as 'there's less capacity to have interns during university and the larger firms have already made this first contact.'

FIRMS WITH THE MOST SWISS LEGAL 500 RANKINGS



FIRMS WITH THE MOST TIER 1 LEGAL 500 RANKINGS IN SWITZERLAND



'If you compare this to London, probably also Frankfurt or New York, later hiring happens very seldomly,' says Gaberthüel. 'What you are more likely to see is senior associates moving from a large firm to a smaller firm or setting up their own shop.' Switzerland has seen an influx of boutiques set up by former big firm employees. Notable examples include tech law focused Arioli Law, corporate firm Advestra, and employment and pension firm Blesi & Papa.

Rather than lateral hiring, Gaberthüel says that Lenz & Staehelin aims to have a team of 'home-grown' lawyers 'who were trainees and have returned to the firm'. And to achieve this, large firms must change their offerings. 'Salaries are just one aspect of being happy and fulfilled in your job,' argues Gaberthüel. 'Things such as interesting, challenging work, flexibility of where you work and when you do your work as well as business developments and personal training are important things to offer.' This approach rests on a quid pro quo: firms require flexibility from lawyers in terms of working longer hours to complete their work, and offer those lawyers the same flexibility in return.

At the same time, firms must balance flexibility against collegiality. Gaberthüel notes that: 'Advocates of having a home office pre-Covid are now more likely to be physically in the office because they've realised that social interaction and getting to absorb the corporate culture is very important, especially for the younger colleagues.' Bär & Karrer has opened smaller offices in Basel and St Moritz, with the aim of, in Schreiber's words, helping people 'feel comfortable in the office and give them opportunities to develop in Switzerland'. Pestalozzi has also followed this approach and opened an office at the lake in Zürich.

The most notable development in this space occurred early in 2023, when NKF opened a new office in Geneva consisting of 27 lawyers, which Schreiber highlights as 'a very important move'. The office was the result of the firm's 'joining forces' with Tavernier Tschanz and a team of lawyers from Python, and grants it access to the French-speaking market. 'The reception from both existing and new clients has been encouraging,' says Peyer. 'The Geneva office is well-positioned for growth.'

'Salaries are just one aspect of being happy and fulfilled in your job.'
Tino Gaberthüel,
Lenz & Staehelin

LOOKING INTO THE CRYSTAL BALL: WHAT TO EXPECT FOR 2024

As interest rates stabilise, many in the market see prospects for higher activity in 2024. The full impact of Credit Suisse's collapse has yet to be fully felt, but few doubt that it will generate work across a range of sectors. Regulatory reform, too, poses both challenges and opportunities. Switzerland revised its corporate law in 2024, shifting to what Clemetson calls 'a more modern way of doing corporate things such as dividends that can be done throughout the year'. The change will impact listed companies, notes Gaberthüel, as they 'had to adapt their articles of incorporation and internal regulations'. Clemetson also points to new fund regulation the Limited Qualified Investor Fund (L-QIF), which 'will probably come into force on 1 March, subject to the Federal Council deciding at the end of January', and upcoming reform of the Financial Market Infrastructure Act, due 'next year'. As businesses adapt to these evolving regulations, the legal sector is poised to play a pivotal role in guiding clients through the intricacies of the updated legal landscape.

'Geopolitical tensions, notably exemplified by the Ukraine conflict, have injected an element of uncertainty,' notes Peyer. 'Legal professionals must remain vigilant about international developments that may impact their clients' interests.' Lawyers also point to technological changes as a key concern for 2024. 'Cyber risk has become a persistent threat, necessitating legal practitioners to implement robust data protection measures and rapid response capabilities,' comments Peyer. 'As generative AI becomes more prevalent, there will be a need to assess its implications for the enforcement of privacy, securities, and antitrust laws.' This will impact firms as well as clients: 'Questions may arise about the reliability and accountability of AI-generated legal documents, and legal professionals may need to adapt to new challenges and opportunities presented by these technologies.'

Still, as the Swiss legal world gears up for 2024, practitioners look forward with anticipation, ready to navigate an environment shaped by regulatory shifts, geopolitical uncertainties, and technological change. In Peyer's words: 'As the Swiss legal market confronts these multifaceted challenges, the resilience and adaptability of legal practitioners become crucial in shaping a forward-looking legal landscape.' LB

LEGAL 500 TIER 1 FIRMS FOR CORPORATE, COMMERCIAL & M&A IN SWITZERLAND

Bär & Karrer
Homburger
Lenz & Staehelin
Niederer Kraft Frey

LEGAL 500 TIER 1 FIRMS FOR LITIGATION IN SWITZERLAND

Bär & Karrer
Homburger
Lenz & Staehelin
Niederer Kraft Frey
Pestalozzi
Schellenberg Wittmer

LEGAL 500 TIER 1 FIRMS FOR BANKING & FINANCE: ZÜRICH

Bär & Karrer
Homburger
Lenz & Staehelin
Niederer Kraft Frey

LEGAL 500 TIER 1 FIRMS FOR BANKING & FINANCE: GENEVA

Lenz & Staehelin
Schellenberg Wittmer