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Tax Considerations in M&A Transactions

Susanne Schreiber and **Cyrill Diefenbacher**[1]

Tax framework and recent changes

General tax framework

Corporate income and capital tax

Legal entities are subject to corporate income tax if they are resident, that is, if they are incorporated or effectively managed in Switzerland. Swiss corporate income tax is levied on the worldwide net income of a legal entity, except for foreign real estate and foreign permanent establishments. Depending on the canton and community of incorporation or management, the effective corporate federal, cantonal and communal income tax rate on net profits before tax varies between approximately 11.22 and 22.8 per cent.

Swiss tax rules foresee the possibility of carrying forward tax losses and using them against future tax profits during a seven-year period.

Furthermore, Swiss tax-resident legal entities are subject to a capital tax levied annually on the taxable equity, which also varies between cantons and communities.

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Withholding tax

A Swiss withholding tax is levied on dividends, including deemed dividends, and certain types of interest deriving from a Swiss source, as well as certain insurance payments paid by Swiss insurance companies. In principle, a flat tax rate of 35 per cent is automatically deducted by the payer (debtor system) and is, if the income is properly reported by the Swiss resident beneficiary, reimbursed through a cash refund or credited against the personal income tax liability. Dividends paid out of qualifying capital contribution reserves are not subject to Swiss withholding tax and are income tax-exempt for Swiss individuals holding the shares as private assets. A recent tax reform introduced a restriction on the capital contribution principle, namely a 50:50 rule stating that distributions out of capital contribution reserves of companies listed in Switzerland will only benefit from the tax-free regime (ie, no withholding tax and no income tax for Swiss resident individuals on capital contribution reserves paid out) if the company makes a distribution out of taxable reserves of at least the same amount. A comparable rule applies in the case of a share buy-back on the second trading line, where at minimum the same amount of capital contribution reserves and other reserves must be used.

Non-Swiss resident income beneficiaries principally suffer the withholding tax as a final burden, unless they are eligible for a partial or full refund based on an applicable Swiss double tax treaty. A recently planned abolition of the withholding tax on interest paid on bonds (to strengthen the debt market in Switzerland) was rejected in a popular vote.

Stamp duties

Issuance stamp duty

The issuance of new share capital as well as any contributions into the reserves of Swiss corporations made by its direct shareholders are subject to issuance stamp duty, which amounts to 1 per cent of the net contribution received by the company. Benefits received from indirect shareholders are not subject to this duty.

The Stamp Duty Act exempts certain transactions from the issuance stamp duty (eg, the first 1 million Swiss francs received as contributions in connection with the issuance of shares or shareholder contributions of up to 10 million

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Swiss francs received in the context of a recapitalisation, to the extent that the contribution eliminates losses in the balance sheet).[2]

Securities transfer tax

Transfers of taxable securities (eg, shares or bonds) against consideration and with the involvement of at least one Swiss securities dealer as party or intermediary may be subject to securities transfer tax of 0.15 per cent (Swiss securities) or 0.3 per cent (foreign securities) on the purchase price. The tax is due by the Swiss securities dealer, which pays half of the tax for itself and another half for the counterparty or client that is neither a Swiss securities dealer nor an 'exempt investor' (exempt investors include inter alia Swiss and foreign investment funds, foreign regulated pension funds and life insurers, and listed foreign companies and their foreign consolidated subsidiaries).

The term 'Swiss securities dealer' comprises not only professional securities traders, banks, brokers, asset managers and the like, but also all Swiss resident corporate entities whose assets consist, as per the last annual balance sheet, of taxable securities in excess of 10 million Swiss francs. Thus a Swiss holding company often qualifies as a Swiss securities dealer and as such becomes generally subject to the tax on taxable transfers and needs to take care of the relevant compliance (regular filings of returns, keeping a securities turnover register).

Exceptions apply inter alia in the case of tax-neutral reorganisations, intercompany transfers of at least 20 per cent shareholdings (10 per cent in case of transfers to subsidiaries) or if the transfer forms part of a replacement investment of a qualifying participation of at least 10 per cent of the share capital of another company.

There are two recent notable high court decisions about securities transfer tax in M&A transactions:

2 A case is currently pending at the Swiss Federal Court, where a taxpayer challenged the Federal Tax Authority's practice requiring a set-off of the contribution against the losses in the balance sheet for the stamp duty exemption.

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- In a decision in February 2021, the Supreme Court ruled that the term intermediation should be interpreted by reference to Swiss private law governing brokerage contracts. Swiss private law recognises two general categories of brokerage: referral brokerage, which is limited to the announcement of investment or contractual opportunities, and negotiation brokerage, which implies an active participation on the part of the intermediary in the conclusion of a contract. The Supreme Court ruled that both types of brokerage contracts may trigger Swiss securities transfer tax. On this basis, the Supreme Court held that Swiss securities transfer tax will be due if the Swiss parent company of either the buyer or the seller in an M&A transaction, qualifying as a securities dealer due to holding significant shareholdings or securities of minimum 10 million Swiss francs book value, is actively involved in the transaction via its officers or internal deal team and will therefore be viewed as a negotiation broker to the transaction. In that respect, neither the existence of a formal contractual relationship between the involved parties nor the payment of a brokerage fee was deemed relevant.
- In a decision in November 2021, the Swiss Federal Administrative Court (SFAC) dealt with the question of whether a company acting as an M&A adviser qualifies as an intermediary within the meaning of the stamp duty law. According to the Federal Act on Stamp Duty, the status of a securities dealer is fulfilled if an intermediary acts as an investment adviser or asset manager and brokers the purchase and sale of taxable securities (including shares). At the same time, this must constitute a substantial part of its business activity.

  A distinction must be made between the 'ordinary' adviser and the investment adviser. An investment adviser qualifies as a securities dealer for the purposes of stamp duty if the investment adviser causally participates in the conclusion of a securities transaction and knowingly causes or contributes to the actual success of the exchange of the concurrent declaration of intent. The activity of the (investment) adviser does not lead to qualification as a securities dealer if the adviser limits itself to activities that merely point out the possibilities of purchases and sales in a non-binding manner, without the adviser being directly involved in the corresponding transactions.

  According to the SFAC, with reference to the Supreme Court decision mentioned above, a qualifying intermediary activity can result from the

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function as a referral broker or negotiation broker. The following activities of the complainant, among others, were used as indications for the qualification as a qualified intermediary:

- searching for suitable buyers for the clients' companies;
- preparation of sales documentation;
- establishing contact with prospective buyers;
- organisation of meetings with interested parties; and
- assisting in the negotiation of the sales contracts.

The court came to the conclusion that an activity as a negotiation broker can be inferred from the above-mentioned indications, as the complainant had a causal influence on the conclusion of the contract. Due to the success fee-based compensation, the successful conclusion of company sales was a central activity of the complainant. Likewise, the majority of the transactions concluded were share deals, so that the relevant activity was essential. According to the SFAC, the interpretation of the term 'investment adviser' is very broad.

Insofar as an M&A adviser qualifies as a securities dealer for the aforementioned reasons, it must register as such with the Swiss Federal Tax Administration, keep a turnover register and, in the case of taxable transactions, pay the turnover tax (0.15 per cent for Swiss or 0.3 per cent for foreign securities) (half of the tax for each party that does not identify itself as a securities dealer or as an exempt party).

Income tax

All periodic or one-time income is generally taxable for a Swiss resident individual (worldwide income, except for foreign real estate, permanent establishments or explicit tax-exempt income). Swiss income tax laws include a very beneficial provision that capital gains from the sale of private assets (other than Swiss real estate) are tax-free (subject to certain limitations to avoid abuse (eg, indirect partial liquidation or transposition, qualification of the individual as commercial securities dealer, etc)).

Dividends received out of qualifying capital contribution reserves are not subject to income tax. The same treatment applies as per a very recent Supreme Court

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decision for the payout of hidden equity contributions by the direct shareholder (to the extent the shareholder can evidence the origin respectively creation of the respective reserves).[3] Dividend payments out of other reserves are taxable, but may benefit from privileged income taxation if the Swiss resident recipient holds a qualifying stake in the distributing participation of at least 10 per cent in capital. The last tax reform slightly increased the taxable dividend inclusion from 60 to 70 per cent at the federal level and to at least 50 per cent at the cantonal level.

Recent changes relevant for financial institutions

The prolongation of the withholding tax exemption on interest paid on 'coco-bonds' or write-off bonds, respectively, until 31 December 2026 keeps these instruments attractive to foreign investors.

From an international perspective, Swiss financial institutions – but also other Swiss resident corporates – are increasingly affected by international transparency initiatives, such as the automatic exchange of information (first exchange of collected information by Switzerland in September 2018), the US Foreign Account Tax Compliance Act or the spontaneous exchange of tax rulings (first rulings exchanged by Switzerland in May 2018). Also, certain types of structured products (eg, securities lending) are under increased scrutiny by the Swiss Federal Tax Authority with regard to the refund of Swiss withholding tax, as the beneficial ownership is often challenged. A number of court cases are currently pending in Switzerland in this regard.

General tax considerations for Swiss M&A transactions

Taxable acquisitions and dispositions: asset deal versus share deal

In the case of taxable acquisitions or dispositions, Swiss resident buyers and sellers often have contrary interests. A (Swiss) buyer often prefers an asset deal, whereas a (Swiss) seller typically prefers a share deal, owing to the facts outlined below.

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3 Supreme Court decision 9C_678/2021 dated 17 March 2023.

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Asset deal

Buyers generally prefer an asset deal to limit their risks from the acquired business, to achieve a step-up in tax basis and to have the possibility to offset financing expenses with operating income. Compared to a sale of shares, capital gains resulting from sales of assets are generally subject to full corporate income taxes (no participation relief applicable) at the level of the selling company. The subsequent distribution of such proceeds to the shareholders constitutes a generally taxable dividend (with privileged taxation of qualifying dividends for Swiss individuals and participation relief for Swiss corporate shareholders). Against this background, sellers generally prefer a share deal, where the capital gains are either generally tax-exempt for Swiss individuals or can benefit from participation relief (see below).

An asset deal is often considered when only part of an entity (eg, one business division) is to be sold. The asset deal gives the buyer the possibility to acquire only the required assets and to acquire them with the right acquiring entity (eg, to centralise IP directly in one entity). Also in such cases, it may be possible for the seller to realise a share deal by way of a tax-neutral demerger (see comments below) of the business (or part of it) to be sold to a new Swiss company and subsequent sale of the shares in this Swiss company.

If single assets are acquired, the purchase price needs to be allocated to the different assets. Based on accounting provisions, the acquired assets will be stepped up to their fair market value, which is relevant for capital gains tax purposes for the buyer in the case of a future sale. This also allows the buyer to depreciate or amortise such assets from their new basis for accounting and tax purposes. Any tax-loss carry-forwards of the selling entity are not transferred to the buyer but remain with the selling entity (and may be set off against the capital gains realised upon the asset deal).

Should the purchase price exceed the fair market value of the assets acquired in the purchase of a business, the exceeding part of the purchase price may be allocated to goodwill. Goodwill generally is to be depreciated in the Swiss financial accounts of a Swiss resident buyer, with tax regulations allowing either a 40 per cent annual depreciation on a declining balance basis over five years or 20 per cent annual on a straight-line basis (general depreciation options for intangibles).

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Generally, no historic tax liabilities are assumed by a buyer, with the exception of a joint and several liability with the seller in certain cases (if seller does not carry on a business and deregisters for VAT purposes) or VAT succession (if a (part of) a business unit is transferred to a related party) or joint liability for social security contributions in case employees are transferred.

Among the downsides of asset deals is the transfer of contracts with suppliers, service providers, etc with the consent of the counterparty who may use this to renegotiate existing agreements. Furthermore, an asset-by-asset deal may require more (legal) work and set-up of individual acquisition entities in the case of cross-border transactions. Last, the risk of a fully taxable capital gain for the seller tends to increase the purchase price for the buyer. The tax benefit for the buyer arising from the higher amortisation and set-off of financing costs in the acquisition entity with income from the acquired business may outweigh this. If real estate is sold, Swiss real estate gains tax respectively property transfer tax may be applicable. These taxes vary from canton to canton and, in cantons applying the monistic system, real estate capital gains tax instead of corporate income tax applies, which may be significantly higher. Should taxable securities be sold as part of the assets, securities transfer tax needs to be considered as well, if a Swiss securities dealer is involved.

From a VAT perspective, the transfer of assets generally is subject to 7.7 (from 1 January 2024, 8.1) or 2.5 (from 1 January 2024, 2.6) per cent VAT, but often the mandatory or voluntary notification procedure applies when a business unit is transferred between Swiss VAT-registered persons.

Share deal

In practice, corporate sellers generally prefer a share deal owing to the applicability of the participation relief (federal and cantonal or communal level) on the capital gain, provided that shares of at least 10 per cent in another corporation, which have been held by the seller for at least one year, are sold. Swiss resident individuals selling shares as private assets generally benefit from a tax-free capital gain on the sale of shares (with different limitations).

At the buyer level, the purchase price is fully attributable to the acquired shares, which cannot be depreciated in a Swiss acquisition company unless

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their fair market value declines. Goodwill cannot be separately capitalised in the balance sheet.

A reduction in value (impairment) is tax-deductible (eg, reduces net profit) for the Swiss corporate buyer. Consequently, a subsequent increase in value is subject to corporate income taxation. A revaluation of a qualifying participation that has been depreciated (ie, a participation of at least 10 per cent) has to be made for tax purposes if the impairment is no longer justified (claw-back provision).

Historic tax risks remain with the Swiss target entity and will crystallise at this company's level. Likewise, any deferred tax liability on the difference between market and tax book values of assets remains with the acquired Swiss target and is usually reflected in the purchase price. Tax loss carry-forwards of the acquired company generally remain available for future use (subject to certain limitations due to deemed tax abuse, eg, the sale of a factually liquidated company). However, the tax-loss carry-forward is generally not confirmed in the context of tax assessments by the tax authorities, which may make a respective valuation difficult.

Real estate gains tax (generally to be paid by the seller) or property transfer tax, respectively, may be triggered if a (majority) shareholding in a real estate company is sold, as this qualifies in most cantons or communities as economic change of ownership of the underlying Swiss real estate.

If a Swiss securities dealer is involved in a share deal (as a party or intermediary), securities transfer tax may be triggered.

In the case of a share deal, no VAT applies, since the transfer of shares is exempt from VAT. An often-incurred withholding tax issue a buyer should consider is the 'old reserves theory' as established by the Swiss Federal Tax Authority. It applies to retained earnings subject to a potential non-refundable withholding tax on dividends, for example, owing to a non-Swiss seller or selling entity that does not benefit from a full withholding tax refund under an applicable double tax treaty. If due to a change of ownership the non-refundable withholding tax would be reduced to a lower rate than pre-deal, Swiss tax authorities may qualify the distributable reserves as earmarked at the higher (pre-deal) withholding tax rate with the consequence that future dividend distributions of the 'tainted' reserves are subject to non-refundable withholding tax up

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to this higher rate. The amount subject to the higher withholding tax rate is usually the lower of retained earnings of the Swiss target company (distributable reserves for corporate law purposes, subject to withholding tax) and non-operating assets (not needed for the conduct of the business, at group level) at the time of change of ownership. There are also further anti-abuse theories with respect to past non-refundable withholding tax in the case, for example, of a partial or full liquidation of the Swiss target after an acquisition, which should be considered by a buyer. A buyer should typically consider the limitations due to a potential extended international transposition as another withholding tax topic (see below).

Swiss resident individual sellers that benefit from a tax-free capital gain on the sale of privately held shares in a Swiss or foreign entity may face retroactive taxation in the case of an indirect partial liquidation. If the target has distributable reserves (for corporate law purposes, subject to withholding tax) and non-business-related assets in the group that are distributed by the buyer within five years after the sale, this amount is taxable as dividend for the seller. Thus, the seller generally includes a share purchase agreement (SPA) indemnity clause, under which the buyer needs to indemnify against a potential indirect partial liquidation triggered (see comments below) during a five-year blocking period.

The downsides of a share purchase generally are the lack of a tax-efficient amortisation of the purchase price as well as the reduced availability of debt pushdown options on the level of the Swiss operating company (see 'Acquisition financing').

Tax-free acquisitions and dispositions

In contrast to taxable acquisitions and dispositions, there are various types of tax-free acquisitions and dispositions of domestic entities, which are tax-neutral on the basis that the relevant conditions are fulfilled, for instance:

- merger;
- demerger;
- conversion; and
- transfer of assets within a group.

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Swiss tax treatment of such reorganisations follows a 'substance over form' approach, that is, generally considers the end result (independent of how it was structured from a legal perspective).

As a general condition for income tax neutrality, a continued tax liability in Switzerland and a transfer at the (tax) book values is required. Apart from this, Swiss tax legislation and the applicable circular published by the Swiss Federal Tax Authority (which has recently been updated) state the specific conditions to be fulfilled for each type of reorganisation.

Tax-neutral reorganisation as pre-transaction step

As mentioned, sellers typically prefer a share deal. In order to shape the target to its ideal form, pre-deal carve-in or carve-out transactions are quite common. Similarly, conversions of partnerships or sole proprietorships into corporations before a sale are often seen but need to comply with a five-year holding period before a sale of the shares in order to qualify as tax-neutral. Capital increases without repayment to the former partner generally do not result in a breach of this holding period.

Pre-deal carve-outs are usually structured as a tax-neutral demerger, for example, with a spin-off of the business unit to be sold or to be kept to a new Swiss company. Such demerger mainly requires that a business unit (or part of it) remains with the transferring company and a business unit (or part of it) is transferred to the new Swiss company and continued. However, there is no holding period (ie, shares in the entity with the spun-off business can be sold immediately after the demerger). The requirements to qualify for a business unit or partial business unit are as follows:

- the company performs services in the market or towards affiliated entities;
- the company has its own personnel; and
- the personnel expenses are appropriate in proportion to the revenues.

In the case of a demerger of a holding company or a mixed holding company, the Swiss Federal Tax Authority's practice requires for the qualification of a (partial) business unit that:

- the investments in subsidiaries concern predominantly active companies; and

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- include at least two qualifying participations (of at least 20 per cent or warranting the exercise of a controlling influence by other means) in such companies.

With the Federal Court Decision of 11 March 2019 (2C_34/2018), the court deviated from this practice and considered it sufficient for a split-up of a holding company if the remaining and the transferred part consist of only one operationally active subsidiary, each, as this was – based on the transparency theory applied – equal to the spin-off of the underlying operational business itself. The Swiss Federal Tax Authority has amended its practice in the newly revised circular relating to the tax treatment of restructurings accordingly. This practice brings new possibilities for pre-deal structuring for mixed holding companies, that is, it is sufficient for tax neutrality if one participation of over 50 per cent in an operationally active company is transferred, constituting a business unit.

Attention should be paid to the fact that tax-neutral intragroup transfers of (partial) business units or operating assets at (tax) book value lead to a five-year blocking period over the asset transferred and the shares in the transferring and receiving entities. If breached, the transferred hidden reserves are retroactively taxed. In the case of a contemplated asset or share deal, this is an important aspect that should be reviewed prior to the transaction by the seller or might also be something that should be reviewed by an interested buyer as it may restrict possibilities for post-transaction integration.

More restrictive withholding tax practice of the Swiss Federal Tax Authority

The Swiss Federal Tax Authority's interpretation of anti-abuse limitations has become more restrictive in recent years; this can inter alia be noticed in Swiss M&A transactions in the following areas.

In the context of a tax-neutral quasi-merger (ie, share-for-share transfer with the contribution of a participation that is controlled by the transferor after the contribution against the issuance of new shares), new qualifying capital contribution reserves may be created (which are not subject to withholding tax upon distribution and not subject to income tax at the level of Swiss resident individuals holding the shares as private assets; certain limitations now apply for Swiss listed companies – see above). The Swiss Federal Tax Authority has,

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against this background, established a practice (based on an old court case) where such capital contribution reserves created will retroactively be denied if the contributed participation is absorbed or liquidated within a five-year period upon its contribution (ie, treatment like a direct sidestream merger). To the extent that such capital contribution reserves have been distributed in the past, this could lead to income and adverse withholding tax consequences. The practice also applies in case of contributions of shares of minimum 10 per cent (with or without capital increase) between corporate entities.

The second area is the above-mentioned old reserves practice where a latent non-refundable withholding tax burden is acquired. Cases of (partial) liquidation on behalf of the seller, where the acquired Swiss target is either merged or assets or participations are transferred out by the Swiss target, are subject to more scrutiny, when the Swiss target was held, for example, by foreign shareholders or private equity funds directly. This practice ((partial) liquidation by proxy) is relevant for the integration plans of a buyer since the withholding tax basis is much higher than under the old reserves practice: the hidden reserves of the Swiss target in the partial liquidation are also subject to the previous non-refundable withholding tax rate in this case.

The Swiss Federal Tax Authority's interpretation of anti-abuse limitations has also become more restrictive in cross-border constellations in recent years. Owing to an 'international transposition', the refund of Swiss withholding tax will be denied based on the practice of the Swiss Federal Tax Authority if a person not entitled to a full withholding tax refund transfers the shares in a Swiss company to a Swiss company controlled by the same person by way of sale against a loan or against share capital increase of the receiving entity respectively a contribution into the capital contribution reserves of the receiving entity. This practice has recently been extended and is also applied to certain acquisitions by Swiss acquisition companies, which are financed via shareholder loans or capital contribution reserves (an extended international transposition) even if the seller benefits from a full withholding tax refund. The tightened-up practice is especially relevant for investments by private equity funds via Swiss acquisition entities. Economic reasons for the Swiss acquisition company may help and should be confirmed in an advance tax ruling.

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Acquisition financing

Swiss acquisitions are often structured with a non-Swiss acquisition or financing company. Often, a Luxembourg-resident company is used, which is leveraged with required bank financing for the acquisition (often guaranteed by a subsidiary with upstream guarantees or collateral; a Swiss subsidiary can provide such securities or guarantees up to the amount of its distributable equity).

One reason for this is mainly better conditions for acquisition financing: Switzerland still levies a 1 per cent issuance stamp duty on equity contributions by direct shareholders and lending to a Swiss company needs to comply with the Swiss 10/20 Non-Bank-Rules (see below), in order to avoid adverse withholding tax consequences on the interest paid. Also, there is no tax consolidation in Switzerland, and possibilities for a debt push-down in case of a share deal are generally limited. A set-off of interest expenses on the acquisition financing may be possible if the deal can be structured with a purchase by a Swiss resident operational company, which may use the expenses to be set off against its operational, taxable income.

Should this not be possible, there may still be structuring options to achieve a debt push-down, for example, the distribution of debt-financed dividends (leveraged dividends), whereby the target company resolves a dividend that is not directly settled in cash but left outstanding as an interest-bearing downstream loan by the shareholder or settled by the assumption of external acquisition debt and the allocation of interest expenses to the target company. In addition, debt financed intergroup acquisitions, such as the acquisition of shares or assets from group companies by the Swiss target against an interest-bearing loan, may be possible.

For intragroup loans, the Swiss thin capitalisation rules must be considered, since related-party debt exceeding the maximum permitted debt for tax purposes is qualified as hidden equity, and interest on such hidden equity is not tax-deductible but considered as deemed dividend subject to withholding tax. For calculation of the maximum debt capacity, a Federal Tax Authority circular sets out the maximum percentage amount of debt that may be taken out per asset category (eg, cash positions can be leveraged by 100 per cent, participations by 70 per cent with debt). The basis for the calculation are the

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fair market values of the different assets in the balance sheet. The Federal Tax Authority annually publishes safe haven maximum and minimum interest rates for intercompany loans. In response to the current interest market, the Federal Tax Authority, for the first time since 2015, has significantly increased the safe haven rates for the tax period 2023. Furthermore, in each case, the possibility of using a higher or lower interest rate remains open, if the respective arm's-length character can be evidenced.

Landmark transactions

UBS acquires Credit Suisse

On 19 March 2023, following discussions initiated jointly by the Swiss Federal Department of Finance, the Swiss Financial Market Supervisory Authority FINMA and the Swiss National Bank, UBS entered into an all-share transaction for the acquisition of 100 per cent of Credit Suisse for approximately 3 billion Swiss francs. Credit Suisse shareholders will receive one UBS share for every 22.48 Credit Suisse shares. In order to facilitate a timely implementation of the transaction, the Swiss Federal Council decided that it would not be subject to shareholder approval by enacting an emergency ordinance to that effect.

Spin-off of Accelleron from ABB

On 3 October 2022, ABB successfully completed the spin-off of Accelleron Industries, which operates ABB's former turbocharger division. Accelleron's shares were admitted to start trading on SIX Swiss Exchange in Zurich, under the ticker symbol ACLN effective as of 3 October 2022. The listing followed the approval by ABB shareholders for the spin-off at ABB's extraordinary general shareholders meeting on 7 September 2022. ABB distributed the Accelleron shares on a pro rata basis, as a dividend in kind, with one Accelleron share for every 20 ABB shares held.

Spin-off of medmix AG from Sulzer AG

On 20 September 2021, at Sulzer's general shareholders' meeting, the shareholders approved the spin-off of the division Applicator Systems. This was spun

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off into the newly founded medmix AG, which was listed on the SIX Exchange in Zurich for the first time on 30 September 2021. The issued share capital of the company comprised 34,262,370 shares. In addition, 7 million newly issued shares were placed as of 1 October 2021. The issue price was 45 Swiss francs per share and the placement volume 315 million Swiss francs.

General tax considerations for cross-border M&A transactions

An inbound, immigration transaction can be structured in different ways, as follows.

Immigration merger

An immigration merger (inbound) basically has to respect the domestic merger law provisions; thus, for an inbound merger, the same provisions apply as for a Swiss domestic merger. Consequently, an inbound merger can be carried out tax-free if the conditions for a Swiss domestic merger are met. The main question is whether the foreign legislation permits an immigration merger and under which conditions. Since 1 January 2020 there has been a legal basis for hidden reserves (including goodwill) of a foreign company merged into a Swiss company (excluding any hidden reserves on qualifying participations) to be stepped up on a tax-neutral basis to market values for Swiss corporate income and capital tax purposes, irrespective of the book values for accounting purposes. However, there is no step up for withholding tax purposes. The transferred goodwill can be depreciated for tax purposes within 10 years. Thus we expect this option to become more popular. The same rules apply in the case of a change of domicile or shift of the place of effective management or the transfer of relevant functions to Switzerland.

Quasi-merger

A very popular alternative to an immigration merger or a transfer of seat of a foreign company to Switzerland is a cross-border quasi-merger. A quasi-merger is a share-for-share exchange between an acquiring and a target company, whereby the shareholders of the target company receive at least 50 per cent of the value of their compensation in the form of new shares of the

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acquiring company, and the target company legally survives as a subsidiary of the acquiring company, whereby the acquiring company must control at least 50 per cent of the voting rights in the target company after the transaction.

Such qualifying quasi-mergers with Swiss and foreign target companies are principally tax-neutral for the companies involved. Foreign-resident shareholders of the foreign target company are not taxed in Switzerland. Swiss resident private individual shareholders of the foreign target company generally realise a tax-neutral capital gain (or loss) on the entire quasi-merger consideration (an exception applies, however, in the case of a transposition). The immigration quasi-merger can typically be done tax-neutrally at fair market value and the share premium at the level of the Swiss acquiring company generally qualifies as capital contribution reserves, which can be distributed without withholding tax. The limitations introduced for Swiss-listed entities with the last tax reform do not apply for distributions out of foreign capital contribution reserves that are or were created, for instance, by quasi-mergers with contributions of non-Swiss participations. Certain limitations may need to be considered (see 'More restrictive withholding tax practice'), in the case of mergers or liquidations of the Swiss target within five years of a quasi-merger.

Landmark transactions

Most cross-border transactions (into Switzerland) are structured as quasi-mergers (takeover by a Swiss entity). From a tax perspective, such quasi-mergers resulted in significant capital contribution reserves, for example, in the case of the combination of LafargeHolcim under a common Swiss holding company. Limitations for the creation of capital contribution reserves may apply owing to the extended international transposition practice in the case of a Swiss target

Royal DSM NV merges with Firmenich SA

On 31 May 2022, DSM and Firmenich announced a cross-border merger of equals, valued at US$20.7 billion, which united two iconic companies into a leading creation and innovation partner in nutrition, beauty and well-being.

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The new parent company is located in Switzerland and listed on Euronext Amsterdam.

Combination of Dufry and Autogrill SpA

On 3 February 2023, Dufry and Edizione SpA successfully closed the transfer of the 50.3 per cent stake, valued at US$3.9 billion, in Autogrill SpA held by Edizione (through a wholly owned subsidiary) to Dufry. In consideration for this participation, Edizione (through its wholly owned subsidiary) received mandatory convertible non-interest-bearing notes. Through the closing, Edizione exercised its conversion rights and received approximately 30.7 million Dufry shares (about a 25 per cent stake). Edizione became the largest shareholder of Dufry. For the remaining Autogrill shares, Dufry launched a mandatory public exchange offer.

Key tax issues in M&A transactions – tax practice points for M&A dealmakers

In the case of an asset or share deal, the Swiss tax-related objectives of a Swiss seller and buyer are often, as outlined above, diametrically different. To find the most tax-efficient deal structure is often subject to longer negotiations. However, Swiss individuals as sellers will usually insist on share deals and it is market practice that a buyer has to accept an indirect partial liquidation indemnity obligation under the SPA.

Depending on the structure of the deal, the focus of the tax due diligence will be different: in the case of a share deal, a buyer generally inherits all historic tax risks of the target, but in the case of an asset deal, certain taxes foresee joint and several liability of the buyer with the seller, and acquired real estate can be encumbered with a pledge for past real estate taxes (without the necessity of registering such pledge in the real estate register).

From a buyer's perspective, there are certain potential pitfalls that should be considered with regard to acquisition financing; for example:

- the issuance stamp duty on direct equity financing into a Swiss company, which can be mitigated in the case of grandparent contributions or

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by making use of exemptions for reorganisations (eg, certain share contributions);

- limited interest deductibility for intragroup financing owing to thin capitalisation limitations and safe-haven interest rates to be considered;
- Swiss 10/20 Non-Bank-Rules to avoid 35 per cent Swiss interest withholding tax of a Swiss borrower, which means that the Swiss borrower may not have more than 10 non-banks as lenders under one facility with the same terms and not more than 20 non-banks as lenders under different terms; Swiss interest withholding tax can also be triggered in the case of a foreign borrower with downstream guarantees by a Swiss parent entity and a detrimental use of the funds in Switzerland or, in certain cases, also upstream or cross-stream guarantees or securities by Swiss entities. The practice with respect to detrimental downstream guarantees by Swiss parents has been relaxed by the Swiss Federal Tax Authority in spring 2019. Thus the acquisition financing agreements require specific language to cover this topic and are often subject to Swiss tax ruling confirmations;
- no tax consolidation for income tax purposes and thus limited options for a debt push-down; this should be reflected when modelling the purchase price or tax benefits of the financing; and
- repatriation of funds from the Swiss target to serve the external debt without triggering indirect partial liquidation limitations (in the case of Swiss individual sellers, eg, by arm's-length upstream loans) or dividend withholding tax leakage; non-refundable withholding tax on dividends may apply either due to the situation of the seller (eg, old reserves practice) or if the acquisition company is not entitled to a full withholding tax refund under an applicable double-tax treaty. The withholding tax reduction under a double tax treaty especially requires, apart from beneficial ownership and fulfilment of the general conditions (shareholding quota, minimum holding period), that the acquisition company has sufficient substance from the perspective of the Swiss Federal Tax Authority. The withholding tax exemption under a double tax treaty has to be applied for in order to benefit from a reduction at source and the Swiss Federal Tax Authority usually requests detailed information about the rationale and set-up of the acquisition company. Further, withholding tax on distributions by a Swiss target to a Swiss acquisition company set up by a buyer who is not entitled to a full withholding tax refund (eg, a private equity fund) may not be fully

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refunded if the acquisition company shows more share capital or capital contribution reserves than the target (extended international transposition). This does not apply if there are economic reasons for the Swiss acquisition company, for example, due to a significant external financing or reinvestment by Swiss or full refund entitled shareholders.

With a share deal, Swiss withholding tax aspects in general should not be neglected. The Swiss concepts of 'old reserves', respectively '(partial) liquidation by proxy', are a speciality of Swiss tax practice of which a buyer is often unaware. In order to assess potential exposure in this regard, which may give the possibility to negotiate a lower purchase price, a buyer also needs to look at the past shareholder history (ie, not only the situation as per signing of the transaction).

Other relevant aspects for a buyer in a tax due diligence are in particular:

- existing blocking periods, for instance, from past reorganisations that need to be considered in the context of potential post-closing integration work;
- deferred tax liabilities on hidden reserves that are permitted from a Swiss tax perspective, for example, inventory allowance, lump-sum allowance for bad debt;
- deferred tax liabilities arising from past depreciation of shares in subsidiaries. Such depreciation may need to be reversed after the transaction in case higher values can be justified (eg, based on the purchase price);
- earn-out arrangements for sellers continuing to work for the target or non-compete agreements may partly qualify as taxable income for the seller and lead to social security contribution consequences in the target company; and
- the shares acquired could in general qualify as employee shares and accordingly, under certain circumstances, lead to taxable salary for the sellers upon the sale and trigger social security contribution consequences in the target company.

A very positive aspect of Switzerland as a tax jurisdiction is the easy access to tax authorities and the broad possibilities to obtain advance tax ruling confirmations within a reasonable time frame. This is particularly important in transactions to obtain certainty, for example, whether the requirements of a tax-neutral reorganisation are met, whether certain upstream loans or distributions do not

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trigger the indirect partial liquidation taxation or whether certain upstream guarantees by Swiss entities do not trigger interest withholding tax for loans to foreign borrowers. Transactional tax rulings with a unilateral context are generally not subject to the international ruling exchange. Tax rulings that were obtained by the Swiss target may also reduce tax risks for the buyer. For any tax rulings, it is important to note that they are only binding to the extent the relevant facts are fully disclosed and the described transaction is actually implemented as described.

Swiss securities transfer tax aspects in share deals should not be forgotten. Financial institutions in Switzerland are used to this tax, but it should be noted that each corporation in Switzerland may qualify as a Swiss securities dealer and as such become subject to securities transfer tax, if it acts as a party to a deal or is involved as an intermediary. The tax currently applies both to the transfer of Swiss or foreign shares (or other securities and bonds). The Swiss Federal Court recently tightened the requirements that a securities dealer can rely on the fact that the other party also qualifies as a securities dealer only if the evidence is provided within three days. Otherwise, the securities dealer has to pay both parts of the securities transfer tax. Also, potential securities transfer tax implications for an M&A adviser who can, as confirmed in a recent court case, qualify as a Swiss securities dealer, act as intermediary in transactions and thus become subject to securities transfer tax, should be considered. Similarly, the role of a potential Swiss resident parent holding company in the context of a transaction should be carefully reviewed, as it often qualifies as a Swiss securities dealer and could also trigger a securities transfer tax on the transaction if it acts as intermediary in the sense of Swiss stamp duty law (see above).

The impact of potential future developments at the international level also needs to be monitored in the context of M&A transactions, since assumptions for the valuation of the estimated tax burden may be affected. A current hot topic is the OECD's Pillar Two project, with which a global minimum taxation of 15 per cent must be achieved for multinational groups with an annual turnover above €750 million. For companies in Switzerland that are part of a multinational group exceeding this threshold and have an effective tax burden below 15 per cent according to the Pillar Two rules, a supplementary tax must be levied by the responsible tax authority to cover this shortfall. The

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implementation in local law will be via a temporary ordinance that can come into force on 1 January 2024. The law will be enacted subsequently in the conventional manner. Parliament agreed on the constitutional article on the OECD minimum tax in December 2022 and the Swiss electorate approved the bill in a vote in June 2023. The effects need to be reflected in M&A transactions where, for example, an international group acquires a target that could have a detrimental or beneficial impact on its Pillar Two position. Further, the consolidation of joint venture entities for Pillar Two purposes must be considered in M&A situations in pricing or contractual terms, since negative tax implications and costs could arise that are not in line with the economic allocation of profits.

Susanne Schreiber
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Susanne Schreiber is senior partner and chair of the board of directors at Bär & Karrer AG and co-heads the tax department.

Susanne Schreiber has extensive experience in international corporate tax matters, in particular in domestic and cross-border M&A transactions and reorganisations. She advises on the tax aspects of financing and acquisition structuring, as well as capital market transactions and management incentive schemes.

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Furthermore, Susanne Schreiber regularly supports Swiss multinationals in their tax planning work, including tax advice on restructurings, financing and tax litigation work.

Susanne Schreiber is a German tax adviser as well as a Swiss-certified tax expert and attorney-at-law. Before joining Bär & Karrer she worked for an

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Cyrill Diefenbacher regularly speaks in the area of M&A tax or corporate tax law and publishes specialist articles in the field of taxes.

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