Practice
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SWISS M&A

Third Edition

Contributing Editors
Ueli Studer, Kelsang Tsün and Joanna Long

LEXOLOGY
Getting the Deal Through

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Introduction

Ueli Studer, Kelsang Tsün and Joanna Long[1]

This Practice Guide – *Swiss M&A* – published by Lexology Getting the Deal Through in its third edition, provides a topical and expert analysis of the legal framework, opportunities, challenges and risks that arise in connection with Swiss M&A transactions. Each chapter deals with a key topic of relevance in Swiss M&A transactions, exploring trends, legislative developments – of which there are several, including the eagerly awaited Swiss Corporate Law Reform – and fundamental issues affecting strategic decision-making in Swiss M&A, not least in the highly regulated financial services industry, which is of particular interest in Switzerland as one of the leading financial centres globally. As such, the Practice Guide *Swiss M&A* aims to serve as a comprehensive manual for industry practitioners when dealing with transactions with a Swiss dimension answering key questions around Swiss M&A.

We, from the UBS Group corporate legal team, have assisted in the selection of the chapters for this guide and in bringing together respective authors known for their expertise and vast experience in M&A and related fields of law. We are delighted that three new chapters have been added to the repertoire since last year, bringing the total number of articles in the guide to 21: 'Shareholder Activism in Switzerland', 'Special Purpose Acquisition Companies' and 'Real Estate Real Estate Transactions with a Special Focus on Hotel Acquisitions', each having been chosen for its relevance for either the Swiss M&A market or considering UBS's own recent experiences, as further mentioned below. We are pleased once again to have been able to attract this selection of experts from renowned Swiss law firms. We have worked with many of these authors or their law firms in the past and can look back on a track record of successful collaborations, particularly in the M&A area.

The UBS Group corporate legal team, with its dedicated lawyers, advises and supports UBS Group and its business divisions on internal and external corporate transactions and reorganisations, in close coordination with divisionally aligned Swiss legal teams, all working together under the umbrella of UBS's Group Legal area. Since 2014, UBS has undertaken a series of internal transactions, changing its legal structure to improve the resolvability of the group in response to

1 Ueli Studer, Kelsang Tsün and Joanna Long are in-house lawyers at UBS.

'Too Big to Fail' requirements. In December 2014, UBS Group AG became the holding company of the group. In 2015, UBS AG transferred its personal and corporate banking and wealth management business booked in Switzerland to the newly established UBS Switzerland AG. In 2016, UBS Americas Holding LLC was designated as UBS's intermediate holding company for the group's US subsidiaries, and European wealth management subsidiaries were merged into UBS Europe SE, the group's Germany-headquartered European bank subsidiary. In 2017, the shared services functions in Switzerland and the UK were transferred from UBS AG to UBS Business Solutions AG. In 2019, UBS Limited, the group's UK-headquartered bank subsidiary, was merged into UBS Europe SE in response to the Brexit vote.

Recent examples of external M&A transactions of UBS during the past 12 months include:

- UBS's agreement to acquire Wealthfront, a US industry-leading, automated wealth management provider serving the next generation of investors;
- the agreement to sell UBS Swiss Financial Advisers AG, the Swiss-based SEC-registered investment adviser and FINMA-licensed securities firm for US clients seeking portfolio diversification in Switzerland, to Vontobel;
- the sale of UBS's remaining minority stake in the B2B fund distribution platform Clearstream Fund Centre to Deutsche Börse;
- UBS AG's sale of Congress Hotel Seepark, Thun, and the related operating company to Artisa;
- the completion of the sale of UBS Europe SE's Austrian wealth management business to LGT;
- UBS Europe SE's agreement to sell its domestic wealth management business in Spain to Singular Bank;
- the purchase by UBS of the remaining 40 per cent share of Brazilian-based Consenso Investimentos;
- UBS Asset Management's agreement to sell its investment in its Japanese real estate joint venture Mitsubishi Corp-UBS Realty Inc to KKR & Co Inc; and
- UBS's increasing its stake in UBS Securities China from 51 to 67 per cent.

When advising UBS Group and its business divisions on internal and external corporate transactions, reorganisations and, in particular, M&A transactions, we are naturally faced with many of the legal issues and challenges that are described in this guide, particularly those that are pertinent to the highly regulated financial services industry. The UBS Group includes various regulated legal entities holding a licence from the Swiss Financial Market Supervisory Authority (FINMA) or a foreign regulator. An M&A transaction involving one or several regulated entities may therefore trigger regulatory consent or notification requirements as described in the chapter 'Financial Market Regulation'. Moreover, UBS as a financial group is subject to consolidated supervision by FINMA. Therefore, even if an M&A transaction does not directly trigger a notification or consent requirement, a careful assessment and, as the case may be, a courtesy discussion might be held with FINMA on the potential regulatory implications of the transaction on UBS as a whole. For buy-side transactions and joint-venture arrangements this may also involve discussions on how an acquired business or entity can be embedded into UBS's policy and risk control framework implementing the legal and regulatory requirements applicable to the UBS Group. Additionally, as described in the chapter 'Financial Market Regulation', banking secrecy protected by Swiss criminal law may add an additional layer of complexity if the disclosure of bank client information is required within a transaction. This comes in addition to data protection issues, such as restrictions on cross-border transfers of client data, arising within M&A transactions as set forth in the chapter 'Data Privacy and Cybersecurity', which chapter notably comments on the latest revisions of the Federal Data Protection Act to bring the Swiss act in line with its EU counterpart, the GDPR. Further, the 'Merger Control' chapter gives key insights into the Swiss merger control framework, which is influenced by the EU merger control model and due for revision in 2023.

The business of UBS is divided into four business divisions – global wealth management, personal and corporate banking, asset management and the investment bank – that operate through various group entities. Because of the structural complexity of the UBS Group and particularly the shared services functions of the group, which are consolidated into separate service companies for certain of our jurisdictions, our sell-side or joint-venture M&A transactions sometimes include important pre-closing carve-out considerations, ranging from the separation of functions and assets such as employees, IT and IP to offering transitional services for a limited period post-deal completion, as described in 'Carve-Out Transactions'. On the other hand, the chapter 'Post-Merger Integration' explains the challenges of integrating the newly acquired business into the existing structure and to realise acquisition value. The chapters 'Key Intellectual Property Issues in M&A Transactions' and 'Labour and Employment' address the complexities that can arise as regards intellectual property, particularly in a group context, and employment law concerns respectively.

In 2020, UBS launched its global venture capital fund, UBS Next, funded exclusively by UBS and managed by a dedicated tech venture investment team. The UBS Next portfolio targets investments in the fintech and the broader tech ecosystem; through equity investments, the UBS Next team is able to ensure closer strategic alignment with key partners while remaining focused on co-developing digital innovation and ecosystems through partnerships, research and innovation pipeline management. The 'Venture Capital Investments' chapter deals with investments into young companies, a topic that will appeal to many, including UBS. While complementing other interesting chapters such as 'Joint Ventures – Selected Aspects' and 'Private M&A', the authors focus on matters of particular interest to the venture capital investor, including key provisions in investment agreements, investment protection through preferential economic rights and exit strategies.

'Shareholder Activism in Switzerland' is the first of our new entries in this third edition. With the expected entry into force of the Swiss corporate law reform on 1 January 2023, the article discusses the legal framework available to shareholders in Switzerland and the impact the new law is expected to have to facilitate further shareholder engagement in Swiss listed companies. Switzerland, as other global economies, has seen a shift to heightened public focus on environmental, social and governance issues, which corporates must now embrace and shareholders will no doubt expect to be addressed in their business strategy and in their respective public communications.

Special purpose acquisition companies (SPACs) were prolific on the 2021 global M&A scene. Following the implementation of the new Directive on Listing of SPACs on SIX Swiss Exchange on 6 December 2021, the first Swiss SPAC was listed on the SIX Swiss Exchange shortly thereafter. This guide's new 'Special Purpose Acquisition Companies' chapter details the rules to be applied to the new regime, including the important De-SPAC phase. It remains to be seen if this trend will catch on in Switzerland and also how global industry developments will further influence the changes in the Swiss regulatory regime.

The third new chapter discusses 'Real Estate Real Estate Transactions with a Special Focus on Hotel Acquisitions'. UBS has benefited from a historically strong real estate portfolio through the years and has a dedicated real estate advisory team that handles Swiss real estate deals with

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support from the Swiss legal team. This chapter is therefore a welcome newcomer, especially given our recent experience with the sale of Congress Hotel Seepark in Thun.

Swiss M&A market

Below we provide a brief overview of the Swiss M&A market, as also covered in more detail in the chapters 'Private M&A' and 'Public M&A', among others. M&A activity in Switzerland has rebounded impressively in 2021 after weathering successive waves of the covid-19 pandemic since early 2020. On the one hand, Switzerland is home to many large multinational companies that are global market players and, on the other hand, Switzerland provides a favourable framework for M&A transactions, with its stable, liberal economy, its straightforward legal framework and almost no investment restrictions.

The number of M&A deals in Switzerland in 2021 increased by 24.6 per cent in volume and by 57 per cent in deal values compared with 2020, from US$63 billion in 2020 to US$170 billion in 2021.[2] This increase was owed to a renewed confidence in the market as covid-19 variants were successfully battled and the backlog of deals was cleared, as well as the impact of low interest rates and financial stimulus packages providing a positive growth environment. Private equity sponsors had an impressive amount of dry powder and activity was very strong for small and medium-sized (SME) targets.

In terms of Swiss deals, 2021 continued to highlight the importance of accelerated digitisation and attractiveness of targets in the technology, media and telecoms sectors, made even more prevalent because of covid-19 restrictions, while the pharmaceuticals and life sciences industry displayed strong M&A activity, as did consumer markets.

Some of the largest deals of 2021 indicate that companies are undertaking corporate structure reviews and restructuring or exiting certain areas to focus management resources on core businesses. Among the largest and most significant deals of the year were Novartis's sale of its stake in Roche back to Roche, Lonza's sale of its Specialty Ingredients business to Bain Capital and Cinven, as well as Nestlé SA's sale of a part of its stake in L'Oréal.

Financial services saw an increase in deal activity and volume made up mainly of the smaller deal activity of several Swiss private banks but also the notable insurance deal of the acquisition by Chubb of Cigna's insurance business in Asia. Some commentators[3] predict that 2022 may bring increased M&A in the asset and wealth management sector owing to the phasing-in of new regulations under the Financial Institutions Act, which will increase regulatory supervision by end of 2022 and thus is seen to put pressure on external asset managers to enhance internal control frameworks to satisfy the new requirements.

In terms of valuation, the average acquisition multiples increased by 1.2x versus 2020, while S&P 500 surged to all time-highs (the average global EV/EBITDA acquisition multiple was 12.3x in 2021 versus 11.6x from 2020)[4], as the path out of the covid-19 pandemic became clearer and a plethora of tailwinds supported deal activity. While below the last 10-year average, a relative uptake in the proportion of deals paid in cash in 2021 suggests acquirers sought to release the preserved cash accumulated since the start of the covid-19 pandemic.

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2 KPMG, Clarity on Mergers and Acquisitions 2022, Sector Reports.

3 ibid.

4 FactSet as of 31 December 2021.

Top 5 announced M&A transactions in 2021 with a Swiss target[5]

	Acquiror	Target	Deal value (US$ billion)
1	Roche	Roche*	20.9
2	CSL	Vifor Pharma	11.8
3	Bain Capital/Cinven	LSI	4.7
4	Carlyle	AutoForm	2.0
5	Blackstone	VFS Global	1.9
*	Roche acquired a 33.3 per cent stake of its voting share capital from Novartis.		

In the short and medium term, Swiss M&A activity seems set to continue on a steady trajectory with plenty of deal activity ahead, subject to the tempering effect of geopolitical and macroeconomic considerations, as mentioned below.

So far, despite the 2020 coronavirus outbreak, the Swiss market has not seen a material increase in distressed M&A and restructuring work, and although bankruptcy claims in 2021 increased by 9 per cent from 2020, insolvencies remain at a stable pre-covid level. The evidence of such financial distress has been tempered, or perhaps just delayed, thanks to measures taken by the Swiss federal government to grant relief from corporate law obligations to file for bankruptcy to companies that became balance sheet-insolvent during 2020, as further discussed in 'Distressed M&A in Switzerland'. In addition, federal government-sponsored bank loans were made available to support SMEs. UBS, along with other large banks in Switzerland, has been heavily involved in this programme. As of 31 July 2020 (the end date of the window in which companies could apply for such bridge loans), UBS had committed 2.7 billion Swiss francs of loans up to 0.5 million Swiss francs per applicant, which are 100 per cent guaranteed by the Swiss government, and 0.6 billion Swiss francs of loans between 0.5 million and 20 million Swiss francs per applicant, which are 85 per cent government-guaranteed. Outstanding commitments of loans granted by UBS under the programme amounted to 1.9 billion Swiss francs on 31 May 2022, with a total amount drawn of 1.4 billion Swiss francs. The first stress test for the recoverability of the covid-19 loans is due in 2022, when the transition period ends and repayments will commence. It remains to be seen if distressed M&A activity will thus increase in 2022 following the end of such stimulus measures and the predicted rise of interest rates.

Otherwise, all eyes will be firmly fixed on the impact of external factors such as the geopolitical situation, the war in Ukraine, the resultant supply chain issues and impact of sanctions, energy prices, as well as macroeconomic elements such as the forecasted inflation, increases in interest rates and increased regulatory scrutiny.

As a final note, we would like to extend our sincere thanks to all the contributing authors and our colleagues from the UBS Group Legal team for their thorough review of and thoughtful comments on this introduction.

5 Dealogic.

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Structuring Cross-border Transactions

Dieter Gericke and Reto Heuberger[1]

Review of acquisition structures for private cross-border transactions

Basics

Under Swiss law, as for other jurisdictions, transactions are formally structured as a two-step process consisting of:

- entering into a binding agreement (normally a share purchase agreement or an asset purchase agreement), typically in writing (signing), in which the mutual obligation of the parties to give effect to the deal, in particular the obligation to transfer a company or business, is agreed; and
- the closing, in which the parties give effect to the transactions agreed at signing (ie, the transfer of shares or assets or the execution of other transfer instruments against payment of the consideration).

From a Swiss legal perspective, signing and closing may occur on the same day, if there are no conditions precedent (eg, antitrust approvals) that need to be satisfied prior to closing.

Signing requirements for share deals and asset deals

The most common forms for the acquisition of privately owned businesses in Switzerland are share deals and asset deals. Swiss share deals and asset deals are governed by Swiss statutory law on the acquisition and sale of securities and property. Except for the sale of real estate, which requires a written agreement legalised by a public notary, there are typically no formal signing requirements (unless the contract directly includes a (conditional) assignment, it does not have to be in writing ('in writing' under Swiss law meaning a written document, bearing the signatures of the persons authorised to sign on behalf of the parties). Swiss statutory law on the acquisition and sale is flexible, includes only minimal mandatory provisions and allows the integration of customary M&A clauses for global deals. However, as the law provides for some

1 Dieter Gericke and Reto Heuberger are partners at Homburger AG.

default provisions (that govern if the agreement remains silent on the relevant question), Swiss transaction agreements explicitly amend, replace or waive certain statutory provisions, such as the scope and limitations of the representations, the inspection and notice periods, the time limitations or the rights for rescission, to ensure that default law does not inadvertently come into play if undesired. Consideration can consist either of shares or other assets of another company, cash, or a combination thereof. The consideration is payable to the shareholder in the case of a share deal and to the company in the case of an asset deal.

Approval requirements for share deals and asset deals

Share deals and asset deals require approval of the relevant internal authority level, deals of strategic importance or magnitude typically approval by the board of directors, or, if a company wants to transfer substantially all of its shares or assets leading to a factual termination or liquidation of its operations, approval by at least two-thirds of the votes represented and the absolute majority of the par value of the shares represented at a shareholders' meeting.

With respect to very limited assets (mainly residential real estate) and industries (eg, banking), entering into a binding agreement by a foreign or foreign-controlled buyer may require government filing, approval or exemption.

Closing requirements for share deals

In a share deal, at closing, shares are transferred by way of execution of a written assignment declaration, endorsement on the share certificates, handover of the share certificates to the acquirer, instruction of the central custodian of intermediated securities, or transfer in accordance with the registration agreement for ledger-based securities, or a combination thereof, depending on the type and form of shares issued. The transfer of shares in a stock company may be subject to the consent of the board of directors, and the transfer of shares in a limited liability company may be subject to the consent of the shareholders' meeting or the board of directors, if so provided for by statutory law or in the articles of association of the company. The exercise of the voting rights in the acquired company is subject to the registration of the acquirer in the company's share registry. Further, as a requirement under Switzerland's anti-money laundering legislation, new shareholders may be under the obligation to notify their beneficial owners to the company. In the case of limited liability companies only, shareholders need to be registered in the commercial register, which is publicly accessible. Share deals do not trigger any legal requirement for employee consultation or consent. There are no Swiss statutory laws that would generally impede cross-border share deals or make them subject to government approval (ie, no general foreign investment regulations). However, certain industries may require a specific approval (in addition to other approvals that may be industry-specific) prior to effecting a share deal with a foreign buyer (eg, the acquisition of a bank).

General structuring of closings of asset deals

In an asset deal, at closing, the assets, agreements and liabilities pertaining to the business can either be transferred one by one (principle of singular succession) or *uno actu* based on a statutory asset transfer pursuant to the Federal Act on Mergers, Demergers, Transformations and Transfers of Assets (the Swiss Merger Act) (principle of universal succession).

Closing requirements for asset deals in singular succession

In an asset deal following the principle of singular succession, for each class of transferred assets the respective closing formalities have to be respected. The transfer of claims, patents, designs and trademarks requires the execution of a written assignment (which can be embedded in the transaction agreement). Real estate can only be transferred based on a written agreement which needs to be legalised by a public notary and registered with the land registry office.

As a general principle, Swiss law agreements can only be transferred with the counterparty's consent, such consent to a transfer or assignment can be included in the initial agreement or obtained at a later stage. As an exception to this rule, employment agreements transfer by operation of law with the business. Employment agreements with employees who object to the transfer are also assumed by the acquirer, but are terminated with the applicable statutory notice period. The seller needs to inform or, if measures affecting the employees are contemplated, consult the transferred employees or, if existing, an employee representative well before effecting the transfer.

Besides applicable laws on data protection that may restrict the cross-border transfer of personal data, there are no Swiss statutory laws that would generally impede the cross-border transfer of most assets. Nevertheless, acquirers typically use a Swiss subsidiary as formal acquirer under an asset deal by way of singular succession or the transaction is effected by way of a two-step demerger (see 'Alternative spin-off structures').

Closing requirements for asset deals in universal succession

Statutory asset deals following the principle of universal succession have to respect the formal procedure pursuant to the Swiss Merger Act and are completed with registration of the asset transfer agreement in the commercial register. The asset transfer agreement has to be in writing and, if real estate forms part of the transferred assets, legalised by a public notary. The transfer agreement replaces all closing formalities that would otherwise apply to the transferred assets and the transfer is effected in one go with the registration. However, the transferring company remains jointly and severally together with the acquirer liable for transferred liabilities for a period of three years (unless the statute of limitations restricts such liabilities to an earlier date). Given that information registered in the commercial register is publicly accessible, the economic terms of the asset transfer can be included in a separate asset purchase agreement while the written, or if real estate forms part of the transferred assets, legalised asset transfer agreement serves as a transfer instrument for the closing only. The asset transfer becomes effective with registration in the commercial register. If employees are transferred, the employees or, if existing, an employee representative, need to be informed or, if measures affecting the employees are contemplated, consulted before the registration of the asset transfer in the commercial register. Also, for asset deals under the Swiss Merger Act, it is common to obtain the consent ofimportant contractual counterparties.

Cross-border immigration statutory asset transfers are permissible under Swiss law provided that the jurisdiction of the foreign company recognises a cross-border transfer of assets and liabilities to the Swiss company by operation of law with registration in the foreign commercial register, such as Luxembourg and Belgium. In addition to the foreign law, Swiss law will apply on the asset transfer. In particular, the transfer agreement has to comply with the Swiss formal requirements. Pursuant to Swiss law, the asset transfer will become effective with its registration in the foreign commercial register competent for the foreign company.

Cross-border emigration statutory asset transfers are permissible under Swiss law provided that the jurisdiction of the foreign company recognises a cross-border transfer of assets and liabilities from the Swiss company by operation of law with registration in the Swiss commercial register. Swiss law will apply on the asset transfer and, on aspects concerning the foreign company, foreign law.

Cross-border asset transfers by universal succession are hardly ever seen in practice. Typically, if the parties prefer to use a statutory asset transfer, the assets and liabilities are transferred to a Swiss subsidiary of the foreign acquirer or the transaction is effected by way of a two-step demerger (see 'Alternative spin-off structures').

Swiss taxation

For a seller who is a Swiss tax-resident legal entity, share deals are more attractive from a tax perspective since Swiss tax law offers participation exemption on capital gains from qualified participations while (at the level of the company operating the transferred business) gains in an asset deal from the realisation of the built-in gains on all other types of assets are taxable at standard corporate income tax rates.

If the shares in the company operating the transferred business are held by a Swiss tax-resident private individual as private assets, a share deal is usually more attractive since capital gains on the sale of such shares are, subject to certain exceptions, not taxable in Switzerland. In contrast, the subsequent distribution of the proceeds from an asset deal to the individual shareholder (by dividend or liquidation of the selling company) would be taxable dividend income. Under the concept of indirect partial liquidation, however, private capital gains from the sale of participations in a company can be requalified into taxable income provided that the respective conditions are fulfilled. In a nutshell, the concept applies if excess cash in the target company is directly or indirectly used to finance or refinance, including by way of a merger with the acquiring company, (during a waiting period) the acquisition price. Swiss private sellers often request an indemnity for the income tax consequences of a requalification to be included in the transaction agreement.

If the company holding the business has certain tax benefits such as losses carried forward or capital contribution reserves that can be distributed free of Swiss withholding taxes, a share deal may be more attractive for the acquirer since this acquisition structure allows the acquisition of such tax benefits.

Domestic asset deals, including to Swiss subsidiaries of a foreign acquirer, are in principle subject to value added taxes, whereby the tax liability can be settled by way of a notification (similar to the concept of the transfer of a business as a going concern).

Preferred transaction structures for acquisition of Swiss banks

While in recent years banking transactions in Switzerland have been effected using both share deals and asset deals, asset deals seem to be the preferred structure for acquirers as they allow the isolation of legal risks from the rest of the transferred business. Also, mainly in domestic private banking transactions where consolidation has been the main driver, the acquirerswanted to acquire the assets under management and certain key employees only and did not want to also acquire the infrastructure of the acquired business, such as the banking licence or the IT platform. Sellers typically prefer share deals as, after an asset deal, they have to unwind and liquidate the company and deal with problem cases, such as dormant accounts or legally tainted accounts. For foreign buyers, a share deal is often the only realistic option, unless they already

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have a subsidiary with a banking licence in Switzerland. Bank acquisitions require notification or approval of the Swiss Financial Market Supervisory Authority (FINMA), and acquisitions by foreign or foreign-controlled entities require specific approval.

Cross-border statutory merger structures

Statutory mergers – basics

Companies may also be acquired or combined by means of a statutory merger pursuant to the Swiss Merger Act (see, for example, the merger between Novartis and Alcon in 2011). Statutory mergers are subject to a formal procedure and can involve two forms: either one company is dissolved and merged into another company (merger by absorption), or the two combining companies are both dissolved and merged into a newly incorporated company (merger by combination). In both cases, the assets and liabilities of the dissolved company or companies are transferred to the surviving or newly incorporated company by operation of law. The merger consideration must, as a rule consist of shares of the surviving or the newly incorporated company. The merger requires approval by at least two-thirds of the votes represented and the absolute majority of the par value of the shares represented at the shareholders' meeting of the two entities. If the merger consideration comprises any compensation other than shares of the surviving company, 90 per cent of all voting securities outstanding need to approve the merger. The companies need to inform or, if measures affecting the employees are contemplated, consult the employees or, if existing, an employee representative before the shareholders' meeting resolving on the merger. The merger agreement, the merger report by the board of directors, the auditor confirmation and the financial statements of the previous three years and, as the case may be, interim financial statements of all companies involved in the merger, have to be made available to the shareholders for inspection during a period of 30 days. The merger documentation needs to be filed with the commercial register. The merger becomes effective with the registration in the commercial register. Shareholders of small and medium-sized companies may unanimously opt for a simplified merger procedure. The shareholders of all companies involved in the merger have an appraisal right and can request a Swiss court to determine an adequate merger consideration within two months from the approval of the merger.

Triangular cross-border merger to acquire a foreign company

Given the 90 per cent approval for cash consideration or shares of a parent company, which is not the absorbing company, triangular mergers are hardly ever used to acquire Swiss target companies. However, if the law in the jurisdiction of the non-Swiss target allows triangular mergers with consideration in cash or in shares of the Swiss buying parent company, such foreign triangular mergers or schemes of arrangement may be used by Swiss buyers for cross-border acquisitions abroad. For example, many acquisitions in the US, including of US public companies, are effected by Swiss buyers by way of a US statutory triangular merger. In such cases, the Swiss parent would establish a US acquisition subsidiary and have the US target company merge into such US subsidiary against consideration to the shareholders of the US target company in cash or in shares of the Swiss parent company.

Immigration merger

A foreign company can merge directly into a Swiss company (merger by absorption) or be combined with a Swiss company into a new Swiss company (merger by combination) provided that the jurisdiction of the foreign company allows for such a merger and the merger complies with the respective conditions of the foreign jurisdiction. This is the case if the foreign law recognises a legal transaction under which the foreign company is dissolved without undergoing a liquidation procedure and all assets and liabilities of the foreign company transfer to the Swiss company uno actu by operation of law. While the availability of the immigration merger has to be confirmed for every specific case, in our experience, for example, Austria, Belgium, France, Italy, Liechtenstein, Luxembourg, Portugal, Romania, Spain, the US states of Delaware and North Carolina, the British Virgin Islands, the Bahamas, Bermuda, the Cayman Islands, the Marshall Islands, Jersey and Guernsey recognise such cross-border merger and transfer of assets and liabilities uno actu into Switzerland. If a direct transfer is not possible, sometimes a transfer through a country recognised for cross-border mergers both by the jurisdiction of the dissolving and the absorbing company may be a solution (eg, merger or redomiciliation into Liechtenstein and from there into a Swiss company).

The Swiss company needs to provide evidence that the submitted merger is permissible under the jurisdiction of the foreign company. Such evidence can be provided either by reference to the unambiguous foreign law or by a confirmation of a competent administrative authority or by a recognised legal institution or expert. Aspects directly relating to the foreign company such as approval requirements, the entitlement of the shareholders of the foreign company to a specific merger consideration, the conditions under which preferential rights of the shareholders of the foreign company can be withdrawn in the merger or provisions with respect to the protection of creditors of the foreign company are solely governed by the respective foreign law. On all other aspects of the merger, Swiss law applies.

Swiss law provides that the immigration merger becomes effective with its registration in the Swiss commercial register.

In the past, statutory immigration mergers have been mainly used for intragroup reorganisations and relocations.

Emigration merger – basics

A Swiss company can merge directly into a foreign company or be combined with a foreign company into a newly incorporated foreign company provided that the Swiss company can prove that:

- all assets and liabilities of the Swiss company will transfer without undergoing a liquidation procedure by operation of law to the foreign company with effect of the cancellation of the Swiss company (principle of universal succession); and
- the participation and membership rights of the shareholders of the Swiss company are respected.

Under the first requirement, the Swiss company has to provide evidence to the competent commercial register by reference to the unambiguous foreign law or by a confirmation of a competent administrative authority or by a recognised legal institution or expert that the foreign jurisdiction allows the transfer of all assets and liabilities by way of universal succession. Under the second requirement, the shareholders of the Swiss company must be offered the possibility to choose shares in the surviving or newly incorporated foreign company as merger consideration, unless the merger is approved by 90 per cent of all voting securities outstanding of the Swiss company. The merger consideration needs to be adequate. Preferential rights of the shareholders of the Swiss company that do not survive the merger have to be appropriately considered in the calculation of the merger consideration. The board of directors of the Swiss company has to report on the adequacy of the merger consideration in the merger report. The merger report is reviewed by a certified auditor and the confirmation of the auditor forms part of the merger documentation.

The emigrating Swiss company has to comply with the requirements of Swiss merger law, including the requirement to publicly notify the creditors of the merger and granting them a two-month period to request collateral for their claims. On all other aspects of the merger, the foreign law applies (in addition to the Swiss law, as the case may be).

Emigration merger – taxes

If, as a consequence of an emigration merger, taxable assets are no longer taxable in Switzerland, the Swiss company is subject to income tax on the built-in gain on its assets. Given that the foreign company is not subject to Swiss withholding tax (ie, not a dual-resident entity), withholding tax is levied on the amount of the fair market value of the assets (including any goodwill) minus the sum of nominal capital and capital contribution reserves.

Emigration merger – squeeze out

A statutory merger allows an acquirer to acquire full control over the target company with a majority of two-thirds of the votes represented and the absolute majority of the par value of the shares represented at the shareholders' meeting of the Swiss company or, if minority shareholders should be squeezed out, with 90 per cent of all voting securities outstanding, while the threshold for a squeeze-out of the minority after a public takeover offer is at 98 per cent of all voting securities outstanding. The statutory merger provides for more deal security and is thus an attractive structuring alternative when consideration for the takeover of a public company consists of shares of the acquirer.

Immigration quasi-merger (share-for-share deal)

A structure more commonly used than a statutory immigration merger and resulting in substantially the same result is the quasi-merger. Under a quasi-merger, the shareholders of the foreign company contribute their shares in the foreign company into the Swiss company and receive newly issued shares of the Swiss company in exchange. Other than in a statutory merger, the shares of the foreign company are not cancelled in the merger. Instead, the foreign company continues to exist as a subsidiary of the Swiss company. The quasi-merger requires approval by at least two-thirds of the votes represented and the absolute majority of the par value of the shares represented at the shareholders' meeting of the Swiss company. The Swiss company can increase its equity by up to the amount of the fair market value of the contributed shares in the foreign company. This newly created equity usually qualifies as capital contribution reserves that can be distributed as dividends free of any withholding taxes. An external auditor needs to render a report on the value of the contributed shares. The quasi-merger is completed with registration of the issuance of the new shares in the commercial register.

For practical reasons, quasi-mergers are only used when the foreign company is privately held, is a group subsidiary or where under the foreign jurisdiction the consent and participation of each public shareholder can be replaced by a structure such as a scheme of arrangement or a reverse triangular merger (see 'Triangular cross-border merger to acquire a foreign company'). Although quasi-mergers also require the involvement of the commercial register, the procedure is significantly less formalised and provides more flexibility to the parties than a statutory immigration merger. A quasi-merger is often also attractive from a tax perspective since under a quasi-merger the surviving Swiss company may obtain tax benefits in the form of additional capital contribution reserves that can be distributed free of any withholding taxes. Compared with a statutory immigration merger, not only the nominal capital (plus, in certain cases, capital contribution reserves) of the foreign company, but its full fair market value may be booked as nominal capital and reserves from capital contributions at the level of the Swiss company (on condition that, for five years from the quasi-merger, the foreign company is not wound up or merged into the Swiss company).

Cross-border structures for the acquisition of Swiss public companies

Given the limitations of Swiss statutory merger law with respect to any consideration other than shares of the absorbing company (ie, as regards cash consideration or shares of a non-absorbing foreign parent company of the acquiring company), statutory mergers are (unlike the other way round, see 'Triangular cross-border merger to acquire a foreign company') rarely an option to acquire Swiss listed companies. Accordingly, almost all such transactions are effected by tender offers governed by Swiss takeover law. Tender offers are essentially direct offers by the acquiring company to the shareholders of the target company. While, in friendly transactions, a bidder would enter into a transaction agreement with the board of the target company in order to obtain its support, that is not a requirement. Only where the articles of incorporation of the Swiss listed target company require approval for an acquisition of shares with voting rights, the board of the target has a direct say or may need to convene a shareholders' meeting and propose abolition of such a restriction. The consideration of such a tender offer may consist of cash (including, subject to certain limitations and requirements, foreign currencies) or tradable securities (including foreign shares or other securities).

Cross-border spin-off structures

Statutory demergers – basics

Divestments or spin-off transactions may also be structured as a statutory demerger pursuant to the Swiss Merger Act. Statutory demergers are subject to a formal procedure and can involve two forms: either the spun-off business is absorbed by another company (demerger by absorption), or the business is spun-off as a newly incorporated company (demerger by incorporation). Further, under a demerger the transferring company can be dissolved and all its businesses are either absorbed by other companies or spun off as newly incorporated companies.

In a symmetric demerger, the shareholders of the transferring company receive shares in the absorbing company or in the newly incorporated company pro rata to their shareholding in the transferring company. In an asymmetric demerger, the former shareholders of the transferring company receive shares in any of the surviving companies involved in the demerger, but not in all of them.

A demerger requires approval by at least two-thirds of the votes represented and the absolute majority of the par value of the shares represented at the shareholders' meeting of the companies involved in the demerger, an asymmetric demerger by 90 per cent of all voting securities outstanding of the transferring company. Before the shareholders' meeting approving the demerger, the company has to:

- make the demerger agreement or plan, the demerger report of the board of directors, the report by the auditor as well as the financial statements of the previous three years and, as the case may be, interim financial statements available to the shareholders for inspection for two months; and
- publicly notify the creditors of the demerger and grant them a two-month period to request collateral for their claims.

In a cross-border demerger, the shareholders of all companies involved in the demerger have an appraisal right and can request a Swiss court to determine an adequate demerger consideration within two months from the approval of the demerger.

Demergers are predominantly used for intragroup restructurings. Since in banking transactions the acquirer often wants to isolate legal risks from the rest of the business, cross-border statutory demergers are rarely seen in practice as the Swiss Merger Acts provides for (unlimited) joint and several liability of the Swiss company together with the absorbing company for all liabilities that were spun off to the absorbing company.

Emigration demergers

Cross-border emigration demergers are possible under substantially the same conditions as emigration mergers. The Swiss company needs to prove that:

- all assets and liabilities of the Swiss company will transfer without undergoing a liquidation procedure by operation of law to the foreign company with effect from the cancellation of the Swiss company; and
- the participation and membership rights of the shareholders of the Swiss company are respected.

Immigration demergers

Cross-border immigration demergers are possible under substantially the same conditions as immigration mergers. A foreign company can be demerged into an existing Swiss company (demerger by absorption) or a newly incorporated Swiss company (demerger by incorporation) provided that the jurisdiction of the foreign company allows for such a demerger and the demerger complies with the respective conditions of the foreign jurisdiction. As for an immigration merger, the surviving or newly incorporated Swiss company may obtain tax benefits in the form of additional capital contribution reserves that can be distributed free of any withholding taxes in the amount of up to the net assets of the absorbed foreign business at book values.

Alternative spin-off structures

Given its formalised procedure and the joint and several liability for the transferring company in a statutory cross-border demerger, cross-border divestments or spin-off transactions are usually structured either as an asset deal (by singular or universal succession) to a Swiss subsidiary of the acquirer or as a two-step demerger (hive down) in which the business (including the assets and liabilities) to be spun off is first transferred to a (newly incorporated) subsidiary and the shares of such subsidiary are then distributed to the shareholders of the parent company (distribution in kind), which may sell the shares to an acquirer as a share deal.

Swiss reorganisation tax rules generally provide for tax-free structuring options rather than taking each of the legal steps into account separately.

Summary

Preferred transaction structures

Swiss law offers a wide range of structuring alternatives for cross-border acquisitions, combinations and spin-offs. While statutory mergers, demergers and asset transfers, with their advantage of a facilitated transfer of all assets and liabilities uno actu under the principle of universal succession, are available for (mostly intragroup) transactions into or from many foreign countries (such availability to be assessed on a case-by-case basis), share deals, asset deals by way of singular succession to a Swiss subsidiary of the acquirer or two-step demergers are typically the preferred structure for cross-border transactions, also in the banking sector. This is mainly the case because of their flexible and less formalised procedure. While acquisitions of foreign public companies by Swiss companies can often be structured as triangular mergers or schemes of arrangement, acquisitions of Swiss public companies by foreign companies are almost exclusively effected by tender offers.

From a tax point of view, the immigration quasi-merger structure (ie, a share-for-share deal) is often the most attractive one, since this structure does not regularly trigger corporate income tax consequences in the foreign company and allows the creation of a substantial amount of capital contribution reserves in the Swiss company. More challenging are cross-border mergers and demergers, since such transactions may trigger taxable realisation of built-in gains on the respective assets as well as withholding taxes. Any cross-border transaction requires a careful tax structuring.

Challenges

With Switzerland being an attractive jurisdiction for foreign investments, there are not many challenges to cross-border M&A transactions. In particular, Switzerland has no statutory law that would allow for general control of foreign investments on the basis of national interest. Only the acquisition of real estate by a foreign person or entity, be it directly (ie, by a foreign person or entity as part of an asset deal) or indirectly (ie, by acquisition of a Swiss company holding real estate by a foreign person or entity as part of a share deal or the combination of such a Swiss company with a foreign company by way of an emigration merger or demerger), may be restricted under the Lex Koller, whereby these restrictions do not generally apply on properties used for commercial activities. Further, the acquisition of a business in certain regulated industries, such as banking or telecoms, may affect the licences granted to such a business or require additional filings, approvals or both.

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Pricing

Philippe Weber and Manuel Werder[1]

Introduction

Despite its relatively small size, Switzerland is home to many large and well-established international corporations spanning a diverse range of industries, from major banks and insurance companies such as Credit Suisse, UBS and Zurich Insurance, global food and healthcare players such as Nestlé, Novartis and Roche, and technology and industrial firms such as ABB and OC Oerlikon, as well as leading luxury goods and lifestyle groups such as Richemont and Swatch.

At the same time, Switzerland is home to many successful small and medium-sized and often internationally active businesses, 'hidden champions', which either are or have the potential to become leaders in their fields, and many of which are working through succession planning in the coming years.

All of this, combined with the typical features of Switzerland, including economic, political and legal stability, limited investment restrictions and a well-functioning financing market, makes Switzerland a fertile soil for an attractive M&A market to both Swiss and foreign investors. Notably, according to a recent survey, private equity was involved in more than a third of the deals involving Switzerland in recent years.

Against this background, this chapter focuses on the pricing mechanisms and methods that are primarily applied in connection with the acquisition of privately held (ie, not publicly listed) Swiss target companies and further focuses on share deals with a transaction value between 50 and 500 million Swiss francs.[2]

1 Philippe Weber and Manuel Werder are partners at Niederer Kraft Frey Ltd.

2 The pricing mechanisms described in this chapter generally also apply to larger Swiss private M&A transactions. However, with respect to certain pricing features, market practice would typically be different for larger transactions. For example, earn-outs are more typically found in small to medium-sized deals. Also, while locked-box deals have become very common for large deals, closing accounts mechanisms are still widely used, in particular when US or Asian buyers are involved.

Pricing mechanisms most commonly used in Swiss M&A transactions

The main pricing mechanisms commonly seen in Swiss M&A transactions are the 'locked-box' mechanism and the 'closing accounts' mechanism; sometimes these two mechanisms are combined into a 'hybrid'.

Locked-box deals have become increasingly popular in Europe, including in Switzerland. They provide a high level of pricing and deal certainty by locking in the price at signing; in turn, closing accounts can better reflect (but also expose parties to) changes between signing and closing.

According to a recent study, in recent years approximately 60 per cent of the M&A transactions in Europe (which matches our experience in Switzerland) applied the locked-box mechanism. This suggests an increase by some 30 to 40 per cent within the past years.

By contrast, closing accounts transactions have partly lost importance in the market and decreased by some 20 per cent to approximately 35 per cent in recent years.[3]

In certain cases parties choose a hybrid structure. For example, if the locked-box accounts are not sufficiently recent or if the locked-box accounts are only finalised or audited after signing, but prior to closing, the parties may agree on an adjustment of the purchase price in case the locked-box accounts are modified in the course of their finalisation or audit.

While the covid-19 crisis temporarily led to increased interest in closing account and other mechanisms seeking to mitigate the risks for buyers between signing and closing, this does not seem to have turned into more than a temporary trend away from locked-box deals.

The key difference between the locked-box and closing accounts mechanisms is the time when the economic risk and benefit in the target company passes from the seller to the buyer. In the locked-box mechanism the economic risk and benefit typically passes to the buyer at the locked-box date, while in the closing accounts mechanism risk and benefit will typically transfer at the date of closing.

Under both mechanisms, the seller and the buyer typically first agree on a valuation for the business of the target company (commonly called 'enterprise value') on a cash-free and debt-free basis and assuming a normal level of working capital. The parties are free in negotiating the ultimate purchase price and in choosing the method for the determination of the enterprise value. The most common valuation methods are multiple of the EBITDA or other multiples and discounted cashflow, but there are numerous other methods, such as net asset value, peer comparisons, etc.

In a second step the enterprise value is adjusted to reflect the actual cash, debt and working capital in the business to determine the 'equity value'.

The pricing considerations and enterprise value to equity value bridge (adjustments for typically cash or debt and working capital) are essentially identical under both closing accounts and locked-box mechanisms. In the locked-box mechanism, the seller and the buyer negotiate a fixed price at signing of the share purchase agreement (SPA) based on the agreed locked-box accounts, which removes price uncertainties for both parties, whereas in the closing accounts mechanism the adjustments for cash or debt and working capital are done only after the closing.

3 The numbers refer to share deals. By their nature, asset deals more typically use closing accounts structures.

Locked box

Description

The locked-box mechanism consists of a purchase price that is fixed at the time of signing the SPA. There is, except in the case of 'leakages' (see 'Protection against leakages'), no purchase price adjustment or true-up between the date of signing and the date of closing. Generally, changes in the balance sheet, in particular the fluctuation in the actual cash, debt and working capital of the target company between the date of signing and the date of closing, will not affect the purchase price, and there is no respective purchase price adjustment for these items.

The purchase price is calculated on the basis of recent historical financial statements, sometimes called 'locked-box accounts'. The date of these financial statements constitutes the agreed date of the locked box and is sometimes called the 'locked-box date'. Often the last audited financial statements as at the end of the last completed business year (or reviewed half-year financial statements) are used as locked-box accounts. However, the parties are free to choose financial statements as at any date that do not need to be audited as locked-box accounts. Experienced parties will normally be reluctant to rely on locked-box accounts that are older than three to six months and not at least reviewed.

As a consequence, the cash, debt and working capital positions as at the locked-box date are amounts that are known to the parties at the time of signing.

Economic impacts

When using the locked-box mechanism, the buyer takes the economic benefit and risk from the locked-box date until the closing date, unless and to the extent the buyer has obtained specific protection under the SPA, for example, in the form of a material adverse change clause or representations, warranties and indemnities that cover the period between signing and closing of the SPA. If the target company is a profitable business, the profit generated between the locked-box date and the closing date belongs to the buyer. In the case of a growing business, this mechanism can provide further significant potential upside benefit to the buyer. By contrast, if the business of the target company is loss-making, the buyer economically bears any negative development of the net cash and the working capital.

Key pricing issues in locked-box deals

Quality and date of locked-box accounts

Locked-box accounts are normally not older than six months. The more recent the locked-box accounts are, the better is the visibility of the buyer that at the date of signing the business of the target company is still essentially in a similar financial condition as shown in the locked-box accounts.

Since the locked-box accounts are key to the determination of the purchase price, the locked-box accounts are normally audited or, if they are not audited, they should at least be reviewed. In the absence of any audit or review the protection of the buyer against misstatements in the locked-box accounts would be limited to claims for misrepresentation or breach of warranty with respect to the locked-box accounts or specific indemnities, which may not offer sufficient protection.

The locked-box accounts should be prepared for the target business. If the business sold does not stand alone from other operations of the seller from an operational or accounting perspective, the locked-box mechanism becomes much more complex and requires bespoke drafting.

Protection against leakages

The buyer will require protection through the SPA against value being extracted from the target company in the period between the locked-box date and the closing date via an undertaking from the seller not to extract any value out of the business. Such extractions are commonly defined as 'leakage'. Leakages may, for example, consist of dividends, the payment of management fees, transaction and other bonuses to the benefit of the seller, any of its affiliates or any party closely related to or having a connection with the seller.

Leakage definitions are essential to preserve the value of the acquired business and therefore must be carefully drafted. They typically cover a broad range of forbidden acts, such as the transfer of cash, cash equivalents or assets, the assumption of liabilities, the waiver of claims, the provision of services, the granting of securities, payments made to third parties on the account of a seller, a seller affiliate or a related or connected party, etc.

Because the purchase price is directly affected, the buyer's obligation to compensate the seller for any leakage is normally not limited in amount (ie, it is structured as franc-for-franc clawback by way of indemnification without minimum or maximum limitations in amount). The duration of such clawback is a matter of negotiation.

The SPA normally provides for a list of exceptions (ie, value extractions that the parties specifically define as permitted leakage). Among the permitted leakages are typically payments made by the target company that are on arm's-length terms, payments in the ordinary course of business or payments that are specifically agreed and defined in amount, such as repayments of shareholder loans. Consequently, permitted leakages will be factored into the purchase price.

Inclusion of enterprise value to equity value bridge

Often the parties negotiate and agree on the fixed purchase outside of the legal documentation and therefore only state the fixed purchase price in the SPA without mentioning the enterprise value to equity value bridge. This simplifies the legal terms and definitions in the SPA.

However, in the section addressing the remedies regime describing the legal consequences of potential misrepresentation, breach of warranty and indemnity cases, the parties often agree that items that had been taken into account in the negotiation of the purchase price and that had resulted in a reduction of the purchase price are excluded from any damage and may not be claimed in the case of any misrepresentation, breach of warranty and indemnity. In the case of such agreement, the inclusion of the enterprise value to equity value bridge as annex to the SPA is recommendable and often done.

Interest or per diem payment

In Swiss locked-box deals it is quite common for the parties to agree on an additional purchase price component, which often consists of an amount per day between the signing date and the closing date or during another defined time period. This purchase price component can be justified as compensation for transferring the profit and benefit of increases in the net cash and working capital positions from the locked-box date to the closing date without the buyer having to finance its capital costs. Accordingly, sellers will typically expect this rate to be determined on the basis of expected results (in which the seller wishes to participate until closing) as opposed to mere interest (according to prevailing interest rates) on a deferred purchase price.

Such purchase price component may further incentivise the buyer to speed up acts it may have to take – in case it needs to take any such acts – for the fulfilment of the closing conditions, such as the making of filings to obtain merger control or other regulatory approvals, tax rulings, third-party consents, etc.

Restrictions on conduct of business between signing and closing

Unless signing and closing of the transaction occur simultaneously (which is the exception in medium-sized and large deals), the seller will continue to conduct the business of the target company until closing, while the buyer will already have assumed the risk of deterioration of that business. In order to protect the buyer, the SPA will therefore contain covenants of the seller to conduct the business in the ordinary course consistent with past practice and to refrain from taking certain actions specifically listed in the SPA that could materially alter the business. If permitted under applicable competition laws (ie, if not considered as jumping the gun), the parties may agree that such listed actions (or omissions) will require the consent of the buyer.

Closing accounts

Description

In the closing accounts mechanism the seller and the buyer agree at the signing only on the enterprise value and some key parameters of the enterprise value to equity value bridge. After the closing of the transaction, financial statements as at the closing (the closing accounts) are prepared. On the basis of the closing accounts the enterprise value is adjusted to reflect the change in these key parameters at the closing date to determine the purchase price amount actually owed to the seller.

In the closing accounts mechanism, the SPA will foresee a preliminary purchase price based on accounts as at a date prior to the date of signing or certain projections of the target company's financial statements at the date of closing. If the adjustment is solely made with reference to cash and debt or net working capital, the SPA will assume a certain net cash or net debt and a certain net working capital position. The preliminary purchase price is then adjusted on the basis of the actual relevant financial parameters at the date of closing.

The financial parameters that are most often seen as decisive for the calculation of the post-closing purchase-price adjustment are cash, cash equivalents and financial debt (ie, net cash or net debt), and trade receivables, inventories and trade payables (ie, net working capital). According to a recent survey, 76 per cent of all closing accounts transactions provide for a net cash or net debt adjustment and 53 per cent of all closing accounts transactions provide for a net working capital adjustment, normally in connection with a net cash or net debt adjustment.

Less often seen are adjustments for changes in the net assets (ie, all assets minus all liabilities). Only 16 per cent of all closing accounts transactions foresee a full net asset value adjustment. Even less frequently, the purchase price will be adjusted on the basis of earnings between signing and closing (regarding earn-out post-closing, see 'Earn-out clauses').

In the financial services industry, adjustments will often be made based on the level of net equity and assets under management (the latter as at closing or a subsequent date to protect the buyer against an excessive post-closing assets-under-management attrition rate as a result of clients leaving following a change of control).

Price adjustments can also be used to control the level of investment from the date of signing to the date of closing. Capex clauses usually require investments within an agreed or planned frame. The purchase price is adjusted by the difference between the planned and the made investments. However, the capex clause is rarely seen in practice.

The parties are free to choose any other financial parameters that they consider relevant for the determination of the final purchase price (eg, turnover, EBITDA, net profit). Equally, the parties are free to choose the date from which such financial parameters shall apply. The most commonly used date for this is the closing date, but in practice parties sometimes also choose a different date such as the last date of the month immediately preceding the closing date.

Economic impacts

When using the closing accounts mechanism, the seller keeps the economic benefit and risk in the target company up to the closing date.

Key pricing issues in closing accounts deals

Calculation of purchase price adjustment

Since the cash or debt and net working capital position (or such other financial parameters agreed to determine the final purchase price) as at the closing date will only be known in final form after the closing, the SPA normally provides for the payment of a preliminary purchase price at closing on the basis of estimates and followed by an adjustment payment after closing once the final closing accounts have been prepared. For the preliminary purchase price the parties will normally rely on good-faith estimates provided by the seller shortly before closing. Given that the final purchase price will be determined based on closing accounts yet to be prepared, key issues for the SPA will be:

- the accounting rules according to which the closing accounts shall be determined; and
- the procedure for who will be responsible for the preparation of these accounts.

Swiss SPAs providing for closing accounts price adjustments will typically contain detailed definitions and rules about the applicable accounting rules, often supplemented by calculation examples in the annex to illustrate and record the respective understanding of the parties. In this context, critical negotiation items often include the treatment of debt and debt-like items such as accrued tax and other liabilities (eg, vacation, bonuses, etc), unfunded pension liabilities, lease liabilities, customer advances, etc, or cash and cash equivalents like trapped cash.

Even though this is often a matter of negotiation and contentious, the right to prepare the first draft of the closing accounts is more often granted to the buyer on the basis that following the closing the buyer will have better access to the target company's business and its financial records. The other party will then be granted a right to review (including access to relevant information and persons) and objection within a stated period.

Dispute resolution regime

State courts and even arbitration courts may often not be well suited to resolve disputes over purchase price adjustment clauses that often contain complex accounting questions. Examples are the treatment of liabilities that, although they have a financing character, technically may not constitute financial liabilities (debt-like items), or the assessment of acts that may have artificially affected certain financial parameters. Therefore, parties often agree that any dispute about the determination of the closing accounts shall be submitted to an accounting expert acting as independent appraiser for final resolution. In the event that the SPA is governed by Swiss law the appraiser will act in the capacity of expert arbitrator within the meaning of article 189 of the Swiss Federal Law on Civil Procedure.

The SPA should include sufficiently detailed rules about the applicable accounting principles, the parties' opportunities to make submissions and to see and comment on the other party's submissions, the timing of the resolution, the language of the submission, etc.

Restrictions on conduct of business between signing and closing

While compared with locked-box deals closing accounts may better protect a buyer against adverse financial developments between signing and closing, the buyer still has an interest to obtain contractual assurance from the seller that the business of the target company will be conducted in the ordinary course between signing and closing. In this context buyers will draw particular attention to ensuring that the seller will not be permitted to artificially inflate the cash or working capital positions (for example, by delaying the payment of suppliers or by accelerating the collection of receivables).

Advantages and disadvantages of pricing mechanisms most commonly used in Swiss M&A transactions

Locked-box mechanism

- The main advantage of the locked-box mechanism is its simplicity and the absence of any post-completion adjustment process. This saves the parties from spending financial means and human resources on post-closing calculations and review procedures.
- In auction procedures, the seller may easily compare the different bids that have been submitted. It further provides both parties with certainty on price.
- The risk of post-closing disputes concerning the purchase price adjustment may be minimised.
- There may be a mismatch between the economic risks and the responsibility to manage the business or the target company.

Closing accounts mechanism

- The closing accounts mechanism allows the risk and benefit with respect to the target company to pass to the buyer at the same time as the completion of the transaction takes place. The management and control of the target company corresponds to the economic risks.
- The purchase price closely corresponds to the enterprise value.
- The closing accounts mechanism may allow the parties to proceed faster to signing.
- Neither party has certainty over the final purchase price until the closing accounts are final. This uncertainty can be mitigated in part by providing for deductibles (ie, minimum amounts within which any difference between preliminary and final numbers will not result in an adjustment of the purchase price) and caps (ie, maximum amounts, by which the final purchase price can be adjusted).
- Purchase price adjustment clauses are often complex and their handling may be costly. For smaller transactions, it may be worthwhile to use a simpler purchase price mechanism.
- There is a higher risk of post-closing disputes concerning the purchase price adjustment.

Summary overview

	Locked box	Closing accounts
Pros	(Fixed) price certainty	Buyer 'pays for what it gets' (and seller keeps upside)
	High bid comparability	Alignment control or economic transfer
	Early transfer of risk (seller)	Potentially more bespoke (eg, if pre-closing restructuring or reorganisation of target intended)
	Simpler, faster and cheaper overall process	Potentially faster process to signing
	Seller controls preparation of balance sheet	Flexible (less dependent on balance sheet)
	Reduced risk of disputes	
Cons	Early transfer of economic upside (except to the extent compensated by way of per diem interest)	Reduced bid comparability
	Increased risk for buyer	Final price unknown
	Valuation risk	Unexpected price adjustments
	Mismatch control or economic transfer	Overall process longer and more costly
	Effect of process delays (balance sheet relevance, etc)	Higher dispute risk

Earn-out clauses

Description

The earn-out is a variable purchase price component, which is conditional upon the occurrence or reaching of pre-agreed performance measures (eg, turnover or milestones), typically during a limited period after closing.

In Switzerland, earn-outs are frequently used in smaller transactions and less so in medium-sized and large M&A transactions.

The parties are free to define the performance indicators for an earn-out. In the majority of the cases the parties use financial performance indicators, such as turnover, EBITDA, EBIT, net income or operating cashflow. The performance indicators may also be of a non-financial nature, for example, the achievement of certain milestones in the development of a product, product approvals obtained from governmental authorities, the sum of orders received, the intake of new customers, etc.

The use of earn-out clauses is particularly useful if, despite extensive financial due diligence, different price expectations remain between the seller and the buyer. Earn-out mechanisms are therefore often used to bridge a valuation gap between the seller and the buyer that may result from a diverging assessment of the future development of the target company's business. Earn-outs may also be used to ensure a seller's continued commitment to the sold business.

Earn-outs are sometimes combined with a deferred sale of part of the shares of the target business. Thereby, the buyer ensures that the seller still has some 'skin in the game'; conversely, by keeping a stake in the company, sellers keep a 'stick' with some (minority) rights helping them to ensure that the business will be operated as agreed.

The amount of the earn-out payments is normally capped. The agreed period for earn-out payments is usually one to three years.

Earn-out purchase price components are predominantly paid in cash and sometimes by alternative means such as shares in the buyer or the target company.

Economic impacts

When using an earn-out mechanism, the seller keeps all or part of the economic benefit and risk relating to the agreed performance indicators for the period after the closing date. The remainder of the economic benefit and risk regarding the business of the target group shifts to the buyer at or before the closing depending on the chosen transaction structure. Often, the seller does not obtain the entirety of the financial benefit generated by the achievement of the agreed performance indicator. As a result, there may be an alignment of interests between the seller and the buyer.

Key pricing issues in earn-out arrangements

Calculation of the earn-out

Earn-out clauses require detailed and careful drafting to precisely define the relevant performance indicators and the relevant time to achieve them, as well as the time and method of calculation of the earn-out. As discussed under 'Closing accounts', the SPA will need to provide the rules for the calculation of the earn-out and the preparation of the relevant financial statements and state the applicable accounting principles. In the case of non-financial performance indicators, the definition of the facts that evidence the fulfilment of the agreed conditions for the payment of the earn-out should be defined.

The SPA will further need to determine the responsibility for the preparation of the relevant financial statements, whereas this is predominantly, but not always done by the buyer. The SPA should also contain the possibility for a review procedure and provide for a dispute resolution mechanism in case of a disagreement or dispute over the achievement of the relevant performance indicators or the calculation of the earn-out (see 'Dispute resolution regime').

Risk of requalification of earn-out payment as taxable salary

If the seller is a Swiss-domiciled individual, capital gains on the sale of shares held as part of its private portfolio are usually tax-exempt in Switzerland. Individual sellers therefore have a strong interest to structure the pricing such that the sale will remain tax-free. If this type of seller, however, continues to work for the target company, there is a risk that all or part of the earn-out payment will be requalified as salary for tax and pensions purposes. Earn-out or similar pricing mechanisms involving Swiss-domiciled individual sellers therefore need to be carefully reviewed from a tax perspective.

Similar adverse tax consequences may apply if the sale is refinanced by the assets of the target company, namely, if shares representing at least 20 per cent of the share capital of a company are sold from the private assets of an individual investor (or a group of individual investors) to the business assets of a corporate or individual buyer, and the target distributes current assets not needed for business operations out of distributable profit or reserves within a period of five years after the sale of the shares with the cooperation of the seller.

Avoidance of manipulation

Earn-out clauses may be subject to manipulation. The earn-out clause should therefore restrict the target company from taking certain acts that may have a manipulative effect on the agreed performance indicators. Such list of restricted acts may be similar to those disallowed between the date of signing and the date of closing. However, the restricted actions should not interfere with the ordinary course of business.

The earn-out clause should principally address the consequences of potential restructurings (such as mergers, demergers, sale or purchase of material assets or parts of the business or other types of reorganisation), the declaration of dividends or other types of distributions, capital increases or capital reductions, etc. In addition, any change to the nature of the target company's business, any entering into of any joint venture, partnership or other similar profit-sharing arrangement, and consolidation with the buyer and any winding-up should be restricted. Most importantly, in the absence of any a specific permission in the SPA or the consent of the seller, there should be no diversion by the buyer of any business or opportunities of the target company away from the target company to the buyer and no transaction between the target company and the buyer that is not on arm's-length terms.

Depending on the agreed performance indicator, the inclusion of further restricted actions may be appropriate or warranted.

Advantages and disadvantages

The earn-out mechanism may bridge gaps in purchase price negotiations between the seller and the buyer and potentially align economic interests.

Earn-out arrangements and related restrictions may delay the integration of the target company's business into the buyer and the realisation of synergies. Earn-out arrangements may further lead to the target company's business being conducted with a view to maximise the earn-out payments rather than the long-term development of the business.

Depending on the complexity of the individual arrangement, earn-out arrangements bear some risk of litigation.

Further variances

Deferred purchase price or vendor loan

Parties sometimes agree to deferred purchase price components that are not subject to any conditions, but are paid at a later stage. For examples, the buyer may be granted the right to pay the purchase price in instalments. The same result can be achieved via vendor loans. Both structures provide the buyer with a security to enforce potential post-closing claims against the seller, provided that the buyer's legal set-off rights have not been contractually excluded.

Deposits

Deposits are sometimes stipulated in case of complex closing conditions or anticipated challenges in enforcing the buyer's obligations to consummate the transaction and pay the purchase price at closing (ie, in the case of foreign-based buyers, SPVs or individual persons).

Escrow

The payment of part of the purchase price into an escrow account of an independent escrow agent is quite common if a foreign-based seller, a private seller or multiple sellers are involved in order to secure any potential post-closing claims of the buyer against the seller. For certain types of buyers, for example, buyers that are subject to capital export restrictions in their home jurisdiction or who will require foreign investment approvals abroad, sellers of Swiss target companies sometimes require a down payment into an escrow account at signing.

Escrows are uncommon if the seller is a listed entity domiciled in Switzerland or in another OECD country.

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Data Privacy and Cybersecurity

David Vasella[1]

Introduction

Applicable law in transactions with international reach

Most M&A transactions involve parties – including employees, service providers such as providers of data rooms, M&A advisers, and law firms – located outside of Switzerland. Whenever this happens, the data protection laws that apply to these parties and their relevant processing ratione loci must be determined first.

Where a civil law claim for an alleged breach of data protection law – for example, a claim for a violation of a subject access request – is brought to a Swiss court by the affected person (the 'data subject' or 'subject'), the applicable law would be determined by that court in accordance with article 139 of the Swiss Private International Law Act (PILA). Under this provision, the following laws may apply:

- the laws of the country where the subject has their ordinary residence, provided the alleged infringer could reasonably have known that its processing may affect subjects in that country;[2] or
- Swiss law, where the alleged infringer has their seat or residence in Switzerland.[3]

It is for the subject to opt for either of these laws.[4] If the subject does not opt for the applicable law, the court will be able to opt in its place.

For example, if a Swiss company sells shares in a French subsidiary to a German buyer and is alleged to have unlawfully disclosed sensitive data about employees of the French subsidiary to the prospective buyer, the affected employees may bring a claim before a Swiss court[5] and opt

1 David Vasella is a partner at Walder Wyss Ltd.
2 Article 139(1)(a) and (c) PILA.
3 Article 139 (1)(b) PILA.
4 Article 139(1) PILA.
5 Article 129(1) PILA.

for either French law (including the EU General Data Protection Regulation (GDPR)) or Swiss law to govern the claim.[6]

Moreover, the parties to a transaction will be subject to the GDPR if they have an establishment in an EEA country[7] (or subject to the UK GDPR, if they have an establishment in the UK). For example, a share purchase agreement or even a prior non-disclosure agreement between a Swiss and a French company, or between a German and an Italian company, will frequently include data protection provisions that refer to or are based on the GDPR. Moreover, the GDPR may apply where assets transferred to a bidder or buyer in an asset deal include personal data for which the seller is subject to the GDPR; that is, whose processing by the seller is or was related to offering goods or services to individuals in the EEA, or to the monitoring of their behaviour.[8] For example, where a Swiss company targets end customers in Germany and sells its business to a Swiss buyer, the asset transfer agreement should include provisions to protect the privacy of the end customers under the GDPR. In all these scenarios, the data recipient may wish to have some form of undertaking or warranty in order to hedge his or her risks arising from a potential breach in relation to data received from the prospective seller.

Revision of Swiss data protection law

In Switzerland, data protection is primarily governed by the Federal Data Protection Act (FDPA) and the Ordinance on the Data Protection Act (FDPO). The FDPA is currently under revision, in order to implement the revised Council of Europe's Convention 108 and to align with the GDPR. The final text of the revised FDPA (rev-FDPA) was passed in Parliament on 25 September 2020,[9] and the rev-FDPA will probably enter into force by 1 September 2023.[10] As a rule of thumb, GDPR compliance will imply compliance with the rev-FDPA, but some localisation of contracts, policies and notices in accordance with the GDPR will be necessary.[11] Along with the FDPA, the FDPO will be revised (rev-FDPO). A draft of the rev-FDPO has been published but was met with harsh criticism for a number of reasons, but most importantly because several provisions of the draft ordinance have no basis in the rev-FDPA. A final version of the rev-FDPO is expected to be published by August 2022.

As of today, the FDPA is much less onerous than the GDPR, and sanctions are low and rarely enforced in practice. Compliance with the FDPA is therefore driven by reputational risk as much as legal risk. Under the rev-FDPA, however, legal risk will increase substantially. On the one hand, the Swiss data protection authority, the Federal Data Protection and Information Commissioner (FDPIC), will have a right to issue binding orders (eg, to cease a particular processing activity, to inform data subjects, etc), which the FDPIC cannot under the current FDPA. On the other hand, the individuals responsible for certain breaches of data protection law may be personally

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6 They may also bring a claim before a French court, provided the court has jurisdiction under French law.

7 Article 3(1) GDPR.

8 Article 3(2) GDPR; see the Guidelines 3/2018 on the territorial scope of the GDPR (article 3) by the European Data Protection Board (EDPB), version 2.1 dated 12 November 2019.

9 See https://datenrecht.ch/ndsg-en for an unofficial English translation.

10 The date has been communicated by the Federal Office of Justice but is yet to be officially confirmed by the Federal Council.

11 See https://datenrecht.ch/revdsg-umsetzungsleitfaden-von-walder-wyss for implementation guidelines.

liable to fines of up to 250,000 Swiss francs, provided they have acted intentionally and a criminal complaint is filed. Not all breaches will be liable to fines, however. For example, failure to erase personal data in time will not lead to a fine, whereas giving incorrect information to subjects making an access request, failure to comply with the information obligation, transfers abroad in breach of transfer restrictions or the use of processors without the required controls will be liable to a fine.

Data protection in M&A

In the context of M&A transactions, the relevance of data protection law may be grouped broadly in the following categories:[12]

- Due diligence phase: a prospective buyer or bidder or, in the case of a vendor due diligence, the seller of shares or assets will require some personal data for their due diligence assessment, at least with regard to key employees.
- Asset deal: where a transaction is for assets that include personal data (eg, a customer base or a database with direct marketing information), the transfer of assets and the subsequent use of personal data by the buyer raises data protection questions.
- Share deal: in the case of a share deal, there are usually fewer concerns about data protection, but the due diligence phase may be even more important.
- Purchase agreements: with an asset deal as well as a share deal, the buyer will usually seek reassurance by incorporating warranties into the purchase agreement.
- Service providers: where service providers are involved, they may act as 'data processors' on behalf of a party or the parties to the transaction acting as controllers, which requires a data-processing agreement.[13] Other service providers such as tax, finance and legal advisers usually act as separate controllers, which does not require a data-processing agreement but may raise other data protection questions.

In addition, the communication between the parties requires the processing of personal data at least with respect to the contact persons. However, since this processing is not different from similar processing in other circumstances, it will not be addressed further.

Overview of applicable restrictions

Most data protection laws, including the GDPR, the FDPA and the rev-FDPA, follow a similar pattern.[14] They set forth general principles, which are broad and somewhat vague in nature but may be directly enforceable nonetheless, and which are complemented by a number of more detailed requirements (very detailed, in some instances). For example, the GDPR requires all data processing to be lawful, fair and transparent and as unintrusive as possible,[15] but what

12 See the guidelines issued by the FDPIC in March 2010, *Datenweitergabe im Rahmen von Unternehmenszusammenschlüssen* (Data transfer in the context of business combinations).

13 Article 28 GDPR; article 10a FDPA; article 8 rev-FDPA.

14 These are based on international conventions and guidelines, most importantly the Council of Europe Convention 108, whose revised version has already been ratified by over 50 countries.

15 Article 5 GDPR.

is lawful is subject to detailed provisions,[16] and transparency is regulated comprehensively as well.[17] In addition, transfers of personal data abroad are restricted,[18] data processors must be bound by an appropriate agreement,[19] and data subjects have a number of rights,[20] most importantly the right to learn about the processing of their data. In addition, controllers are under an obligation to document their data processing and maintain a record of processing activities.[21]

To allocate the obligations to comply with these requirements, data protection laws make a distinction between the controller on the one hand, and the processor on the other. 'Controller' means the party that drives the processing, that determines its purposes and its 'means', that is, how the processing plays out – for example, which protective measures are applied, how long data is kept and who will have access to the data. A 'processor', on the other hand, is a party that processes data on behalf of and only for the purposes of the controller; for example, the provider of a data room.[22] These concepts are rather fluid, and what complicates matters is that several parties can share the role of controller if they determine jointly the purposes or means of the processing. Where this applies, under the GDPR, the joint controllers must allocate the various obligations under the GDPR through an agreement with each other and must tell the data subject who has which responsibilities.[23]

Due diligence phase

In the due diligence phase, the data protection principles mentioned above require the controller to plan ahead and consider data protection restrictions throughout the due diligence phase. The most important points are set out below, without claiming completeness.

Lawfulness

Under the GDPR, all processing must be 'lawful', which means it must be based on one or several of the legal grounds provided by the GDPR. With regard to a due diligence assessment, 'legitimate interest' will generally be the most likely ground. The interest in carrying out a due diligence assessment constitutes an important legitimate interest for both the seller and the prospective buyer or buyers.[24] Where this interest is not outweighed by contrary interests of the subjects, it provides a legal ground for the processing. As a rule, the interests of the parties to the transaction will prevail so long as the scope of the data disclosed is as narrow as reasonably possible, is not disclosed prematurely (eg, only to a buyer with a genuine interest in the transaction, or to the remaining bidders after a first round) and is protected by a non-disclosure agreement that prevents the recipient from disclosure or repurposing.[25]

16 Articles 6, 9–10 and 47–49 GDPR.
17 Articles 12 et seq GDPR.
18 Articles 44 et seq GDPR.
19 Article 28 GDPR.
20 Articles 12 and 15 et seq GDPR.
21 Article 5(2) and 30 GDPR.
22 See articles 4(7) and 4(9) GDPR.
23 Article 26 GDPR.
24 See Peter Schantz, in: Simitis/Hornung (eds), *Datenschutzrecht*, 1st ed 2019, article 6 GDPR No. 128.
25 See Schantz, article 6 GDPR No. 128.

However, legitimate interest does not justify the processing of sensitive data ('special categories of data' in GDPR lingo). For sensitive data, such as health data, genetic or biometric data, data revealing racial or ethnic origin, or data concerning a natural person's sex life, etc,[26] the only legal ground available in M&A transactions is explicit consent.[27] In other words, the seller will not be permitted to disclose sensitive data to a prospective buyer, unless the subject has been informed in sufficient detail about the disclosure and has provided their free, specific and explicit consent and has not withdrawn consent.[28]

Different from the GDPR, the FDPA (and the rev-FDPA) do not require a legal basis for the processing of personal data. However, the situation is slightly different for employee data. Employers cannot process employee data unless the processing is necessary for the employment,[29] which raises the question of whether disclosing employee data ahead of a potential transaction is necessary for the employment. The question remains open, but writers addressing this question specifically remain sceptical in this regard, except perhaps for key employees. Moreover, it is questionable if the processing of employee data for purposes not necessary for the employment may be justified by prevailing interest. If a seller applies a cautious approach, collecting employee consent may be an option, although this raises additional questions.[30]

Where personal data is transferred abroad to a recipient in a country that is not considered to provide adequate data protection (such as the US), the transferor will need to ensure that the transfer is based on adequate safeguards, such as the current version of the EU Standard Contractual Clauses, which were released on 4 June 2021.[31] The EU Standard Contractual Clauses are set standard contractual clauses recognised by the European Commission and the FDPIC as providing sufficient protection for transfers abroad to countries with inadequate data protection (provided that they are usually slightly tweaked where data is transferred from Switzerland in order to account for Swiss law).[32]

A seller and prospective buyer may therefore need to enter into an agreement incorporating the EU Standard Contractual Clauses in order for the seller to be able to transfer personal data

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26 Article 9(1) GDPR. However, not all data that may reveal sensitive information is sensitive in all cases. For example, employee photos are not considered to be sensitive, even though a photo of someone wearing glasses reveals something about their health, and a name indicative of a particular country or region is not always sensitive as well. This is more relevant when it comes to transactional data that may be used to derive information about a person's sexual preferences or health, so long as no such profiling information is disclosed to the prospective buyer.

27 Except in the unlikely case that a transaction is warranted by applicable law of an EEA member state.

28 Articles 4(11), 7(3) and 9(2)(a) GDPR.

29 Article 328b of the Swiss Code of Obligations (CO).

30 For example, consent is invalid if it is not given freely, which may be questionable for employees.

31 See https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021D0914. Note that under the current FDPA (but not the rev-FDPA), the data exporter must notify the use of the EU Model Clauses to the FDPIC (article 6(3) FDPA).

32 The FDPIC published guidance on 27 August 2021, which is available in English at www.edoeb.admin.ch/dam/edoeb/en/dokumente/2021/Paper%20SCC%20def.en%2024082021.pdf.download.pdf/Paper%20SCC%20def.en%2024082021.pdf.

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to the buyer. In accordance with the European Court of Justice's *Schrems II* ruling,[33] with later guidance provided by the European Data Protection Board and with the EU Standard Clauses, the parties to these clauses must carry out an assessment to understand the risk that an authority may gain access to the data transferred through the recipient on the basis of local law (usually referred to as a 'transfer impact assessment' or 'transfer risk assessment' and the result of the assessment may be that additional technical and organisational measures are required for the relevant transfer.

Data minimisation, proportionality, purpose limitation and data security

The principles of proportionality, data minimisation and purpose limitation[34] require the parties to consider carefully the extent of personal data to be disclosed to the prospective buyer, and the time when personal data is first made accessible. As a general guideline, less and later is less intrusive to the privacy of the subjects and preferable under these principles. For example, it may be sufficient in an initial stage to provide anonymous, aggregate information (such as the overall compensation structure or the total compensation paid out to a group of employees) or pseudonymised information ('employee 1534' instead of the name), provided the prospective buyer cannot draw personalised conclusions, or to permit the buyer to access a sample of but not all customer data to carry out verification or testing. If and when disclosure of personal data is not a viable option, then the controller is not in breach of the minimisation and proportionality principles but must assess if there is a legal ground for the disclosure (see above).

Moreover, disclosing personal data for a due diligence will generally not amount to a change in the processing purpose. However, to prevent the recipient from processing data for additional purposes, the disclosing party should enter into an appropriate non-disclosure agreement, which will certainly be in place at this stage of the transaction, and should include a specific clause to limit data processing and require erasure should the transaction be aborted.

Finally, data minimisation and proportionality require restricting the individuals with access to the due diligence documentation and the due diligence report, both at the buyer as well as the seller, and under the data security principle,[35] data should be transferred securely.

Transparency (information)

The principle of transparency[36] requires the controller to inform the data subject about the purposes of their processing, among other points. In many cases, the privacy notices provided earlier to the subjects (usually employees) will lack an express reference to M&A transactions. It is therefore advisable (and perhaps necessary in order to assess risk arising under a warranty or other undertaking agreed with a buyer) for the party providing information for the due diligence process to review the relevant privacy notices, even though it is questionable if 'transactions'

33 Decision C-311/18 dated 16 July 2020, https://curia.europa.eu/juris/document/document.jsf;jsessionid=D6CBAF955278E56DF5D2FB67DF0BDBF2?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=563797.

34 Article 5(1)(3) GDPR; article 4(2) FDPA; article 5(2) rev-FDPA.

35 Article 7 FDPA; article 7 rev-FDPA; articles 5(f) and 32 GDPR.

36 Articles 5(1)(a) and 12 et seq GDPR; articles 4(3) and 14 FDPA; articles 5(4) and 17 rev-FDPA.

really are a separate processing purpose that must be notified to the subjects.[37] If they are found to be lacking, that party may wish to update the notices[38] or provide additional information about a potential transaction in generic terms if that is a viable option at this stage.[39] This applies for all subjects whose data is expected to be disclosed or otherwise processed within the framework of the transaction. However, the controller may have an argument that providing the required information is impossible (if these subjects are not known) or 'likely to seriously impair the achievement' of the transaction, if confidentiality is of the essence, at least with respect to third parties where the controller has no direct contact.[40]

Focus areas

The comments above deal with the data protection framework around due diligence reviews. A different point, however, is the focus a due diligence review should have in view of data protection restrictions. The answer here is twofold – a due diligence should detect and help mitigate compliance risks of the target company in a share deal generally, and it should help a potential buyer to understand the risks involved with acquiring data as an asset or as part of an asset. These questions will be addressed below in 'Focus areas for a due diligence review'.

Asset deals

Regulatory restrictions

In asset deals, the key question usually is whether personal data may be transferred to and further processed by the buyer, and if consent by the affected data subjects (usually the seller's end customers, such as users of a software product or online service) is necessary. Under Swiss law, consent is generally not a requirement, provided that:

- the subjects are informed at the appropriate time and in the appropriate manner about the transaction;
- the seller discontinues its use of the relevant data; and
- the buyer does not process the data in ways that would not have been permitted for the seller.

37 Transactions arguably do not change the processing purposes, because a transaction aims at transferring a company or a business, not at processing personal data, even though the transaction incidentally requires data processing.

38 For example, by including language such as 'to prepare and consummate company transactions such as sales and purchases of assets or stakes in a company' in the statement of purposes and mention the legitimate interest (article 6(1)(f) GDPR) in carrying out transactions.

39 See articles 13(3) and 14(4) GDPR.

40 Article 14(5)(b) GDPR; see EDPB, Guidelines on Transparency under Regulation 2016/679, 11 April 2018, No. 65. With regard to subjects with a direct link, however, this exception may not be available (some propose to apply article 14(5)(b) GDPR by analogy, but this is an uncertain proposition. The controller might find an exception of the obligation to notify under applicable EEA member state law that complements the GDPR (article 23(1)(i) GDPR). However, most EEA countries do not provide an additional exception that would apply in this context, see, eg, sections 32–33 of the German Bundesdatenschutzgesetz (Federal Data Protection Act) or article 32 of the French Loi No. 78-17 relative à l'informatique, aux fichiers et aux libertés (Law on Information Technology and Civil Liberties)).

If these conditions are satisfied, the only real effect of the transaction is a change in the controller, which does not constitute a breach of a processing principle and is therefore not in need of justification (whether by consent or by a prevailing interest).[41] However, to mitigate risks, the seller may seek an agreement with the buyer that restricts the buyer's processing to the earlier processing by the seller.

Should the seller consider a change in the processing, the question arises whether this change amounts to a different processing purpose. In the affirmative, the purpose limitation principle may be infringed, which would require the buyer to justify the novel purpose.[42] Justification by commercial interests is a possibility, as well as benefits arising from the changed processing for the data subjects, but all depends here on the nature and scope of the novel processing. For example, should the buyer intend to leverage data by performing analytics not carried out previously by the seller, or to market different types of services to the data subject, there might be a change in purpose that is difficult to justify by prevailing interest. In that case, the buyer (or the seller) may consider collecting consent from the subjects, for example, by sending an email notification to the subjects with information about the transaction and the further processing by the buyer, and asking the subjects to opt in.[43]

Under the GDPR, the analysis is similar. If personal data is transferred as part of a business, then the seller and the buyer should be able to rely on legitimate interest for the transaction.[44] Where the original processing by the seller relied on consent, however, the buyer will have to make an assessment if consent is specific to the seller or, rather, covers the processing independently of the name of the controller. In any event, risks can be mitigated by giving an option to the data subjects to object to the transaction and the subsequent processing by the buyer.

Finally, data should again be transferred securely, for example, by an encrypted file or using a secure data-sharing platform.[45]

Focus areas for a due diligence review

If personal data is transferred as an asset or part of an asset, the buyer will value the transaction fully or partly in accordance with the value of the buyer's anticipated processing of the data. The due diligence will therefore focus on restrictions applicable to that processing. For example, and depending on the circumstances (including the risks for the data subjects and the companies involved with the transaction), the buyer will ask to review the following documents and items:

- privacy notices presented to the data subjects;[46]
- where the processing is based on consent (for example, processing for electronic direct marketing), whether consent has been properly collected and documented, and generally

41 See articles 4, 12 and 13(1) FDPA and articles 5, 26 and 27(1) rev-FDPA.

42 Articles 4(3) and 12(2)(a) FDPA; articles 5(3) and 26(2)(a) rev-FDPA.

43 Opt-out may be an option as well, depending on the circumstances, unless the data transferred includes sensitive data.

44 Article 6(1)(f) GDPR.

45 Article 7 FDPA; article 7 rev-FDPA; articles 5(f) and 32 GDPR.

46 The buyer should be aware that a lack in transparency might lead to the relevant processing being unlawful, at least where the processing is based on particular legal grounds. This is the position taken by a part of the doctrine under the GDPR. Under the FDPA and the rev-FDPA, it is less likely that a purpose not stated to the subject would render the processing for that purpose inadmissible.

the consent management used by the seller. Likewise, the management of objections against the seller's processing;

- if, how and when the subjects will be informed about the transaction, and the likelihood for subjects to opt out of or object to the transfer, which may directly affect the transaction's value proposition;
- any restrictions arising under specific regulation. For example, personal data may be subject to secrecy obligations, which may prevent the seller from transferring personal data to the buyer without a waiver by the subject;
- terms and conditions applicable to the agreement between the seller and the data subjects (if any), which may state expressly that personal data will not be shared with a third party, and may also include a waiver for transactions; and
- the age of the relevant data, and whether it has been kept beyond the periods stated in the seller's retention policy or applicable under law.

Asset purchase agreements

When considering the purchase of data as an asset or part of an asset, the prospective buyer will usually seek reassurance by incorporating warranties into the asset purchase agreement. For example, the seller may warrant – depending on the circumstances and the negotiation – that the seller has complied with applicable data protection laws when acquiring and maintaining the data and is entitled to transfer the database to the buyer, that the buyer is entitled to use the data under applicable data protection legislation for the intended purposes, and that the seller has no notice of any claims or complaints by data subjects in relation to the data and no notice that any data protection authority considers the seller to have infringed applicable data protection legislation in relation to the data. On the other hand, general compliance with data protection laws by the seller will be of less interest, unlike as with a share deal.

Share deals

Regulatory restrictions

Different from an asset deal, with a share deal the controller for the personal data processed by the acquired company does not change. There is therefore no transfer of personal data from one company to another. However, the buyer must be aware that data flows from the acquired company to other members of the acquiring group constitute a data transfer that is only permitted within the constraints of data protection law, which does not give carte blanche for intra-group transfers.[47] Likewise, if the acquired company adjusts its business model following the integration in a new group, it must be conscious that a change in its data processing may lead to a new purpose, which may violate the purpose limitation principle.[48]

47 Under the GDPR, such transfers require a legal ground, just as any other form of data processing, for example, legitimate interest (article 6(1)(f) GDPR). However, Recital 48 states that there may be 'a legitimate interest in transmitting personal data within the group of undertakings for internal administrative purposes'.

48 Articles 5(1)(b), 6(4), 13(3) and 14(4) GDPR.

Focus areas for a due diligence review

With respect to share deals, a buyer will expect the target company to be reasonably compliant with data protection regulation, in particular with the GDPR but also with other applicable regulation, for example, Swiss or US legislation (such as the Health Insurance Portability and Accountability Act, which protects health information, or the California Consumer Privacy Act). Under normal circumstances, a buyer should not expect full compliance with applicable data protection law and instead should focus on the key compliance issues potentially arising for the target company. 'Compliance' in absolute terms is not possible to achieve in any real-world scenario, and looking for it would potentially delay the transaction and take the focus away from other equally important areas.

However, a buyer should look for documents and information that demonstrate robust, workable procedures designed to ensure compliance. The following list sets out documents that might be reviewed by a prospective buyer (including on a group level if the target company is part of a group), although not all of these documents may be necessary or available, and that additional documents may need to be reviewed, in particular in regulated areas:

- a privacy policy that sets out the principles guiding the company's dealing with personal data and the key roles and responsibilities;
- 'records of processing activities' (sometimes abbreviated as ROPAs), which is the inventory of the company's various data-processing activities mandated under the GDPR and under the rev-FDPA, along with any data protection impact assessments carried out or ongoing;
- if the company has appointed a data protection officer (DPO), the job description or appointment document;
- a document explaining the company's security measures to protect key data;
- if the company has appointed an EU representative under the GDPR, the document appointing the representative;
- internal policies and procedures for dealing with data breaches and for carrying out data protection impact assessments;
- the company's retention policy, along with information about its retention and deletion practices;
- customer-facing privacy notices, in particular where the target company is active on the mass market, and in that case policies or procedures for dealing with data subject requests;
- if the company generally relies on consent for key processing activities, information about the collection, documentation and management of consent;
- information about high-risk profiling activities and automated decision-making (if any);
- agreements regulating intra-group data flows, which may consist of a framework agreement along with terms for joint controllership, controller–processor arrangements, and standard clauses for data exports to third countries;
- data protection agreements with key suppliers, customers and partners and standard clauses used by the company in agreements with these parties, for example, a standard data-processing agreement;
- 'legitimate interest assessments' carried out for key or high-risk processing activities;
- a privacy notice for employees, along with other employee regulation such as acceptable use policies and policies for whistle-blowing or the use of personal devices for business purposes;

- agreements with works councils or other employee organisations with respect to the company's data processing (if any);
- any regular or ad hoc reports submitted by the DPO to the management;
- breach notifications and data protection impact assessments submitted to authorities;
- breach notifications communicated to the affected data subjects;
- a description of data protection training given to all or key employees;
- records of government action related to data protection, including requests from data protection supervisory authorities and fines imposed on the company; and
- records of litigation related to data protection, for example, subject access requests that were escalated to a court.

The availability of these documents, their granularity and generally the way they are drafted and used and communicated internally will give a sound idea of the company's general maturity of data protection compliance and the legal risk it may be exposed to. If important documents are missing, the buyer will expect the company to explain in order to understand legal risk related to any gaps, which will depend to a large extent on the company's business case and its exposure in countries with tighter data protection supervision.

Share purchase agreements

In share purchase agreements, sellers usually provide warranties for compliance in general or specifically with respect to data protection. For example, the buyer may ask for a warranty that the target company complies with applicable data protection legislation, that no litigation on data protection is pending or threatened, or that no data breaches have occurred in a past period. If the target company operates under increased risk, for example, a regulated entity, an additional warranty may be required for compliance with internal policies. Warranties may be subject to disclosure letters stating exceptions for a data protection warranty, and to a cap on indemnities, which may be different for violations of data protection laws than for breaches of other warranties.

Where specific infringements have been detected during the due diligence review, the buyer may expect the seller to remedy the infringements prior to closing, unless the buyer is content to accept the risks related to the infringements. Infringements of a lesser nature that can be remedied quickly (for example, where a data protection officer is necessary but has not been appointed) and a remedy of the infringement may be agreed as a condition precedent to closing. For other infringements, a specific indemnity may be a more appropriate solution.

Service providers

In M&A transactions, the parties will usually employ a range of service providers, for example, law firms, M&A advisers and data room providers. Depending on their role, particular agreements with these providers may be required.

Even though they are service providers, law firms and M&A advisers generally act as individual controllers, as opposed to data processors in terms of article 28 GDPR and joint controllers under article 26 GDPR. A transfer of personal data to these providers is therefore subject to the general processing principles but does not require an agreement with specific minimum content. However, where a transaction is particularly sensitive, the seller or buyer may wish to have an agreement with these providers to restrict their processing of information, for example, by requiring Chinese walls between different teams or erasure of data transmitted (subject to retention requirements). In some cases, these providers will additionally be required to apply certain data security standards. However, these requirements will usually be driven by general confidentiality concerns, not data protection law specifically.

On the other hand, a provider of an electronic data room (for example, Merrill or Intralinks) acts as a data processor under article 28 GDPR (or, under Swiss law, article 10a FDPA and article 8 rev-FDPA). The controller is therefore under an obligation to enter into a data-processing agreement. Typically, these providers use their own data-processing terms as part of their general conditions of business or as a separate agreement, and tailor these terms to article 28 GDPR. Moreover, where the provider is located in a country that is not considered to provide adequate data protection, such as the US, the provider will typically incorporate the EU Model Clauses mentioned above in the applicable terms (unless the provider is certified under the Swiss–US or EU–US Privacy Shield).

A review of these terms may be prudent, however, for example, to ensure that the controller does not accept to be bound by the GDPR (should the GDPR not apply), and that the controller is content with other terms such as a limitation of liability.

On a related note, the seller and the buyer should not be seen as joint controllers in the transaction, including with respect to data room and other providers, even though there are other views, and they will therefore not be required to enter into joint controller arrangements in terms of article 26 GDPR.

Concluding remarks

Data protection is gaining importance in all areas, including M&A transactions. While restrictions under data protection law generally do not conflict with transactions per se, risks can be mitigated, and negotiations can be helped, if data protection is considered early on, before and in the transaction. Law firms know today that their M&A team should speak to the data protection team and involve specialists in transactions where data is an important asset. As regulation becomes tighter and data becomes more important, the due diligence specifically with respect to data and data protection gains increasing importance as well. In this respect, the buyer – in the case of buyer due diligence – should take care to understand the maturity of the target's data protection and restrictions potentially applicable to data acquired, but without perfectionism and without expecting full compliance in every regard.

4

Key Intellectual Property Issues in M&A Transactions

Peter Widmer and Peter Bigler[1]

Introduction

Switzerland is a small but key market for businesses worldwide. Featuring a highly educated workforce, competitive tax laws, a stable government and an efficient judicial system,[2] as well as access to the EU market, Switzerland is home to both global corporations as well as SMEs and innovative start-ups. At the heart of the success of these companies lies their innovation, often reflected in intellectual property (IP[3]) and rights vested therein, namely, intellectual property rights (IPRs[4]). Apart from trademarks, patents and other classical IPRs, trade secrets and in particular software form the backbone of modern businesses.[5] Proper identification, description, allocation of and securing access to IPRs are therefore not only crucial for the architecture of M&A deals as such, but also, when designing the IP-relevant part of the deal, it must be ensured that:

- the company's own operations can continue without undesired restrictions after the planned transfer of assets consisting of IP to a buyer; and
- the buyer may require appropriate continued access to IP remaining with the seller for a defined phasing-out period in order to be able to use and implement the acquired IP at all.

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2 In particular, Switzerland offers efficient patent litigation (among other things, in the English language); for this purpose, the highly specialised Federal Patent Court was established in 2012 and has exclusive jurisdiction in civil matters relating to both validity and infringement of Swiss and European patents.

3 The term 'IP' refers to creations of the mind, such as inventions; literary and artistic works; designs as well as symbols, names and images used in commerce; see definitions under www.wipo.int.

4 The terms 'intellectual property rights' or 'IPRs' describe the rights given to individuals over the creations of their minds. They usually give the creator an exclusive right over the use of his or her creation for a certain period of time; see definitions under www.wto.org.

5 See, eg, the now famous *Wall Street Journal* essay by venture capitalist Marc Andreessen on why software is eating the world: https://a16z.com/2011/08/20/why-software-is-eating-the-world/.

When preparing M&A deals, pitfalls lurk. Therefore, many M&A deals fail completely. Others succeed, but fail to pay back the money invested in them. One of the reasons is lack of understanding of the involved firms' IP, its scope and limits.[6] Flawed M&A deals may in particular lead to either buyer, seller or their affiliates lacking access to vital IP after the deal, to unintended forfeiture of said rights or – even worse – to infringement of third-party rights.

The starting point must therefore always be the identification of the IP and IPRs relevant for the intended transaction, their analysis, description and appropriate listing. Registers such as the Swiss IP register[7] may give stakeholders an overview of registered IPRs. But such registers do not necessarily show complete or up-to-date information: past changes of ownership of IPRs may not (yet) be reflected in the current registry records. This applies all the more for complex chains of assignment of IP and IPRs that took place over the years but were never (completely) reflected in such registers. The entries also do not necessarily show whether the IPRs in question are encumbered (ie, used as collateral), given that the registration of pledged IPRs in the Swiss IP Register is not constitutive for a valid pledge under Swiss law. Also, there may be other encumbrances such as licences granted to third parties or intra-group entities. Again, the validity of such licences does not require recordal in the Swiss IP Register. Finally, there may be other contractual restrictions in relation to the permitted use of such IPRs.[8]

Such pitfalls occur even more frequently in relation to unregistered rights such as copyrights,[9] which form the basis for software protection in Switzerland. Software usually grows over the years with many parties involved, as well as other software elements (both proprietary and open source) being integrated and adapted, leading to complex ownership situations.[10]

Finally, in a globally connected economy, IP issues can have considerable cross-border effects, such as in the bankruptcy of an affiliate company owning certain core IPRs. Such IPRs can be business-critical for a going concern of surviving entities within a group of companies and may have an effect in many different jurisdictions. Of course, strategies such as ring-fencing of IPRs can be deployed to mitigate such risks: the ownership of business-critical IPRs can be transferred from operational (in particular regulated) group entities to business-remote and resolution-resilient entities such as mere IP holding companies, non-operational holding entities or dedicated business support entities. However, this all comes at a price. Obviously, such intra-group transfers are complex and costly. Moreover, decentralised and ring-fenced ownership of IP may complicate transfer of such IPRs in subsequent M&A transactions, monetisation of valuable IPRs in licensing scenarios with third parties as well as in enforcement scenarios in the case of infringement of own IPRs.

In light of the above, this chapter aims to highlight the key IP issues in Swiss M&A transactions.

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6 For these and other failure risks see Bryer/Simensky, *Intellectual Property Assets in Mergers and Acquisitions*, Wiley 2002, p2.26.

7 www.swissreg.ch.

8 In relation to trademarks, there could be coexistence and delimitation agreements that can considerably limit the permitted scope of use of a certain registered trademark in several jurisdictions.

9 Registration of copyright is neither necessary nor possible in Switzerland; see also 'Unregistered IPRs'.

10 See 'Joint ownership in IPRs'.

Identifying and taking stock of the relevant IP and IPRs

From an IP point of view, the preparation of any M&A transaction starts with the identification and listing of all relevant IP and IPRs, irrespective of whether it is a share or an asset deal.

In a share deal, IP and IPRs do not change hands directly. Nevertheless, the careful analysis of IP and IPRs flagged for transaction (together, transaction IPRs) is crucial in numerous aspects. First, such a transaction may have an impact on the underlying licence rights connected to some of the transaction IPRs used by the entity intended to be divested. This can be relevant if a share deal is regarded as a change-of-control event in a particular business-critical licence agreement, which may result in its termination. Second, some of the transaction IPRs may not be owned by the company that is sold to the buyer (see 'Ownership by employees or third parties'). Third, the seller may want or need to keep certain rights (which are part of the transaction IPRs) for continued use in its own organisation.

In an asset deal, where a specific part of the business is to be carved out and sold to an independent third party, stakeholders must ensure that the transaction IPRs are properly allocated to the target entity that acts as the seller within a group of companies. The same is true in regard to joint venture transactions with minority interest of the transferring party. In such scenarios, ownership of IPRs is often scattered across various companies of the group or company acting as seller. This requires thorough investigation in relation to the ownership and use of the transaction IPRs by the seller so that the transaction IPRs can be properly allocated to prepare for the carve-out exercise. Again, such IPRs may often be relevant to other business units of the seller (eg, software that powers the entire business). In those situations, an outright sale of such IPRs may not be an option, while a licensing or software as a service (SaaS)[11] concept may work.

Finally, to add an additional layer of complexity, ownership of IPRs within a group of companies is not only a question as to who is their legal owner in IP registers or intra-group inventories. Rather, there may be aspects of (tax- and accounting-related) economic ownership as far as a particular entity within the group has contributed to the value of the transaction IPRs. This differentiation between legal and economic ownership may be (tax-) relevant in relation to the split of proceeds resulting from the sale of such IPRs, both in share and asset deals. Therefore, pre-transaction valuation of IPRs is not only price-relevant in relation to the buyer but also for internal accounting and tax purposes.

In sum, the identification, description, categorisation, valuation and listing of relevant transaction IPRs is crucial for a successful transaction. This process can be quite laborious and difficult, especially when concerning unregistered IPRs and other intangible assets (see 'Unregistered IPRs').

If the company lacks detailed internal records in relation to its IPRs, a search of the public databases may be a good starting point. Apart from the official registers,[12] dedicated search providers may assist in accessing additional databases relating to registered IPRs. The majority

11 For the purpose of this chapter, SaaS is defined as follows: the software of interest continues to be operated within the control of the seller and the buyer obtains access to it by contractual means, eg, a service-level agreement.

12 Swiss trademarks, patents, supplementary protection certificates, designs and topography rights for certain semiconductor designs can directly be accessed via the official Swiss IP rights database (www.swissreg.ch). For Swiss trademarks and IP trademarks with designation Switzerland, see also the new Trademark Database (database.ipi.ch).

of the work of such IP due diligence consists, however, of investigating databases, contract files and similar repositories by internal staff in order to complete the relevant transaction inventory. While this may be a costly exercise in complex transactions, there are also valuable side effects. Indeed, it is an opportunity to review and streamline the existing IP.

Types of IPRs to be considered

In order to identify and list the transaction IPRs, the seller must know what kind of rights and intangible assets are to be considered. Swiss law does not provide for a legal definition of IP or IPRs per se. However, various laws provide statutory protection for the following types of IPRs and other intangible assets in Switzerland.

Registered IPRs

Common registered IPRs in Switzerland are trademarks, patents and designs. Registered rights grant exclusive rights to their owner upon registration in the relevant registers. Patents[13] are governed by the Federal Act on Patents for Inventions and its corresponding regulation.[14] Trademarks, on the other hand, are governed by the Federal Act on the Protection of Trade Marks and Indications of Source and its corresponding regulation.[15] Industrial designs aim at the protection of a new characteristic visual presentation of products or parts of these.[16]

Apart from these common IPRs, other registered rights are often overlooked, but may prove crucial to a business and its operation. Most businesses are closely connected to their company name (which can consist of the seller's house mark), as well as domain names and names of social media channels. Under Swiss law, the registration of names of legal entities (company names) can be constitutive for setting up a company. Such names are recorded in the register of commerce as operated by each canton in Switzerland, with a centralised registration and online tool.[17] These company names grant their owners certain exclusive and defensive rights[18] against other similar junior company names and are thus considered valuable IPRs. Given that company names and trademarks may overlap but each have their specific scope of protection, it is crucial that these company names are addressed in any M&A transaction. This applies all the more as the names of affiliates in a group of companies regularly consist of the distinctive element of the group's umbrella brand.

The same applies mutatis mutandis for domain names and names of social media channels. While these signs are not considered as IPRs in the traditional sense, they often include the house mark and are used as names of links to web content (ie, client-facing applications) that may be part of the proposed transaction. Thus trademarks, company names, trade names, domain names and names of social media channels are important elements of an entity's 'brand IP'.

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13 Including Supplementary Protection Certificates for active ingredients of Medicinal Products.

14 Federal Act on Patents for Inventions (Patents Act, SR 232.14) and Patents regulation (SR 232.141).

15 Trade Mark Protection Act (SR 232.11) and Trade Mark Regulation (SR 232.111).

16 Federal Act on the Protection of Designs (Design Act, SR 232.12).

17 An aggregated search of all cantonal indexes is accessible via ZEFIX, the central business name index of the Swiss Federation, www.zefix.ch.

18 See articles 944–956 Federal Act on the Amendment of the Swiss Civil Code (Code of Obligations, SR 220).

Unregistered IPRs

More difficult to identify and inventorise are unregistered IPRs and other intangible assets. The most business-relevant rights in this category are copyrights, as these form the backbone of the protection of software in the broadest sense. Switzerland does not have a register for copyrighted works. Instead, the Swiss Copyright Act grants copyright to the natural person who created the work upon its creation, a mechanism known as the 'creator principle'.[19] While this saves the creator a lot of administrative work, it makes tracking the owners of copyrighted works much more complex. Additionally, in practice, copyrighted works are often the result of collaboration between several individuals who may be employees of one but also of several different entities. This may result in joint authorship situations, which complicate ownership questions and transfers of copyright-based transaction IPRs considerably.[20]

In M&A transactions, these questions frequently materialise in relation to software. Companies often use proprietary software that has been written or at least adapted for their specific requirements. As these requirements change over the years, software is adapted and expanded, often implementing software elements provided by or procured from third parties (both proprietary and open-source elements). All this creates new interdependencies in relation to ownership of rights vested in such software. Depending on the licensing terms in relation to such third-party software elements, the seller may not even have the necessary IPRs vested in certain software to perform the proposed transaction. Also, the seller may lack the right to grant the proposed buyer the necessary sublicences to use specific software that is part of the transaction IPRs. To answer these complex ownership questions and properly transfer software, it is therefore crucial to trace the chain of assignment, and all contracts and other documents regarding the development and expansion of software identified for the transaction.

Apart from software, copyright plays an important role in relation to IPRs vested in corporate literature and material in the broadest sense, including manuals, promotional videos, video-tutorials in relation to specific business processes, etc. These IPRs are rarely systematically inventorised and are therefore very hard to identify when defining the scope of the transaction IPRs. Furthermore, only recently the Swiss Copyright Act was revised in relation to the protection of 'photographic depictions'.[21] Previously, photographs needed to have 'individual character' to be protected. With the revised law, any photographic depiction is copyrighted. This results in the protection of every-day pictures, which may be integrated in corporate literature intended to be transferred to the buyer as part of the transaction IPRs. This is likely to cause conflicts with copyright owners who have not granted consent for the use or transfer of such copyrights to third parties, for example, as part of an M&A transaction. A well-designed IPR catch-all clause may help to protect against such scenarios, but will require express limitations in the representations and warranties (see 'IP due diligence, IP representations and warranties, indemnification').

Finally, know-how in the sense of trade secrets, specific work products, business relationships, etc, may qualify as intangible assets and may enjoy protection under the rules of the Unfair Competition Act.[22] However, identifying and listing these assets may prove difficult. Nonetheless,

19 Article 6 of the Federal Act on Copyright and Related Rights (Copyright Act, SR 231.1).

20 See 'Joint ownership in IPRs'.

21 Article 2 section 3-bis Copyright Act.

22 Federal Act against Unfair Competition, SR 241.

stakeholders should ask themselves whether any such intangible assets may need to be part of the planned transaction. However, the appropriate valuation of IPRs is even more pronounced regarding these intangible assets.[23]

IP due diligence, IP representations and warranties, indemnification

The true value of IPRs lies in their economic exploitation, either as 'negative' defensive tools (eg, preventing competitors from using a patented technology) or as 'positive' tools for external communication (eg, using a trademark and the reputation associated with it to distinguish a company's own offerings). This fact has profound implications on M&A transactions. Transaction IPRs are of limited or no value to the buyer if they are legally flawed. IP due diligence is therefore a vital part of any preparation for an M&A transaction and should ideally start in the pre-signing phase in order to avoid undesired surprises in relation to the ownership and transferability of transaction IPRs.

After all the transaction IPRs have been inventorised, the next step must be listing their known and documented encumbrances and potential (legal) risks. Have the rights in question been licensed to third parties? If so, are these licences exclusive (meaning the buyer will be excluded from licensing such rights to other parties)? Have the rights in question been pledged as collateral, transferred by way of security or encumbered in any other way that could impede their unrestricted exploitation? Are there delimitation agreements with third parties limiting the scope of use rights in relation to trademarks? Listing these encumbrances is not only the basis for the negotiation of substantiated representations and warranties of the seller in the transaction agreements in relation to the transaction IPRs. Rather, this process may also prompt the seller to address certain IP issues proactively, for example, that existing contracts with third parties need amendment or termination and that the transaction IPRs must first be consolidated in the hands of the seller before the planned transaction is possible.

With regard to software and its source code, this leads to multiple issues. First, does the seller own the rights to the original version of the software? Does the seller own the full rights to the code or just a licence to use the software? Who owns possible adaptations, extensions or derivative versions of the original software as developed over time? Second, does the code contain third-party software, implemented libraries, application programming interfaces or open-source elements, etc? If so, what are the licensing terms and do they impede the transfer of the software? Especially in the case of tailored software that has grown over the years, these questions are often difficult to answer and frequently a nightmare for the seller to grant realistic and robust representations and warranties to the buyer. Prior proper documentation of the software development history and of the relevant agreements is therefore imperative.

IP due diligence should also address (potential) legal disputes, such as past, active or emerging lawsuits or other procedures, such as threatening administrative trademark cancellation actions,[24] etc. Similar to a 'freedom-to-operate analysis' when considering patent protection, the buyer must ascertain in IP-related representations and warranties that there is transparency

23 The complex topic of valuing intellectual property is not within the scope of this chapter; for more information in the context of M&A deals, see, eg, Berens/Brauner/Knauer/Strauch (Eds), *Due Dilligence bei Unternehmensakquisitionen*, 8th ed, Schaeffer-Poeschel Verlag, 2019, pp638–647.

24 Article 35a Trade Mark Protection Act.

in relation to potential IP conflicts. While listing past and currently active legal disputes should not pose difficulties, identifying emerging lawsuits may prove trickier and often requires a risk-based judgement call by the seller as to whether to reveal a potential conflict.

The acid test for the seriousness of the seller's representations and warranties is the scope of the liabilities and indemnification accepted by the seller eventually. The seller is likely to be most careful in this respect. In fact, IP risks often do not materialise right after the M&A transaction, but can emerge years after, posing liability risks long after an M&A deal has been concluded. In addition, IP litigation never comes cheap. The parties must therefore keep in mind that indemnification clauses in particular pose considerable risks for the party granting them and thus have to be carefully evaluated and limited at least in relation to the scope, amount and duration.

Ownership issues in relation to IPRs

Within a group of companies

In general

Identifying and taking stock of the relevant transaction IPRs frequently leads to the question of who owns which rights within the group. What again seems like an obvious issue regularly leads to complex questions.

This is particularly true in a group of companies, where many if not all group members need access to the group's IPRs (such as trademarks that form the umbrella brand if group entities appear under a common brand identity). Typically, these IPRs are centralised and reside in a specific entity of this group (this can be the operational parent, a dedicated IP holding company or business support entity, etc). But IPRs may also be held by different entities of a group, with no or incomplete centralisation of the management of such assets.

Therefore, the entity acting as seller in an M&A transaction may not necessarily be the intra-group holder of the transaction IPRs. However, in an asset deal, these rights can only be sold if the seller is actually their legal owner. In a share deal, these rights get transferred only if they are owned by the company to be sold. Thus, proactive internal consolidation of the relevant IPRs in the hand of the seller is imperative before the M&A transaction. But there are several questions to consider: do internal agreements, such as intra-group service management and licensing agreements, permit such a transfer in the first place? Are there specific contingencies in case of a subsequent sale of IPRs to a third party? Are other companies of the group depending on the continued use of the transaction IPRs? If such IPRs cannot be transferred to the seller, does another company (such as the parent) have to become a party to the deal? The best way to handle these questions depends on the group structure and thus cannot be answered in general. The overarching goal must always be that all companies of the group keep access to all vital IPRs irrespective as to whether the M&A deal is successful or fails. The same is true in the case of bankruptcy of one group entity or restructuring of the group as such.

Safeguarding against bankruptcy in particular

As the set-up of IP ownership and licences within a group of companies can be complex, safeguarding against bankruptcy is vital, not only in relation to M&A transactions but in general. Relevant IP and IPRs must be accessible to all companies of a group at all times. That may not be the case if an operational company holding the IPRs falls into bankruptcy: the administrator in charge of managing the bankruptcy must do what is best to ensure proper procedure and protection of the creditors' rights, not necessarily what is best for the other companies of the group.[25] In the worst-case scenario, bankruptcy of one group company (or failure of the M&A deal) may cut off the other companies from vital technical infrastructure such as business-critical software or from IPRs such as trademarks and domain names used by affiliated entities as part of their corporate identity.

Strategies such as ring-fencing, where vital IP and IPRs are separated from the operating business, are therefore a tested option. Ownership of business-critical IP and IPRs is transferred from operational (in particular regulated) group entities to business-remote and resolution-resilient entities such as mere IP holding companies, non-operational holding entities or dedicated business support entities. As mentioned above, such intra-group transfers of IPRs are complex and costly. Moreover, decentralised and ring-fenced ownership of IP may complicate the transfer of transaction IPRs in subsequent M&A transactions, monetisation of valuable IPRs in licensing scenarios with third parties, as well as in enforcement scenarios in the case of infringement of own IPRs.

Joint ownership in IPRs

Joint-ownership of IPRs can be a stumbling block in M&A transactions. Where multiple inventors have made an invention jointly, they also own the rights to the patent jointly.[26] The same goes for copyrights and therefore for software protection in Switzerland: where two or more individuals have contributed as authors to the creation of a work, copyright belongs to all such individuals jointly.[27] Unless agreed otherwise, joint owners may only use and dispose of the work with the consent of all other owners.[28] Especially in regards to software, where there is no registration reflecting ownership, the concept of joint ownership raises complex issues as to who owns which rights to what part of the work in question. In an ideal world it should therefore be ensured that all employees involved as well as any external contributors transfer their IPRs in the software and in derivative versions thereof to the designated IP holding entity in a group of companies (see 'Legal situation in Switzerland').

Finally, in the case of a joint development of a specific project (eg, developing an industry standard or common platform based on hardware or software), employees of different entities and contractors often exchange ideas and work closely together. In hindsight, it is often controversial as to who provided ideas or added a (legally relevant) contribution to a work result. Establishing and, if necessary, proving the chain of assignment of individual shares for a complex piece of software can thus become quite difficult, if not impossible. This again raises risks for M&A transactions if the buyer requests comprehensive representations and warranties in relation to the ownership of software-related transaction IPRs.

25 For example, for the moratorium on debt collection, see article 295 et seq of the Federal Law on Debt Collection and Bankruptcy (SR 281.1).

26 Article 3 section 2 Patents Act.

27 Article 7 section 1 Copyright Act.

28 Article 7 section 2 Copyright Act; the Patents Act does not contain a similar explicit restriction to jointly owned patents, but the prevailing doctrine seems to support such an interpretation, see, eg, Heinrich, PatG/EPÜ, 3rd ed, Stämpfli Verlag, 2018, article 3 N 29.

Best practice when dealing with joint ownership is therefore simply to avoid it where possible. Otherwise, the parties should carefully make sure that underlying agreements allow the use and disposal of the jointly owned IPRs independently of one another.

Ownership by employees or third parties

Legal situation in Switzerland

As mentioned, the rights to inventions and copyrights arise with the natural person creating them, not the company that employs them. Switzerland does not know a 'works made for hire' doctrine such as in the United States, where under certain circumstance copyright is automatically assigned to the employer. Nevertheless, Swiss law provides for regulations on exceptional automatic transfer of ownership in relation to specific IPRs.[29] In view of the lack of an overall concept of automatic transfer of ownership vesting in IPRs, it is safe to provide for express clauses in employment contracts as well as express language in internal regulations such as IP policies in order to secure that employees have to actively assist in the transfer of IPRs created by them to the employer.

In the case of external contractors or other third parties participating in the creation of relevant IPRs, stakeholders must ensure that agreements with said parties cover the transfer of any relevant IPRs to the target owner. Particular care must be given to the scope of transfer: in Swiss copyright law, the principle of 'assignment limited to purpose' applies. This means that, unless otherwise explicitly agreed, copyrights are not transferred in whole, but only those specific rights (such as use rights) necessary to the agreed-upon purpose. For example, this might include the right to use a piece of software, but not to modify it or have third parties adapt and expand it. It is thus crucial that the transfer clauses reflect any rights the company needs and may need in the future, preferably the full rights to the copyrighted work or any other work result.

M&A transactions and joint ventures in particular

While properly assigning IPRs from employees or third parties to a target entity is necessary in general, it becomes especially important in the case of M&A transactions and other scenarios such as the setting-up of joint ventures. Often, missing rights of the seller to certain transaction IPRs are only discovered in the process of the IP due diligence (see 'IP due diligence, IP representations and warranties, indemnification'). Obtaining the necessary rights in the course of ongoing negotiations on IP-related transactions will regularly put time pressure on the stakeholders and may eventually compromise the M&A negotiations.

Additionally, there is always the risk that:

- the other party takes advantage of the situation by lowering the price offered for the proposed transaction; or
- the required rights have to be procured by a third party at disadvantageous commercial terms.

In the case of joint ventures, it is one thing to permit use of its own IPRs under a licence agreement. It is a totally different issue to transfer ownership of own IPRs to the joint venture company or to permit the entity to register and own rights consisting of IPRs of one of the joint venture

29 As an example, article 332 section 1 of the Code of Obligations.

partners. As a general rule, the latter scenario should be avoided to minimise the risk of losing control over valuable own IPRs.

Granting usage rights

As shown above, most IP issues relating to M&A transactions boil down to the question of whether all parties involved own the necessary rights to execute the M&A deal and continue their business operation afterwards as intended. In this regard, stakeholders must differentiate between the full rights to an IP title (such as a trademark) and licensed rights to said title. Inventorising the relevant IPRs[30] and performing careful IP due diligence[31] will give a good overview of the different categories of IPRs, as well as the scope of rights vested in such assets. Based on that overview, stakeholders will have to verify whether any of the findings collide with the target of the proposed M&A transaction.

In particular, stakeholders must check whether any of the transaction IPRs have been licensed to third parties or other companies within the group and, if so, whether such licences restrict or even jeopardise the goal of the M&A deal. Further, stakeholders must evaluate the effects of the M&A deal on any such licences in change-of-control scenarios. Licensing agreements with third parties may have explicit change-of-control clauses that exclude the transfer of a specific licence agreement to the M&A target in the first place or that require the prior consent of the licensor. In addition, it needs to be clarified whether the licence agreement at least permits sublicensing (if transfer is excluded) and, if so, under which conditions. Finally, the seller needs to ascertain that its own business operations can continue even if some IPRs have been transferred in the M&A transaction to a third party.

Eventually, this leads to the key allocation process in which the transaction IPRs are parsed into:

- IPRs that can be transferred to the buyer as a whole;
- IPRs that can only be licensed or sublicensed; and
- IPRs that must remain with the seller but to which the buyer obtains access on a contractual basis (eg, SaaS as far as software is concerned).

Other issues to consider

Post-closing transitional branding aspects

M&A agreements should not only clarify future ownership, use and protection of the IPRs, but should also address if and how long the buyer will be allowed to use the seller's brand IP post-closing. As a rule of thumb, immediate rebranding after closing the transaction is the preferred option from a seller's perspective. In any case, post-closing transitional branding aspects should be addressed as part of the M&A agreements or in the context of a separate transition services agreement, as well as whether (and, if so, under which terms and conditions) the seller's brand IP in general is permitted to be used beyond the transition or even registered as part of the buyer's own-brand IP. Finally, granting permission to post-closing transitional use of the seller's brand IP may require detailed licensing provisions and may pose delicate issues regarding continued liability and reputational exposure of the seller.

30 See 'Identifying and taking stock of the relevant IPRs'.

31 See 'IP due diligence, IP representations and warranties, indemnification'.

Public disclosure in the case of an M&A transaction

M&A deals always require sharing confidential business information with other parties, in particular regarding the own IP inventory. For example, during IP due diligence, the buyer will learn about the potential weaknesses and issues of the transaction IPRs. While all parties involved sign strict non-disclosure agreements regarding the use of such confidential information, the protection in practice is anything but watertight. If the M&A deal fails, the other party still knows the facts they have learned and may thus be in a much better position to compete.[32]

Furthermore, M&A transactions may require the parties to file documents with the public authorities. For example, the Swiss Mergers Act requires the parties in a variety of transactions to file an inventory of assets and liabilities that are the object of the transfer, including IPRs.[33] As third parties may obtain access to these documents, they could theoretically gain valuable insights about the IP or IT set-up of the parties involved. When preparing M&A transactions, it is therefore advisable to draft the internal documents as precisely as possible, while keeping any external documents as generic as permitted by law.

Tax issues

Finally, IPRs in M&A transactions may also have considerable tax implications, which require careful analysis. Swiss tax law offers new tools in relation to the holding and management of IPRs, such as 'patent boxes'. This option should be considered by the parties to an M&A transaction when discussing IPRs.

Conclusion

IP questions are a major part of any M&A negotiation. Handling IP and IPRs properly can therefore make or break M&A deals. Even if shortcomings in past IP strategy may not immediately affect an M&A deal, they may manifest years later in the form of costly litigation with third parties or between seller and buyer over IP in relation to representations and warranties. Thus the timely and proper set-up of policies for the systematic and comprehensive identification, protection, management, use and enforcement of the company's own IP and IPRs, and the comprehensive documentation of contracts in relation to the acquisition, transfer, amendment, restriction and sale of IPRs, will save time, costs and trouble when preparing for an M&A transaction. Shaping the IP chapter of the M&A transaction aims not only at a smooth transfer of the transaction IPRs. Rather, it must consider that:

- the company's own operations can continue without undesired restrictions after the transfer of IPRs to a buyer; and
- the buyer may require appropriate continued access to IP remaining with the seller for a defined phasing-out period in order to be able to use and implement the acquired IP.

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32 See also Bryer/Simensky, op cit, p2.27.

33 For example, article 71 Federal Act on Merger, Demerger, Transformation and Transfer of Assets (Mergers Act, SR 221.301).

5

Financial Market Regulation

Stefan Kramer, Benedikt Maurenbrecher and Manuel Baschung[1]

M&A transactions involving Swiss financial institutions

Licensing requirements for financial institutions

Main licence categories

This chapter provides an overview of the relevant regulatory and associated legal considerations for M&A transactions in the following financial institutions requiring a licence from the Swiss Financial Market Supervisory Authority FINMA (FINMA):[2]

- banks and other entities licensed under the Federal Act on Banks and Savings Banks 1934 (as amended; the Banking Act);
- the financial institutions licensed under the Federal Act on Financial Institutions 2018 (as amended; the Financial Institutions Act): portfolio managers, trustees, managers of collective investments, fund management companies, and securities firms; and
- insurance companies licensed under the Federal Act on the Supervision of Private Insurance Companies 2004 (as amended; the Insurance Supervision Act).

No consideration is given to transactions involving financial market infrastructures such as trading venues regulated under the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading 2015 (as amended; the Financial Market Infrastructures Act) and collective investment schemes regulated under the Federal Act on Collective Investment Schemes 2006 (as amended; the Collective Investment Schemes Act). Institutions of social security and pension schemes are also outside the scope of this chapter.

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1 Stefan Kramer and Benedikt Maurenbrecher are partners and Manuel Baschung is an associate at Homburger AG.

2 The respective licensing requirements are not limited to financial institutions incorporated in Switzerland but generally also apply to foreign institutions having a physical presence in Switzerland.

Recent developments

The Financial Institutions Act entered into force on 1 January 2020. Its licensing requirements are set to be phased in as follows:

- Financial institutions already licensed for the corresponding activity at the time of the Financial Institutions Act's coming into force (eg, fund managers of collective investment schemes) are not required to obtain new authorisation but were required to fulfil the requirements of the Act within one year of its coming into force (article 74 paragraph 1 Financial Institutions Act).
- Financial institutions that under prior law were not subject to a licensing requirement but were newly subject to a licensing requirement at the time of the Financial Institutions Act's coming into force (ie, in particular, portfolio managers and trustees) were required to report to FINMA within six months of the Act's coming into force. They must satisfy the requirements of the Act and submit a licensing application within three years of the Act's coming into force (article 74 paragraph 2 Financial Institutions Act).
- Portfolio managers and trustees that started their activity within one year of the Act's coming into force were required to report immediately to FINMA and after starting their activity generally must satisfy the licensing requirements. Within one year of FINMA's authorisation of the first supervisory organisation tasked with the supervision of portfolio managers and trustees on 6 July 2020, they were required to affiliate to such an organisation and submit an application for authorisation (article 74 paragraph 3 Financial Institutions Act).

Share deals

In principle, in a share deal, the transferred financial institution maintains its structure, its prudential authorisations and its contractual relationships (subject to possible change-of-control clauses). In the event of a merger (either by absorption or by combination), the surviving entity or the new entity takes over by law all the assets and liabilities as well as the contractual relationships of the acquired financial institution. Thus, from the point of view of financial regulation, there are advantages to a share deal, in particular when the buyer does not have a regulatory licence in Switzerland.

Nevertheless, such transactions may affect the particulars of the licence and thus require regulatory consent. They may also trigger requirements to notify the regulator.

Regulatory consent requirements

The financial institutions referred to above require a licence from FINMA to carry on their activities. This licence is granted only if certain conditions are met. For banks and the financial institutions licensed under the Financial Institutions Act, these include that the natural and legal persons who directly or indirectly hold at least 10 per cent of capital or voting rights or exercise decisive influence on their business activities by other means (each such instance, a qualified holding) ensure that their influence is not exercised to the detriment of prudent and sound management.[3] The requirement for these financial institutions to meet the licensing requirements on an ongoing basis also means that almost all transactions involving significant changes in shareholders require FINMA approval to be obtained.

3 Banking Act, article 3 paragraph 2c-bis; Financial Institutions Act, article 11 paragraphs 3–4.

In addition, banks and securities firms organised under Swiss law but subject to a controlling foreign influence are subject to additional licensing requirements. A controlling foreign influence is assumed if foreigners directly or indirectly hold more than half of the voting rights or otherwise exercise a dominant influence. If a controlling stake is acquired by foreigners only after the initial licensing, the bank or securities firm must apply for an additional supplemental licence. Such an additional supplemental licence must be renewed upon changes in the foreign holders of the controlling stake. Conversely, no additional permit needs to be obtained if a foreign-controlled bank or securities firm comes under Swiss control.[4]

Mergers and acquisitions may also trigger regulatory consent requirements indirectly. In particular, insofar as the transaction affects a financial institution's activities (including their geographic scope, not least by foreign acquisitions) or organisation described in the licence, the changes thereto may require approval from FINMA. Such transactions also regularly lead to changes among persons subject to 'fit and proper person' requirements. Furthermore, changes to the financial institution's constitutional documents (particularly its articles of association and organisational regulations) require consent from FINMA and may only be entered into the commercial register if they have been approved by FINMA.[5] Such changes are therefore usually submitted to FINMA in draft form for review and approval. As FINMA may request the financial institution's auditors to comment on the financial institution's continuing ability to meet its capital and liquidity requirements, the auditors should generally be involved prior to the submission of the relevant changes to FINMA.

Mergers, demergers and conversions of insurance companies generally require the approval of FINMA.[6] Authorisation will be granted only if the insurance companies concerned continue to meet the material conditions for authorisation after the transaction has been completed.

Regulatory notification requirements related to the acquisition and divestment of qualified equity holdings

Any natural person or legal entity must notify FINMA before directly or indirectly acquiring or disposing of a participation in a bank or financial institution licensed under the Financial Institutions Act of at least 10 per cent of the capital or votes (qualified holdings). This notification obligation also applies if a qualified holding is increased or reduced in such a way that the thresholds of 20, 33 or 50 per cent of the capital or votes are reached or crossed.[7] The obligation to report is linked to the participation. It exists regardless of the way in which this participation is acquired. The obligation can therefore be triggered by a purchase (share purchase), quasi-merger (share exchange) or merger.

The bank or financial institution licensed under the Financial Institutions Act itself is also obliged to notify FINMA of persons subject to the reporting obligation as soon as it becomes aware of the acquisition or sale. In addition, the reporting obligation must be fulfilled at least

4 Banking Act, articles 3-bis–3-quater; Financial Institutions Act, article 43.
5 Banking Act, article 3 paragraph 3; Financial Institutions Act, article 8; Insurance Supervision Act, article 5.
6 Insurance Supervision Act, article 3 paragraph 2, article 5 paragraph 1.
7 Banking Act, article 3 paragraph 5; Financial Institutions Act, article 11 paragraphs 5 and 7 (exempting portfolio managers and trustees).

once a year.[8] As these reporting obligations also cover indirect acquisitions, they must be observed if, for example, the holding company of a banking group is acquired.

The notification by the seller and the acquirer must be made prior to the acquisition or sale. This means that the notification must be made at least before the transaction is completed. While this does not constitute an outright consent requirement, in view of the possible sanctions, namely the possibility for FINMA to withdraw a licence if the conditions for the licence are no longer met, the parties will normally suspend the closing of the transaction and exercise their reporting obligation as soon as the commitment transaction is concluded. This makes it possible to await FINMA's determination on the matter. FINMA will check whether the new holders of qualified holdings have the necessary subjective qualifications.

The acquisition of an insurance company by means of a share purchase or a public takeover bid as such does not require explicit authorisation from FINMA. However, here again, the acquirer has to notify FINMA of the acquisition if the stake in the insurance company exceeds 10, 20, 33 or 50 per cent of the capital or voting rights of the insurance company. The seller is also subject to a corresponding notification obligation if, as a result of the transaction, its shareholding falls below one of these thresholds or the insurance company ceases to be a subsidiary. Further, the law provides that FINMA may prohibit the participation or attach conditions to it if the nature and extent of the participation could endanger the insurance company or the interests of the insured persons. In addition, a share deal will also regularly require a change in the business plan of the insurance company purchased, which in turn must be submitted to FINMA in advance. The obligation to submit the corresponding application is the responsibility of the insurance company itself. Finally, it should be noted that an insurance company that wishes to acquire a stake in another company itself must also submit a notification to FINMA if the stake exceeds 10, 20, 33 or 50 per cent. Here, too, FINMA may prohibit the participation or impose conditions if the type and scope of the participation may endanger the insurance company or the interests of the insured persons.[9]

Asset deals

Asset deals permit the transferor and the acquirer to jointly define the scope of the assets and liabilities transferred: for example, the parties may agree to take over a portfolio of clients from a particular geographical region or to exclude certain clients with predefined risks or who do not fit the buyer's profile.

Regulatory consent requirements

Assets and liabilities tied to regulated activities may only be transferred to an acquirer holding the requisite licence before the transfer becomes effective. If the acquirer already holds an applicable licence, a new licence application is typically not required.

However, the institution must continuously meet the licensing requirements. Indirectly, therefore, there are many ways by which such a transaction may trigger consent requirements on either side of the transaction. Among other things, the financial institution's organisational

8 Banking Act, article 3 paragraph 6; Financial Institutions Act, article 11 paragraphs 6 and 7 (exempting portfolio managers and trustees).

9 Insurance Supervision Act, articles 5 and 21.

structure must be appropriate for its business activities and thus, depending on the size of the acquisition, the asset purchase must therefore still be submitted to FINMA for approval, both in terms of the scope of activities underlying the licence per se and the continued appropriateness of the organisational structure in light of the expanded set of activities. Even smaller takeovers are subject to approval if the business area of the acquirer is thereby expanded.

Furthermore, amendments to the articles of association may only be entered in the commercial register if they have been approved by FINMA. Consequently, a permit may also be required in this way. More broadly, FINMA requires that all amendments to a financial institution's articles of association and organisational regulations be submitted to it for approval. Thus, if the takeover involves changes to the company, FINMA's approval must also be obtained.

In the case of insurance companies, more direct consent requirements apply. Specifically, asset deals involving a transfer of an insurance portfolio require FINMA's approval, which is granted only if the interests of all the policyholders and beneficiaries are safeguarded.[10] A special feature of the purchase of an insurance company by means of an asset purchase is that, when FINMA approves the transaction, the insurance portfolio (ie, the insurance policies) and the tied assets are transferred to the buyer at the same time, without the consent of the policyholders to the transfer being required. However, the policyholders subsequently have the statutory right (which may be waived by FINMA under certain circumstances) to terminate the insurance contract within a period of three months from receipt of a respective notification from the insurance company.[11] Further, if an insurance portfolio is transferred to another insurance company, the tied assets are also transferred to the insurance company taking over the insurance portfolio unless FINMA orders otherwise.[12]

Client consent requirements in general

Fundamentally, transfers of assets and liabilities may occur as a bulk transfer of a portfolio of assets or liabilities pursuant to the Federal Act on Mergers, Demergers, Conversions and Bulk Transfers 2003 (as amended; the Merger Act) or as a transfer of individual assets or some or all of the liabilities of a legal entity under the Swiss Code of Obligations 1911 (as amended).

Of relevance, particularly in the case of banks, is that the scope of application of bulk transfers is limited by the Merger Act (article 69 paragraph 1) to companies and sole proprietorships entered in the commercial register, limited partnerships for collective investment and open-ended investment companies. Thus, for example, a Swiss branch of a foreign bank cannot participate in a bulk transfer of assets and liabilities within the meaning of the Merger Act.

In the case of an individual transfer of each asset and each liability, and in the absence of either a pre-existing contractual relationship between the acquirer and the client or a mechanism for the transfer of the client relationship between the financial institutions involved, a new contractual relationship may need to be entered into between the acquirer and the client, which precludes tacit consent to the transfer of the contract. In such a case, the acquirer is required to draw up all the documentation required for the opening of an account, particularly regarding know-your-customer requirements (repapering).

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10 Insurance Supervision Act, article 62 paragraph 1.

11 Insurance Supervision Act, article 62 paragraphs 3–4.

12 Insurance Supervision Act, article 19 paragraph 2.

In the case of a bulk transfer, the prevailing view holds that the contracts linked to the transferred assets and liabilities automatically pass to the acquiring entity with the registration of the transfer of assets and liabilities in the commercial register. On this date, all the assets and liabilities listed in the inventory are transferred by law to the acquiring party. The fact that a contract has been entered into intuitu personae, which may be the case for contracts concluded between a client and a financial institution, does not preclude the effectiveness of a bulk transfer. The acquiring financial institution then takes the place of the transferring financial institution in all its contractual relationships. If the acquiring financial institution is able to rely on the account-opening documentation (including as to know-your-customer requirements) provided by the transferring financial institution, itself a financial intermediary, repapering (ie, the opening of a new client relationship) may not be required. In these cases, the change of counterparty takes place by law and the consent of the client is not required for the transfer of the contract to be effective (but is generally required with a view to complying with certain constraints in light of banking secrecy, as set out under 'Client consent requirements in relation to banking secrecy in particular').

Because the contractual relationship in its entirety is transferred to the acquiring financial institution, the general terms and conditions of the transferring financial institution will continue to apply, at least until they are amended by the acquiring financial institution, which, however, may not take place until 30 to 60 days after the transfer, depending on the general terms and conditions. If it cannot adhere to the transferring financial institution's general terms and conditions (eg, due to incompatible outsourcing policies), the acquiring financial institution may request the transferring financial institution to amend the general terms and conditions (which will only come into force at the time of the transfer of the contractual relationship) prior to closing. Alternatively, the acquiring financial institution may ask the transferred clients to (explicitly or implicitly) agree to its own general terms and conditions.

In the case of insurance companies, these issues are tied to the requirement to obtain consent from FINMA (see above).

Client consent requirements in relation to banking secrecy in particular

Barriers for M&A transactions also arise from the criminal law protection of banking secrecy as well as other privacy and data protection laws. In particular, article 47 of the Banking Act makes it a criminal offence for a person to disclose a secret that has been disclosed to that person in their capacity as a member of a governing body, employee, agent or liquidator of a bank or as a member of a recognised auditor, or that has otherwise come to that person's notice while acting in such capacity. All the information relating to the banking relationship between a client and the bank (including the existence of the banking relationship itself) is protected by banking secrecy and any intentional breach of this secrecy is punishable by a custodial sentence or a pecuniary penalty. Accordingly, any transfer of confidential customer information (and, therefore, the completion of the transaction) generally requires some form of consent from the transferring clients.

While it is possible at the stage of preparation for the execution of the transaction to ask clients to consent to the transfer of data, this is usually not the case at the stage of due diligence, before a transaction has been signed. The reason for this is that the transaction is generally confidential at this stage and it is not conceivable to inform the clients concerned of the existence of transactional talks, and in whose favour they would have to waive secrecy. Due diligence by the potential acquirer or acquirers is therefore typically carried out based on documents that do not contain confidential customer information such as anonymised (redacted) agreements or template agreements.

However, a potential acquirer may in certain instances need information on the composition of the institution's client portfolio or part of the assets it intends to take over, which may go beyond generic or anonymised information. This pertains, in particular, to the adequacy of control over the origin of funds (know-your-customer requirements), the nature of the assets deposited, the compliance of the loans granted with the bank's credit policy, etc. One among several approaches for overcoming this problem is the appointment by the transferring bank of its auditor or a third-party audit company to examine its client portfolio and issue a report (again in anonymous form) addressed to the potential acquirer or acquirers.

Between the signing of the transaction documents and completion of the transfer, the transmission of client data may become necessary for the eventual on-boarding of clients and to enable the transferee bank to fulfil any regulatory requirements, such as know-your-customer requirements. If it is no longer possible to transmit data anonymously at this stage, the consent or waiver of banking secrecy by the client concerned must be obtained.

In certain cases, the client's express consent is required. Among other instances, the scope of hold-mail clients' deemed consent upon the information being made available to them may not include a transfer of their relationship and the transmission of their data to a third party. The client's express consent should also be obtained prior to a transmission of client identifying information to a foreign transferee, not least in case the information transmitted to the foreign acquiring institution is protected to a lesser extent than under Swiss banking secrecy.

In other cases, the tacit or deemed consent of clients to the transfer of their data to the acquiring bank is generally sufficient. Broadly, silence may be deemed to indicate consent by virtue of a prior agreement between the parties or their usual business relationship. In addition, the terms and conditions underlying the client relationship often provide for the possibility of tacit consent by the client. Nevertheless, tacit or deemed consent requires that clients have had sufficient time to object to the transmission of information. This period typically matches the period set out in the bank's general terms and conditions during which clients may terminate their banking relationship if they do not agree with a change to the general terms and conditions that was proposed by the bank.

Enforcement by FINMA

FINMA has various enforcement instruments at its disposal. For example, where a shareholder holding a qualified equity stake in a bank or financial institution licensed under the Financial Institutions Act fails to comply with the applicable requirements, FINMA may suspend that shareholder's voting rights.[13] As a last resort, FINMA may revoke the licence of the financial institutions supervised by it and trigger the liquidation of entities carrying on regulated activities without a requisite licence or whose licence has been revoked. Contraventions of regulatory requirements may also trigger criminal liability.

13 Banking Act, article 23-ter; Financial Institutions Act, article 65.

6

Merger Control

Marcel Dietrich and Richard Stäuber[1]

Introduction

Swiss merger control law requires that certain transactions are notified and approved before they may be implemented. Such merger control proceedings may be lengthy, absorb a lot of resources of the parties, and can potentially affect the structure of the transaction – or even its feasibility – if there are competition issues. It is thus important that the specifics of Swiss merger control are considered from the outset and throughout transaction planning and implementation. This chapter sets out the relevant legal framework and key elements of the Swiss merger control regime, focusing on practical issues arising in M&A transactions and recent developments of Swiss practice.

Legislative framework and regulators

Legislative framework

Swiss merger control is governed by the Federal Act on Cartels and other Restraints of Competition (Cartel Act) and the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance). The Cartel Act is currently being revised. A preliminary draft for the partial revision of the Cartel Act was published in November 2021. A public consultation on the preliminary draft has been held and the Federal Council is now expected to publish the draft law. Entry into force is expected in 2023 at the earliest.

In addition, the Swiss Competition Commission (ComCo) and its Secretariat (Secretariat) have adopted communications and guidelines on the application of the relevant merger control provisions.

Swiss merger control law is in many respects similar to, and partly designed upon the model of, EU merger control law. Therefore, when applying Swiss merger control law, ComCo tends to look also at the guidelines (in particular the Consolidated Jurisdictional Notice) and decisional practice (in particular regarding market definitions) of the European Commission.

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Regulators

Swiss merger control law is enforced by ComCo and its Secretariat. ComCo is the decision-taking body and consists of 11–15 members (currently 12) who are elected by the Swiss Federal Council. The Secretariat conducts investigations, prepares the decisions of ComCo and, together with one member of the presiding body of ComCo, issues the necessary procedural rulings. The Secretariat consists of four departments: construction; services; infrastructure; and product markets. Each department handles the merger control filings in its area of competence. A fifth department, resources, provides administrative and technical services within the Secretariat. The headcount of the Secretariat amounted to more than 70 employees as at the end of 2021.

A special regime exists for certain banking mergers. If the Swiss Financial Market Supervisory Authority (FINMA) considers a concentration of banks necessary for reasons related to creditor protection, it takes the place of ComCo, which it has to invite to submit an opinion.

No general foreign investment control regime (yet)

There is no general foreign investment control regime in force in Switzerland. Special regimes apply to certain sectors that were formerly served by state monopolies and where the conduct of business requires prior authorisation, such as telecommunications, broadcasting and airline transport services. In addition, the acquisition of a real estate company (ie, a company whose purpose is to own real estate) may require a permit from the competent cantonal authority under the Federal Act on the Acquisition of Real Estate by Foreign Persons prior to acquisition.

This legislative framework is set to change. In August 2021 the Federal Council presented the key cornerstones of its proposal and in May 2022 the preliminary draft of a law for Swiss investment control. According to this concept, investment control will encompass two groups of cases: first, the Federal Council provides for a sector-specific review, aiming at protecting public order and security. In this context, acquiring control over Swiss companies by foreign investors will be subject to review in certain industries if the companies provide non-substitutable services or if state entities in security-relevant areas are critically dependent upon them. Second, in the case of takeovers by states or state-related investors, a sector-independent review is envisaged to prevent any distortions of competition.

According to this proposal, the review procedure should include two stages. In a short Phase I, it would be examined whether an in-depth approval procedure is required. If there are no concerns that the acquisition will endanger public order or security, the acquisition can be completed. In Phase II, with a longer deadline, a more in-depth examination takes place. The Federal Council proposes to entrust the State Secretariat for Economic Affairs with the implementation and coordination of the investment control scheme. The procedure provides for a consultation with other federal offices. In cases of disagreement between the offices involved or in cases of consensus to prohibit the acquisition, an escalation to the Federal Council would take place. This means that only the Federal Council would have the competence to order non-approval.

Entry into force of the Swiss investment control legislation is not expected before 2024.

Scope of merger control

Concentrations

The Swiss merger control regime applies to concentrations, a legally defined term comprising two kinds of transactions:

- a merger of two or more previously independent undertakings; and
- any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof.

Control is the ability to exercise decisive influence over the activities of the other undertaking through the acquisition of rights over shares or by any other means. Control may thus be acquired directly or indirectly, de jure or de facto. In particular, a buyer may acquire control even when only acquiring a minority interest in the target, thus potentially triggering a notification obligation. This may in particular apply if:

- the buyer is granted strategic veto rights, for example, regarding the business plan, budget or appointment of senior management of the target;
- the buyer is highly likely to achieve a majority at the shareholders' meeting, given the expected participation; or
- the target is economically dependent on the buyer, for example, because of very important long-term supply agreements or credits.

The Swiss merger control regime also applies to joint ventures (acquisition of joint control). In such cases, an additional requirement for the qualification as a concentration applies in that the joint venture needs to perform all functions of an autonomous economic entity, a concept known as 'full functionality'. This requirement is met if the joint venture has a management dedicated to its day-to-day operations and sufficient resources, including finance, staff and assets, to conduct its business activities on a lasting basis.

Applicable notification thresholds

A merger control notification obligation for a certain concentration exists only if the undertakings concerned exceed the relevant thresholds. Undertakings concerned are the merging entities (in the case of a merger) or the controlled and controlling undertakings (in the case of an acquisition of control), respectively. Hence, the seller is not an undertaking concerned, and its activities are thus not relevant for assessing the notification obligation. Swiss merger control relies primarily on a turnover test, supplemented with a notification obligation for dominant undertakings.

Under the turnover test, a concentration is notifiable if in the financial year preceding the concentration:

- the undertakings concerned together reported worldwide turnover of at least 2 billion Swiss francs, or Swiss turnover of at least 500 million Swiss francs; and
- each of at least two undertakings concerned reported Swiss turnover of at least 100 million Swiss francs.

With respect to insurance companies, annual gross insurance premium income is used instead of turnover, and with respect to banks and other financial intermediaries, gross income. The relevant turnover is calculated on a consolidated basis (ie, the entire turnover of all companies under common control is relevant, excluding intragroup sales). This may significantly enlarge the relevant turnover. By way of example, in acquisitions by PE companies, the cumulative turnover of all their controlled portfolio companies has to be considered for an assessment of the controlling undertaking's turnover. In terms of geographic allocation of turnover, the domicile of the customer is normally relevant (as the place where competition for the relevant customer has taken place). A number of corporate groups in practice use Swiss subsidiaries as mere billing addresses. For such cases, ComCo has clarified in a note that mere invoicing to addresses in Switzerland for supplies taking place outside of Switzerland does not make such turnover Swiss turnover, and such turnover is hence not considered for the question as to whether the Swiss turnover thresholds are exceeded.

In addition, a notification obligation is triggered, irrespective of the turnover, if one of the undertakings concerned has in a final and non-appealable decision been held to be dominant in a market in Switzerland, and if the concentration concerns either that market, an adjacent market or a market upstream or downstream thereof.

Meeting one of the above thresholds is both necessary and sufficient for triggering a notification obligation in Switzerland.

It is necessary in that ComCo does not have the authority to review a planned concentration, or to impose any remedies if the thresholds are not met. This applies also if the substantive threshold for intervention (see 'Threshold for intervention: dominance plus') would be met.

Meeting the thresholds is also sufficient for a notification obligation. There is no additional nexus of a concentration to Switzerland required to trigger a notification obligation. The fact that the thresholds are met in a certain case sufficiently indicates local effects, according to the Federal Supreme Court. As a consequence, the Swiss merger control regime in principle also applies to foreign-to-foreign transactions. An exception applies to certain foreign joint ventures. According to a note published by the Secretariat, the establishment of a joint venture in Switzerland is not notifiable if the joint venture does not have any activities in Switzerland and such activities are neither planned nor foreseeable.

Standstill obligation

If a merger control notification obligation exists, the parties must refrain from implementing the concentration before it is cleared by ComCo. During the period between signing and closing of a concentration, it is therefore important for the parties involved to continue their operations as if there was no concentration.

Hence, the buyer must refrain from influencing the target's day-to-day business. Certain preparatory work for the concentration's implementation after closing is in many cases necessary for the parties. This is in principle allowed, but should take place under antitrust guidance. In particular, exchanges of information between the parties must be limited until closing based on two leading principles:

- Any information must only be exchanged among the parties if there is a 'need to know' for the receiving party in order to prepare implementation. This need to know might depend on the stage and duration of the implementation preparations. If the time between signing and closing is long, more detailed information is often only required at a later stage of the implementation preparations.
- If information is exchanged that is commercially sensitive, such information must only be exchanged in a clean team. The clean team can only contain individuals that are not

working in the parties' day-to-day business. Further, it must be assured that the clean team members are bound by separate confidentiality undertakings to refrain from disclosing clean team information to non-clean team members. In addition, clean team information should be held separately from other information and access must be restricted.

Upon request, ComCo may exceptionally authorise implementation of the concentration prior to clearance. The parties need to show good cause for such implementation, for example, by showing that the concentration could otherwise not be implemented or that third parties may suffer significant harm. With respect to concentrations of banks that are deemed necessary for reasons of creditor protection, special rules apply. FINMA is competent to review such concentrations (see 'Regulators'), and it may permit implementation at any stage of the proceedings.

In the case of public takeover bids, the standstill obligation may conflict with public takeover rules, in particular as the latter may require the acquisition of shares prior to clearance. Swiss law does not provide specific rules to address these situations. It is recommended to raise the topic with ComCo early in the process, and to potentially request early implementation or to propose arrangements on voting rights.

Merger control proceedings

Notification

To obtain clearance of a concentration subject to merger control review, the concentration needs to be notified to ComCo. In the case of a merger, the notification obligation is on both merging parties, which have to designate at least one joint representative. In the case of an acquisition of control, the notification obligation is with the undertakings that acquire control (ie, the buyer), but not the target or the seller. Compared with merger control notifications in other jurisdictions, Swiss notifications are rather lengthy and detailed, requiring – depending on the competition sensitivity of the concentration – significant time and effort for the parties to prepare.

ComCo has published a form for the notification of concentrations that lists the information that the notifying undertakings have to submit. In particular, these are:

- a description of the business activities of the undertakings concerned;
- a description of the planned concentration, including the goals that are pursued with it; and
- information on the relevant markets (product as well as the geographic markets) that are affected.

The following documents need to be provided to ComCo:

- the most recent annual accounts and reports of the undertakings concerned;
- any agreement affecting or related to the concentration;
- offer documentation, in the case of a public takeover; and
- reports, analyses and business plans made with regard to the concentration, to the extent they contain relevant information for the competitive assessment of the concentration.

A lot of work in practice goes into the description of affected markets, if there are any. Markets are deemed affected if two or more of the undertakings concerned jointly hold a market share of 20 per cent or more, or if one of the undertakings concerned holds a market share of 30 per cent or more. There is a large body of decisional practice of ComCo and the European Commission on market definition, covering many sectors and activities, that will be considered to determine the relevant markets. These definitions of product and geographic markets may not correspond to the business perspective as to what 'markets' they operate in (they often are very narrow), and the required data may not be readily available with the parties.

For affected markets, detailed information is required, in particular in the following respects:

- market shares of the parties and their competitors in the past three years;
- market entries in the past five years, expected future market entries and the estimated costs of market entry;
- structure of supply and demand on the relevant market;
- importance of research and development for the relevant market;
- R&D activities of the undertakings concerned;
- key innovations;
- the innovation cycles; and
- patents, know-how and other intellectual property rights.

Parties to M&A transactions should also bear in mind that the reports and analyses they draft to assess a potential transaction in advance may ultimately need to be provided to ComCo and considered for the competitive assessment of the concentration.

The undertakings concerned and the Secretariat may mutually agree on the details of the content of the notification prior to the notification of the concentration, and limit the required data and information. In doing so, the Secretariat may grant an exemption from the duty to submit particular information or documents if it is of the opinion that such information is not required for the assessment of a certain concentration. In practice, this is relevant for foreign-to-foreign mergers that deploy limited effects in Switzerland. The notification may also refer to the notification to the European Commission (Form CO) if the concentration has already been notified there, in particular where markets are broader than national.

In this context, according to the preliminary draft for a revision of the Cartel Act, the notification requirement is to be waived in the event of international concentrations that are assessed by the European Commission if all relevant geographic markets include Switzerland and at least the European Economic Area (EEA). The companies concerned are thereby exempted from having to notify the merger in parallel to the European Commission and ComCo in cases where only markets covering at least Switzerland and the EEA are involved. This is likely to bring some relief in terms of resources. However, the savings should not be overestimated: Already at present, notification in Switzerland in such cases is regularly based on the filing with the European Commission. In addition, it can be expected that the definition of the relevant geographic market may give rise to discussions and that a concentration would still have to be notified to ComCo in case of doubt.

There is no deadline for the notification to be submitted. However, the review period for ComCo only starts upon submission of a complete notification, and, as mentioned ('Standstill obligation'), a concentration must not be consummated before it is cleared. A concentration may even be notified before the signing of a transaction. In this case, the parties need to be able to show a good-faith intention to conclude an agreement (eg, by way of a letter of intent or memorandum of understanding).

The notification form may be submitted to the ComCo in any official language of Switzerland (ie, German, French or Italian). Exhibits may also be submitted in English.

Course of proceedings

It is customary and recommended to enter into pre-notification contacts with the Secretariat, in particular in complex concentrations. To this end, the parties submit a draft filing to the Secretariat for review. The Secretariat subsequently will comment on completeness and indicate what additional information it requires, if any.

Upon formal submission of the notification, a one-month review period for ComCo to assess the concentration begins (Phase I). If a concentration has to be notified in parallel to the European Commission, it is recommended to align these filings in time. Specifically, by submitting the Swiss filing a few days after the Form CO (where the Phase I review period is 25 working days), the parties allow ComCo to await the European Commission's decision before it issues its own decision.

The Secretariat has to formally revert on completeness of the notification within 10 days. If the notification is considered incomplete (a finding that will be avoided by the above-mentioned informal pre-notification contacts), the review period is considered not to have started and it will only begin upon submission of the missing information.

Within the one-month period, ComCo is required to notify the undertakings concerned whether it intends to open an in-depth investigation. If no such notice is given, the concentration may be implemented and clearance is assumed. Rather than remaining silent, however, ComCo regularly provides a comfort letter to the parties stating that it considers the concentration as unobjectionable. ComCo cannot prohibit a transaction at the end of Phase I. As an alternative to clearing a concentration or opening an in-depth investigation, ComCo may exceptionally authorise a concentration at the end of Phase I subject to conditions or obligations; however, such conditions or obligations require the parties' approval.

If there are indications that a concentration creates or strengthens a dominant position, ComCo may open an in-depth investigation (Phase II). The in-depth investigation needs to be completed within four months. This period may only be prolonged if ComCo is prevented from reaching a decision in time for reasons attributable to the undertakings (in particular, if they fail to provide requested information in time). In controversial cases, ComCo will summon a hearing towards the end of the Phase II review period where the parties can provide their assessment of the concentration, and third parties are asked to give their views directly to ComCo. At the end of Phase II, the concentration is either cleared unconditionally, cleared subject to conditions or obligations, or prohibited.

During the entire review process (Phase I and Phase II), the Secretariat is in charge with investigating the concentration and is the primary point of contact for the parties. The Secretariat may request further information from the parties at any time, and parties are obliged to provide the requested information. In Phase I, given the short one-month period, the parties should be prepared to deliver additional information at short notice. In Phase II proceedings, the Secretariat may issue extensive requests with short deadlines (of a few days) that will absorb considerable resources for the parties.

Further actors: third parties, the general public and other competition authorities

When reviewing a concentration, the Secretariat may contact third parties, in particular customers and competitors, and request their assessment. The Secretariat regularly does this in Phase II proceedings. Where remedies (conditions or obligations) are considered, the Secretariat may also obtain the assessment of such remedies by market participants. Any such third parties are not parties to the merger control proceedings. Hence, they have no access to the file.

The submission of a notification is not made public. A Phase I clearance will not be published immediately, but ComCo regularly publishes its reasoned decisions in a quarterly overview, which will appear a few months after clearance. In the case of in-depth investigations (Phase II), ComCo will publish both its opening of the in-depth investigation and the final decision. Again, the reasoned decision will be published at a later stage. For the publication of the reasoned decision, the undertakings concerned have the possibility to indicate business secrets and request redaction in the published version of the decision. If the undertakings concerned and ComCo do not reach an agreement on business secrets, ComCo issues an appealable order.

In the case of concentrations notifiable in several jurisdictions, ComCo may contact other competition authorities. ComCo is entitled to share information with the European Commission, based on an agreement between the EU and Switzerland concerning cooperation on the application of their competition laws. Such an exchange is possible without approval by the parties, but they need to be notified in advance. There is no legal basis allowing ComCo to exchange information with anyone other than the EU's competition authorities. However, ComCo may request a waiver of confidentiality from the parties to be able to exchange information with other competition authorities.

Appeals

The undertakings concerned may appeal a conditional clearance or a prohibition decision to the Federal Administrative Court. Third parties, such as competitors or customers, are not entitled to appeal a decision. The Federal Administrative Court has full jurisdiction to review ComCo's decision in fact and in law, and it may confirm or revise ComCo's decision. An appeal to the Federal Administrative Court has to be made within 30 days of the formal notification of ComCo's decision to the parties. The duration of the proceedings before the Federal Administrative Court depends largely on the complexity of the appeal and the case, but usually amounts to significantly more than one year.

The judgment of the Federal Administrative Court can be appealed to the Federal Supreme Court. The Federal Supreme Court can normally review the judgment only with respect to its conformity with the law and is bound by the facts established by the Federal Administrative Court. It can deviate from these facts only if they are manifestly incorrect or have been established in violation of the law. Appeals to the Federal Supreme Court have to be filed within 30 days of the receipt of the formal notification of the judgment of the Federal Administrative Court. The proceedings before the Federal Supreme Court usually take more than one year; however, in principle, judgments of the Federal Supreme Court are issued faster than those of the Federal Administrative Court.

Overall, appeal proceedings may be very lengthy and provide only unsatisfactory relief for the parties in the fast-paced area of M&A. By way of example, an appeal against a prohibition decision of ComCo of May 2017 (*Ticketcorner/Starticket*) was still pending with the Federal Administrative Court in April 2022, after the question of standing to appeal has been litigated up to the Federal Supreme Court.

Sanctions

Non-compliance with the Swiss merger control regime may lead to sanctions for the parties and potentially the individuals acting on their behalf. An infringement of the standstill obligation – by omitting a notification or implementing a concentration prior to clearance – may be sanctioned with a fine. The undertakings obliged to file a notification – the merging undertakings or the undertaking acquiring control – may be fined by up to 1 million Swiss francs, and in repeated cases by up to 10 per cent of their overall Swiss turnover. In addition, responsible individuals may be fined by up to 20,000 Swiss francs. Fines have already been imposed on undertakings for failure to notify, including with regard to foreign-to-foreign transactions. These fines are made public. Further, if a notifiable concentration has been implemented without notification, ComCo may investigate it ex officio and take the necessary steps to restore effective competition, such as imposing remedies, or even ordering the separation of any combined undertakings. Finally, the civil law effects of a notifiable concentration that has not been notified are suspended, potentially endangering the buyer's effective control over the target.

Any undertaking that fails to comply with a condition or obligation attached to an authorisation, implements a prohibited concentration or fails to implement a measure intended to restore effective competition may be sanctioned with a fine of up to 1 million Swiss francs, and in repeated cases by up to 10 per cent of its overall Swiss turnover.

Any undertaking that does not, or does not fully, fulfil its obligation to provide information or produce documents may be fined by up to 100,000 Swiss francs. If the undertakings have provided inaccurate information, ComCo may revoke an authorisation or decide to investigate a concentration.

Substantive assessment of concentrations

Threshold for intervention: dominance plus

ComCo may intervene with a concentration if:

- the concentration creates or strengthens a dominant position liable to eliminate effective competition; and
- the concentration does not strengthen competition in another market such that the harmful effects of the dominant position can be outweighed.

According to the case law of the Federal Supreme Court, the liability of an elimination of competition is a condition on its own, in addition to dominance. The Swiss substantive test is therefore sometimes termed 'dominance plus'. Compared with other jurisdictions, the threshold for intervention is rather high.

When applying this test, ComCo may in particular intervene under the theories of harm of single-firm dominance and collective dominance. Single-firm dominance entails that the merged entity can behave on its own appreciably independently from other market participants. Single-firm dominance liable to eliminate competition is in practice effectively excluded in the case of market shares below 50 per cent, and even higher market shares regularly become an issue only if they exceed 70 per cent. Under the concept of collective dominance, ComCo reviews whether the concentration gives rise to a market structure that would allow the merged entity to enter into collusive practices together with another undertaking. Such collective dominance regularly requires, among other things, a certain symmetry in size and characteristics of the potentially collusive companies, as well as market transparency.

Economic efficiencies are traditionally not taken into consideration by ComCo when reviewing a concentration. However, as mentioned above, the Swiss substantive test provides that economic efficiency gains in one market can outweigh the effects of the creation or the strengthening of a dominant position and therefore overall promote competition. This provision for long had limited practical relevance, but this may be about to change (see 'Increased role for the efficiency defence').

The focus of the Swiss substantive merger control assessment is on the effects of a concentration on competition. Therefore, ComCo principally does not consider issues other than the competition effects of the concentration, such as foreign investments, national security, industrial policy, employment effects or other public interests. There is one exception: if FINMA deems a concentration of banks necessary for reasons related to creditor protection, the interests of creditors may be given priority (as to the competence of FINMA, see 'Regulators').

If ComCo prohibits a concentration, the undertakings concerned may request the Swiss Federal Council to nevertheless authorise the concentration for reasons of public interest. The Federal Council may take into consideration competition-related as well as further aspects in its assessment. To date, two such requests have been made, but none has been granted.

The dominance plus test as currently applied is subject to legislative review, and the threshold for intervention by ComCo may be lowered in the future (see 'Potential lowering of the threshold for intervention').

Remedies and prohibition

If the threshold for intervention is met, ComCo may authorise a concentration subject to conditions or obligations, or prohibit it. According to the principle of proportionality, a prohibition is excluded to the extent that the competitive concerns can be addressed by conditions or obligations. Conditions have to be implemented prior to the closing of the transaction, whereas obligations may be implemented thereafter. ComCo usually imposes remedies in the form of obligations, and has used conditions only exceptionally. Unlike under, for instance, EU merger control law, ComCo may impose remedies on its own, even if they have not been proposed by the parties. In practice, the parties nevertheless are heavily involved in the design of potential remedies.

Neither the Cartel Act nor the Merger Control Ordinance specify the types of conditions or obligations that may be ordered by ComCo. In practice, both structural and behavioural remedies have been implemented. Unlike the European Commission, ComCo does not have a strong preference for structural remedies, such as divestitures. ComCo has in several cases accepted behavioural remedies, such as an obligation not to integrate certain businesses. In addition, access remedies may be considered, for example, in the telecommunications sector where access to a network infrastructure could be ordered.

Given the high threshold for intervention under Swiss law, prohibitions and decisions subject to conditions or obligations are rather rare. Overall, only four concentrations have been prohibited by ComCo since the introduction of merger control in 1996, most recently in 2017 with regard to a proposed merger of the two largest ticketing companies in Switzerland (*Ticketcorner/Starticket*). There has not been a clearance subject to conditions or obligations recently.

Ancillary restraints

Ancillary restraints, such as non-compete obligations for the seller, are considered by ComCo as part of a merger control review only if they are directly related to and necessary for the concentration. For such an assessment, ComCo takes into account the practice of the European Commission and in particular follows the criteria set out in the European Commission's Notice on Ancillary Restraints.

Unlike under EU competition law, ancillary restraints are not automatically covered by the clearance of a concentration by ComCo. Rather, a specific request in the notification is required. The undertakings concerned have to describe the ancillary restraints in detail and provide an assessment as to why they consider such restraints as directly related to and necessary for the concentration.

If an ancillary restraint is not considered directly related to and necessary for the concentration, it is subject to the general assessment under competition law (prohibition of anticompetitive agreements).

Recent developments and trends

Potential lowering of the threshold for intervention

As set out above (see 'Threshold for intervention: dominance plus'), the current Swiss test for the substantive assessment of concentrations – dominance plus – is subject to legislative review. As described above ('Legislative framework'), a preliminary draft for the partial revision of the Cartel Act was published in November 2021. Entry into force is expected in 2023 at the earliest. In this preliminary draft, a new attempt is being made to introduce the significant impediment to effective competition test (SIEC test).

The introduction of the SIEC test would lower the threshold for regulatory intervention. In particular, the new test would allow for an intervention in the case of 'non-collusive oligopolies', a situation where a concentration neither leads to single-firm nor collective dominance, but nevertheless strengthens a competitor to a degree that effective competition is materially limited. It is expected that the introduction of the SIEC test would generally make Swiss merger control proceedings more time-consuming and burdensome for the parties, in particular given an increased role for economic evidence, and lead to more regulatory intervention.

Increased role for the efficiency defence

In 2019, ComCo for the first time explicitly relied on considerations of economic efficiency. As provided for under the Cartel Act, a concentration leading to or strengthening a dominant position liable to eliminate effective competition can be cleared if the concentration strengthens competition in another market such that the harmful effects of the dominant position are outweighed (out-of-market efficiencies). ComCo considered such a scenario to be given in a recent concentration in the logistics sector (*Gateway Basel Nord*). Concretely, three companies in the cargo sector planned a large terminal with a gateway function for combined transport. The companies were vertically integrated and had high market shares in the upstream and downstream markets. While the investigation revealed the possibility of the elimination of effective competition on the markets for certain cargo-handling services, ComCo considered that the creation of a large terminal would lead to considerable improvements in combined transport and significant savings of cost and time, mainly related to rail freight transport and operator services, concluding that the improvement of competitive conditions outweighed the disadvantages in the markets for cargo-handling services.

According to the preliminary draft for the revised Cartel Act (in-market and out-of-market) efficiencies are explicitly acknowledged as a defence. Similar to EU merger control law, any efficiency gains to be considered must benefit consumers. The Swiss legislature has so far refrained from pursuing distributive goals in favour of consumers with competition law.

Focus on coordinated effects

As mentioned above (see 'Threshold for intervention: dominance plus'), the intervention threshold may sometimes appear difficult to meet. Even in the presence of market shares of up to 70 per cent, an intervention is regularly not possible. Intervention in cases of lower market shares may be possible on the basis of a collective dominance reasoning, which assumes that the merged company may engage in collusive practices with other companies. Against this backdrop, the analysis of collective dominance plays a particularly important role in Swiss merger control practice compared with other jurisdictions.

A full analysis of such effects was conducted in a proposed merger in the telecommunications sector (*Sunrise/UPC*). Sunrise, Switzerland's second-largest mobile network operator and third-largest provider of broadband internet, planned to acquire UPC, the largest cable network operator in Switzerland. ComCo's in-depth investigation showed indications for collective market dominance between the merged entity (Sunrise/UPC) on the one side and the Swiss telecommunications incumbent and largest market player (Swisscom) on the other. Collective dominance was considered possible in the market for broadband internet for end customers in regions where only two network infrastructures would be available, the coaxial cable of the merged entity and Swisscom's copper network (but no fibre-to-the-home infrastructure). ComCo reached the conclusion that collective dominance was unlikely, in particular owing to a lack of symmetry between the technologies of the two companies, as well as the assumption that Sunrise would continue its expansion strategy and invest in new technologies such as 5G. For these reasons, the concentration was cleared unconditionally. Nonetheless, the proposed concentration was aborted, as approval by Sunrise's shareholders was considered unlikely. The deal was later realised in a mirror-image constellation with a UPC parent company acquiring Sunrise.

7

Warranties, Indemnities and Insurance in Private M&A

Christoph Vonlanthen and Oliver Triebold[1]

In private M&A, buyers commonly have available post-closing or indemnification recourse against sellers. This recourse typically rests on a general and specific indemnities. These provisions operate as an adjustment to the equity value or the purchase price. They are intended to ensure that within agreed-upon parameters, the buyer receives the benefit of its bargain. Increasingly as well, M&A deals are insured. In this chapter, we discuss key considerations applicable to the buyer's post-closing recourse.

Default regime

Sophisticated parties typically agree to disapply the statutory default regime governing contracts of sale (ie, articles 197 et seq of the Swiss Code of Obligations (CO)) and instead delineate the buyer's post-closing recourse in the sale and purchase agreement (SPA) subject only to any mandatory fraud-related remedy. The reason for this is that the default regime is ill-suited to the acquisition or disposition of a business. For example:

- the Swiss Supreme Court takes the view that the default regime applies to defects affecting the shares (in a share deal) or the individual assets and liabilities (in an asset deal), but not the business;
- the default regime imposes a duty to inspect and give prompt notice (CO 201) that is ill-fitted to the purchase of a whole business comprising a collection of assets, liabilities, and contracts where breaches may only emerge over time; and
- the warranty periods under the default regime (CO 210) can simply be too short for certain breaches (eg, for liabilities arising in connection with a tax audit covering pre-closing tax periods).

Accordingly, the SPA will typically contain an extensive catalogue of warranties on the key attributes of the business, lay out the terms of the buyer's indemnification and include detailed procedural provisions, such as on the conduct of third-party claims.

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Contractual warranties

There is no distinction under Swiss law and practice between representations and warranties. In this chapter, we will therefore refer to them as warranties only. Warranties are statements of fact given as of a particular date (usually as of signing, closing or a certain reporting date). They are made about the contracting parties, the shares in a share deal, the assets in an asset deal and the business.

The warranty package serves four essential purposes:

- it is the basis for indemnification or insurance;
- it is a key component of the buy-side due diligence;
- its accuracy (to a material adverse change standard) can sometimes be elevated to a condition to closing; and
- it is the basis for a fraud claim to rescind the SPA or collect damages.

Scope

The scope of the warranties in the Swiss market broadly aligns with international practice. Warranties will consist of fundamental warranties (eg, title to the shares or assets, capacity, and the absence of regulatory or third-party consent requirements) and business or general warranties (chiefly on the financial statements, undisclosed liabilities, no material adverse changes, taxes, social security and pensions, permits, compliance, material agreements, employees, intellectual property, real and personal property, insurance, litigation, environment and finder's fees, as well as industry-specific matters).

Depending on whether the SPA is structured to shift the business risks to the buyer at signing (eg, in a locked-box deal) or at closing (eg, in a closing adjustment deal), warranties will tend to be given either at signing only or both at signing and closing. Leverage and negotiations among the parties can, however, result in many permutations of these basic models.

A fairly recent trend is for sellers to seek to ring-fence the scope of warranties. For example, the seller may seek to provide that the environmental warranty addresses environmental risks comprehensively, precluding the buyer from having a second bite at the apple by relying on other warranties.

In a cash deal, the buyer will typically solely give fundamental warranties coupled with, in leveraged acquisitions, warranties on its debt financing. In a share-for-share deal, the buyer will give co-extensive warranties.

Qualifications and limitations

The warranties are qualified by disclosure made by the seller (rather than the target). In practice, the entire data room is commonly disclosed against the warranties. This arguably seller-friendly arrangement borrows from the UK tradition, which is tempered by the concept of fair disclosure grounded in case law. The Swiss practice has co-opted that concept, and typically defines fair disclosure in the SPA. Fair disclosure generally means the disclosure of a fact, matter or circumstance in a manner that allows, or would reasonably be expected to allow, the buyer and its advisors to reasonably identify and assess the relevant fact, matter or circumstance. In other words, the relevant facts cannot be buried in the data room.

The seller also will often negotiate to provide that business warranties are not breached unless the breach is material or would cause a material adverse effect (MAE). By contrast, fundamental warranties typically will be given 'clean' or to a lower level of materiality than MAE (or the definition of MAE will be modified to refer to a seller MAE based on the ability of the seller to consummate the transaction).

The seller will also typically seek to qualify the scope of specified warranties, especially those having a forward-looking nature, by reference to its own knowledge. The SPA typically lists the persons whose knowledge will be deemed to constitute knowledge of the seller for such purposes and what types of inquiries they must conduct.

Indemnification

Recoverable damage

There is often a fair amount of negotiation among the parties to tailor the concept of damage to the specifics of the transaction. That concept is key as it underpins the buyer's indemnification claims. Leverage, parties involved and deal atmospherics often play a significant role.

As a general matter, under Swiss law recoverable damage includes an increase in liabilities, a decrease of assets, and the loss of profit that naturally result from the breach in accordance with the usual course of things. The key inquiry is around causality. Similarly, in an M&A transaction, negotiations often boil down to the desire of the parties to exclude indirect damage that is not foreseeable by the parties.

Many SPAs use the terms of 'consequential damages' and 'indirect damages' interchangeably. Consequential damages are a common law concept referring to the damage resulting from special circumstances of the buyer that were communicated to or known by the seller (eg, a buy-side strategic plan modelling the integration of the target company). That concept has no readily available equivalent under Swiss law.

Loss of profits often is the subject of negotiation. As a general proposition, loss of profit can be the direct and foreseeable consequence of a warranty breach and sometimes the only loss that the buyer may incur in connection with such a breach.

Sometimes the parties attempt to define what is indirect, excludable damage by reference to CO 208, paragraph 3. It is worth noting that case law under that provision does not apply directly to M&A transactions, lends itself to significant judicial discretion and has been controversial among legal commentators. An alternative can be to craft a contractual definition of direct, indemnifiable damage including all damage that is the reasonably foreseeable result of a breach.

Punitive damages are often excluded. It is noteworthy that if the target business is sued by a third party in jurisdictions where punitive damages are recognised, and that fact pattern also constitutes a breach of a warranty under the SPA (for example, the absence of litigation), the exclusion of the punitive component of the damages payable to the third party can leave the buyer short in its recovery from the seller.

Standard exclusions include loss of investment opportunities, loss of goodwill or reputation, and internal administrative and overhead costs, although that list is by no means exhaustive.

Once the parties have agreed on the scope of indemnifiable damage, the indemnification clause has a significant advantage over simply relying upon the default regime: the effect of that clause (assuming that no other exclusions under the SPA apply) is to make whole the buyer on a Swiss franc-for-franc basis, and typically allows for the recovery of (reasonable) legal expenses. In the absence of such clause, the buyer would be required to prove a reduction in the value of the business (where the courts normally assume that the purchase price reflects the value of the business 'defect free').

Credit-enhancement of an indemnification claim can be a key consideration for the buyer. Where that is warranted, the parties typically negotiate an escrow, holdback or insurance. We address insurance in more detail below.

Quantitative limitations

Given that the indemnification clause creates a significant Swiss franc-for-franc monetary exposure for the seller, quantitative limitations are customary. The most frequent quantitative limitations are:

- De minimis amount: only a claim or related claims having a minimum value will be recoverable on the basis that it would be unreasonable to have both parties and their lawyers expend more time and resources on a claim than what the claim is worth.
- Threshold or deductible (or a combination of both): the buyer's eligible claims must, on an aggregate basis, reach a minimum amount before the buyer can recover them. This amount is either structured as a deductible (then the buyer can only claim the amount in excess) or a threshold or tipping basket (then the buyer can claim the whole amount from the first Swiss franc) or a combination of both of these constructs (when the threshold is met, the buyer can claim the whole cumulative amount net of the deductible).
- Cap: the seller's aggregate liability for any business warranty claims will be limited to a percentage of the purchase price (rather than the enterprise value), usually between 5 and 30 per cent.

Survival periods

Swiss SPAs usually provide for the following warranty periods:

- for legal title normally, five or even 10 years;
- for tax, pension and social security warranties, three to 12 months following the expiration of the applicable statute of limitations; and
- for all other warranties, between six and 36 months; it is very rare not to allow the buyer at least a full audit circle to examine the target business and make claims.

The parties sometimes discuss whether the lapse of the survival periods results in a time bar or forfeiture of the relevant claims. Unlike with forfeited claims, buyer can still assert time-barred claims under certain circumstances (eg, by offsetting them against seller claims).

Specific indemnities

Specific indemnities are commitments by a party to pay another party on a Swiss franc-for-franc basis for specified liabilities or claims. Usually, specific indemnity claims:

- exist irrespective of the buyer's and seller's knowledge;
- are subject neither to disclosure nor to the quantitative limitations applicable to warranties; and
- survive for five to 10 years following closing.

If negotiation leverage allows, buyers often request a specific indemnity for all taxes (often including pension and social security contributions) arising up and until the relevant cut-off time (ie, closing or locked-box date) under an 'our-watch-your-watch' principle.

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Specific indemnities can further be negotiated for known contingent liabilities, such as current litigation, where the seller is not willing to deduct the amount of the contingent claims from the purchase price but the buyer insists on being indemnified if the contingent liability materialises (eg, the litigation is lost).

In locked-box deals, where the purchase price is based on the amounts of cash, financial debt and working capital as at the date of the target's last financial statements (the 'locked-box date') and subsequent profits are literally 'locked in the box' until closing, the buyer will insist in the SPA on the seller's undertaking to indemnify the buyer on a Swiss franc-for-franc basis for any leakage of value out of the box.

Generally, sellers (or the beneficial owners of pass-through entities) who are individuals residing in Switzerland holding their shares 'in their private wealth' insist that the buyer undertakes (1) not to trigger an 'indirect partial liquidation', and (2) to indemnify the sellers for all taxes incurred as a consequence of a breach of that undertaking. The reason for this is that this class of sellers can usually realise a tax-free capital gain. However, under certain circumstances, especially if the buyer accesses cash accumulated in the target before closing within five years of closing (eg, by way of dividend or merger), the tax authorities can requalify the seller's tax-free capital gains into taxable income under the concept of indirect partial liquidation.

Insurance

The insurance market is dynamic and growing. It offers an ever-expanding range of products to address potential transactional challenges, such as post-closing recourse for warranty breaches, protection against tax risks (tax covenant), ongoing litigation claims, and environmental risks. In this chapter, we concentrate on buy-side warranty insurance.

Uses of insurance in M&A transactions

Insurance can be bought to enhance the post-closing recourse available to the buyer. Alternatively, insurance can be the sole recourse available to the buyer, especially when the seller is looking for a clean break. Technically, this is achieved by including a usual warranty package and indemnification clause in the SPA but reducing the cap to 1 Swiss franc.

Insurance can offset a credit deficit of the seller without using an escrow, which may attract negative interest in the current environment, or a holdback (both an escrow and holdback will be viewed negatively by financial sellers as they impact their internal rate of return); it can be used to enhance the attractiveness of a bid in an auction (it is now common for the seller in a competitive process to run a soft stapling process); it can also be used to retain a good relationship with the seller when it rolls over part of its equity. The premium is often borne equally by the parties or by the party who benefits the most from obtaining the warranty insurance.

Key terms

Key terms include quantitative limits, coverage and policy period.

Retention (or excess or attachment point) is the deductible; in other words, the portion of risk that remains with the buyer. Over the years, retention has come down significantly: it is now usually between 0.5 per cent and 1 per cent of the enterprise value (EV), but it can be as low as 25 basis points of EV or even nil in specific industries, such as real estate. Creativity has no bounds: retention can be turned into a basket (a tipping retention: once the retention is exceeded, the policy responds from the first Swiss franc) or it may step down after a set period of time (a dropping retention). Most insurers also include a de minimis amount per claim, generally not lower than the due diligence materiality threshold (this must be factored in when configuring the due diligence review).

The policy limit operates as a cap. It is typically between 10 and 20 per cent of EV. The premium is expressed as a percentage of the policy limit (that percentage is also called the 'rate online'). It currently hovers at between 1 and 2 per cent of the policy limit and will become cheaper for excess capacity in an insurance programme (layering first in line and excess insurance).

Coverage relates to the scope of the warranties insured. Traditionally, insurance covers the business warranties (subject to exclusions further discussed below). A new trend is the ability to insure fundamental warranties. The underwriters will review the warranty package and overlay qualifiers or exclusions when the warranty package is perceived as too buyer-friendly.

The policy period can be negotiated. It often tends to be around two years for warranties and up to seven years for tax and fundamental warranties.

Exclusions

For all its merits, warranty insurance is not iron-clad. Sophisticated parties will pay a keen eye to exclusions. These include, among other things:

- matters known (even if the SPA contains a 'pro-sandbagging' provision);
- specific areas that are typically difficult to due diligence and can cause considerable losses, such as cyber-events, data breach, bribery and corruption ('ABC exclusions'), sanctions, condition of assets, pollution, contamination, clean-up, the impact of the pandemic, transfer pricing and availability of tax attributes (some of these exclusions can typically be removed if there is a specific and targeted due diligence or if the target has a policy covering the particular risk);
- activities and operations in jurisdictions viewed as higher risk; and
- specific deal features, such as leakage, price adjustment mechanism, breach of covenants, and pre- and post-completion reorganisation.

The definition of insurable loss is generally based on reasonably foreseeable damage but will typically exclude lost opportunities, reputational damages, internal administrative and overhead costs, frustrated expenses and damages applying multipliers. Underwriters may also seek to exclude consequential and punitive damages.

Process

Insuring a deal first involves appointing a broker. Brokers sound out the market, identify potential underwriters and obtain quotes, which they summarise in a non-binding indication report.

An expense agreement is then signed with the selected underwriters, which kickstarts the underwriting and due diligence process.

During that process, the underwriters will be most concerned about disclosure, the scope of due diligence and the vigour of the negotiations between the seller and the buyer. The selected underwriter will have identified exposure areas of heightened focus in the underwriting process (such as, most recently, the impact of covid-19).

Usually, it takes about two weeks from the non-binding indication report to get to a position where the policy is 'bound', which means that the underwriters will have provided a firm binding quotation.

The insured will generally be requested to sign a declaration warranting to the underwriters that it is not aware of any matter that might give rise to a claim under the insurance policy. Upon receipt, the insurer will confirm that the cover is in place subject to completion of the transaction. For historical reasons, insurance is still less prevalent in Switzerland than in other jurisdictions. However, underwriters are keen to insure Swiss deals, and we have little doubt about market participants' increasing adoption of insurance.

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Private M&A

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Legal framework and recent changes

Switzerland continues to provide a generally favourable legal framework for private M&A, giving parties extensive contractual freedom in agreeing on the terms to apply to a transaction. In addition, in spite of other jurisdictions' tightening on foreign investment control and certain political aspirations to introduce the same in Switzerland, there are to date still very few restrictions in this respect.

The initiative to amend the Act on the Acquisition of Real Estate by Persons Abroad (or Lex Koller) in order, inter alia, to make the acquisition of business premises by a foreign buyer subject to an approval, was rejected in the legislative process. Such tightening of the conditions for the purchase of commercial real estate in Switzerland might have had a discouraging effect on foreign investors.

With the entry into force of the Federal Act on the Implementation of Recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes on 1 November 2019, bearer shares are permitted only if the company has securities listed on a stock exchange or if the bearer shares are structured as intermediated securities. If such exceptions are applicable, this needs to be registered in the commercial register. In the absence of such exceptions, companies had to convert their bearer shares into registered shares by the end of April 2021. If the company had not complied with its obligations, the bearer shares were automatically converted into registered shares by the commercial register and the company had to amend its articles of association. Until such an amendment (ie, the conversion of bearer shares into registered shares) is made, the commercial register will reject the registration of amendments to the articles of association. As a consequence of the duty to disclose the beneficial owner of shares pursuant to article 697j of the Swiss Code of Obligations – which mainly provides that the acquirer of shares exceeding 25 per cent or more of the share capital or voting rights of a Swiss non-listed company must give notice of the beneficial owner of this position to the

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company – owners of bearer shares that have fulfilled the reporting obligation are automatically registered in the share register of the company. As of 1 November 2024, shares of shareholders that have not been entered in the share register will be legally void and those shareholders will lose all rights associated with those shares.

On 19 June 2020, the Swiss parliament approved a general corporate law reform amending the Swiss Code of Obligations (the Corporate Law Reform). The Corporate Law Reform will modernise corporate governance by strengthening shareholders' and minority shareholders' rights and promoting gender equality in boards of directors and in senior management. In this regard, listed companies will have to reach a minimum threshold of 30 per cent of women for the board of directors and 20 per cent for management. In case of non-compliance with these thresholds, companies will have to explain in their remuneration report why these thresholds have not been met and indicate the measures planned to remedy the situation. The provisions of the Ordinance on Excessive Compensation (the Minder Ordinance) applicable to listed companies will be integrated into the Code of Obligations, with only a few changes. Furthermore, the Corporate Law Reform facilitates company formation, makes capital rules more flexible and revises the rules on corporate restructurings. Pursuant to this revision, the board of directors is required to monitor a company's liquidity and is further obligated to take measures to ensure solvency. Beyond this, the revision modernises the way in which general meetings of shareholders may be conducted as it allows for the holding of virtual meetings, which may also take place abroad, while universal meetings can also be held in written or electronic form. Finally, the Corporate Law Reform introduces certain disclosure requirements for commodity firms (report of payments made to public authorities) and allows the share capital to be fixed in a foreign currency.

The effective date of the Corporate Law Reform has yet to be determined but is expected to enter into force as of 1 January 2023. After coming into force, companies have two years in which to make any necessary amendments to their articles of association and organisational regulations. Regarding gender representation, listed companies have five years to comply with the new provisions for the board of directors and 10 years for the management board.

On 3 March 2020, the Swiss parliament entrusted the Swiss government to create a draft bill introducing a control over foreign direct investments in Swiss companies, including setting up a licensing authority to monitor the transactions concerned. The purpose of investment control is to avoid possible threats to public order as a result of foreign investors taking over a domestic company. It should also prevent major distortions of competition in the event of the acquisition of a domestic company by a foreign state or state-related investors. The consultation draft is expected to be published for consultation in the course of 2022. It is still unclear whether and how an investment control will be implemented.

Development of private M&A activity

While the number of transactions decreased in 2020 due to the covid-19 pandemic, in 2021 the M&A market bounced back and achieved historical record-breaking levels, recording 604 transactions involving a Swiss participation (compared with 363 in 2020). The volume of transactions with Swiss involvement nearly tripled from US$63 billion to US$170 billion, representing a 64 per cent jump as opposed to 2020. Similar to 2020, outbound deals were approximately twice as high as inbound deals, as in 43 per cent of overall transactions with Swiss participation Swiss companies acquired foreign entities, compared with 29 per cent of inbound transactions. Domestic transactions, however, declined compared with the previous year, with only 16 per cent of all transactions (14 per cent in 2020).

After a decline in transaction volume at the beginning of the covid-19 pandemic caused by the uncertainties related thereto, private M&A transactions in 2021 picked up again, shattering an all-time record with 94 transactions (more than double compared with the previous year). M&A activity involving private equity accounted for 40 per cent of the overall Swiss M&A market, driven by a high level of dry powder, low interest rates and generally favourable borrowing conditions.

As in the prior year, the technology, media, and telecommunications (TMT) sector was particularly attractive, taking advantage of the pandemic situation and reporting one-fifth of all transactions both in terms of the number of deals and deal value. The pharmaceutical industry also grew for the third consecutive year due to strong growth prospects (ageing population, prevalence of lifestyle diseases, focus on prevention) as well as the consumer goods sector.

Important factors for ongoing strong M&A activity in 2021 were, in our view, Switzerland's stable political and regulatory environment, with very few investment restrictions, in combination with very attractive potential investment opportunities – besides large cap targets, this in particular also includes small and medium-sized enterprises dealing with succession planning. Last but not least, transformation and portfolio reshaping have continued to account for a substantial portion of M&A (showcased, eg, by Vifor Pharma's tender offer by CSL Limited for all shares in Vifor Pharma Limited, and the merger of TX Markets and Scout24 Schweiz), and so have consolidation waves in various sectors (such as healthcare, TMT and consumer markets). Overall, private M&A deals in Switzerland have been delayed rather than cancelled as a result of the covid-19 pandemic. In the short and medium term, the pandemic will likely also lead to a certain shift of the driving factors of M&A activity in Switzerland. In sectors where the covid-19 pandemic has had (and continues to have) a significant impact (such as travel or holiday and related sectors), the main focus of M&A transactions will be on distressed companies in need of financial aid and reorganisational matters. This trend will in our view continue far into 2022 (and possibly even 2023), and companies will increasingly dispose of non-core assets and businesses in an attempt to secure or achieve more financial stability.

Cross-border transactions have always been key to Switzerland's M&A landscape and continued to be a driving force in 2021. The significance of cross-border deals can also be observed with respect to private equity investments. In terms of jurisdictions, western European countries were involved in over half of all Swiss transactions, both from an inbound and outbound perspective.

Landmark transactions

On 3 November 2021, Novartis announced the sale of 53.3 million Roche bearer shares for a consideration of approximately US$20.7 billion.

At the end of 2021, global biotechnology leader CSL Limited announced a tender offer for all shares in Vifor Pharma Limited, a global speciality pharmaceutical company with leadership in iron deficiency, nephrology, and cardio-renal therapies. The offer valued Vifor Pharma at US$11.7 billion.

The end of 2021 saw a major deal in the sectors of real estate, vehicle, financial services and general digital marketplace with the merger of TX Markets from TX Group a leading firm in digital marketplace solutions based in Switzerland, with Scout 24 Schweiz.

These three transactions are proof of the M&A market's and its participants' ability to quickly adapt to new situations (such as travelling and meeting restrictions owing to covid-19), as physical signings and closings often shifted to purely remote virtual signings and closings, a shift that will likely leave its imprints even after the covid-19 pandemic.

Outlook 2022

After a certain slowdown in 2020 owing to the covid-19 pandemic, M&A activities achieved historical levels in 2021. The high M&A level is likely to remain in 2022, despite a certain slow-down in the deal flow.

The global recovery, however, remains fragile, showing signs of headwinds. The threat of the end of negative interest rates and inflation could affect the valuation of businesses, hence making investors less likely to engage in large transactions. The geopolitical situation may also have an impact on the M&A market, as the price of commodities (oil and gas) has reached all-time highs.

Typical stages of Swiss private M&A transactions

The process of private M&A transactions differs substantially depending, inter alia, on the parties involved and the envisaged form of transaction. However, owing to the recent sellers' market and the ongoing trend towards an ever more competitive and sophisticated market, structured transactions and corporate auctions along the lines described below have become market practice in Switzerland.

In the first stage, the seller and its advisers prepare the sale documentation and marketing materials. This is followed by a marketing phase in which the seller's financial adviser, or less often the target's executive management, initiates first contact with potential bidders. The latter are then required to execute a non-disclosure agreement in order to receive further information in the form of an information memorandum. Based on this, bidders may decide to make a non-binding offer, which is followed by the due diligence phase for selected bidders. In this stage of the process, in addition to data room review, usually management presentations take place and expert sessions are set up. Seller's and bidders' counsel will regularly also have a first exchange on the sell-side draft transaction documents. After binding offers are submitted and the seller enters into negotiations with the chosen bidder(s), parties proceed to the signing of the transaction agreements. In spite of generally limited conditionality in Swiss transaction agreements in the recent sellers' market, there is usually a certain lapse of time between signing and closing to account for the necessary governmental approvals and pre-closing covenants. During this phase, the parties typically have to fulfil certain obligations and follow contractually agreed rules of conduct. The technicalities of closing itself vary depending on the form of transaction and target business. For the post-closing phase, the parties may agree on certain restrictive covenants (non-competition and non-solicitation) of the seller and covenants (such as continuation of the business, direct and indirect partial liquidation tax covenants combined with a respective indemnity in case of a private individual seller) of the purchaser.

Typical governance arrangements

The predominant legal form for private M&A transactions in Switzerland is the stock corporation, irrespective of deal size. Sometimes, limited liability companies are used instead, which is usually because they are treated as transparent for US tax purposes.

A stock corporation is governed by a board of directors that has a supervisory function and certain inalienable duties with regard to strategic and other important aspects (eg, appointment of senior management). Directors must be individuals and they are appointed ad personam (ie, proxies or representation by other persons is not permitted). The board of directors usually delegates day-to-day management responsibilities to management on the basis of a respective authorisation in the company's articles of association. Details of the delegation are set out in organisational regulations enacted by the board of directors.

Further particularities on governance, including board and management composition and specific quorum requirements, are commonly also reflected at a contractual level in a shareholders' agreement. While the articles of association of a company are filed with the commercial register and therefore publicly available, there are no public disclosure requirements with regard to shareholders' agreements and organisational regulations in the private environment.

Shareholders' agreements

General

Swiss law provides for far-reaching flexibility with regard to contractual arrangements in shareholders' agreements, and Swiss market practice has reached a high level of sophistication in this respect. However, certain limitations need to be taken into consideration.

As a general rule, shareholders' agreements are only enforceable against their respective parties, and there is an ongoing debate in Swiss legal doctrine as to the extent to which a target company itself can be party to a shareholders' agreement. While certain administrative obligations of the target company are acceptable in the view of a majority of commentators, it is questionable whether further obligations can be validly entered into by the target company under a shareholders' agreement. A further important limitation is that the directors of a company must act in the best interest of the company pursuant to mandatory Swiss corporate law. This needs to be taken into consideration in the context of enforcing certain provisions under shareholders' agreements. It should also be noted that shareholders' agreements may not have unlimited terms or set out to remain in force for the entire lifetime of a company. Rather, the maximum term should be set at about 20 to 30 years (alternatively at, eg, 10 years with automatic extensions). Non-competition covenants of shareholders in favour of the company are usually enforceable if the shareholders (jointly) control the company and the covenants are limited geographically and in scope of activity to the business of the company.

Veto rights

Private M&A investors in the Swiss market follow a wide range of investment strategies, which, beside classic control deals, also include non-control deals, club deals and joint ventures between financial investors and corporates. We have also seen various transactions in recent times where a seller retained a minority stake or rolled into the buyer's structure with minority participation. With several shareholders in a company, protection is usually sought via detailed minority and majority rights in shareholders' agreements.

There are certain restrictions with regard to implementing the same in a Swiss company's corporate documents. At shareholder level, high quorums can be introduced for specific decisions in the articles of association to the extent that such arrangements do not lead to a per se blocking of the decision-making in the company. At board level, veto rights for individual board members cannot be implemented in a company's articles of association or other corporate documents. However, such veto rights are often agreed on a contractual level between parties. As a consequence, while decisions taken in breach of such contractual arrangements would be valid from a corporate law perspective, they may lead to consequences under the shareholders' agreement.

The specific veto rights of minority investors usually depend on the size of the stake held. Investors with stakes up to 20 per cent usually have only fundamental veto rights aimed to secure the protection of the investor's financial interest. Such rights include veto on the dissolution or (de facto) liquidation of the target company and fundamental changes to its business, pro rata rights to participate in capital increases and other financing measures as well as maximum leverage provisions. Minority shareholders with a more significant stake (20 to 49 per cent) typically are also granted a say on material business decisions and the composition of board and management. At shareholder level, statutory law also provides for certain blocking rights of important matters for shareholders holding at least one-third of all votes. These include, inter alia, certain forms of capital increases, the dissolution of the company and the merger or demerger of a company under the Swiss Merger Act.

Questions surrounding the concept of control under competition law regulations or accounting standards (in the context of consolidation) also need to be taken into consideration with regard to minority rights and can have an impact on contractual arrangements between parties in specific cases.

In addition, specifically for private equity investors holding a minority stake, exit rights are usually key and therefore a heavily negotiated point in the context of shareholders' agreements.

Recent trends

W&I insurance

There has been a noticeable increase in the use of warranty and indemnity (W&I) insurance in Swiss private M&A deals in Switzerland. In the sellers' market that continued into early 2021, buyer policies have become a popular solution for bridging the 'liability gap' where a seller is willing to give a set of representations and warranties but wants to cap its liability at a level that the buyer is not comfortable with. In such cases, a W&I insurance policy can increase the overall cover to a level that is acceptable to the buyer.

In this context, stapled W&I insurances have been more widely used by sellers in auction processes, whereby sellers will initiate a buyer policy process themselves and usually provide bidders with a non-binding indications report in the data room during the due diligence phase. This is not only a means to expedite the W&I insurance process and to prevent the latter from interfering with the overall transaction timeline, but can also help to prevent insurance providers from going into exclusivity with certain bidders at an early stage of the process.

If the liability cannot be capped or excluded owing to the lack of negotiation power of the seller, which, as mentioned, has more rarely been the case in the past year, seller policies are used (especially by financial sponsors). In this way, the risk of potential outstanding claims can be shifted to an insurer in order to be able to distribute the exit proceeds to the greatest extent possible to investors immediately following closing.

In any case, the impacts of obtaining W&I insurance on the overall process of a transaction should be considered by the parties at an early stage to ensure smooth coordination of the different workstreams (including in particular due diligence). This should also include awareness of the limitations of insurance coverage, which are typically as follows:

- liabilities from known facts and matters identified in due diligence or information otherwise disclosed by the seller;

- forward-looking warranties;
- certain tax matters, for example, transfer pricing and secondary tax liabilities;
- pension underfunding;
- civil or criminal fines or penalties where insurance coverage may not be legally provided;
- post-completion price adjustments and non-leakage covenants in locked-box deals;
- certain categories of warranties, for example, environmental matters or product liability; and
- liabilities arising as a result of fraud, corruption or bribery.

Purchase price

Locked-box pricing mechanisms are widely used and accepted in Swiss private M&A transactions, which can be perceived as unusual in particular by US and Asian bidders looking to invest in Swiss companies. Sellers aiming to limit balance sheet risks and reduce the risk of post-closing purchase price adjustment disputes have often been successful in pushing towards using locked-box pricing mechanisms in the recent sellers' market. As a consequence, locked-box pricing mechanisms are often combined with an interest payment or cashflow participation for the period between the locked-box date and actual payment of the purchase price (ie, closing), allowing sellers to participate in the generated cashflows. Buyers also tend to accept longer periods between the locked-box accounts date and closing. Deferred purchase price elements (such as earn-outs) or vendor loans have been seen occasionally in recent deals as a consequence of the covid-19 pandemic.

Conditions

Owing to the sellers' market we experienced in 2021 (other than in the context of 'fire sales'), sellers have usually pushed towards reducing conditionality to an absolute minimum in order to increase transaction certainty. Especially in highly competitive auctions, bidders have been reluctant to introduce conditions precedent so as not to impair the overall attractiveness of their offers.

As a result, in particular MAC clauses have largely disappeared, and so have change-of-control waivers, with buyers usually taking the economic risk in order to secure a deal. But even the outcome of merger control assessment may be a criterion for certain sellers to move forward with a specific bidder, and we have therefore increasingly often encountered 'hell or high water' clauses included in merger clearance closing conditions.

Exit routes

In cases where a private equity or other investor is invested in a target jointly with another party, terms of the shareholders' agreement are usually decisive with regard to the conditions under which the investor is able to exit as well as the specific exit route.

The most frequently seen exit routes in Swiss deals are (still) trade sales to a strategic investor or secondary buyouts by a private equity firm. Exits by way of an IPO on the SIX Swiss Exchange have become more common in recent years, especially in the healthcare and industry sectors.

We continue to see dual-track processes pursued by exiting investors. While there is inherent complexity in running simultaneous IPO and M&A sale processes, sellers hope to increase deal certainty with the dual track, specifically in times of volatile and unpredictable markets, and to maximise valuation.

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Public M&A

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Legal framework and recent changes

Swiss M&A transactions related to public companies are mainly governed by the Swiss Financial Market Infrastructure Act (including its implementing ordinances) and the Swiss Federal Merger Act. In addition, certain agreements entered into in connection with a public M&A transaction, such as block trade agreements, tender undertakings or shareholders' agreements, are governed by the Swiss Code of Obligations. Apart from the specific Swiss public takeover rules, a number of other laws apply in the context of public tender offers, including the Federal Antitrust Act.

The Swiss public takeover rules are enforced by the Swiss Takeover Board (TOB). Decisions of the TOB may be challenged before the Swiss Financial Market Supervisory Authority (FINMA) and, finally, the Swiss Federal Administrative Court.

The Swiss takeover rules only apply if either the target is domiciled in Switzerland and its shares are fully or partly listed on a Swiss stock exchange (eg, SIX Swiss Exchange or BX Swiss) or the target is domiciled outside of Switzerland but the main listing of all or part of its shares is on a Swiss stock exchange (the TOB may waive the applicability of the Swiss regime if the takeover rules of the country of domicile also apply, provided that such rules are not in conflict with the Swiss regime and provide for equivalent shareholder protection). In principle, the Swiss takeover rules do not apply to companies whose shares are exclusively listed on a stock exchange outside of Switzerland or not listed on a stock exchange. However, the TOB has held that the Swiss takeover rules also apply to a company not listed on a stock exchange if, shortly prior to the transaction, either the shares were delisted to prevent the applicability of the takeover rules, or the target was demerged from a listed company.

The Swiss takeover rules apply to both Swiss and non-Swiss bidders irrespective of whether they are listed. As with private M&A transactions (as described in the chapter on private M&A), there are to date very few restrictions in respect of foreign investment control with regard to Swiss-incorporated public companies, in spite of other jurisdictions across Europe tightening

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foreign investment control. Political aspirations to introduce wider foreign investment control in Switzerland are, however, increasing (a draft law on the control of foreign direct investment that focuses on acquisitions or similar transactions by state-owned investors and related parties to such investor as well as transactions in critical industries has been published). There is, however, one important exception. Pursuant to the Federal Act on the Acquisition of Real Estate by Foreigners (Lex Koller), non-Swiss buyers (ie, non-Swiss natural persons, non-Swiss corporations or Swiss corporations controlled by such non-Swiss natural persons or corporations) have to obtain a special permit from cantonal authorities in order to purchase real property or shares in companies or businesses owning real property, unless the property is used as a permanent business establishment. The acquisition of shares of a public company whose shares are listed on a Swiss stock exchange is exempted from such special permit obligation. However, there may be restrictions regarding transactions of such public company following the settlement of the public tender offer, for example, regarding additional acquisitions of real estate in Switzerland or in the case of a migration of its statutory seat or an emigration cross-border merger outside of Switzerland. Further requirements and restrictions exist in certain regulated sectors such as banking and securities trading, insurance, healthcare and pharmaceuticals, and media and telecommunications.

For instance, the intended acquisition of a qualified direct or indirect participation (ie, 10 per cent or more of share capital or voting rights or significant influence by other means, eg, on a contractual basis) in a Swiss bank or securities firm as well as the reaching or crossing of further shareholding thresholds at 20, 33 and 50 per cent of share capital or voting rights triggers notification duties to FINMA, both on the part of the acquiring and disposing shareholders and on the part of the bank or securities firm itself. Given that qualified shareholders must fulfil regulatory fit-and-proper requirements, the notification duty de facto has the effect of an approval requirement. If, as a result of a planned transaction, a Swiss bank or securities firm stands to become foreign-controlled (ie, where foreign qualified shareholders directly or indirectly control more than 50 per cent of the voting rights or exercise control by other means), a formal approval by FINMA in the form of a supplemental licence is required. Further requirements may apply in the context of financial groups or conglomerates subject to consolidated supervision by FINMA or a foreign lead regulator, which may create a need for coordination with or between different authorities in the approval process.

In connection with the Swiss takeover rules, no new laws or practices of particular note have been recently introduced. However, a notable change in Swiss corporate law regarding the disclosure of the beneficial owner of shares by the shareholder as well as the abolition of bearer shares was implemented in November 2019 (as described in the chapter on private M&A). One of the few exceptions to the prohibition of bearer shares is companies with shares listed on a Swiss stock exchange. Following the settlement of a public tender offer and subsequent delisting from the Swiss stock exchange, such company will therefore need to convert its bearer shares into registered shares. As part of the general revision of Switzerland's financial regulatory framework, the Financial Services Act and the Financial Institutions Act (including their implementing ordinances) entered into force in January 2020. In June 2020, the Swiss parliament passed a bill amending Swiss corporate law, which seeks to update corporate governance by enhancing shareholder rights, facilitating company formation and increasing the flexibility of capital regulations. It also implements the provisions of the Ordinance on Excessive Compensation at statutory level, introduces gender equality guidelines for boards of directors and executive management and imposes stricter transparency rules regarding non-financial reporting and for an additional set of rules for companies in the commodity business. The new Swiss corporate law will enter into force on 1 January 2023.

Development of public M&A activity and landmark transactions

The development and performance of the overall Swiss M&A market continued to see very strong activity in 2021 (as described in the chapter on private M&A). Even though private M&A transactions accounted for the majority of the overall Swiss M&A market in terms of number of deals in 2021, there were a few noteworthy public M&A deals and TOB procedures.

The most significant public M&A deals in 2021 were the buyback of Roche shares from Novartis for a consideration of approximately US$20.7 billion and the tender offer by CSL Limited for all shares in Vifor Pharma Ltd at a valuation of Vifor Pharma totalling US$11.7 billion.

Besides the above-mentioned transactions, in 2021 the TOB was involved in a number of share buyback programmes, as well as a number of procedures relating to the exemption from the duty to make a tender offer.

In addition, five IPOs took place in Switzerland in 2021. The largest IPO was the listing on the SIX Swiss Exchange of PolyPeptide Group AG, one of the world's largest independent contract manufacturers of therapeutic peptides for the pharmaceutical market, with a market capitalisation of 2.53 billion Swiss francs.

Finally, in the field of public M&A, shareholder activists continue to engage in Swiss targets and this trend can be expected to continue, as activist shareholders are becoming more sophisticated and better funded.

Typical stages of Swiss public M&A transactions

General

The process of a typical public M&A transaction is governed by the Swiss takeover regime. Regarding the structuring of such a transaction, the Swiss takeover rules, however, allow for great flexibility.

The classic method of acquiring a Swiss public company is a public tender offer for the purpose of acquiring equity capital of the target. In exchange for the target shares, the bidder may offer shares (listed or non-listed), cash, or a combination thereof. Alternatively, control over a Swiss public company may also be obtained by:

- purchasing a controlling block of shares from the previous shareholder(s) (subject to an opting out from the mandatory bid obligation);
- acquiring a business (assets and liabilities) or by a transfer of assets according to the merger agreement;
- participating in a major share capital increase (again, subject to an exemption or opting out from the mandatory bid obligation); or
- a merger.

In the classic method of a public tender offer, the view of the target board determines the categorisation of the offer as friendly or hostile. The Swiss takeover rules apply irrespective of this categorisation. The support of the target board is, however, required in order to conduct a due diligence process prior to launching an offer. Further, a bid that is recommended by the board of directors of the target company is in general more likely to succeed (and is far more common than a hostile takeover).

Preliminary phase

Once the pre-announcement of the offer or the offer prospectus have been published, the typical stages and the timing of a public M&A transaction are regulated to a large extent. However, the phase immediately prior to the pre-announcement or the publication of the offer prospectus depends largely on the involved stakeholders and is relevant for the bidder to structure the deal and to get the support of the target's board of directors as well as possibly major shareholders. In this preliminary phase, the bidder and the target company usually conclude a confidentiality (and standstill) agreement. In the case of a friendly offer, the bidder and the target company will typically conclude a transaction agreement according to which the bidder is obliged to publish a tender offer subject to certain terms and the target's board of directors commits to support and recommend the offer. Further in such preliminary phase, the bidder may seek tender undertakings from major shareholders of the target.

In general, there are no rules about the approach by the bidder of the target company. As long as the threshold for triggering a mandatory offer (ie, 33⅓ per cent), is not passed, creeping tender offers, where a stake is steadily built up, do not fall within the ambit of the Swiss takeover rules. However, such a tactic is difficult to pursue owing to the disclosure obligations of significant shareholdings (starting at 3 per cent of the target's issued voting rights), and the bidder must keep in mind the minimum price rule.

During this preliminary phase, the potential bidder has to be mindful of public statements. First, the TOB may qualify a public statement regarding a potential public takeover offer as a de facto pre-announcement of the offer if such statement contains already specific information as to the bidder's intent and the offer price. Second, even if such public statement does not fulfil the requirements of a pre-announcement, it may trigger certain obligations. In particular, the TOB may set the potential bidder a deadline to either 'put up' by making a formal offer or to 'shut up' by confirming that it will refrain from launching an offer for a period of six months (put-up or shut-up rule). This put-up or shut-up rule aims at liberating a target company that has been taken hostage by the destabilising effects of a lingering potential offer.

Public tender offer procedure

Subsequent to the negotiation and structuring phase and once an offer has been pre-announced, the bidder must publish the offer prospectus within six weeks. A pre-announcement is optional (ie, the bidder may directly publish the offer prospectus). If the bidder must obtain clearances from competition or other regulatory authorities prior to the formal publication of the offer, the TOB may extend the six-week period between pre-announcement and the publication of the prospectus. Prior to publication of the offer, the bidder must further appoint a review body to assess the offer and issue a report as to whether the offer complies with takeover law and whether financing is in place. In the case of a friendly takeover offer, the offer prospectus will also contain the report of the board of directors of the target. It is standard practice for the bidder to seek pre-clearance from the TOB prior to the publication of the offer prospectus, and the TOB will publish its decision regarding the compliance of the offer typically on the date of publication of the offer prospectus.

Following publication of the offer prospectus, a cooling-off period generally of 10 trading days applies, during which a qualified shareholder of the target (holding alone or together with other shareholders 3 per cent or more of the target's issued voting rights) may join the takeover proceedings as a party and appeal the decision of the TOB. The main offer period, which commences after the cooling-off period, typically lasts between 20 and 40 trading days and may be shortened or extended in specific situations with the consent of the TOB. On the trading day following the lapse of the main offer period, the bidder must publish the provisional interim results of the offer. The definitive interim result must be published no later than four trading days following the lapse of the main offer period, and must specify whether the offer conditions have been met or waived and whether the offer has been successful. If the offer has been successful, the offer must be open for additional acceptances for 10 trading days after publication of the definitive interim result. The final result of the offer must be published again on a provisional basis on the trading day following the lapse of the additional acceptance period and in its final form no later than four trading days following the lapse of the additional acceptance period. The settlement of the public tender offer must take place 10 days after the last day of the additional acceptance period, but may take place later with the consent of the TOB in case merger and other regulatory clearances have not yet been obtained.

Squeeze-out and delisting

A bidder holding, alone or together with persons acting in concert, more than 98 per cent of the voting rights of the target company is entitled to request the cancellation of the remaining shares against payment of the offer price by way of a statutory squeeze-out. The action must be filed within three months following the lapse of the additional acceptance period. The bidder may continue to purchase target shares in order to reach the 98 per cent threshold until the court's decision regarding the cancellation of the shares. The duration of the statutory squeeze-out procedure varies between four and six months. Shareholder rights to challenge the statutory squeeze-out are limited to certain formal requirements and do not allow for any claim to increased compensation.

If the bidder holds more than 90 per cent of the shares but does not reach the 98 per cent threshold, minority shareholders may be forced out against compensation by way of a squeeze-out merger according to the Swiss Merger Act. The target shareholders have no right to obtain shares of the absorbing company, but may challenge the merger and the fairness of the compensation in court. Such appraisal claims may lead to a lengthy litigation procedure.

In the event of a successful tender offer followed by a squeeze-out merger or a statutory squeeze-out, and in the event the intention to delist the target company's shares has been disclosed in the offer prospectus, the requirements for a delisting are a mere formality and the timetable is very compact. In the absence of any rules to the contrary in the target's articles of association, the decision to delist the target's shares lies with the target board of directors. As of 2023, as part of the revised corporate law, delisting decisions will require shareholder approval.

General principles and rules of the Swiss takeover regime

Mandatory public tender offers, opting-out or opting-up and exemptions

Under certain circumstances, a person may be required to make a mandatory public tender offer to buy all publicly held shares of a listed company. Such a mandatory offer is triggered by an acquisition of shares (completion of the sale), resulting in a shareholding exceeding

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33⅓ per cent of the voting rights of a target company, irrespective of whether such voting rights may be exercised.

Although mandatory offers are generally governed by the same set of rules as voluntary bids, there are important exemptions where stricter provisions apply. The minimum price rule applies (see below) and settlement by means of an exchange against securities is only permitted if a cash alternative is offered (such cash alternative must comply with the minimum price rule, but can be lower than the value of the shares offered in exchange). Further, mandatory offers, unlike voluntary offers, may be made subject to only a very limited number of offer conditions.

The Swiss takeover rules allow a Swiss target company to opt out of the mandatory offer rules by adopting a provision to this effect in its articles of association. Target companies may also opt up the threshold triggering a mandatory offer requirement in their articles of association from 33⅓ up to 49 per cent. The TOB has established a number of strict rules regarding transparency and majority requirements in connection with the introduction of such a clause in the company's articles of association, which, if they are not followed, prevent the opting-out or opting-up to be valid and effective (see leading case regarding LEM Holding SA, in which the validity of such a shareholders' resolution was the topic in two TOB procedures in 2011 and 2019).

There are a number of exemptions to the obligation to make a mandatory offer when exceeding the threshold of 33⅓ per cent of the shares of the target company. Certain of these exemptions, such as (among others) a restructuring involving a capital reduction immediately followed by a capital increase so as to offset a loss, require only a notification to the TOB. Other potential exemptions, such as (among others) the transfer of voting rights within a group, the temporary exceeding of the threshold or the acquisition of shares for the purpose of a restructuring (as in the case of Schmolz + Bickenbach AG in 2019) require a formal approval by the TOB and are only granted in justifiable cases.

Transparency and equal treatment of shareholders

The bidder must publish the offer in a prospectus with true and complete information in order to enable the recipients of the offer to reach an informed decision, including (among others) a brief description of any agreements between the bidder and the target as well as the target's shareholders. Further, the bidder must treat all shareholders of the target company equally, which is further expressed by the price rules applicable to Swiss tender offers.

Price provisions

According to the best-price rule the bidder must pay the same price to all recipients of the offer. Therefore, should the bidder or a person acting in concert with the bidder pay a price that is higher than the offer price offered under the offer to any shareholder between the pre-announcement of the offer and the date that is six months from the expiry of the additional acceptance period, such higher price must be paid to all recipients of the tender offer. Pursuant to its practice, the TOB may extend such period of six months if the parties tried to circumvent the best-price rule, which needs to be analysed carefully by the parties involved, in particular with regard to put or call options of certain major shareholders of the target company that have not tendered their shares under the offer.

In mandatory and in change-of-control offers (ie, offers that would allow the bidder to exceed the 33⅓ per cent threshold if successful), the offer price must be at least equal to the 60 days' volume weighted average price (VWAP, if the stock is liquid) or the highest price paid for securities of the target company by the bidder(s) in the 12 months preceding the offer, whichever is higher (minimum price rule). If the target shares are not deemed liquid from a takeover law perspective, the 60 days' VWAP is replaced by a valuation to be provided by the review body.

In partial tender offers or public tender offers for target companies with an opting-out provision in their articles of association, the minimum price rule does not apply and the bidder is free to set the offer price (the best-price rule, however, applies).

Rolling shareholders and ancillary benefits

In recent years, with more private equity investors looking at Swiss-listed target companies, a trend has evolved whereby structuring options involving one or more major shareholders of the target company either remain in the company (and sign a respective non-tender undertaking) or roll over into the bidder structure.

Such a structuring option involving a rolling shareholder leads to complex questions in connection with the price rules under the Swiss takeover law. The TOB may qualify certain benefits granted by the bidder to such rolling shareholder, which may be contained in a shareholders' agreement or other transaction documents such as put and call options or management or employee incentive plans (if the major shareholder is simultaneously a manager or an employee of the target), as ancillary benefits under the minimum, the best-price rule or both. If this is the case, such benefits would lead to an increase of the price that the bidder must pay to all shareholders of the target company having tendered their shares into the offer.

To mitigate the risks for the bidder in such structuring options, it became standard practice in Swiss public M&A deals with such a remaining or rolling shareholder that the bidder appoints an independent valuation expert in order to determine and value potential ancillary benefits included in such transaction documents (or to be in a position to delete them prior to the publication of the pre-announcement or the offer prospectus). Further, in such a transaction structure, the bidder will almost always seek a formal pre-clearance by the Swiss TOB to avoid any risk of breaching the price rules.

Offer conditions

The public tender offer may be subject to certain conditions. If, and only if, such offer conditions are not fulfilled (or waived), the bidder may walk away from the offer, which is, in Swiss public M&A transactions, extremely rare. In the context of voluntary offers, conditions are generally permissible if:

- their satisfaction is outside the bidder's control;
- they are stated clearly, objectively and in a transparent way in the offer documents; and
- they do not require any actions from the target company that could be unlawful (in particular a violation of the board's fiduciary duties).

The bidder must take all reasonable steps to ensure that the offer conditions are met.

Typical offer conditions are:

- a minimum acceptance threshold;
- a material adverse change clause relating to the target company (within the specific thresholds set out by the TOB case law);
- the registration of the bidder in the share register (in the case of registered shares) and the cancellation of transfer or voting right restrictions in the target's articles of association;

- merger and other regulatory approvals;
- replacement of the board of directors; and
- no injunction or court order.

Mandatory offers may be made subject to only a limited number of conditions, such as merger and other regulatory approvals, the removal of transfer or voting right restrictions and no injunction or court orders.

Transaction notifications

From publication of the pre-announcement or the offer prospectus until expiry of the additional acceptance period, all parties in a takeover proceeding, shareholders holding at least 3 per cent in the target company and persons acting in concert with the bidder must disclose on a daily basis all transactions in securities relating to the offer to the TOB and SIX Swiss Exchange. The TOB publishes the transaction notifications on its website.

Persons acting in concert with the bidder

Persons are acting in concert with the bidder when they are coordinating their conduct by contract or any other manner to purchase or sell securities or exercise voting rights. As a general rule, persons acting in concert with the bidder must be disclosed in the prospectus and comply with the bidder's obligations, such as the obligation to treat shareholders equally (including adherence to the price provisions), to notify transactions and to comply with transparency requirements. Further, if the persons are acting in concert in view to obtain joint control with the bidder over the target (ie, if they exercise a main role in the public tender offer), they are perceived as co-bidders and, if they hold in the aggregate 33⅓ per cent of the voting rights, a mandatory offer may be triggered.

Transaction certainty and competing offer

Swiss takeover law limits the ability of a bidder to protect the envisaged takeover transaction and absolute deal certainty is difficult to achieve. Conversely, Swiss law facilitates competing offers on a level playing field, which may be submitted until the last day of the main offer period. Generally, the target board of directors may lawfully agree to refrain from soliciting competing offers (no-shop undertaking). However, the right to react to unsolicited offers must be retained to the extent required by the board's fiduciary duties, including the disclosure of non-public information to, or negotiate with, the unsolicited bidder. Also, the target board must be free to withdraw its recommendation of the first offer and recommend a superior offer in compliance with its fiduciary duties. Obligations in the transaction agreement between the bidder and the target company that the TOB deems to be too restrictive on the right of the target board to consider competing offers have been declared void by the TOB. Further, break fees contained in the transaction agreement are not permissible if they will result in coercing shareholders to accept the offer. As a rough guide, the TOB has accepted in the past break fees of up to 1 per cent of the transaction volume.

Shareholders accepting an offer may revoke their commitment in the event of a competing offer. The same withdrawal right applies to tender undertakings (which, under Swiss law, are therefore not irrevocable).

To discourage potential competitors and to achieve a higher transaction certainty, the bidder may build up a stake in the target prior to the offer. If the bidder secures a large stake from a majority shareholder prior to the publication of the offer, but with a completion date after the publication of the offer (eg, because of required merger clearances), the bidder will need to pay attention that such a block trade share purchase agreement is not linked to the public tender offer. If it was, for example, conditional upon the success of the public tender offer, the TOB would treat it similarly to a tender undertaking that may be revoked in the case of a competing offer.

Outlook

Despite some uncertainties relating to the covid-19 pandemic, the macroeconomic situation (eg, rising interest rates) and the geopolitical environment (especially the war in Ukraine), the public M&A market is expected to have a good year ahead.

There has been a continued trend of private equity investors looking to take over Swiss listed targets. Also, shareholder activists continue to play a role in Swiss public M&A transactions whereby they can have the role of a catalyst (eg, Cevian in the DSV offer for Panalpina in 2019) or the role of a blocking force if the offer price is deemed too low.

10

Carve-out Transactions

Christoph Vonlanthen and Oliver Triebold[1]

Introduction

The key defining feature, and source of complexity, of a carve-out transaction is that it involves the separation of a business integrated in the operations of the seller. Carve-out transactions can take the form of a disposal of subsidiaries, divisions or assets. In the public markets, it can be the spin-off or split-off of business units.

At a strategic level, companies turn to a carve-out in an effort to focus on their core assets, improve their value proposition, become operationally more agile or simply raise cash to shore up their balance sheet. Historically, carve-out transactions have accounted for a healthy percentage of deal activity, with bursts of activity in the wake of market upheavals. It is therefore not surprising that volumes have been spurred in the recent past by the pandemic, supply chain disruptions and geopolitical events. In this chapter, we review a range of challenges that the parties need to anticipate and navigate when considering these complex transactions.

Financial statements

A key underpinning of an M&A transaction is the availability of financial statements for the target business. Financial statements are critical for pricing the deal. In addition, they are a crucial area of due diligence and the basis for important representations and warranties. Carve-out financial statements can also be essential to support the buyer's capital-raising efforts.

There may, however, not be any financial reporting at the level of the target business, or the consolidating financial information used to compile the seller's consolidated financial statements may lack the necessary granularity. This means that a critical task in a carve-out transaction will often be to prepare suitable financial statements for the target business.

Carve-out accounting or the determination of the assets, liabilities, revenues and costs attributable to the target business can be a particularly complex and time-consuming process.

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Pricing the carve-out transaction

Interdependencies between the target business and the business to be retained by the seller matter in a carve-out transaction. In particular, they can make it challenging to price a carve-out on a 'locked-box' basis, the most favoured pricing mechanism in Europe, including Switzerland.

One of the features of the locked box is to turn over the profits and cash accumulated since the locked-box date to the buyer. In a carve-out transaction, opportunities for hidden or disguised leakages however are generally significant, with the potential of diverting value of the target business for the benefit of the seller.

A locked-box pricing will thus require carve-out financial information to serve as a basis for the equity value bridge, a close due diligence review of all inter-company arrangements and transfer pricing, and tight negotiation of prohibited and permitted leakages. It will also regularly involve post-completion due diligence to ensure that permitted inter-company trading occurred in compliance with those arrangements and the sale and purchase agreement (SPA).

Corporate reorganisation and transaction structuring

A carve-out will typically involve a separation or corporate reorganisation ahead of the consummation of the transaction. This means that the seller and the buyer will have to identify which assets, liabilities and contracts are within the scope of the transaction and which ones will remain with the seller. In a second step, the parties will need to analyse how the target business can be separated and transferred to the buyer in the most efficient manner.

Separation

Generally, a separation of the carve-out business can be done by way of a formal demerger pursuant to the Swiss Merger Act or an 'old-fashioned' split-off involving a contribution of assets, liabilities and contracts into a newly formed subsidiary and a distribution of the shares of the new subsidiary to the seller. The contribution itself can be implemented by means of a registered transfer of assets pursuant to the Swiss Merger Act or individual transfers. There are pros and cons to each form of separation, including:

- the complexity and length of the process;
- financial statements requirements;
- the consultation of creditors, employees and shareholders;
- consent of contracting parties;
- creditors' rights; and
- secondary liability for historic claims (which can be offset contractually).

From the buyside perspective, the goal is to gain a detailed understanding of the separation process and whether and how the target business can operate on a stand-alone basis or be integrated in the buyer's group upon completion of the transaction. Accordingly, a key focus of the buyer's due diligence investigation will be on separation issues.

The separation process often raises many complex structuring issues for the parties. For example, some assets or contracts may be shared between the target business and the remaining business of the seller, and may need to be transferred, replaced, duplicated or partially terminated. In addition, contracts in general and sometimes certain types of assets, such as joint venture interests, require the consent of the contracting party to be transferred into or out of the

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target business. These may become 'stranded assets' if the required consent is not forthcoming, for which the parties will need to devise the applicable regime.

Typically, a plan of reorganisation or step plan will be attached to the SPA and its completion will be a condition precedent to closing.

Wrong pockets clauses

The SPA will contain 'wrong pocket' and mutual indemnification clauses. The goal is to ensure that, post-completion, each party has all the necessary assets and contracts to conduct its business and is not exposed to liabilities that should attach to the other group. Wrong pocket clauses go both ways. They aim to return to the retained business those assets that ended up with the target business but belong to the retained business. They also serve to transfer to the buyer or the target business those assets that should have been transferred but were held back by the retained business.

A practical difficulty is that it may not be clear cut whether an asset or contract belongs to the retained or target business. The parties often define the assets belonging to a group by reference to assets 'exclusively' or 'predominantly' used in the business of that group. They will also determine whether the group to which an asset will be transferred post-closing needs to pay value for the assets.

Intellectual property and data

Intellectual property, or IP, will raise additional considerations, especially if it has been historically shared within the seller's group. The parties may agree that IP will be retained by the group making the greatest use of it and licensed to the other group. Parties should, however, keep in mind that perpetual licences pose difficulties under Swiss law (to the extent that they involve active duties by one of the parties, such as maintenance by the licensor). An alternative can be for the seller to sell IP rights for specified products or regions.

Data, nowadays one of the most important assets for companies, can also result in complex separation issues. It will need to be determined how integrated the data of the target and retained businesses are, how the separation can be done and whether this is achievable prior to completion.

Employees

The parties will need to determine which personnel need to transfer to the target business or be retained by the seller, whether personnel are likely to transfer automatically by operation of law, and whether any consultation process needs to be undertaken with the works councils or the employees.

Switzerland has its own version of Transfer of Undertakings (Protection of Employment) rules. These rules may pose an issue in the separation of the target business because even a transfer of assets and liabilities may have the effect of triggering the automatic transfer of employment contracts (together with insurance and pension entitlements).

If the buyer does not want some of the employees who would automatically transfer to the target business, the parties will have to determine whether to formally re-assign these employees. Alternatively, layoffs may need to be undertaken post-closing. If that happens, the parties may be required to comply with the mass layoff provisions of articles 335d et seq of the Swiss Code of Obligations.

Each employee may object to the transfer by operation of law, in which case the relevant individual employment terminates upon the expiration of the statutory (rather than the contractual) notice period (one to three months, depending on seniority).

The transfer of a business or a portion thereof will require a pre-transfer notification to the works councils or employees and, if measures affecting the employees are contemplated, a consultation process. Works councils or employees' feedback during the consultation must be considered, but is not binding.

The parties will also have to address the apportionment of the seller's pension fund. Sizeable carve-outs often lead to a 'partial liquidation'. Such partial liquidation triggers a closely regulated process for the transfer of insured employees, data, entitlements and assets. On the buyer's side, it has to be decided whether to fold acquired personnel into existing plans or create new plans.

For target businesses that are particularly reliant on the skillset, know-how or client relationships of the workforce or key employees (eg, in the asset management or investment banking industry, or for companies active in technology, life science or engineering), the buyer may insist on a condition to closing linked to the implementation of new employment agreements or a retention plan. This may involve incentives in the form of retention or stay bonuses.

Intra-group interdependencies

In addition to ensuring that assets and contracts sit in the right business, there will be interdependencies to terminate or rearrange, such as group-wide insurance policies, group IT, cash-pooling arrangements or intra-group debt and guarantees. The buyer is likely to be required to subscribe for new insurance policies at completion. It may, however, seek to obtain that the seller maintains insurance policies to cover outstanding insurance claims or past events.

In regulated industries, the buyer may need to submit applications for the granting of new licences and permits or their transfer. Such a regulatory process will require close cooperation from the seller, the contours of which ideally will be delineated in the SPA.

Tax considerations

Tax considerations are generally critical in a carve-out transaction. They will feature heavily both in the pre-closing reorganisation and the structuring of the disposal.

High level considerations on demergers

Provided that they satisfy a number of conditions, carve-out transactions can be tax-neutral under Swiss law. This is generally the case where the following requirements are cumulatively met:

- the surviving entities continue to be subject to Swiss taxes;
- income tax values are being maintained;
- the transferred assets or participations constitute an operating business or part of an operating business; and
- the remaining entities after the demerger carry on pursuing an operating business or part of an operating business.

Where the carve-out concerns purely holding companies, as well as finance or real estate companies, additional considerations apply to satisfy the operating business requirement.

In particular, the 'transparency principle' was recently introduced for the split or demerger of holding companies. On the basis of this principle, holding companies are no longer restricted to satisfying the operating business requirement by ensuring that each holding company (resulting from the split or separation) hold participations of at least 20 per cent in at least two active subsidiaries. It is now sufficient if each resulting holding company controls a 'business operation' (ie, if it holds more than 50 per cent of the voting rights in an active subsidiary).

Importantly, where the reorganisation can be structured as a tax-neutral demerger in compliance with the conditions outlined above, there is no 'blocking period' that would preclude the subsequent disposal of the newly established, demerged entity.

Where the reorganisation is not tax-neutral, it may crystallise income tax, withholding tax and stamp duty leakages at the level of the entities concerned, as well as the shareholders. In some cases, these tax consequences can be mitigated, but this can then lead to other restrictions (eg, a blocking period).

Tax consequences of a share deal

Where the sale of the target business by a corporate entity or an individual holding the target as business assets is structured as a share deal, the transaction will generally result in taxable income for the seller to the extent of the difference between the tax book value and the realised purchase price.

However, participation relief can be claimed on the realised capital gain if certain conditions are met (including the holding of a participation of at least 10 per cent for a period of more than one year).

Furthermore, if any of the involved parties qualifies as a securities dealer for Swiss securities transfer tax purposes (a qualification that especially applies to holding companies with participations with a book value of more than 10 million Swiss francs), a share deal will be subject to securities transfer tax of up to 0.3 per cent.

Tax consequences of an asset deal

As an alternative to a tax-neutral demerger on the basis of the general conditions outlined above, assets can also be transferred within a group as single operating assets on a tax-neutral basis (without complying with the requirement that the assets constitute a business or a portion thereof), with a blocking period of five years.

Where the sale of the target business is structured as an asset sale, the transaction will generally crystallise income tax over the realised gain.

Furthermore, VAT consequences need to be addressed (usually by means of notification procedure to the Swiss Federal Tax Administration).

Transitional services

Once the target business is defined, the deal is priced and the path to get there is defined in the SPA, carve-out transactions usually pose one more challenge: designing and implementing appropriate arrangements between the parties regarding services during a transitional phase following completion.

Rationale for post-completion transitional services

Prior to completion of a carve-out transaction, services such as legal, accounting, procurement and software licensing or sourcing may be managed group-wide. These internal arrangements will need to be unwound upon completion. As this task usually takes time, the parties often agree on a certain post-completion transition phase.

For the seller, offering transitional services can open the field to more potential buyers, and so can help maximise value in an exit. This consideration will be balanced with the fact that transitional services may require the seller to have in place employees, licences and supply arrangements that it may not otherwise need to maintain. Transitional services can also be a distraction and a burden in the management of the retained business.

Client's involvement

The key feature of transitional services agreements and, in particular, service level agreements is that they require substantial attention and time from operational people from both parties. In our experience, value is added in the precise definition of the services, a clear structure of the costs associated with these services, and the ability to terminate or extend specific services (rather than all of them) before their scheduled end date. The parties to a Swiss-law-governed transitional services agreement should, however, also keep in mind that the agreement may qualify as a mandate with the effect that, as matter of law, it may be terminable by both parties at any time (as per article 404 paragraph 3 of the Swiss Code of Obligations).

Key drivers in the negotiation process

There are a number of key drivers that colour the negotiation process. It is important for both parties to be aware of the parties' incentives to facilitate the negotiation.

From the seller's perspective, a key consideration is that it is typically not in the business of providing the services that it will agree to supply to the target business post-completion. Transitional services are a facilitating device. This fact will underpin the position that the seller will take across a number of important clauses.

- Prompt transition: the seller will often insist on including an acknowledgement from the buyer that the services are transitional in nature paired with an effort-based commitment from the buyer to integrating or migrating as promptly as practicable.
- Standard of care: the seller will generally only accept to provide transitional services in a manner generally consistent with, and with the same standard of care, as they were historically provided to the target group (pre-completion).
- Fees: the seller will seek to at least cover its costs, and may seek to earn a profit by charging market price. The seller may seek to include an adjustment mechanism if the fee structure is materially insufficient to compensate it for the cost of providing the services. The pricing structure can also be used by the seller as a lever to incentivising the buyer to accelerate the transition, for example, by contemplating an uptick in the price of the transitional services over time.
- Indemnification: the seller will often object to an indemnification clause or at least to limit the scope of any indemnity to cases of the seller's wilful misconduct or gross negligence.

On the other hand, the buyer will be focused on preserving business continuity and a successful migration or integration. Among other key considerations, the buyer may be concerned with the continued ability of the seller or the retained business to provide the transitional services and may insist on including an obligation to maintain employees for the provision of these services.

As with other aspects of carve-out transactions, the negotiation of transitional services can be complex. Advance preparation and readiness to anticipate all the details of post-completion operations are crucial.

11

Joint Ventures – Selected Aspects

Pascal Richard and Petra Hanselmann[1]

Introduction

A joint venture is an arrangement between two or more parties for pursuing a specific commercial purpose. From a business perspective, joint ventures are generally formed for the following reasons:

- to leverage resources such as capital, human resources or technology;
- to share risk, cost and resources, thereby minimising potential financial exposure; and
- to create synergies by combining complementary strengths.

While joint ventures are not confined to a specific industry, in Switzerland they have recently been seen in particular in the media, technology and financial services sectors.

A joint venture may take a vast variety of forms. This might involve transferring an existing business to the joint control of the parties or indirectly acquiring an existing business from another party, in which case organising the joint venture will involve elements of a disposition or acquisition, or both. Alternatively, an alliance may only involve licence agreements, joint marketing agreements, affiliate revenue sharing agreements or other types of agreements in which the parties agree to pursue a set of common goals.[2]

From a legal perspective, a general distinction is usually drawn between contractual joint ventures and corporate joint ventures (commonly referred to as equity joint ventures). This chapter will focus on equity joint ventures and assumes the joint venture company (JVC) is a Swiss joint stock company (AG).[3, 4]

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2 International Joint Ventures Handbook, Baker McKenzie (Editor), 2015, p1.
3 A Swiss joint stock company (Ltd/AG – *Aktiengesellschaft*) is the most common company form used for joint ventures in Switzerland; alternatively, the JVC might also be in the form of a Swiss limited liability company (LLC/GmbH).
4 For simplicity, this chapter predominantly assumes a joint venture by two parties.

Neither the term 'joint venture' nor 'joint venture company' is specifically regulated in the Swiss Code of Obligations (CO). Rather, the law applicable to joint ventures has been developed by legal doctrine and case law. Owing to the lack of any codified legislation specifically governing joint ventures and the resulting uncertainty, it is of paramount importance for the parties to carefully address in detail their respective rights and obligations in the legal documentation governing the joint venture. Such legal documentation commonly consists of the following:

- a transaction agreement (business combination or investment agreement) and a shareholders' agreement form the basis for the joint venture between the parties. While the transaction agreement provides for the details regarding the acquisition of shares in the JVC by the parties, the shareholders' agreement deals with the various aspects following the formation of the JVC (eg, the governance principles, the financing of the JVC, the distribution policy, the information rights, the transfer of shares in the JVC, the restrictive covenants and the duration and termination of the JVC). Owing to the principle of freedom of contract in Swiss law, elements of the transaction agreement and the shareholders' agreement may also be combined in one contractual document (ie, a joint venture agreement that would thus govern the whole lifecycle of the joint venture);
- the corporate documents of the JVC, which comprise the articles of association and the organisational regulations; and
- the ancillary agreements providing the contractual framework between the JVC and the parties (eg, licensing, supply or services agreements).

Selected aspects of the transaction agreement

Corporate set-up and parties to the transaction agreement

The formation of the joint venture is typically addressed in detail in the transaction agreement. There are various ways by which a joint venture may be established. In practice, however, the two following ways seem to prevail:

- the parties form a new company and make their respective contributions to the JVC against issuance of the respective number of shares in the JVC; or
- one (or more) of the parties invests in an already existing corporate structure, in which case the relevant party makes its respective contribution to the JVC in return for shares that will be issued in the framework of a capital increase.

In such cases, the JVC will also be a party to the transaction agreement as the JVC will be obliged to issue and deliver the shares. Various issues may arise from such a contractual relationship (see 'Liability concepts').

Alternatively, shares in the existing JVC are directly acquired by one party from the other (ie, the already existing shareholder) without the issuance of new shares and without the involvement of the JVC as a party to the transaction agreement.

Determining the equity participations

One aspect that naturally needs careful consideration in a joint venture set-up is the determination of the amount of shares in the JVC a party shall receive in return for its contribution.

In an ordinary sale and purchase of shares against cash, it is customary that the parties agree either on a locked-box mechanism or on a completion accounts adjustment mechanism to determine the (final) purchase price. In the case of a locked-box mechanism, the purchase price is fixed at the signing of the transaction based on a reference balance sheet as at a pre-signing date. When applying a completion accounts adjustment mechanism, the initial purchase price as at signing will be subject to adjustments by reference to certain balance sheet positions as at completion of the transaction (eg, net debt, net working capital or net equity adjustment), which will eventually result in the final consideration. In a joint venture scenario, the fundamental difference from an ordinary sale and purchase transaction against cash is that the main consideration received by a party for its contribution to the JVC is not cash but shares in the JVC.

Unlike for shares in a listed company, there is typically no established market price for the shares in a JVC. Thus the value of the respective contribution made by each party to the JVC has to be established by applying the respective methodologies in order to calculate the equity participations of the parties. In this context, it is important to note that the number of shares in the JVC that a party receives depends not only on the value of its own contribution but also on the value of the contribution of the other party. Therefore, the earlier in the transaction process the equity participations of the parties can be determined and fixed, the more efficient and less complicated the transaction process as such becomes. As a consequence, a completion accounts adjustment mechanism in the transaction agreement to determine the final amount of shares to be allocated to a party will, in most cases, not be practicable, as in this case the final equity participations of the parties would only become final after completion and hence too late in the process. Thus the most viable method will often consist of applying a locked-box mechanism, determining the final equity participations at signing and making adjustments only in the case of extraordinary events. If the parties should nevertheless contemplate a completion accounts adjustment mechanism, it is recommended that such a mechanism would only provide for a cash adjustment and thus would not lead to any change in the equity participations of the parties at completion.

Contribution in kind

The formation of the joint venture typically involves new shares being issued against respective contributions. If a company at its incorporation or at a capital increase takes over assets from a shareholder by contribution in kind, Swiss law[5] provides that the articles of association of the company must disclose:

- the type of contribution;
- the valuation of such contribution;
- the name of the party that makes the contribution; and
- the amount of shares issued in consideration for the contribution in kind.

Because of the disclosure requirements, the parties must be aware that a substantial amount of information on the contribution will become publicly accessible. Further, the parties at the incorporation or the board of directors (board) of the JVC at a capital increase must verify the type, the condition of the contribution in kind as well as the adequacy of its valuation in a written report.[6] The report is subject to verification by an admitted third-party auditor (this may or may not be the

5 Article 628 paragraph 1 CO (incorporation) and article 650 paragraph 2 cipher 4 CO (capital increase).

6 Article 635 CO and 652e CO.

JVC's statutory auditor), who has to confirm in writing that the report is complete and correct.[7] To qualify for a contribution in kind, assets must be capitalisable in accordance with the applicable accounting rules. In addition, the respective asset must be transferable and realisable, and the company must be able to freely dispose of the asset immediately after the contribution. In practice, this may raise issues in relation to contributions of intangible assets such as intellectual property, know-how or goodwill owing to the fact that it may be questionable if a respective asset fulfils the above-mentioned requirements. It is therefore important for the parties to determine their equity participations and initiate discussions with the auditor at an early stage in the transaction process. The contribution in kind may also be a mixed contribution consisting of a cash element in addition, if necessary to even out any discrepancies in the value of the contributions in kind in order to arrive at the equity participations that the parties desire to achieve. Further, the contribution in kind is based on a contribution agreement, which, depending on the nature of the asset, has to be in writing or in the form of a public deed. The contribution agreement also belongs to the documents that become publicly accessible.

In the case of a violation of the described disclosure requirements, there is a risk that the contribution in kind could be considered null and void by a court. In addition, the parties or the board of the JVC, respectively, may face civil or even criminal liability. Observance of the relevant provisions is therefore important under Swiss law.

Liability concepts

A joint venture often comprises a contribution of the parties against receipt of shares in the JVC and, as a consequence, the parties have to agree on the value of their respective contribution and the resulting equity participation in the JVC. Thus, unlike in a sale and purchase of assets against cash, there is a sell-side and a buy-side element at the same time.[8] In practice, this means that usually each party conducts a due diligence of the respective contribution of the other party. Furthermore, there will be some sort of reciprocity when it comes to protecting the parties' relevant investments (eg, each party is likely to give representations and warranties, guarantees, indemnities and covenants). In some situations, this leads to issues that are different from those in an ordinary sale and purchase transaction.

Where a party contributes assets into an already existing company held by the other party and receives shares in the relevant JVC in return, the JVC – and not the other party – will normally be liable to issue and deliver the shares in the JVC to the contributing party. Naturally, the JVC will also be liable for a breach of representations and warranties and other contractual breaches. The following issues arise with this concept:

- In the event a party brings a claim against the JVC, any payment to be made by the JVC in connection with such claim will indirectly also damage the claimant party, because of its own equity participation in the JVC. As a consequence, in order for the claimant party to be made whole for any potential claim, the JVC would need to pay more than the amount of the actual claim.[9]

7 Article 635a CO and 652f paragraph 1 CO.

8 The respective party contributing its asset into the JVC will 'sell' its asset to the JVC and 'buy' shares in the JVC.

9 Depending on the proportion of the parties' participation in the JVC.

- In addition, a claim by a shareholder may also raise issues from a corporate law perspective because a payment under such a claim may result in a breach of article 680 paragraph 2 CO, which prohibits the repayment of the contributed share capital to the shareholders. Any such breach resulting from a payment will render the relevant payment null and void and may expose the board of the JVC to civil and criminal liability. Further, such a payment may also be considered a prohibited hidden distribution of profits under article 678 paragraph 2 CO and may also infringe the principle of equal treatment of shareholders under article 717 paragraph 2 CO. As a result, there is a considerable degree of uncertainty as to whether the JVC may even respond to a claim raised by a party.
- Another drawback of having the JVC as a counterparty to a claim under the transaction agreement is that the claimant party will normally also be represented by its nominated members in the JVC's board or even the management, and any such claim will necessarily have to be dealt with by these corporate bodies. It is obvious that this situation will inevitably create a conflict of interest, which would need to be resolved accordingly.

For all these reasons, it is advisable that the transaction agreement provides that claims by a party for a breach of representations and warranties, under a guarantee or for other contractual breaches, can be brought against the other party instead of the JVC. If this should not be a viable solution,[10] more refined liability concepts have to be designed. One possibility to address and potentially alleviate some of the usual concerns may consist of having warranty and indemnity insurance in place that would respond in the case of claims for a breach of representations and warranties.

Selected aspects of the shareholders' agreement

Governance and organisation

General

The main decision-making bodies of a Swiss joint stock company are the shareholders' meeting and the board. Provisions on the composition of the board and the management of the JVC, the number of board members, quorum and attendance provisions for shareholders' and board meetings, as well as potential veto rights of the parties, are key elements of any shareholders' agreement. If such contractual governance provisions are – to the extent permitted by Swiss law – in addition incorporated into the articles of association of the JVC, the mere contractual obligations among the parties become hard-wired in the sense that they are in addition enforceable from a corporate law perspective and also bind the JVC and third parties. As the articles of association become publicly accessible under Swiss law, despite the benefit of additional protection from a corporate law perspective, the parties often come to the conclusion not to mirror contractual obligations such as veto rights or a quorum provision in the articles of association, as they wish to keep the details of the internal governance of the JVC and the balance of power among the parties confidential.

10 For example, in cases of joint ventures involving private equity funds as they seek to strictly limit their liability exposure for risks that are not fully controllable.

Shareholders' meeting

Under Swiss law, the shareholders' meeting must mandatorily resolve on certain matters, such as the approval of the financial statements, the distribution of dividends, the adoption and amendment of the articles of association or the election of the board. The parties are free to assign in the shareholders' agreement and potentially the articles of association of the JVC additional matters that are not mandatorily in the competence of the board[11] for decision by the shareholders' meeting.

According to article 703 CO, resolutions by the shareholders' meeting require the absolute majority of the votes present or represented at the meeting, subject to certain important resolutions, such as the change of the company's purpose, the liquidation of the JVC, certain forms of capital increases, certain forms of mergers, or the limitation on the transfer of shares, which require a mandatory qualified quorum of two-thirds of the votes and the absolute majority of the nominal value of the shares present or represented (article 704 CO). In the shareholders' agreement and potentially in the articles of association of the JVC, the parties may agree on higher quorum requirements for specific resolutions as provided by the CO. Depending on the equity participations of the parties in the JVC, such specific agreed quorum requirements may result in a veto right of one or several parties. In practice, specific quorum requirements or veto rights are often introduced for the amendment of the articles of association, the election and removal of board members, capital increases and decreases, the liquidation of the JVC, approval of the financial statements and dividend distributions.

Swiss law does not provide for strong protection rights of minority shareholders. Besides the qualified quorum for certain resolutions mentioned above, minority shareholders holding 10 per cent of the total share capital have the right to request a shareholders' meeting or the adding of an item to the agenda for a specific shareholders' meeting. The latter right also applies to shareholders representing shares with a nominal value of 1 million Swiss francs. As a consequence, additional minority protection measures need to be stipulated in the shareholders' agreement and mirrored in the articles of association (to the extent desirable) and the organisational regulations of the JVC.

Board of directors

According to article 716a CO, the board has certain non-transferable and inalienable duties, such as the ultimate management of the company and the issuance of the necessary directives, the structuring of the accounting system, of the financial controls and of the financial planning or the appointment of the management. Such matters must mandatorily remain in the decision competence of the board and may not be delegated, neither to the management nor to the shareholders' meeting.

According to article 713 CO, resolutions by the board require the majority of the votes cast. The parties can agree on higher quorum or presence requirements. Such quorum or presence requirements may result in a veto right of one or several parties with respect to selected matters such as the approval of the budget and business plan, acquisitions and disposals of a business, investments and financings above a certain threshold, approval on the transfer of restricted shares, appointment and removal of managers and amendments of the organisational regulations.

11 See 'Board of directors'.

As a default provision, the CO provides that in the case of a tie, the chairman of the board shall have the casting vote. Therefore, if the casting vote of the chairman shall be excluded, the parties should explicitly agree accordingly in the shareholders' agreement and also stipulate this in the articles of association and the organisational regulations. For non-listed companies, the chairman of the board is by default appointed by the board from among its members. However, it is possible to delegate the right to appoint the chairman of the board to the shareholders' meeting. With regard to the composition of the board, Swiss law does not provide for any nationality requirements on the board. The entire board may consist of foreign nationals. However, at least one authorised signatory (ie, either a board member or another person authorised to act on behalf of the JVC) with single signature right or two authorised signatories with joint signature right need to be domiciled in Switzerland.

The members of the board are not parties to the shareholders' agreement. As a consequence, the shareholders' agreement does not directly bind the members of the board. In practice, the issue is addressed by a provision in the shareholders' agreement according to which the parties undertake to procure that the board members appointed by them will observe the provisions of the shareholders' agreement. This may, however, result in a delicate situation for the board members. On the one side, according to article 717 CO, board members have to act in the best interest of the JVC. On the other side, they should act in accordance with the instructions of the respective party for which they sit on the board of the JVC and by which they are mandated. As a consequence, from their own liability perspective, in the case of a conflict between the interests of the JVC and the interests of a party, the board members should act in the interests of the JVC and against the provisions of the shareholders' agreement.

Organisational regulations

Under Swiss law, the board may only delegate the management of the JVC if the articles of association of the JVC explicitly allow the board to do so by way of the adoption of organisational regulations (whereas, in any event, the board may not delegate its non-transferable and inalienable duties, as mentioned above). The organisational regulations typically govern, among other things:

- the rights and duties of the board including the details for the convocation of meetings and the above-mentioned quorum requirements;
- the delegation of the day-to-day business by the board to the management;
- the rights and duties of the management and specific members of the management, such as the CEO and CFO; and
- the signature authority of the board members and members of the management.

The provisions of the shareholders' agreement and the articles of association should, to the extent applicable, be mirrored in the organisational regulations. Contrary to the articles of association, the organisational regulations do not become publicly accessible. To avoid any discrepancies between the shareholders' agreement, the articles of association and the organisational regulations, the shareholders' agreement should contain a provision stating that the provision of the shareholders' agreement shall prevail among the parties.

Deadlock devices

In 50:50 joint ventures, but also in joint ventures in which a party has been granted veto rights to block certain material decisions,[12] there is always the risk that the parties may reach a deadlock situation on a particular issue. There are many potential solutions on how to address a deadlock. In practice, frequently used instruments to overcome a deadlock are:

- the granting of the tiebreaking vote to the chairman of the board;
- the granting of the tiebreaking vote to an independent, non-executive board member;
- the referral of a deadlock matter to an independent third party for solution; or
- the referral of the deadlock matter to the upper-level management of the parties in combination with put-and-call options or liquidation rights if the escalation process should ultimately fail.

In our experience, such internal escalation process to the upper-management level, or even up to the CEO or the chairman of the board of the parties, has proven to be an effective solution in practice. As the management of the parties typically wants to avoid an escalation to the top-level management, compromises acceptable to both parties are often found at an early stage in such a set-up. Even if the escalation goes to top management, the potential threat of the call-and-put option process, which could kick in, for example, in the form of 'Russian roulette'[13] provisions or blind bids,[14] often helps the parties to find a common understanding. However, it has to be mentioned that such provisions are only meaningful in practice if the parties have similar financial resources available and not both parties are required for the continuance of the JVC. In such a constellation, the winding-down or liquidation of the JVC might be the only option left. As the composition and underlying interests in a joint venture can be very diverse, potential deadlock instruments must be analysed and determined for each joint venture individually. To avoid a deadlock situation at all, it is first of all important that the parties carefully govern their rights, obligations and responsibilities in the shareholders' agreement and ancillary documents.

Transfer restrictions

Shareholder agreements usually contain restrictions on the transfer and encumbrance of the shares in the JVC, such as lock-up periods, rights of first refusals, pre-emption rights, call option rights and sometimes also tag-along and drag-along rights. Under Swiss law, such provisions can, according to majority doctrine, no longer be included in the articles of association of the JVC. As a consequence, if a party violates the share transfer restrictions, the other parties typically can only claim contractual damages against the breaching party under the shareholders' agreement. To reduce the risk that a party breaches the transfer restrictions, it is possible and market-standard to provide in the articles of association of the JVC that in the case of registered shares, such shares may only be validly transferred with the consent of the board. The board may object against a share transfer for important reasons explicitly stipulated in the articles of

12 This will typically be the case for any reserved matters at board or shareholder level.

13 One party makes an offer and the other party has to buy the shares of the other party at the offered price or sell its shares for the offered price.

14 Both parties simultaneously make an offer to each other to buy the shares of the other party and the higher offer is successful.

association of the JVC or if it offers to acquire the shares from the selling party for the company's own account, for the account of other shareholders or for the account of third parties at their real value at the time the transfer request was made. According to article 685b paragraph 2 CO, provisions governing the composition of the shareholder group that are designed to safeguard the pursuit of the company's objects or its economic independence are deemed to constitute important reasons. As the consent of the board to share transfers is typically subject to a special majority quorum agreed by the parties in the shareholders' agreement, such transfer restrictions contained in the articles of association of the JVC prevent shares being sold by one party without the knowledge of the other parties or at least without the knowledge of the board. To safeguard compliance with the transfer restrictions, the parties can in addition agree to issue physical share certificates and to deposit such share certificates with an independent escrow agent. Although frequently seen in practice, it should be noted that depositing the shares with an escrow agent is not to be deemed an entirely watertight solution as there may still be ways that enable an non-permitted share transfer in specific cases.

Duration and termination

Under Swiss law, contracts cannot be entered into for an eternal period as the personal and economic freedom of a contracting party may not be restricted in an excessive way. Eternal agreements are not fully void but a judge may reduce the term of such eternal agreement to an acceptable limited term. As joint ventures are not specifically governed under Swiss law, there is a certain risk that the shareholders' agreement could be qualified as a simple partnership, with the consequence that the provisions of article 545 et seq CO and in particular article 546 CO would be applicable. Article 546 CO provides that if the parties have not agreed on a specific term, the partnership agreement can be terminated within six months (ie, a notice period that is inadequate for most joint ventures). As a consequence, it is in any event recommended to specify the term of a shareholders' agreement governed by Swiss law.

Generally, a term of up to 20–25 years is, under certain circumstances, still considered as non-excessive according to doctrine and case law. In practice, a shareholders' agreement in a joint venture context often has a term of 10–15 years and provides for an extension of an additional fixed term of 1–5 years if not terminated by a party after the initial or any extended period. It is also common that the parties agree on additional termination possibilities, such as, for example, in the case of:

- a change of control over one of the parties;
- the opening of insolvency or similar proceedings over a party;
- a material violation by a party of its obligations under the shareholders' agreement, the transaction agreement or any of the ancillary agreements; or
- deadlock situations that could not be resolved by the parties through other means provided in the shareholders' agreement.

These events will typically also trigger a call option right for the party that is not affected by the aforementioned events.

Ancillary agreements

In addition to the transaction agreement and the shareholders' agreement, a joint venture set-up usually requires the execution of a number of further agreements, such as, for example, licensing, supply or services agreements. Such ancillary agreements are typically entered into by the JVC and the parties or any of their affiliates. There are regularly certain interdependencies among the ancillary agreements on the one side and the transaction agreement and the shareholders' agreement on the other side that need to be carefully addressed and aligned when drafting the various agreements. The effectiveness of an ancillary agreement may, for example, depend on the fulfilment of certain conditions by the other party and, once the shareholders' agreement is terminated, the parties do typically also wish to end or at least amend the terms and conditions of the ancillary agreements, so that the term and termination of the various agreements need to be aligned in order to avoid any unexpected consequences.

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Venture Capital Investments

Beat Schwarz and Franz Schubiger[1]

Characteristics of a venture capital transaction

Swiss law neither defines nor provides a specific set of rules for venture capital (VC) investments. However, the nature of VC transactions as direct equity investments provides for some particular characteristics that are not (or less) relevant in other M&A transactions and must be addressed when negotiating and entering into a deal to avoid interference with mandatory Swiss law.

The same as for private equity, VC investments are investments in shares of non-listed companies. While private equity investors typically aim for a buyout, in which they obtain 100 per cent control over a usually already matured company with a stable business track record, VC investors typically aim to invest, alongside other strategic or financial investors, to provide funding to, and to obtain a minority equity stake in, fast-developing and growing start-up and innovative companies. Such direct equity investments involve, by their very nature and owing to the investment in equity securities, significant risks for the investor, but also provide for high growth and respective profit and return on investment potential.

The investment amount of a VC investment can vary significantly and, typically, an emerging growth company sees different investment stages during its early lifetime. While the initial investors, besides founders, in initial funding rounds often consist of wealthy private individuals (business angels) and family and friends (often referred to as seed stage and early stage financing), VC investors and funds or strategic investors (such as corporates or corporate VC funds) typically become more active in later rounds (eg, starting in a series A or B round) in order to provide funding for growth and expansion (later stage financing), often ranging up to multi-million investments. Sometimes, existing investors also participate beside new investors in subsequent financing rounds and thereby increase their investment.

1 Beat Schwarz and Franz Schubiger are partners at Pestalozzi Attorneys at Law Ltd. The authors thank Raphael Widmer and Monika Maric, both associates at Pestalozzi Attorneys at Law Ltd, for their valuable contributions to this article and assembling the most recent VC market data from the various sources.

Market overview[2]

2021 market trends

After the slight decline in the first half of 2020 because of the covid-19 crisis, in 2021 the Swiss start-up scene continued its growth path after the strong rebound towards the end of 2020. While the amount of invested capital increased significantly (3.059 billion Swiss francs, up 44 per cent compared with 2020) the number of funding rounds increased at a steady rate close to the growth numbers of the previous years (355 rounds, up 16.8 per cent compared with 2020). In particular, within the information and communication technology (ICT) and fintech sectors the increase in the invested capital was the highest (an additional 799 million Swiss francs compared with 2020). Other industry sectors also achieved a record number of invested capital (cleantech and healthcare IT sectors). For the first time, a financing round of more than 500 million Swiss francs took place in 2021 (Wefox, a company active in the ICT as well as in the fintech sectors, raised 584.5 million Swiss francs in a series C financing round). Four other financing rounds of companies active in the ICT, biotech and medtech sectors resulted in investment amounts of over 100 million Swiss francs each.

VC funds in Switzerland are on the rise. A growing number of Swiss VC funds (35 Swiss VC funds with different specialisation in 2021) are offering institutional investors a wider choice than in previous years. Although Swiss VC funds do not yet reach the fund size of their Anglo-Saxon competitors, it can be observed that the volumes are increasing.

With 11 IPOs and 55 trade sales of Swiss start-ups/emerging growth companies, 2021 resulted in a record number of exits, exceeding the numbers of the previous year (two IPOs and around 30 trade sales in 2020). In particular, two IPOs in the sports market were remarkable, with Sportradar (a St Gallen-based sports technology company providing services for sport media and the sport betting industry) on the Nasdaq and On (a Zurich-based athletic sport company addressing the sportswear market) on the New York Stock Exchange. With respect to 55 trade sales, the majority of the new owners of Swiss start-ups are located in Switzerland (15), United States (12) and Germany (8). A considerable number of trade sales occurred in the ICT sector. One of the most prominent was the acquisition of the Swiss real estate marketplace Flatfox by Mobiliar (a Swiss insurance company).

In terms of industry sectors, the ICT (fintech) sector as well as the life sciences sector, including pharmaceutical, biotechnology and medtech, as well as cleantech, remained the most active sectors for VC investments in Switzerland in 2021.

The basis of a strong Swiss VC ecosystem

In the rankings of the World Intellectual Property Organization, the World Economic Forum's Global Competitiveness Report and the European Innovation Scoreboard, Switzerland is regularly top-ranked for its innovation, competitiveness and education, not only in terms of university education but also for its formation on the job as an alternative, profession-focused route to university education raising a well-educated workforce with relevant know-how in technical and other relevant sectors, which also benefits the start-up and VC ecosystem. To name just a few, the polytechnic universities in Zurich (ETH) and Lausanne (EPFL), as well as other world-leading

2 The stated 2021 data is extracted from the 2022 VC report published by startupticker.ch and the Swiss Private Equity & Corporate Finance Association (SECA).

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research institutes such as CERN in Geneva or the Paul Scherrer Institute located in the canton of Aargau, are very important in driving innovation, and start-ups are often located and closely connected to those universities and institutions. Many other cities and regions in Switzerland have seen an increase in successful start-up and VC activities. For example, Basel, owing to its already very strong pharmaceutical and biotech industry (with multinationals such as Novartis and Roche), also hosts a high number of start-up companies in the biotech sector.

The Swiss VC sector benefits not only from innovative research institutions and a generally tax-friendly environment, but also from a well-educated and driven workforce, for which a venture in a start-up is nowadays often preferred over corporate employment. Also, the number of investors capable of leading large multi-million VC rounds has increased significantly over recent years. In the past five years alone, the market has seen the entry of a considerable number of VC funds backed by experienced professional entrepreneurs and investors. Further, digitalisation and other trends that challenge established business models have caused many corporations to initiate their own VC activities or to cooperate, buy or become a (lead) investor in start-ups in order to benefit and learn from technology, experience and new approaches that help to adjust established business models according to market needs.

These factors caused a significant boost to the Swiss VC ecosystem in past years, allowing for more professionalisation and institutionalisation in venture capital investments. However, it can still be observed that large (and later-stage) investments in particular are regularly led by foreign lead investors. This may also create a certain risk that the start-up shifts operational activities abroad. But it is noteworthy that exactly this combination of attractive and innovative Swiss start-ups with the availability of foreign funds from international financial or strategic investors has caused so many success stories and enabled promising Swiss ventures to successfully expand globally over the past few years.

Therefore, this chapter focuses on the perspective of the foreign (lead) investor (eg, a VC fund, a corporate VC or corporates) in later-stage venture capital investments with the aim of giving some insights into the particularities of the Swiss legal framework applicable to the transaction.

Legal and tax framework in general

The legal framework in Switzerland is transaction friendly. Except for very particular sectors – such as banks, insurers or electricity providers or investments in real estate – there are no notification or approval requirements or restrictions on foreign investment in Switzerland. Existing merger control or sector-related notification or approval requirements are usually not relevant in a venture capital investment. Moreover, Swiss law permits the reflection of the usual deal parameters negotiated by the parties for the full range of venture capital investments, although the implementation of such deal parameters may vary in certain aspects from the Anglo-Saxon approach, because some common features of a venture capital transaction may interfere with Swiss corporate law. However, there is flexibility under Swiss contract law to provide for the usual preference rights (some of which may also be reflected on a corporate level with preferred shares) that a later-stage (lead) investor in a venture capital transaction usually asks for.

From a tax law perspective, an investor needs to take into account that Swiss tax law does not provide for specific tax incentive schemes for institutional venture capital investors. A Swiss resident venture capital investor, however, may benefit from the general participation exemption. Under the general participation exemption, capital gains from the sale of a qualifying participation are virtually tax-free. A qualified participation is an equity investment that represents at

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least 10 per cent of the equity of a company and has been held by the investor for at least one year prior to being sold. Further, the participation exemption applies to dividends received from equity investments of at least 10 per cent or equity investments worth at least 1 million Swiss francs. Switzerland levies a dividend withholding tax at the statutory rate of 35 per cent. While Swiss tax resident investors are generally entitled to full relief, foreign investors may only claim relief based on a tax treaty. Switzerland has a very wide network of tax treaties, which generally provide for relief from Swiss dividend withholding tax if the investor is tax resident in the relevant treaty state and the beneficial owner of the dividends. For qualifying participations, a number of tax treaties provide for full relief from Swiss dividend withholding tax. For shareholdings below 10 per cent, a residual treaty rate of usually 15 per cent applies.

Typical direct equity investment versus venture debt

In later stage VC financing rounds of Swiss start-ups (eg, series C, D or E rounds), the parties usually pursue a direct equity investment approach and structure, whereby the new investor(s) and sometimes also existing shareholders agree to invest and subscribe for new shares (eg, preferred shares) in the company against payment of the investment amount. The company and the existing shareholders need to ensure that certain resolutions are passed and actions taken in order to implement the investment though a capital increase.

In practice, alternative VC deal structures have emerged and become more common in Switzerland, in particular, in distressed financing situations. For example, VC funds or funds with a special investment focus may prefer to enter into venture debt transactions instead of straight equity investments. In a venture debt transaction, a debt financing, for example in the form of a (convertible) loan agreement (whether secured or not), is combined with equity-linked instruments (such as warrants for the acquisition of additional shares as equity kicker). In such structures, the equity investment itself is achieved through a (partial) conversion of the debt into equity and/or the exercise of warrants later on (eg, in a subsequent financing round).

The following discussion and explanations focus on the direct equity investment approach and its mechanics.

VC transaction sequence and key documents

In terms of transaction phases, a typical VC transaction does not largely deviate from other (private) M&A transactions and can be divided into three phases:

- a preparation phase;
- a contract negotiation phase; and
- signing and completion of the transaction.

After having prepared the due diligence process and a business plan, which will serve as a basis for the valuation that defines the subscription price per share, the founders and existing (lead) investors and other shareholders engage in negotiations with potential new investors. In the negotiation phase, the interested VC investor usually conducts a due diligence review of the Swiss company, and the terms of the investment need to be negotiated and agreed upon.

Unlike a buyout transaction, in which 100 per cent of the existing shares change hands against payment of a purchase price from the seller or sellers to the purchaser subject to a share purchase agreement, a venture capital investment round leads to an issuance of new shares by the company, which are subscribed to by the new (and often also existing) investors against payment of the investment amount in order to finance the company's operations and growth, all subject to and on the basis of an investment agreement as well as a shareholders' agreement. Usually, the company's revised articles of association, reflecting the status after implementation of the financing round, and the organisational regulations governing board matters, form an integral part of the shareholders' agreement. For these VC documents, there are widely accepted standards and templates available that generally allow the reflection of all features that are commonly used in the VC industry. For example, the Swiss Private Equity & Corporate Finance Association (SECA), a leading industry organisation, provides model sets of documents for VC financing rounds with Swiss start-up and emerging growth companies, which can serve as a starting point for crafting tailor-made solutions (www.seca.ch).

Interplay between corporate law and contractual arrangements in VC transactions

In venture capital financing, the deal terms and related legal rights and obligations of the parties involved are laid down on the one hand in the transaction agreements (investment and shareholders' agreements) and on the other hand, they are mirrored to the extent possible on a corporate level in the articles of association and organisational regulations of the Swiss company. In order to have an elaborate and coherent framework, covering all relevant aspects beyond corporate law aspects and offering the required investment protection to investors, it is indispensable to enter into the transaction agreements.

To some extent and as in other jurisdictions, Swiss corporate law imposes certain restrictions (as outlined below) on how contractual obligations – which are fairly common in a VC context – can be entered into by the company. For example, the Swiss company cannot validly by contract commit itself to perform or to procure the performance of all required actions (eg, shareholder resolutions) necessary to increase the company's share capital and to allot the new shares, which are key items in an investment agreement for completing the investment round. Accordingly, the founders as well as other existing shareholders and investors often commit to procure that the requisite corporate actions are taken or performed.

Also, owing to mandatory Swiss corporate law restrictions, some common features in a VC investment and respective (preference) rights attributed to later-stage investors cannot be reflected in a Swiss company's charter documents; ie, the articles of association and its organisational regulations (eg, sales proceeds preference, redemption features). Other than in many other M&A/PE settings, where Swiss corporate law by default assures that a controlling shareholder can in fact obtain its controlling rights by virtue of corporate law rules alone, there are limits on how investor (preference) rights common in a VC investment can be implemented and enforced by virtue of corporate law and charter documents alone. Obligations regarding the exercise of voting rights or transfer restrictions only create contractual rights and need to be enforced against the non-complying party. It is therefore also not possible to challenge the validity of a shareholder or board resolution, which has been resolved in violation of the transaction agreements. Therefore, in a typical VC set-up with many minority shareholders, from the initial investment until the exit, common preference rights of later-stage investors heavily depend on well-drafted and enforceable transaction agreements, such as the investment agreement as well as the shareholders' agreement, that bind and can be enforced against all shareholders in order for them to vote or instruct board members to undertake the necessary actions to comply with the transaction agreements or to ask for damages payments.

Investment approach and terms, share subscription

Overview

The terms and process of the investment and the related share subscription are agreed upon in an investment agreement between the investors, all existing shareholders (including the founders) and the company. As key elements of such financing rounds, the investor subscribes and receives newly issued shares. Hence, in the investment agreement, the main obligations of the existing shareholders are to waive their subscription rights and to perform all necessary actions to increase the company's share capital, and the investor's principal obligation is to subscribe for the newly issued shares and to pay the investment amount.

Mechanics of direct equity investment, funding approach

With regard to the terms of the investment, the investment agreement sets forth the details on the type of the newly issued shares (eg, often a series of preferred shares) and the subscription price per share referring to an underlying pre-money valuation. The capital structure of the company is usually set forth in a separate document, the cap table, which sets out the company's initial capital structure prior to the capital increase and the final capital structure after the capital increase.

The funding undertaken by the investors pursuant to the investment agreement can be structured and implemented in one single tranche at the closing (ie, one capital increase) or can be split into several tranches (eg, depending on the achievement of predefined milestones). A staggered funding approach can be a useful means for investors to monitor the progress of the company's projects and business development in accordance with the business plan and to mitigate investment and funding risks. However, staggered funding adds complexity and increases the transaction costs, because multiple capital increases are usually necessary.

Representations and warranties, remedies

Similar to other M&A transactions, a set of representations and warranties is typically agreed upon in an investment agreement governed by Swiss law. Besides the founders of the company, often other existing shareholders, such as family and friends of the founders, business angels or other investors that are invested in the company are requested to provide representations and warranties.

However, if these existing shareholders are not directly involved in the company's business, they may be reluctant or unable (eg, through a lack of information) to provide later-stage investors with any representations and warranties relating to the business of the company (as opposed to warranties relating to the shareholder itself, for example, capacity and share ownership).

Also, the founders in the early stages of a company may not have sufficient funds to potentially indemnify the investor in case of a misrepresentation or a breach of a representation and warranty. To address this concern, the investment agreement may foresee as a remedy an obligation of the existing shareholders to transfer shares in the company to the investor as compensation for damages (or part of the damages whereby the remainder of the damages is indemnified in cash, creating a staggered remedy concept) instead of a monetary damage payment. However, such a compensatory share transfer may not always be an appropriate compensation. In particular, in cases of substantial damages resulting from breaches of representations and warranties, the existing shareholders may be marginalised to a large extent. In general, however, VC investors are interested in keeping existing shareholders, such as founders or management shareholders, incentivised.

Therefore, in line with usual standards in Anglo-Saxon VC agreements, it is often suggested that representations and warranties are given by the Swiss company and not by the founders (or other existing shareholders), in particular, in later-stage rounds. However, in cases where the company shall be liable for breaches of representations and warranties, besides the fact that a new (lead) investor pays its own damage to a large extent, significant mandatory restrictions pursuant to Swiss corporate law regarding the prohibition of the repayment of paid-in share capital (article 680 paragraph 2 of the Swiss Code of Obligations (CO)) and other capital protection rules forbidding direct or hidden distributions (article 678 CO) also need to be observed.

These rules essentially lead to a situation in which a company can only compensate or indemnify new shareholders (investors) for damages up to the amount of the company's freely distributable equity (ie, the amount that would be available for dividend distributions to its shareholders). For obvious reasons, these restrictions most often effectively eliminate any reliable remedy, because early-stage companies generally do not have sufficient freely distributable equity to cover for potential liabilities. Therefore, the VC investor must carefully consider whether to require the company itself to grant representations and warranties or to insist that (some) existing shareholders have to provide representations and warranties (often subject to reasonable limitations and liability caps).

An alternative way to compensate damages resulting from misrepresentations or breaches of warranties is a compensatory capital increase, which essentially works in a similar way to an anti-dilution (down-round) protection. Under the concept of a compensatory capital increase, in the event of a breach of representations or warranties, the existing shareholders agree that the company's share capital be increased for the sole benefit of the new investor(s). In particular, the existing shareholders agree in the investment agreement on waiving their subscription rights for the new shares issued in connection with the compensatory capital increase, and the investor is granted the right to subscribe for such new shares at their nominal value, which is usually much lower than the subscription price based on the valuation of the company.

Swiss law provides the parties with a lot of flexibility in this respect as the compensatory capital increase can be combined with a cash indemnification. For example, it is often agreed that with respect to representations and warranties given by the Swiss company, the remedy is primarily a cash indemnification, and secondarily, if there is no freely distributable equity, the remedy shall be a compensatory capital increase.

Completion of the VC transaction

The process of completion of a financing round on the basis of the investment agreement differs significantly from the completion of a share purchase agreement. In a share purchase agreement, the transfer of the shares to the buyer and payment of the purchase price usually take place simultaneously. In an investment agreement, however, owing to the particularities of the formal capital increase process, such mechanisms are not possible. According to Swiss law, the formal ordinary capital increase process requires that the shareholders' meeting first approves the capital increase. Such a resolution needs to be passed in the presence of a Swiss notary public, who has to prepare a public deed. The investor will then have to sign a subscription certificate and to pay the agreed investment amount into a blocked bank account opened in the name of the company. After the company has received the investment amount, the board of directors of the company issues a capital increase report and, once all requirements are met and documents are available, the board will proceed with certain ascertainment on and the execution of the capital increase, all to be reflected in a public deed to be drawn up by a notary public. Finally, the capital increase needs to be registered in the competent commercial register in order to become fully effective. The new shares are validly created and issued upon registration in the commercial register, which may take a few business days.

Therefore, the capital increase process in Switzerland requires the VC investor to pay the investment amount in advance before receiving the new shares. However, as the investment amount needs to be paid into a special blocked account with a Swiss bank, related risks appear to be remote. In order to mitigate any potential risks in connection with the advance payment by the investor, the investment agreement usually provides for termination and rescission rights of the investor in case the capital increase cannot be implemented or registered in the commercial register. In the event of termination or rescission, the investment agreement with respect to the investment and the capital increase typically ceases to have a binding effect on the parties, and the parties often agree that in such cases any executed documents are deemed terminated and are without any further effect. Moreover, the company will have to take all necessary actions to unwind any transactions contemplated by the investment agreement, including the repayment of any payments made by the investors. It is common that the investor is granted the right to claim damages if, for reasons not within the investor's control, the capital increase cannot be completed.

Investment protection and preferences

Overview

Later-stage (lead) investors who provide substantial investments to the company in a financing round usually seek preferential economic rights over the rights of existing shareholders in order to protect the investment, for example, by way of dividend and liquidation preferences as well as by anti-dilution clauses in the shareholders' agreement. Further, venture capital investors often insist on having certain participation rights in the decision making within the company, such as nominating a board member or consenting to important matters.

Swiss law restrictions on common VC features

Owing to the fundamental principle of Swiss corporate law, that the only obligation of a shareholder towards the company is the obligation to contribute the subscription price for subscribing the shares (article 680 paragraph 1 CO), not all preferential rights of an investor can – to their fullest extent – be mirrored in the corporate documents of the company. For example, the introduction of further obligations of a shareholder in the company's articles of association, such as non-compete undertakings, fiduciary duties or buy and sell obligations of a shareholder, is not possible. For the same reason, the articles of association cannot provide for preferential rights, which would require acts or waivers by other shareholders, for example, sales preferences or financial anti-dilution provisions.

Another important principle under Swiss corporate law is the board's duty to treat all shareholders equally (article 717 paragraph 2 CO). Certain rights granted under the shareholders' agreement, however, could often lead to unequal treatment of shareholders, for example, beneficial subscription rights for the investor or special information rights for the benefit of the investor.

Owing to this corporate law framework, it is common in venture capital practice to rely on contractual obligations in the investment or shareholders' agreements in which the contracting parties agree to waive their statutory rights or covenant to vote or act in a particular way for the benefit of the new investor. Non-contracting shareholders, on the other hand, could successfully claim the omission of such equal treatment of shareholders or vote their shares differently, all in compliance with corporate law and without being held liable under the shareholders' agreement. It is therefore crucial that all shareholders are party to the shareholders' agreement and that it can be enforced against all shareholders.

Usual rights of later-stage (lead) investors

Governance and information rights

Later-stage (lead) investors often ask for a right to nominate a representative to the board of directors of the company or to have a board observer. Further, the shareholders' agreement often stipulates strict quorums for certain defined important (board or shareholder) matters, which eventually can only be met if the VC investor (or its board member nominee) agrees. Information rights of shareholders under Swiss corporate law are rather limited. A shareholder below 10 per cent of the voting rights can only exercise its information rights at the shareholders' meeting, for example, by way of information requests directed to the board or, if the information requests remain unanswered, by way of requesting the shareholders' meeting to resolve on the appointment of a special auditor. Therefore, the shareholders' agreement often provides for more extensive information rights to the benefit of the VC investor. Other provisions, which venture capital investors usually want to include in the shareholders' agreement, are provisions regarding lock-up periods, non-competition and non-solicitation undertakings.

Exit provisions and share transfer restrictions

In order to facilitate an exit by way of a sale of 100 per cent of the shares (trade sale) in the company to a proposed buyer, VC investors usually insist on provisions regarding co-sale obligations (drag-along rights). According to such provisions, the investor is granted the right to require all other shareholders to co-sell their shares to the proposed buyer. For minority shareholders, the counter piece consists in the right to co-sell their shares (respectively to oblige the selling shareholders to co-sell the shares) under certain circumstances (tag-along rights).

Generally speaking, not only the investors but also other involved parties have an interest in keeping the shares in the company under control (eg, also in view of a potential (joint) exit) and, thus, the shareholders' agreement usually contains an elaborate set of transfer restrictions and regulations on transfer scenarios (including the aforementioned drag-along and tag-along rights, but also rights of first refusal, purchase options, etc).

To mitigate the financial risks connected with their investment in the company, VC investors regularly ask for financial preference rights and for anti-dilution protection in the shareholders' agreement:

(Financial) preference rights

Pursuant to article 656 of the CO, a company may issue preferred shares with preferential rights in relation to common shares. In particular, preferential rights may relate to cumulative or non-cumulative dividends, to proceeds of the liquidation and to subscription rights in the event that new shares are issued. Such a share category needs to be implemented in the articles of association in order to unfold corporate effects in relation to the company. However, investors will also insist on contractual implementation of the two classes of shares in the shareholders' agreement (ie, common shares for all shareholders except the investor and preferred shares with dividend, liquidation and subscription preferences for the investor).

Therefore, the shareholders' agreement usually also contains a clause regarding the order of precedence, whereas in cases of a conflict or discrepancies between the provisions of the shareholders' agreement and the organisational documents of the company, the provisions of the shareholders' agreement shall prevail between the parties bound by the agreement.

- Dividend preferences: dividend preferences are granted as the first priority to the holders of preferred shares up to a certain amount (preference amount). In VC settings, the preference amount is often defined in relation to the investment amount, for example, a certain percentage. As second priority and subject to the full satisfaction of the holders of preferred shares, the remaining amount of the dividend is allocated to the holders of common shares pro rata to their respective shareholdings. The dividend preference rights usually cease to be effective upon completion of an IPO.
- Liquidation and sales proceeds preferences: liquidation preferences include the preferential participation of the holders of preferred shares in liquidation proceeds if the company is liquidated (eg, in the case of a voluntary winding-up or forced liquidation scenario). Such liquidation preference rights in the strict sense may be implemented in the articles of association (article 656 paragraph 2 CO). However, in VC transactions, the preference often extends to the sale of shares or to the sale of a substantial part of the company's assets or other transactions (eg, mergers) leading economically to similar results. However, there is legal uncertainty as to whether such a broad definition of liquidation preferences (also extending to transactions at the shareholder level, such as the sale of shares, or divestitures that are not a liquidation) can be implemented in the articles of association owing to the limits imposed by article 680 CO; thus, respective rights and obligations have to be agreed contractually in the shareholders' agreement.
- Subscription preferences: pursuant to Swiss corporate law, each shareholder has a subscription right to newly issued shares pro rata to its shareholding prior to a capital increase, unless the subscription right has been cancelled or limited by the shareholders' meeting. With the subscription preference right, the holders of preferred shares may be granted the right to subscribe for larger proportions of newly issued shares or have preferential rights to subscribe for all newly issued shares. While dividend preferences and liquidation preferences are commonly agreed upon in the shareholders' agreement and, to a large extent, can be mirrored in the articles of association, subscription preferences are less frequently seen.

Anti-dilution (down-round) protection

Common anti-dilution clauses in the VC context aim to protect the investment by way of a compensation from down rounds (financial dilution). A down round is a future financing round in which the subscription price of the shares is lower than the issue price of the financing round in which the investor has previously invested in the company. Therefore, the investors will be protected if, in retrospect, they had overpaid for their shares in the initial investment.

Accordingly, the anti-dilution protection aims to reduce the price for all shares held by the protected investor to either an average of both financing rounds or to the level of the down-round (anti-dilution adjustment). The anti-dilution adjustment is either settled by transferring a certain number of shares from the existing shareholders to the protected investor for free or, likewise as for the compensatory capital increase in case of breach of representations and warranties given by the company, by way of an additional capital increase in which the protected investor is granted the right to subscribe for such shares at their nominal value.

A full ratchet anti-dilution protection is the most investor-friendly type of protection and aims to put the investor in a position as if the shares received in the previous round had been subscribed for the same price as in the down round. For the existing shareholders, the full ratchet anti-dilution protection is the most dilutive and may lead to considerable change in the ownership of the company. As an alternative to prevent a marginalisation of the founders, often a weighted average calculation method is used to calculate the anti-dilution adjustment. With the weighted average calculation method, the investor is put in the same position as if the shares received in the previous round had been subscribed for the weighted average price of both financing rounds.

Overall, VC investments in emerging growth companies can be very attractive to financial and strategic investors and may offer opportunities. However, they need to be carefully structured and reviewed from a legal and tax perspective in order to properly reflect deal terms and to provide for adequate protections on a contractual and corporate level to satisfy the needs of institutional investors.

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Special Purpose Acquisition Companies

Matthias Courvoisier[1]

Introduction

In 2020, first explorations were made into the possibility of listing special purpose acquisition companies (SPACs) in Switzerland. While the SIX Swiss Exchange would have approved a SPAC listing based on a track-record exemption, the Swiss regulator did not support this pragmatic approach and so the stock exchange had to set up special rules for SPACs that wanted to list on the SIX Swiss Exchange (SIX).

SPAC IPOs in Switzerland

SPAC IPOs in Switzerland have been possible since the new SIX rules on SPACs entered into force on 6 December 2021. VT5 Acquisition Company AG listed at SIX on 15 December 2021 as the first Swiss SPAC. SIX implemented rules that mirror as well as possible current practice relating to SPACs, with only few special Swiss rules.

The SPAC rules of SIX only allow the listing of Swiss corporates (article 89h(1) Listing Rules – LR). The reason is probably that the Swiss regulator (FINMA) was uncertain whether it had to qualify SPACs as collective investment schemes – which they are clearly not. The collective investment scheme act exempts Swiss corporations listed at a Swiss stock exchange from the act. The only corporate purpose of a SPAC is the direct or indirect acquisition of a target or, if occurring at the same time, several targets or the merger with a target or several targets (article 89h(1) LR). This De-SPAC needs to occur within three years from the first day of trading at SIX (article 89h(1) LR). The target needs to be an operating company or a holding company of an operating company. Pure real estate holding companies would therefore not be a proper target. However, given that the track-record requirement does not apply to real estate companies, a real-estate SPAC would not be sensible in any event. Nothing in the rules prohibits a SPAC from merging with an already listed company, although that was not necessarily the intention of the new rules.

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Funds raised within the IPO need to be deposited in an account with a Swiss bank or a foreign bank subject to similar prudential supervision (article 89h(3) LR). The funds may be held directly by a bank as the escrow agent or there may be a different person acting as the escrow agent and holding the fund for the SPAC with the bank. It is only admissible to hold those funds as deposits or invest them into short-term liquid assets with low volatility (article 3(2) Directive on the Listing of SPACs – DSPAC). The risk of being treated as an investment company from a US point of view already limits the investment possibilities if there is a plan to sell to US QIBs within the IPO. There is no requirement that the funds be deposited in a way that is bankruptcy-remote. The funds raised must not be used for operating purposes of the SPAC, but may be used for the acquisition itself or for redeeming shares within the De-SPAC or a liquidation. The funds may also be used for paying stamp duty, taxes, bank fees and negative interest charged to the account. The admissible purposes need to be disclosed in the prospectus (article 3(1) DSPAC). Clearly, any use of funds raised within the IPO reduces the appetite of the typical SPAC investor and so it is more common for the sponsors to limit the use of the funds raised within the IPO and to pick up costs, such as negative interest rates.

In connection with these costs, one needs to keep in mind the biggest hurdle for SPAC IPOs in Switzerland so far. This is the stamp duty of 1 per cent that has to be paid by the issuer on newly raised equity capital. So, if a SPAC with 200 million Swiss francs of funds is initiated, 2 million Swiss francs flow to the Swiss federal tax authorities immediately. However, starting from 1 January 2023 the new corporate law rules will make it possible to postpone the stamp duty charge of 1 per cent to the time of the De-SPAC (ie, the point in time when there is no possibility of liquidation or handing back of the shares issued to the investors any more). There will then be no stamp duty on those shares that are to be redeemed at the time of the De-SPAC and there will also be no stamp duty on those shares that are redeemed at the time of liquidation. Thus, although the stamp duty has not been removed in its entirety, postponing the stamp duty to the time the share issuance is definitive, is very helpful to enable SPACs to work properly in Switzerland. This possibility makes the alternative of issuing a convertible to the SPAC investors as provided for in the Swiss SPAC rules superfluous; therefore this alternative is not discussed here.

As normal, shares issued within the IPO may be redeemed in the course of the De-SPAC, whereby the right to redeem such shares may be restricted to those shareholders that have voted against the De-SPAC (article 89h(3) LR). Since the redemption is treated as a public offer for purchasing shares, the Swiss Takeover Board needs to approve the repurchase. In theory, such approval could be obtained at the time of the De-SPAC. However, to be certain that the redemption as planned is possible, one should obtain the approval prior to the listing (ie, just as VT5 Acquisition Company AG did).[2] Should the SPAC have to be liquidated, the shares issued at the IPO are granted a preferred liquidation right up to the amount paid at the IPO (article 89h(4) LR). No deduction is made for warrants issued (and possibly sold before in the market).

Warrants do not have to be issued, but they are normally and may be issued in parallel with the shares in the course of the IPO. These warrants may also be listed and traded at SIX. There is no waiting period until shares and warrants may be separated. If the IPO is also directed to retail clients, the issuance of warrants requires that a key information document is established (article

2 See www.takeover.ch/transactions/detail/nr/0782.

58(1) Financial Services Act – FINSA) that summarises the key information for the warrants (article 60 FINSA).

As a matter of course, the offering and the listing of the SPAC shares and the SPAC warrants also require the issuance of a prospectus. The prospectus needs to comply with the requirements of FINSA and the Financial Services Ordinance (FINSO), namely Annex 1 to FINSO for the shares and Annex 3 to FINSO for the warrants. In addition to this, the SIX rules require some specific further information to be disclosed. That information could be regarded as captured by the general rule that all information relevant for the investors needs to be disclosed, but SIX wanted to explicitly list that information:

- Scenarios on the possible dilution of the IPO investors resulting from the capital structure (article 4(1)(a) DSPAC). This includes information on percentage holding of sponsors, management, public shareholders and other investors after the De-SPAC, disclosure of further elements of compensation for sponsors or management aside from shares in the SPAC or the surviving company after the De-SPAC, the possibility of raising further capital, the maximum dilution per type of investors and the maximum dilutive effect from warrants issued.
- Illustration of how the originally invested amount develops over time as a result of interest charges or additions (article 4(1)(b) DSPAC).
- Disclosure of possible conflicts of interest of founders, sponsors, board members and members of management as well as the measures taken to reduce any impact therefrom (article 4(2)(a) DSPAC). One of those measures is the requirement of a lock-up for shares held by founders, sponsors, board members and members of management of the SPAC, which lasts for at least six months from the date of the implementation of the De-SPAC (article 89h(5) LR). That lock-up does not apply to (additional) shares they acquire as normal IPO investors, but, for example, to shares they acquire from the exercise of founder warrants.
- Major terms of the escrow agreements, in particular the conditions under which the funds raised may be used (article 4(2)(b) DSPAC).
- Information on the De-SPAC, including target market and process of the De-SPAC (article 4(2)(c) DSPAC).
- Information on the founders, board members and members of management and their track record (article 4(2)(d) DSPAC). Ultimately, that is the key information because the investors invest into the ability of these persons to engage in a successful De-SPAC.
- Disclosure of the role of the lead banks and possible conflicts of interest they may have (article 4(2)(e) DSPAC).
- Details of the lock-up agreements of founders, sponsors, board members and members of management of the SPAC or other persons (article 4(2)(f) and (g) DSPAC).
- Description of the preferential treatment of the shares issued at the IPO to the investors at the time of liquidation of the SPAC (article 4(2)(h) DSPAC).

The above shows that the additional information required is a standard list of disclosures with no surprises. Articles 11 and 12 LR that require a three-year track record of the issuer and the disclosure of corresponding annual reports are not applicable to SPACs. Only IFRS and US GAAP are admissible GAAP for SPACs, but not Swiss GAAP FER. There is a 25 million Swiss francs equity capital requirement, whereby IPO shares, should they be treated as debt under applicable GAAP, are nevertheless counted against the 25 million Swiss francs equity requirement of the listing rules (article 89i(2) LR). In addition to this, the free float needs to amount to at least 20 per cent of the shares sold in the IPO and to 25 million Swiss francs. Normally, that should not be a problem because one would hardly expect a Swiss SPAC IPO to raise less than 200 million Swiss francs.

As in every IPO, the prospectus needs to be approved by a review body, which may be the prospectus office of SIX, and the listing application needs to be approved by the Regulatory Board of SIX. The process is not very different from a normal IPO, except that the focus of the due diligence is slightly different.

Particular duties as a SPAC during the time of listing as a SPAC

Outside of the rules regarding the De-SPAC, the only deviation from the rules applicable to other equity issuers is that also sponsors and founders of a SPAC need to disclose their transactions in shares of the SPAC as management transactions. Since this is a duty of the SPAC towards the stock exchange, the SPAC needs to make sure that sponsors and founders with which the SPAC does not necessarily have a service agreement or the like are obligated in other ways to comply with these rules.

De-SPAC

The De-SPAC (ie, the acquisition of or the merger with a target entity) is the most important step in a SPAC's life. The SIX rules focus on two elements: the approval of the De-SPAC and the information to be disclosed to the shareholders with respect to the De-SPAC.

A De-SPAC can occur in two forms, either by purchase of the shares of the target or by a merger (be it a statutory merger or a quasi-merger). The acquisition of the shares of the target company against payment of cash is not the standard transaction for a De-SPAC. The reason is that target company shareholders may well have an interest to remain shareholders of the target company. This is also in the interest of the SPAC investors and private investment in public equity (PIPE) investors since this makes sure that there is a longer-term commitment given by the previous owners, at least if they commit to appropriate lock-ups. That makes sure that they do not simply sell the target company and walk away. Furthermore, a merger allows a larger transaction than a purchase.

The Swiss rules on SPACs require that a majority of the investors investing into the shares issued at the IPO and represented at a special meeting of these investors approve the De-SPAC proposed by the SPAC (article 89l LR). From a corporate point of view, this requirement can only be implemented indirectly by making it a condition for the non-dissolution of the SPAC. The consequence of this is also that the decision of this special meeting cannot be appealed. However, there is a substantial interest that this requirement is properly complied with because otherwise a shareholder may subsequently request that the company be dissolved (eg, when the share price should drop below the investment), and may claim damages from the board members since they did not comply with their duty to apply for the recording of the dissolution. As a result, although there is no possibility to perfectly implement the requirement under corporate law, one can implement it such that it is expected to work.

The process of the De-SPAC has a certain complexity and particular issues need to be taken into account, as described below.

Shareholders' agreement of target company

The shareholders' agreement of a target company may not have dealt with a combination with a SPAC as an exit transaction. That may lead to a situation where a transaction is not possible or only with the consent of a large number of or even all the shareholders. The consequence of this is often that the SPAC cannot or should not continue evaluating the transaction because evaluating transactions in detail with high transaction uncertainty is a costly exercise for a SPAC, which generally has limited funds for such exploration exercise.

Obtaining information on the interest of or commitments from major SPAC shareholders to keep their shares

The SPAC is interested in knowing whether its shareholders plan to redeem or to keep their shares. They wish to know this before they announce the transaction. The first question is whether a SPAC may consult some of its shareholders from an insider point of view. This is admissible under Swiss insider rules if this is done with a view to obtaining a commitment from the shareholders regarding keeping their shares. One element needs to be carefully looked at, that is whether such agreements, if entered into shareholders holding more the 33⅓ per cent, might be an agreement that triggers the obligation to submit a mandatory offer. From our point of view that is certainly not the case if the shareholders only commit not to redeem their shares. Nothing in such an agreement suggest a common control of the SPAC. That would probably be different with respect to an agreement where shareholders commit to support the specific De-SPAC. Nevertheless, the SPAC can get such commitments from a relevant number of shareholders and thereby show the rest of the shareholders that the De-SPAC is supported by important investors.

Soliciting investors for a PIPE

As soon as the SPAC has an idea on the likelihood of success of the De-SPAC and the likely redemptions as well as the financing needs of the target company after the De-SPAC, the SPAC may wish to raise capital in a private placement to secure the financing need. This may be key and may be a condition to the De-SPAC transaction from the point of view of the target company. Preferably, fixed commitments are obtained before the De-SPAC transaction is made public. The issue is that under Swiss insider rules transactions between insiders are inadmissible because insider rules also protect the market as such. It should be possible to handle this situation with an offer by the PIPE investor before the De-SPAC is announced and the acceptance of this offer after the announcement because insider rules only prohibit the conclusion of the agreement while the parties hold insider information. The alternative is to solicit the PIPE investors before the De-SPAC and enter into the respective agreements immediately after the disclosure of the De-SPAC. Although this is not ideal, since there is no absolute certainty, such a way to proceed should give a fair amount of comfort.

Redemption

Redemption under Swiss law needs to be done in the form of a repurchase offer, which is subject to the supervision of the Swiss Takeover Board (TOB) and the TOB's Circular No. 1 on repurchases. Circular No. 1 is a set of rules that are exemptions to the ordinary takeover rules and set up a very narrow framework for repurchases. Therefore it is necessary to obtain a wide number of exemptions from Circular No. 1 to make sure the redemption works smoothly and is subject to the closing of the De-SPAC. In terms of timing, the repurchase takes about a total of just over

22 trading days, with announcement, cooling-off period, offer period and result announcement. This procedure needs to finish before the vote on the De-SPAC because shareholders should take their decision being fully informed. Moreover, it may be necessary to plan for a longer time to the De-SPAC decision should the SPAC prefer to raise the PIPE only at that point in time (ie, only after the exact financing needs are known).

A further tricky part of the redemption is that if a capital reduction is necessary to pay for the redemptions, the current corporate law requires a two months' creditor call that has to occur after the shareholders' meeting resolving on the capital reduction and thus after the meeting approving the transaction. This delays the settlement by two months. The pertinent rules will change as of 1 January 2023 and then allow a creditors' call of 30 days ending before the meeting approving the transaction.

Type of transaction

As mentioned above, there is the possibility of a simple purchase of the shares, statutory merger or a quasi-merger. In principle, an asset deal would also be possible, but that would be rather uncommon given the usually unfavourable tax consequences.

- The purchase of shares is often a straightforward transaction and should essentially work from the point of view of the shareholders' agreement of the target since a trade sale is most often one of the options provided for an exit. One disadvantage of the purchase of shares is that one is limited to the funds held by the SPAC. Of course, one could add debt into the equation, which could be bank debt or debt raised in the capital markets. However, this approach requires that there is sufficient certainty as to the equity capital remaining to allow proper debt financing. There are then also restrictions with respect to any debt push-down or financial assistance by the target company that need to be taken into account. Another disadvantage is that in a pure share purchase, the likelihood of competition with other bidders is higher. It may be hard for SPACs to grant the same level of certainty to sellers in such a transaction as other investors.
- A statutory merger is reasonably only possible with a Swiss entity for corporate law and tax reasons. Normally, a merger transaction would be in the form of a quasi-merger (ie, where the shareholders of the target contribute their shares against the issuance of new shares in the SPAC). Such transaction may also entail a partial cash payment to some or all of the shareholders of the target. Also in these transactions, debt may form part of the equation. The advantage over the purchase of shares is that the target company shareholders remain entirely or partly bound into the listed company and form part of the further journey. That gives the SPAC and the PIPE investors, but also possible debt providers, substantially more comfort into the transaction with the target company at the intended price compared to a mere purchase.

Negotiating on dilution

One difficult part for target shareholders is the possibly complex equity structure of the SPAC with various types of warrants and other incentive elements. This is particularly difficult if the information provided to the shareholders is not fully transparent and requires them to look through hundreds of pages of documentation. Getting this part wrong may result in substantial losses for the target shareholders. In these negotiations, the target company may also be in a position to get the warrants held by management and founders readjusted to reduce subsequent dilution.

Voting on the transaction and other required decisions

As mentioned, the SIX rules require that a majority of the shareholders investing in the IPO approve the transaction. In addition to this requirement, if the De-SPAC is a statutory merger or a quasi-merger, the approval of two-thirds of the votes and a majority of the capital represented at the general meeting are required to approve the transaction. This voting quorum is also required for a PIPE transaction, unless the board has sufficient capital authorised to use for the PIPE.

Documentation

The documentation required primarily depends on the type of De-SPAC transaction. In the case of a statutory merger or a quasi-merger, certain corporate law documents will be produced. However, those documents, as long as they comply only with corporate law requirements, are not sufficiently equivalent to justify an exemption from the requirement to publish a prospectus pursuant to article 37(1)(e) and article 38(2) FINSA. Either these documents are amended such that they form an equivalent to a prospectus or a separate reviewed and approved prospectus is published. Irrespective of the route taken, the key will be the financial information of the target company to be published. One may expect that there is a structural change of the SPAC as a result of the merger that requires audited accounts of the most recent two financial years of the target in accordance with recognised GAAP and pro forma financial information. Further, depending on the time of issue, an interim financial report of the target and interim pro-forma financial information may be required. In the case of a mere purchase of a target company, these requirements do not apply.

However, irrespective of the chosen type of De-SPAC transaction, article 5 DSPAC provides for the establishment and publication of an information document with a view to the voting on the De-SPAC transaction with the following content (article 5(2) and (4) DSPAC):

- fairness opinion established by an independent expert that confirms the fairness of the De-SPAC, in particular with respect to the value of the target company;
- description of the target and of its business, including risks relating to the target and its industry, main products and services provided, business prospects and the uncertainty thereof as well as information on pending or threatened proceedings to the extent relevant for the target;
- financial information relevant for the decision on the De-SPAC, including the most recent two annual reports with the audited financial statements of the past three years according to the accounting standard applicable to the target or equivalent information, a description of the difference between the accounting standard applied by the target and the SPAC, unless the target applies a recognised accounting standard, and description of the financial effects resulting from the De-SPAC, such as the recording of goodwill, recording of identifiable intangible assets and transaction costs;
- unless resulting from the annual report of the target, breakdown of net turnover according to product or service areas or geographies (unless immaterial for the business of the target), research and development expenses, provisions and contingent liabilities;
- information on the corporate governance and management and board after the De-SPAC, including the operating group structure, information on members of the board and of management, composition of board committees and their task and powers, compensation and participation programmes, non-financial rights deviating from the law, change-of-control clauses and defence measures;

- confirmation that the SPAC has not received any non-public information that is not disclosed and that is material for the decision on the De-SPAC;
- description of the De-SPAC, including reasons and risks of the transaction, interests of the board and management in the evaluation of the target, possible conflicts of interest and dilution effect for a public shareholder as a result of the De-SPAC; and
- description of the redemption, conditions to completion and the possibility of terminating the transaction agreement, description of the financing of the transaction and description of the role of the banks.

This information needs to be published in accordance with ad hoc publicity rules, which require the publication to those that may and shall receive information in accordance with article 53 LR. In terms of timing, the information has to be published together with the invitation to the investor meeting resolving on the De-SPAC (article 89m(1) LR). If an information document is to be published for the merger, the above information is preferably included in that information document, which needs to be the equivalent of a prospectus.

Overall process

The overall process of the De-SPAC from announcement to closing takes roughly three months. From 1 January 2023, the process may be completed within approximately one month. Up to announcement the timing mainly depends on the time required for preparation of the information document and in particular the financial information. That means that before engaging into an expensive and lengthy process, it is important to have looked into and removed the key stumbling blocks.

Subsequent to the closing of the De-SPAC, the SPAC needs to apply to change the regulatory standard according to which it is listed within three months. If the SPAC did not disclose financials of the target for the previous three business years in accordance with a recognised accounting standard, the SPAC needs to publish quarterly reports for two business years (article 89n LR). Until the expiry of one months after end of the lock-ups of the sponsors and the founders, they need to continue to disclose management transactions.

Liquidation

If no De-SPAC closes during the time provided for by the articles of incorporation, the board of directors must file for dissolution of the SPAC. Thereafter, the liquidation proceeds as provided for by Swiss law and may be finished within roughly three-and-a-half months. At that point the distribution to the shareholders takes place, with a preference for distribution to the shareholders of shares issued in the IPO up to their invested amount.

Conclusion

Switzerland has established a fairly well-functioning regime for SPACs. The key difficulty for a SPAC, whether in Europe or the US, is to find a suitable target.

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Distressed M&A in Switzerland

Emanuel Dettwiler and Lukas Bopp[1]

Introduction

Businesses rise and fall and, in this natural cycle of events, companies are incorporated, dissolved and liquidated. When a company ends up in financial difficulties or even becomes insolvent or over-indebted and finally goes bankrupt, it will seek opportunities to navigate out of the troubled waters or find solutions for the business operated by the failed company.

This is when distressed M&A comes into play. Distressed M&A is all about acquiring, selling and financing troubled and insolvent companies.[2] Distressed M&A transactions are different from traditional M&A transactions mainly in terms of timing (much higher pace) and risk allocation. Both aspects result in the buyer being forced to take more risks than in a traditional M&A transaction. The upside is that acquiring the assets of a distressed business offers amazing opportunities for any buyer with enough risk appetite.

Compared with a traditional M&A transaction, a distressed M&A transaction is much more complex. It comes with twists and turns, which most dealmakers would be unfamiliar with. There is a significant higher volume of documentation required and, last but not least, there is not just a buyer and a seller at the table. In most distressed M&A transactions, the buyer will have to negotiate with secured and unsecured creditors, senior and junior lien holders and lenders and, if the deal takes place after the target company has been declared bankrupt, the bankruptcy administration or the judge. In most situations, all these parties have diverging interests, which need to be reconciled in the limited time available to execute a deal. Further stakeholders are the board of directors, the management, the employees or the workers' representatives and, in some cases – for example, if the company is of importance as an employer – the (local) authorities. Often their situation and interests have to be taken into account as well. Adding to the complexity of a distressed M&A deal are the numerous advisers involved, which include accountants, appraisers, attorneys, investment banks and turnaround specialists.

1 Emanuel Dettwiler and Lukas Bopp are partners at Kellerhals Carrard Basel KlG.

2 Nesvold/Anapolsky/Lajoux, *The Art of Distressed M&A*, New York 2011.

Following the largest economic downturn for years with gross domestic product decreasing by 2.4 per cent in 2020, 2021 marked a year of significant economic recovery, with GDP growing by 3.7 per cent. Despite the economic revival, Switzerland saw a 9.1 per cent increase in company and private bankruptcies in 2021 – probably a time-lagged effect of the pandemic.[3] Yet the 14,081 insolvencies in 2021 remain in the range of the long-time average of insolvencies. By comparison, around 13,800 insolvencies were registered in 2019 and 12,912 in 2020. The fact that bankruptcies did not surge in 2020 despite the coronavirus crisis and its devastating effects on the corporate landscape in Switzerland, but increased only in 2021, can be explained by the measures taken by the Swiss government to prevent bankruptcies. In 2020, companies were exempt from the obligation to report impending over-indebtedness if they were financially sound as of the end of 2019 and as second measure, a special covid-19 deferral for small and medium-sized companies was introduced, by which the maturity of financial claims could be postponed by three months. In addition, the Swiss federal government had introduced in 2020 a scheme allowing companies to take out a loan from banks secured by guarantees issued by guarantee organisations backed by the federal government.

To this end, the Federal Council issued the ordinance on the granting of credits with joint and several federal guarantees (Credit Guarantee Ordinance) in response to the covid-19 pandemic on 25 March 2020. Eligible companies were to have quick access within hours to loans to bridge liquidity shortages due to the pandemic. The loans could be applied for between 26 March 2020 and 31 July 2020. For a loan of up to 500,000 Swiss francs (a Covid-19 Loan), the federal government provided a guarantee of 100 per cent of the loan. Applicants with a higher turnover could apply for a loan of more than 500,000 Swiss francs (a Covid-19 Loan-Plus). In this case, the federal government guaranteed 85 per cent of the loan. The disbursing banks remained liable for the remaining 15 per cent and were required to contractually exclude the unauthorised use of funds. The total amount of the loan could not exceed 10 per cent of a company's turnover in the financial year 2019.[4] On 19 December 2020, the Credit Guarantee Ordinance was replaced by the federal act of 18 December 2020 on credits with joint and several federal guarantees (the Credit Guarantee Act). The Credit Guarantee Act equally applies to loans granted under the Credit Guarantee Ordinance. To ensure the exclusive use of the loans for ongoing liquidity needs, article 2 of the Credit Guarantee Act lists several restrictions on the use of the loan. It excludes the payment of dividends, royalties or the reimbursement of capital contributions.[5] This exclusion is absolute and is intended to prevent the outflow of liquid funds, as well as to encourage the repayment of the loan.[6] All liquid assets of a company are affected by this restriction, regardless of whether they originated from the granted loan or not. The list of restricted actions contained in the Credit Guarantee Act includes further restrictions, such as the prohibition to disburse or repay loans to and from shareholders or affiliated parties, regardless of their legal form.[7]

However, the full impact of the covid-19 crisis on the Swiss economy and in particular on the number of bankruptcies could not be seen in the first year of the crisis (2020). It was only

3 Press release of the Federal Statistical Office of 4 April 2022.

4 Christ/Keller/Simic, in: COVID-19, section 18 N4 et seq; Erläuterungen Covid-19-SBüV, p3.

5 Article 2 paragraph 2 lit a Covid-19-SBüG.

6 Beat Brechbühl, Corona-Kredite für KMU, Vol 1, 2021, pp78–79.

7 Article 2 paragraph 2 lit b Covid-19-SBüG.

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in 2021 that the number of bankruptcies started increasing. This upward trend continued in 2022 with a significant 18 per cent increase in the first quarter compared with the first quarter of the previous year.[8] It is not unlikely that this trend will continue.

Legal framework

Liability risks for board members of companies in crisis

The board of directors of a company has a special responsibility in the context of restructuring and reorganisation in a crisis close to insolvency. The chosen action alternatives can trigger personal liability risks for the board of directors and the managers of a company.

The main duties of directors of a Swiss company on the brink of insolvency are laid down in article 725 paragraph 1 and 2 of the Swiss Code of Obligation (SCO).

Article 725 paragraph 1 SCO establishes that where the last annual balance sheet shows that half of the share capital and the reserves required by law are no longer covered, the board of directors is held to convene a shareholders' meeting without further delay and the directors should propose restructuring measures.

If there is a substantiated concern that the company is over-indebted, article 725 paragraph 2 SCO orders the board of directors to establish an interim balance sheet and to submit it to the auditors for verification. If the interim balance sheet reveals that the claims of the corporate creditors are covered neither by assumed continuation values nor by break-up values, the board of directors must notify the judge, unless creditors agree to subordinate their claims up to the amount of the overindebtedness. The period for notification depends on the particular case and the reasonable expectations for reorganisation. In practice, notification periods of 15 to 30 days are a feasible average.

In general, the balance sheet can be drawn up on going-concern values as long as the board may assume that the business of the company can continue for a reasonable period of at least 12 months (going-concern assumption; see article 958a SCO). If, however, the business must presumably be ceased within the next 12 months, the balance must be drawn up on the basis of liquidation values (which generally leads to an implosion of the assets of a company, thus enhancing the chance of overindebtedness).

Under current Swiss law, imminent illiquidity of a company is not a legal element that requires the board to apply for the opening of an insolvency proceeding. Nevertheless, since the financial planning is a core duty of the directors, imminent illiquidity is a fact that may give rise to the concern that the company is over-indebted in the sense of article 725 paragraph 2 SCO or question the going-concern assumption under article 958a SCO.

High decision-making pressure on board of directors and management

In a situation of crisis, this legal framework creates a difficult and unfamiliar environment for the management and the board of directors, in which fast actions are to be undertaken and in which the decisions once taken can in most cases not be changed at a later stage.

8 Dun & Bradstreet, *Firmenkonkurse und Neugründungen in der Schweiz*, published on 26 April 2022 and accessible at https://hello.dnb.com/rs/145-JUC-481/images/CH_Konkurse-und-Gründungen-per-März-2022.pdf.

To decide how to save the company, the board must weigh up the following alternatives:

- restructure the company on its own;
- restructure the company and admit new shareholders;
- sell key parts of the company; or
- if restructuring is not feasible, liquidate the company or file for insolvency.

In normal times, any M&A transaction is a complex, time- and resource-consuming process for both seller and buyer. In the event of a crisis, time pressure and liability risk add to this complexity. The existence of the company is at stake and vital factors such as the reputation of the company and its relationship with customers, suppliers, employees and banks must not be strained. Finding a suitable buyer becomes an almost unsolvable problem for the directors in such times. However, this problem can be solved by calling in suitable specialists who, with their network, offer access to possible investors or buyers. They can also help to quickly set up the necessary transaction structure, prepare a plausible valuation of the company and a minimal due diligence possibility.

While all parties involved are interested in a fast transaction, it is vital to ensure deal security. Depending on the particular constellation, a distressed M&A transaction before or during insolvency may be the best option.

Distressed M&A prior to insolvency

Overview

The main differentiator between a regular M&A transaction and one involving a distressed company is time. When it comes to a distressed M&A transaction, everything has to happen at a much faster pace.

A healthy M&A transaction would typically start with the negotiation and signing of a letter of intent or a memorandum of understanding. Then, the buyer would engage in extensive due diligence covering a large part of the relevant financials, documents, etc, of the target company, previously carefully arranged by the seller. Due diligence would be followed by negotiating the purchase agreement, signing of the transaction documents and closing. The whole process up to the signing of the transaction documents would typically take between several weeks and a few months. In a bidding process, the process often takes even longer. Due diligence is typically preceded by the distribution of a teaser to potentially interested parties, who, after signing a non-disclosure agreement, would receive an information memorandum based on which they would submit their indicative offer. After the due diligence, the bidders still interested would submit a final offer, together with a mark-up of the purchase agreement. In a negotiated sale as well as in a bidding process, the transaction follows certain characteristic patterns and is pretty foreseeable, both in timing and the steps to be taken.

On the other hand, distressed M&A transactions hardly ever follow a common script. The only joint feature of distressed M&A transactions is urgency. Timing does not permit for a letter of intent to be negotiated or even a smooth bidding process to be followed. The document collection made available for due diligence will not be comprehensive and well structured as in a traditional M&A transaction. Instead, buyers will have to bear with an incomplete and opaque set of data and documents patched together in a hurry. The time available to conduct due diligence will be countable in days rather than weeks. Despite the general time pressure, the buyer has a certain interest in delaying the process. While there are risks related to such behaviour, it often allows the buyer to push down the price further.

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Sale of shares

It is always easier and faster to execute a transaction as a sale of shares rather than of assets. A share sale usually allows regulatory or licensing issues to be avoided. The documentation required for the transaction is simpler than that for an asset sale. With the board of directors and the management under considerable time pressure, often caused by banks or investors, it is obvious that this is the preferred mode of transaction in distressed M&A before bankruptcy.

On the other hand, any buyer who is reluctant to take the risk will have to invest significant effort into the due diligence, and in a short period of time, it being understood that the quality and quantity of the due diligence most likely will remain lower than usual. But only with comparatively detailed due diligence of all relevant aspects of the target company will the buyer be able to drive down the risks to a more comfortable level. This is all the more important as in a distressed M&A transaction, as distinct from traditional M&A transactions, the representations, warranties and recourse rights in the transaction documents will be limited, mainly for two reasons:

- first, the time pressure will make the seller accept a significant price cut to get rid of its risk; and
- second, the representations and warranties will be of use only to the buyer if the seller itself is (and, after the transaction, will remain) financially solid and solvent.

In a distressed transaction regarding an already bankrupt company, the buyer will in most cases even have to accept the target on an 'as is' basis, as the receiver will not be prepared to grant any representations or warranties at all.

Sale of assets

With the efforts attached to a share sale, it does not come as a surprise that buyers prefer asset deals. In an asset deal, the buyer may only take the assets it wants and, by doing so, minimise its risks. This means, inter alia, that, other than in a share sale, the buyer may focus its due diligence on the assets to be acquired and, by doing so, may streamline its due diligence process.

As in a share deal, by operation of law, the employees of a sold business will be transferred to the buyer.

Owing to the strict liability scheme for directors under Swiss law, in bankruptcy, the directors of a company often face liability claims of creditors or shareholders for damaging the company by depriving it of its assets.[9] Also, pursuant to article 164 of the Swiss Penal Code, the seller may be criminally liable for selling the assets below value. The buyer may face criminal charges under this article too, if it knowingly supported the seller in such a sale below value.

Hence, in an asset deal, the board of directors has to make sure to sell the assets at a fair price and not at a price too favourable to the buyer in order to avoid such liability or criminal charges. Ideally, this is best done by having the assets valued by an independent appraiser. An additional way to minimise the liability risk on the buyer's side is to assess whether, following the transaction, the seller will be able to cover its remaining liabilities.

A possible way to combine the advantages of an asset and a share sale is a hive-down. In a hive-down, the distressed company establishes a subsidiary to which it transfers the business (in the form of assets, liabilities and contracts) as a contribution in kind. By transferring the

9 See article 754 SCO.

troubled business into a clean new company, the buyer gets the opportunity to buy the business in the form of a share sale with the associated advantages while at the same time avoiding having to acquire all the risks attached to the legacy company.

Challenges and pitfalls

The often diverging interests of the many parties involved in a distressed M&A transaction create many challenges and the complexity of a distressed M&A transaction makes it prone to pitfalls.

Lack of information

Given the time pressure in a distressed M&A transaction, it is difficult for a buyer to gain a comprehensive view on all aspects that are important to decide on whether to go ahead or to back out of the deal. To limit the lack of information, it is advisable for the buyer to gather information before the formal sale process actually starts. Such information should include knowledge about the distressed business and industry, as well as about the legal process to be followed to acquire the distressed assets.

Uncertainty of the deal

Chasing a distressed company may turn out to be a costly exercise, as several parties may be interested in an acquisition or investment, but usually only one will be successful and the others will be left with nothing but the cost of the M&A process. This is not just because only one party or a consortium can be successful, but also because the buyer may find the troubled company to be in much more difficulty than expected, the company reassesses its situation and finds ways to restructure itself or the circumstances that led to the distress improve significantly. In addition, a buyer may overdo it by driving down the price too much, thus making it more interesting for the seller to find alternatives to a sale. Such an alternative may even be to liquidate the company.

Failure to convince creditors of a 'haircut'

Often, the distressed M&A transaction forms part of an overall out of-court restructuring plan for the troubled company. In such cases, it is important to make sure that the creditors of the company agree to a partial waiver of their loans before the M&A transaction is completed. Following the acquisition, the buyer will have no leverage against the creditors, which may result in the continuing financial difficulty of the acquired company and, possibly, its bankruptcy under the ownership of the buyer. Given the rigorous liability scheme for directors under Swiss law,[10] each board member failing to make the haircut in favour of the target happen prior to the closing of the acquisition will risk personal liability.

Retention of employees and suppliers

The retention of key employees, key suppliers and customers in a distressed M&A transaction is crucial. The important employees are required to keep the business operations running smoothly and to prepare all data necessary for the due diligence of the buyer. Key suppliers should be kept to avoid any disruption to the supply chain, and key customers to secure the revenue. As soon as doubts arise about the survival chances of a company, key employees will seek to leave the

10 See article 754 SCO.

company, suppliers are likely to start requesting prepayment before delivering and customers may stall their orders or avoid placing them. This retention aspect is another reason for timing being of such paramount importance in a distressed M&A transaction.

Confidentiality and standstill agreements

Prior to the transaction, the seller and the buyer typically enter into a confidentiality agreement. As it is crucial for the buyer to be able to inform third parties about the transaction and discuss it, in particular with the seller's creditors or other bidders, the buyer should avoid accepting any clauses prohibiting it from such discussions. By requesting a standstill agreement, a seller tries to prevent the buyer prevailing in the negotiations with the seller because it acquired claims against the seller allowing it to exert pressure on the seller. Hence, the seller should refrain from accepting a standstill agreement.

Alternatives

Instead of selling a company or its assets, the seller may consider restructuring the distressed company. The overall objective of such an exercise is to secure the liquidity of the company or overcome a situation of overindebtedness. There are many ways to restructure a company:

- subordination: lenders subordinating part or all of their debt will help to straighten out the balance sheet as, under Swiss law, subordinated debt is disregarded when assessing whether a company is over-indebted;
- 'harmonica': a reorganisation of a company is also possible by decreasing the share capital to zero and, immediately thereafter, increasing it again.[11] This measure reinforces the equity base of a company and renders it less prone to overindebtedness. It is sometimes chosen to replace the existing debt of a lender by equity (debt-to-equity swap) or to streamline the shareholder base and limit it to shareholders willing to continue with their investment; and
- convertible loan: a convertible loan allows an investor not only to provide debt financing to a company but also profit from the interest payment. With a convertible loan, the lender may profit from the conversion option should the company be successful in a turnaround.

Which measures are to be taken depends on the individual situation of the company. Often these measures are combined with each other or precede an M&A transaction.

Distressed M&A in insolvency

Overview

When a Swiss company becomes insolvent, Swiss law provides (mainly) two types of insolvency proceedings. First, there is a conventional bankruptcy proceeding, in the course of which the assets of a debtor are liquidated and the proceeds distributed to the creditors. In a conventional bankruptcy proceeding, we must further distinguish between ordinary bankruptcy proceedings for large companies with complicated conditions, and summary proceedings for small or rather simple bankruptcies. Second, there is a reorganisation proceeding, in the course of which the business of a debtor can be reorganised, debt can be restructured or the business or parts of it can be sold more efficiently than in a conventional bankruptcy proceeding.

11 See article 732a SCO.

Opportunities for distressed M&A transactions vary in the different insolvency proceedings as the prerequisites and the legal conditions for the acquisition of a company are different.

M&A in bankruptcy

Once bankruptcy proceedings have been initiated, the company loses the right to dispose of its assets. The shareholders and the board of directors no longer have any decision-making powers, and the creditors become the new 'owners' of the business. Decisions on the future of the company have to be taken in their interest.

Important decisions such as the continuation of a business in bankruptcy or its sale therefore require at some stage, according to Swiss bankruptcy law, the consent or involvement of the creditors. This involvement needs time, which is usually not at hand for a distressed M&A transaction. In an ordinary Swiss bankruptcy proceeding, the liquidation of assets may not occur before the second assembly of creditors has taken place, which is often held months, if not years, after the opening of the bankruptcy. By this time the business of the company might not have been able to continue – usually due to the lack of liquidity – and it may have had to shut down. Any going-concern value of a company that might have been still existing at the opening of the bankruptcy is usually lost, and the acquisition of the continued business is either no longer possible or not of interest. Distressed M&A transactions in which an entire business is sold are accordingly rare in conventional bankruptcy proceedings.

Under certain circumstances, however, it is possible that the fixed assets of a company or even the business as such can be sold without the involvement of the creditors. According to article 243 of the Swiss Bankruptcy Code (SBC), assets that are subject to rapid deterioration can be sold directly by the bankruptcy office without taking recourse to the creditors by an 'emergency sale'. According to Swiss doctrine and the Swiss Federal Tribunal,[12] it is also accepted that an entire company or part of its business can be subject to rapid deterioration and can therefore be sold in an emergency sale. But it is also clear that such an emergency sale is only possible under specific conditions. Further, it is unclear and not yet decided by the Swiss Federal Tribunal whether the creditors' right to make higher bids according to article 256 paragraph 3 SBC is applicable in an emergency sale.[13] There is therefore always the risk that the sale will be challenged in court, and an emergency sale is therefore always associated with risks for the bankruptcy administration. As the bankruptcy administration is a state authority in Switzerland with a 'natural' risk aversion, it is not surprising that in practice only few businesses are sold by way of an emergency sale in the course of ordinary bankruptcy proceedings.

Provided the requirements for an emergency sale are met or if there is enough liquidity to continue the business until after the second creditors' assembly, the acquisition of a distressed business out of bankruptcy might be a good opportunity for investors. The employees of the bankrupt business do not have to be taken over and a potential buyer can therefore choose whether it wants to restructure the workforce with the acquisition. Also, the provision on a mass

12 BGE 131 III 280, 284.

13 Article 256 paragraph 3 provides that assets of a significant value can be sold only if the creditors were granted the right to make higher bids.

dismissal of employees[14] or for a social plan obligation[15] are not applicable in bankruptcy. Finally, the agreed sale price cannot be challenged by way of a voidance action. On the other hand, there are no representations and warranties and the acquisition is entirely at the risk of the buyer.

A sale of a business can also take place in summary bankruptcy proceedings. Because in summary proceedings there is no creditors' committee, the competence to sell a business or a company lies with the bankruptcy office. The sale is more flexible than an ordinary sale, and can take place 30 days after the creditors' call, which – once it is clear that there are sufficient assets to finance the bankruptcy proceeding – can be made shortly after the opening of the bankruptcy proceeding. In summary proceedings, it is therefore possible to carry out an ordinary sale within six to eight weeks of the opening of bankruptcy proceedings. However, in this time and under such circumstances an ordinary due diligence process is usually not possible and the support of the bankruptcy office is usually limited.

A speciality of Swiss law is that the creditors have the right to make higher bids and can accordingly outbid a potential buyer. Further, the consent of chargeholders is required if the business is sold by way of a private sale and not in an auction. If these parameters are complied with, the sale may not be challenged by way of voidance action. As in ordinary bankruptcy proceedings, employees need not automatically be taken over.

M&A in reorganisation proceedings

Overview

Swiss law provides for a reorganisation procedure that, on the one hand, is conceived as a statutory debt settlement procedure and aims to settle the liabilities of a company without the company going under as an economic unit. On the other hand, in such proceedings a business can also be liquidated as gently as possible by transferring the whole or parts of a business to a newly established subsidiary (hive-down) or a third party.

A Swiss reorganisation procedure can roughly be divided into two phases. The first starts with an automatic stay or moratorium and serves the preparation of the reorganisation or the liquidation of the company. In this phase, the right of a company to dispose of it assets is restricted; the business may, however, be continued, usually under the supervision of an administrator. In the second phase, the actual restructuring or liquidation and the distribution of the proceeds to the creditors takes place. The sale of a company is possible in both phases.

Sale of a business during the moratorium

Although the sale of a business was not contemplated by the law in the phase of a moratorium, many businesses are sold during this first phase of a reorganisation proceeding. In fact, since a moratorium can be granted without public disclosure, a transaction can be executed swiftly and without the need to inform creditors and customers of the difficulties of the company, which in many cases results in a better price.

During the moratorium, the company remains in charge of its business, although usually under the supervision of an administrator. The company must, therefore, conduct the M&A process and may also hire advisers.

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14 See article 335d et seq SCO.

15 See article 335h et seq SCO.

However, since the company may, according to article 298 SBC, only dispose of fixed assets with the consent of the court, any sale of assets requires court approval. As the creditors are not involved in the process and to protect their interests, the court will usually only give its consent if the company can demonstrate that it will realise the best possible price for the creditors and that there is an urgency to carry out the sale, and an impairment threatens if the sale is postponed. To evidence this, the company can ask the administrator to hand in a report or a fairness opinion of an M&A adviser to the court. Further, the company can demonstrate that it conducted an auction process or obtained several offers. If there is sufficient time and if publicity does not affect the transaction, the creditors might also be granted the right to make higher offers as pertained in ordinary bankruptcies in article 256 paragraph 2 SBC.

If the court accepts that the sale is in the best interests of the creditors and affirms the sale, it can afterwards no longer be challenged by way of a voidance action. In addition, the consent of creditors or shareholders is not required. A buyer is not required to take over the entire workforce with the acquisition. However, in contrast to an acquisition in a bankruptcy proceeding, the provisions on mass dismissal of employees or for a social plan obligation are applicable.

Cases in practice show that it is possible to sell a distressed business within a month of the opening of the automatic stay, especially when the transaction has already been prepared in a 'pre-pack' before the request of the automatic stay has been filed. In this case, the request for opening the moratorium can even be combined with the request to approve the sale.

Sale of a business by adopting a reorganisation

If there is no urgent need to sell the business, and provided the company disposes of or generates sufficient earnings to maintain its liquidity during the moratorium, the company can also be sold by adopting a reorganisation plan. There are different ways to sell a business in a reorganisation plan. If the sale of the business is ready to be closed, the sale and its terms can form part of the reorganisation plan itself. It is, however, also possible that the reorganisation plan only authorises the liquidator to sell the business. In this case, the liquidator has to structure the M&A process and the sale of the business or parts of it and constitutes an ordinary liquidation action, which gives the liquidator considerable discretion about the timing and the execution of the sale. The reorganisation plan can also provide that the business is to be transferred to a newly established entity (hive-down) whose shares will afterwards be sold by the liquidator. In all these cases, the reorganisation plan must be approved by the majority of the creditors and sanctioned by the court. The latter requires that the sale is in the best interests of the creditors, and that they at least receive for their unpaid claims no less than what they would receive in an ordinary bankruptcy proceeding.

For a potential buyer, the acquisition of the business has the benefit that it can be taken over without any debts and that the transaction, once it is finally sanctioned by the court, can no longer be challenged. A buyer can usually also choose which parts and which employees it wants to take over, as employees are not automatically transferred to the buyer in such a sale.

Conclusion

There are not only successful players in the market. Business failure is commonplace, tragically but inevitably. However, every failure creates opportunities, which, with the necessary respect, skills and risk, can be seized as a chance to create something new and economically viable. Properly managed and supported by competent specialists, distressed M&A provides an attractive opportunity to allow a distressed company or business to become successful and financially sound again.

15

Real Estate Transactions with a Special Focus on Hotel Acquisitions

Markus Aeschbacher, Thomas Schönenberger and Ion Eglin[1]

Introduction

Introductory remarks

Even though price growth in the Swiss real estate market has slowed somewhat in recent years, it is to be expected that real estate property will remain in demand in the future and represent an attractive investment opportunity.

However, access to these attractive investment opportunities has been restricted for foreign investors in Switzerland for many decades. In particular, the Federal Law of 16 December 1983 on the Acquisition of Real Estate by Persons Abroad (better known as the Lex Koller) restricts the acquisition of real estate for residential purposes. This will be discussed in more detail in the course of this chapter. This restriction inevitably leads to foreign investors having to focus on the acquisition of commercial property for the time being. For this reason, the chapter focuses on real estate transactions in the area of commercial property. Since it has also transpired in the past that foreign investors in Switzerland are increasingly investing in hotels, a separate section of this chapter goes into more detail on hotel transactions.

Principles and systems of the real estate sector in Switzerland

Switzerland has extensive building regulations (regarding land use, building quality, distances to adjacent properties, etc). Land is divided into different zones, such as agricultural, residential, commercial and industrial. There are also many environmental regulations.

The land register is the public register for rights in rem to real estate such as ownership rights, easements, land charges and liens on real estate. Its main purpose is to make private rights and encumbrances on real property visible to third parties.

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Swiss law requires contracts for the purchase of land and very often also for other legal transactions concerning rights in rem to be drawn up as notarial instruments by a notary.[2] The procedure for public notarisation is left to the cantons, which is why there are different systems:

- In the case of independent professional notaries, the notary is a self-employed person who draws up the notarial instrument, while the land registries make the land register entry based on the application for registration.
- In cantons with official notaries, the act of drawing-up the notarial instrument is carried out directly at the land registry by a public official who is also the chief clerk of the land register.
- Finally, there are hybrid systems in which the elements of independent professional notaries and official notaries are mixed in various ways.[3]

Restrictions for foreign investors

Under the Lex Koller direct investment in residential and other non-commercial real estate and the acquisition of shares of a real estate company with such purpose by a foreign investor (Person(s) Abroad) are restricted and permitted only with a corresponding administrative authorisation. Approval will be denied unless there is a reason for approval specified by law. The acquisition of residential real estate for purely investment purposes is generally not allowed.

Not considered as Persons Abroad according to the Lex Koller are particularly foreigners domiciled in Switzerland who are nationals of EU/EFTA member states or of the UK with a respective residence permit and nationals of other countries who are holders of a valid settlement permit (C permit) in Switzerland. All other foreigners are generally subject to the Lex Koller. Legal entities are considered Persons Abroad if they are either domiciled abroad or dominated by Persons Abroad. Domination by Persons Abroad is presumed in particular when more than one-third of a company's capital or more than one-third of the voting rights are in the hands of Persons Abroad, or if they have granted substantial loans to the company.

In addition to the direct purchase of real estate registered in the land register, any transaction (the acquisition of property rights, title, or usufructs in shares, the constitution and exercise of a right of purchase, pre-emption or redemption, etc) that from a commercial perspective confers a position analogue to ownership, is deemed an acquisition under Lex Koller.

Real estate for permanent business establishment, such as manufacturing facilities, warehouses, offices, shopping centres, retail premises, hotels, restaurants, etc, can be acquired without authorisation. In this case, it is immaterial whether the real estate is used for the buyer's business or was rented or leased by a third party in order to pursue a commercial activity. Such real estate properties may also be purchased solely as an investment.

Real estate transactions in general

Transaction basics

Subject matter of contract and deal structure

As in the case of corporate M&A transactions, there are basically two possible main structures for real estate transactions. The first one is the asset deal, where the real estate itself (with its

2 See for example articles 657(1), 732(1) and 799(2) Swiss Civil Code.

3 See for example Mühlematter Adrian/Stucki Stefan, *Grundbuchrecht für die Praxis*, 2nd ed, Orell Füssli Verlag, 2017, p53.

associated rights and obligations as well as contractual relationships) forms the subject matter of the contract and is transferred to the buyer. In an asset deal, the real estate can be transferred either by singular succession or by partial universal succession by means of a transfer of assets under the Federal Merger Act.

The other main transaction structure is the share deal where the participation right (eg, a share in the company owning the real estate) forms the subject matter of the contract and is purchased by the buyer.

Since by far the most common deal structure in real estate transactions in Switzerland is still the asset deal with singular succession, which also differs most clearly from corporate M&A transactions, this chapter focuses on this type of deal structure, while asset deals by means of transfer of assets under the Federal Merger Act and share deals are only mentioned if there are particularly noteworthy differences to asset deals with singular succession.

Overview of transaction process and deal phases

Real estate transactions basically follow the same process and are divided into the same deal phases as corporate M&A transactions. These are the preliminary phase, the signing phase, the closing phase and the post-closing phase. However, as will be shown below, the processes are less developed in practice, M&A terminology is mostly not used and there are some special features and differences worth mentioning.

Preliminary phase

Information memorandum and indicative offer

In Swiss real estate practice, the information memorandum issued by the seller and an initial process letter (in smaller transactions often only sales documentation, a teaser or a letter or email asking for an indicative offer) are followed by an indicative offer from the prospective buyer.

Due diligence

If this seems reasonable to the seller, the prospective buyer is granted access to the data room for a certain period of time after signing a confidentiality agreement. The documents contained in the data room enable the prospective buyer to carry out a large part of the due diligence. Particularly with regard to legal and tax issues, but also in environmental and contaminated site matters, the prospective buyer often relies heavily on the documents available in the data room. The prospective buyer examines in particular (without claiming completeness):

- the extract from the land register including land register plans and existing land register documents for the registrations and reservations, easements and land charges as well as mortgages (eg, promissory notes);
- the extract from the register of contaminated sites;
- tenants' statements, tenancy agreements and service charge statements;
- other contracts (such as maintenance and service contracts, caretaker contracts, management contracts); and
- tax returns and invoices.

For the purpose of carrying out structural or technical and commercial due diligence, the prospective buyer is usually also given the opportunity to inspect the property on site. Finally, most data rooms already contain a first draft of the purchase agreement.

Binding offer

In a second process letter, the prospective buyer is then requested to make a binding offer and to submit it by a certain date together with any requests for amendments and/or additions to the draft purchase agreement. However, it must be emphasised here that binding offers in the case of an asset deal with singular succession are not legally binding due to formality requirements under Swiss law. This is because any contractual agreements in connection with the transfer of real estate – even if they are only pre-contractual agreements – are subject to mandatory public notarisation in order to be valid or binding (see above). Regardless of its invalidity, the binding offer is usually a prerequisite for being admitted to further contractual negotiations with the seller. Often the prospective buyer is also granted a certain period of exclusivity with regard to contract negotiations.

Signing phase – purchase agreement

General remarks

Since agreements for the purchase of real estate need to be drawn up as official notarial instruments in order to be valid, the standard documents developed by cantonal notarial practice for the acquisition of private property form the basis of the draft agreements. In comparison with international practice and M&A standards, these are relatively rudimentary and structured simply, especially with regard to larger transaction projects.[4] Deviations from these standard documents are permitted only to a limited extent and depend on the respective canton and notary's office. It is therefore advisable to consult the responsible notary early on and to involve him or her in the drafting of the agreement. For the sake of efficiency, it is advisable not to provide the responsible notary with a draft of the purchase agreement at this stage, but only with a list or a term sheet with the points to be included in the agreement, which the notary will then use as a basis to draw up the first draft.

Object of purchase and price

The first major part of the agreement for the purchase of real estate is the object of purchase, which is defined on the basis of a current description of the property (including measurements, notes[5] and priority notices, easements, real estate liens, etc), which the notary integrates into the agreement on the basis of the extract from the land register. Another important part of the agreement is the purchase price with details of the partial payments, the recipients of payment as well as other terms (due date, security payments, etc).

The time of the transfer of ownership is also stipulated, which usually takes place immediately after the notarisation. However, a different date at the end or beginning of the month is usually chosen for the transfer of benefits and risks (the effective date), so that rental income and other periodic obligations can be settled more easily.

4 See also for example Vischer Markus/Hänni Luca, *Lehren aus der M&A Praxis für den Immobilienkauf*, AJP 2012, p613 et seq, p614; Baumann Maja, *Gewährleistung in Grundstückkaufverträgen mit professionellen Investoren*, AJP 2010, p1269.

5 'Notes' of legally relevant facts, legal restrictions or exemptions from legal restrictions.

Representations and warranties

Detailed warranty clauses are uncommon. In practice, the statutory warranties are either amended or excluded.

They are frequently amended in the case of new buildings, often by granting the buyer essentially the same rights arising from defects in relation to the seller as the seller (in its capacity as customer or project owner) has in relation to its contractors, for example through the adoption of SIA standard 118, which is widely used in building projects. As an alternative to this arrangement, the buyer's warranty rights against the seller are often excluded (to the extent legally possible); in return, the latter assigns its rights arising from defects against the contractors to the buyer. However, this is not without legal problems, particularly since it is controversial whether such assignments may be made and, if so, to what extent.

In the event of a purchase of properties that are not new buildings, and thus by far in the majority of cases, warranties are excluded in purchase agreements with the exception of certain representations (see below). Under the principle of contractual freedom, this is generally possible provided that the seller has not fraudulently concealed a defect.[6] The validity and scope of the exclusion of warranties (warranty exclusion clause) are legally controversial. In cases of doubt, the courts interpret warranty exclusion clauses in a restrictive and buyer-friendly manner. The seller is therefore well advised to draft the warranty exclusion clause as clearly and in as much detail as possible, including making reference to any known defects and possibly unanticipated special features of the object of purchase and describing the condition of the buildings.

The exclusion of warranties does not apply in the event that the agreement provides for representations made by the seller. They mainly concern the tenancy agreements that are transferred to the buyer by operation of law upon transfer of ownership,[7] which are usually listed with the most important key figures in an annex that forms part of the purchase agreement (rent schedule). Frequently encountered among professional investors, for example, are clauses according to which the seller represents that:

- the (due diligence) documents provided are complete and correct;
- the rent schedule is complete and correct;
- the aforementioned rent deposits are in place and that the rights thereto will be transferred to the buyer;
- no additional ancillary agreements have been entered into with the tenants and, in particular, that there are no amortisation agreements or loans for tenant improvements in place and that they are not part of the rental payments;
- no rent reductions have been promised;
- no notices of termination have been given or threatened;
- there are currently no legal disputes or proceedings in connection with the tenancies or with neighbours in connection with the object of purchase and that no such disputes have been threatened;

6 Articles 192(3) and 199 Swiss Code of Obligations.

7 Article 261(1) Swiss Code of Obligations.

- there are no outstanding claims from contractors or workers for work carried out in the past four months and that there is therefore no risk of statutory lien of tradespeople and building contractors being registered with regard to the property; and
- all taxes and fees related to and due on the object of purchase have been paid.

Depending on the circumstances, buyers may also try to negotiate further representations, for example, regarding the accuracy of measurements within a percentage tolerance range, creditworthiness and payment habits of the tenants as well as compliance of existing buildings with regulations and permits. Which and how many representations the parties want to include in the purchase agreement ultimately mainly depends on how well the seller knows the property, which clarifications the buyer was able to make in the course of the due diligence process and how many risks are accounted for in the purchase price.

In addition to a careful due diligence process regarding possible soil contamination, it is particularly important to include clear provisions regarding this issue in the warranties. Any contaminations the buyer is aware of should be listed. Should a reclamation of contaminated sites be necessary in the foreseeable future, it is advisable to include provisions as to who shall bear the costs and, if appropriate, to agree on a security for the amounts to be paid.

If an owner benefits from an increase in the value of his property as a result of a spatial planning measure under public law (eg, change of zone into a development zone), the owner must expect to be put under an obligation at cantonal and communal level to pay an added-value charge to the local authority. Since many cantons provide for a lien on the property and/or joint and several liability of legal successors to secure this charge, it is important to check when acquiring a property whether such a value-added charge has already been imposed (and possibly postponed) or is latent. If this is the case, a provision should be included in the purchase agreement to say that the buyer shall pay the unpaid charge directly to the local authority (such payment being offset against the purchase price) or that the seller shall furnish security in the appropriate amount.

According to the law, the parcel of land and the buildings and installations on it must be inspected as soon as possible in the ordinary course of business and any defects must be reported immediately thereafter; any defects discovered later must be reported immediately upon their discovery. According to the case law, these deadlines are very short and they create legal uncertainty as they are not clearly defined. From the buyer's point of view it is therefore advisable to agree on clear deadlines that are sufficiently long depending on the object of purchase.

Other clauses

There are numerous other contractual provisions that are beyond the scope of this chapter. Most of them are standard clauses, for example, on the obligation to pay VAT, on the transfer of insurance policies and other agreements (management agreement, caretaker and maintenance agreements), on declarations regarding the Lex Koller, on the provision of documents, on the (non-)obligation to pay commission fees of real estate agents and on the payment of notary and land registry fees.

Special set-ups

The agreement for the purchase of real estate is often linked to other types of agreements. If the seller is obliged to construct a building, there are generally three possible ways to structure this:

- The parties enter into a purchase agreement for a future object. In this case, the purchase agreement is concluded immediately and the transfer of ownership (and thus usually also the major part of the purchase price payment) takes place upon completion of construction.
- The parties enter into a hybrid purchase/construction agreement. In this case, an agreement for the purchase of real estate is entered into, which contains a construction obligation, and ownership usually transfers immediately while the building is constructed or completed thereafter.
- The parties conclude both a purchase agreement and a (comprehensive) construction agreement, and these two agreements are linked.

A legally controversial, but in practice frequent set-up is sale and lease back, in which the seller leases back the sold property or parts thereof from the buyer on a long-term basis. This involves a lease agreement that is usually concluded prior to the agreement for the purchase of real estate, which only comes into force on condition that ownership is transferred to the buyer (and subsequent landlord).

Finally, in the real estate industry, the purchase of a real estate is often linked to the acquisition of the related development projects. In this case, a comprehensive intellectual property rights agreement is required, which ensures the transfer of all project rights to the buyer and the buyer's entry into the existing agreements between the seller and the planners, contractors, etc. This provision can be integrated into the purchase agreement.

Closing phase

The main performance obligations under the purchase agreement are executed by transferring ownership to the buyer by registering the purchase transaction with the land register and paying the purchase price. This 'exchange of service' usually occurs reciprocally and simultaneously. In most cases, payment of the purchase price is secured by an irrevocable bank guarantee or, in the case of private notaries, by the notary acting as escrow agent.

A signed written document is sufficient for the application to the land register, but the seller needs to provide proof of its right of disposal by certified signature or personal presentation of an official ID document at the land registry. The application to the land register is immediately entered in the daily register. Rights and obligations arise once they are later entered in the main register but with retroactive effect to the time of the entry in the daily register.

The purchase price is not always transferred in full to the seller's account. If there is no other security for the real estate capital gains tax, part of the purchase price amounting to the estimated tax amount is usually paid into an account of the tax office. A further part of the purchase price is often transferred to the seller's lending bank so that, in return, the latter redeems any liens on the property (or possibly transfers them to the buyer's mortgage bank). This exchange of service can also be secured by the above-mentioned instruments.

Post-closing phase

Post-closing rights and obligations

Compared with corporate M&A transactions, the rights and obligations of the contracting parties after closing play rather a minor role in real estate transactions. However, purchase agreements usually contain provisions on the following post-closing rights and obligations of the contracting parties after completion:

- obligation of the contracting parties, within a certain period of time after the transfer of ownership or the date of taking possession, to settle separately from the purchase agreement and pro rata temporis the periodic services related to the object of purchase, such as public charges, taxes, energy costs, insurance premiums, rent, shares of heating and operating costs, etc;
- obligation of the seller to hand over to the buyer in return for a separate receipt all original documents relating to the object of purchase that have not already been provided, in particular all lease agreements, building and construction specifications, contracts for work and services, property plans, maintenance contracts, etc; and
- obligation of the buyer not to terminate any assumed tenancies for cause (with reference to the buyer's own need).

Special post-closing rights

Sometimes, especially in sale and lease back situations where the seller remains the tenant of the object of purchase, special rights are granted to the seller in the purchase agreement, which the seller can exercise after closing. These are primarily pre-emption and repurchase rights that, when exercised, allow the seller to re-acquire ownership of the sold property at a later date, usually under predefined conditions.

Taxes

The following taxes are typically payable in real estate transactions in Switzerland:

- Real estate gains tax – in general, tax must be paid on the difference between a property's purchase value (less the property transfer tax, land register fees and notary fees) and the sale proceeds (less the property transfer tax, land register fees, notary fees and broker commission). This tax is generally payable by the seller. In certain circumstances, taxation is deferred.
- Property transfer tax – in the vast majority of all cantons, the acquisition of real estate is subject to property transfer tax based on the purchase price plus all other services provided by the buyer. Property transfer tax is generally borne by the buyer. There are exemptions in certain circumstances.
- Value added tax (VAT) – in general, the sale of land is not subject to VAT. However, the seller can, under certain circumstances, voluntarily subject the property to VAT.

In connection with the above-mentioned taxes, in many cantons the corresponding tax claims are secured by a legal lien on the transferred real property and/or there is a joint and several liability of the party responsible for paying the tax in question and the other contracting party.

Hotel transactions in particular

Preliminary remarks

Buying hotels in Switzerland has always been attractive to foreign investors, whether in cities or resort hotels in the mountains, whether as investments or for 'asset parking' in the politically stable environment of Switzerland, or as 'trophy assets' in the case of some luxury hotels.

In principle, of course, the acquisition of a hotel is only a real estate transaction. However, many aspects significantly differentiate the acquisition of a hotel from the acquisition of other commercial real estate.

Current hotel operator

First, it is necessary to know who currently operates the hotel and what legal relationship exists between the current operator, plus maybe a franchisor, and the owner. Hotels which are operated by the owner still exist mainly in family businesses, but usually even then the operation of the hotel is outsourced to a separate company in order to protect the asset from the financial and operational risks of the daily hotel business.

The legal relationships between the operating company and the owner are either governed by a hotel lease agreement (in various forms) or a hotel management agreement (with additional trademark licence, marketing or centralised services agreements, if applicable). These may be combined with a franchise agreement, whereby the lessee or manager then acts as white label operator.

Hotel lease agreements

In principle, lease agreements remain in force and unaffected in the case of a sale of a hotel. This means that the buyer of a hotel automatically takes over any existing lease agreement. Consequently, it is recommended to carefully review the existing lease agreement before the acquisition. In addition, hotel lease agreements often contain clauses that grant a pre-emptive or termination right to the lessee in the event of a sale of the hotel – which could influence or even prevent the intended transaction.

Hotel management agreements

Such pre-emptive or termination rights in the event of a sale may also be contained in hotel management agreements. However, the legal qualification of hotel management agreements is more complex, especially with regard to termination rights. Under Swiss law, hotel management agreements are qualified as 'innominate contracts', which consist of different standard agreements such as, among others, the mandate agreement. As mandate agreements can be terminated at any time,[8] it is questionable whether such termination rights could be applicable to hotel management agreements. The question has not been definitively clarified by Swiss courts so far; however, in 2005, the Federal Supreme Court decided in a case involving the Hilton hotel in Geneva[9] that it cannot be said once and for all which legal norms govern such management contracts. Rather, the question must be answered considering the overall agreement and legal relationship between the parties. Taking into account that hotel management agreements are quite complex, consist of various different rights and obligations, and are usually long-term relationships, it seems very unlikely that a termination right at any time would be applicable. Either way, it is recommended that the hotel management company be involved in any acquisition plans. If the acquisition is confidential and this is not possible, the buyer should request appropriate warranties, indemnifications or even withdrawal rights from the seller in order to obtain the best possible protection against the various scenarios. This is particularly recommended because the employees of the hotel are usually employed by the owner and not the manager in hotel management relationships (see 'Transfer of employment relationships').

8 Article 404 Swiss Code of Obligations (a compulsory provision).

9 Decision of the Swiss Federal Supreme Court No. 131 III 528 from 30 May 2005, 5C.252/2004.

Franchise agreements

If the hotel is operated by a lessee or a manager under another brand, there is usually a franchise agreement in place with a franchisor, such as an international hotel chain. These franchise agreements often not only include the use of a brand, but also offer their own distribution system and sales channels, with global marketing campaigns, loyalty programmes, etc, and may also contain requirements for some construction elements, interior design or food and beverage concepts. Furthermore, franchise agreements often contain special rights or sanctions in the event of a sale of the hotel that can affect the intended transaction. In addition, if the brand or protected design elements are permanently installed, a termination of the franchise agreement may require structural measures in order to modify or remove the previous brand or design elements for the buyer and new owner. Last, there might also be 'owner's agreements': these are additional agreements between the franchisor and the owner, obligating the owner to secure the franchise in the event of insolvency of the lessee – or specifically in the event of a sale of the hotel. Hence these agreements also must be carefully examined before a planned hotel acquisition.

Share deal or asset deal

Like other real estate, a hotel can also be acquired by way of a share deal (purchase of the shares in the owning company) or an asset deal (purchase of the real estate only). However, unlike other commercial real estate, a hotel is usually an ongoing operation, has numerous employees, has guests for short-, medium- or long-term stays, and has current and future bookings as well as numerous other contractual relationships.

Due diligence for hotels – specifics

As a result, the scope and topics of a due diligence review differ from other commercial real estate, regardless of whether the hotel is acquired through a share or an asset deal. To illustrate the specific nature of a hotel deal and, as examples only, some selected topics are explained in more detail below.

Transfer of employment relationships (acquisition of business)

Legally, the acquisition of a hotel in operation is usually qualified as a takeover of the business.[10] As a consequence, all existing employment contracts of the hotel are automatically transferred to the buyer, regardless of whether the acquisition is made through a share or an asset deal – unless the employees are employed by the lessee in the case of a lease agreement that continues (see above). If the employment contracts are being transferred, it is highly recommended to review all employment contracts, related obligations and claims prior to the acquisition, including, but not limited to, outstanding salaries and bonuses, holiday entitlements, overtime compensation, pension contributions, withholding taxes, compliance with the collective employment contract[11] and labour safety regulations, as well as threatened or pending labour law disputes. Another important point in connection with employees is their housing – whether a staff house is connected to the hotel, or whether rental apartments are available.

10 Article 333 Swiss Code of Obligations.

11 The collective labour agreement in the Swiss hospitality industry, L-GAV, https://l-gav.ch/.

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Maintenance of the hotel

A hotel property is typically more exposed to wear and tear than a normal residential or office property. This is why it is advisable – even in the case of an asset deal and in addition to structural and technical examinations – to study the minutes of the meetings between the owner and the hotel operator, the board of directors, the general meetings and, if applicable, the condominium owners' association. If major or repeated structural or technical problems have arisen, it is very likely that they will have been an item on the agenda or mentioned at one of these meetings. Particularly sensitive and expensive areas are the wellness and spa facilities, hotel and restaurant kitchens, and building technology in general.

In the case of a lease, the owner should review the list of interfaces[12] in particular. Who is responsible for which parts and which maintenance works, the owner or the lessee? Are there any limits? And does the lease agreement contain an obligation of the lessee to build reserves to cover its future maintenance obligations?

Furniture, fixtures and equipment (FF&E)

The FF&E of a hotel must usually be replaced every seven years, some even more frequently. The ownership of the FF&E is usually clarified in the lease agreement: While the initial procurement has usually been provided by the owner, renewals and replacements are typically the obligation of the operator (who usually must build a reserve fund in cash for this purpose – whose existence must be verified in the due diligence as well). However, it is often not clear who will be the owner of all FF&E at the termination or expiration of the lease agreement. This being said, we recommend diligently verifying the inventory, the list of interfaces and again the lease agreement in this regard.

Ongoing hotel operations

Hotel operations require a variety of external services and contractual relationships with third parties, such as travel agencies, tour operators, online travel agencies (with maybe granted packages and future bookings) and tourism organisations, sales and marketing agencies, hotel associations, suppliers and technical companies for maintenance (such as lifts, heating, spa, etc) or maybe outsourced housekeeping, just to name a few. These contracts, the ongoing charges and their termination options are also important for a hotel transaction, again whether a share deal or an asset deal is intended.

Intellectual property rights

The intellectual property rights of a hotel are very important: Under which brand is the hotel managed? Do franchise agreements exist (see above)? Which software and licences are used for booking, reservation or new digital applications for the guests? And, especially important, who owns the guest data, the operator or the owner? What applies in case of the expiry or termination of the lease or the management agreement? And finally, is compliance with the applicable data protection regulations ensured? All these questions affect the owner in any case as well, regardless of the nature of its acquisition or the legal relationship with the operator.

12 Usually drafted as an appendix to the hotel lease agreement.

Permits

In general, a hotel in Switzerland requires two types of permits:

- a permit relating to the building: it is issued by the municipality after construction or renovation and allows the hotel to be opened to the public. This relates to fire protection, escape routes, etc, and usually already exists; and
- an actual operating licence: this authorisation is issued to a natural person, typically to the general manager of the hotel.

Are all these authorisations granted and in force? It is advisable to check whether all periodic fire safety tests, regular inspections and food controls, etc have been passed and all reports are available.

Environment, ESG

An increasingly important issue is the compliance with environmental protection regulations and ESG guidelines. Many aspects of a hotel are subject to particular scrutiny: heating systems, electricity and water consumption (eg, laundry), alternative energy sources, waste disposal, certifications, existing or planned sustainability measures, connection to public transport, etc. These aspects can be crucial for the assessment by financing banks and for the calculation of future investment needs.

Economic viability of the hotel

Last but not least, the economic viability of a hotel is relevant to a buyer as well. In order to examine the profitability, the buyer must be familiar with the key figures of hotels, such as revenue per available room, average room rate, occupancy rate, total revenue, capital expenditures, and adjusted/gross operating profit. Other aspects should also be considered. What is the competitive situation in the region? Is a refurbishment needed? Is an extension possible? How is the hotel being operated? What are the fees or the expected rent? Again, the covid-19 pandemic has shown that hotels are not simple fixed assets, but require the owners, in cooperation with the operator, to actively manage them. This is what makes hotels a special and complex, but even more interesting, asset class.

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Acquisition Financing

Philip Spoerlé and Markus Wolf[1]

Introduction

In the years prior to the outbreak of the covid-19 pandemic there was high demand for acquisition and leveraged finance in Switzerland, which was supported by a notable number of mid-market and larger M&A transactions with significant activity of private equity sponsors based in Germany, France, Switzerland and the United Kingdom. With the outbreak of covid-19, private M&A activity (and, accordingly, the need for related debt financing solutions) in Switzerland decreased. Instead, the focus of many larger Swiss banks shifted to providing emergency financing to enterprises strongly affected by the economic ramifications of the pandemic. However, by the end of 2020, the demand for acquisition financing had increased again, partially spurred by M&A deals that had been put on hold. In 2021 and in the first half of 2022, the number and volume of acquisition finance transactions have again reached, and even exceeded, the levels seen before the start of the pandemic.

Current trends in the Swiss leveraged finance market include the emergence of sustainability-linked loans that employ interest rate ratchets tied to sustainability targets and an increase in direct lending (ie, privately held debt provided by non-bank lenders) for junior debt tranches.

The main players in the Swiss market offering acquisition finance solutions are UBS, Credit Suisse and Zürcher Kantonalbank, which regularly act as lead arrangers in acquisition finance transactions or participate in a club deal structure. In the syndication phase, the arrangers often invite smaller cantonal banks or other local banks to participate in the financing. Small and medium-sized domestic acquisition finance transactions are also regularly financed by a single bank or a small group of finance providers, depending on whether the borrower or sponsor has one or more relationship banks. Larger-scale financings or financings involving a large industrial buyer are frequently placed with an international banking syndicate involving names such as BNP Paribas, Deutsche Bank, Citibank, Barclays, HSBC and others. In some instances,

1 Philip Spoerlé is a partner at Niederer Kraft Frey Ltd and Markus Wolf is a partner at Baker McKenzie.

such financings are also arranged out of London or, if there is a US angle, New York. Larger acquisition finance transactions often include a capital market element such as the issuance of a high-yield bond that can either be used as a take-out instrument or be issued at the same time as the loan structure is implemented. Super senior and senior structures, where high-yield bonds provide the only term debt in the structure and a super senior revolving credit facility is put in place to provide liquidity, are not frequently seen in the Swiss market.

Transaction structure and documentation

Sources of funds

By their very nature, leveraged acquisition financing arrangements combine an equity and a debt element. The equity element is provided by way of hard equity (share capital, capital contributions) or quasi-equity (such as deeply subordinated shareholder loans).

The structure and the quantum of the debt element mainly depend on the targeted (or accepted) leverage of the target group: in a low or medium leverage scenario, the debt package regularly consists of senior debt that is structured as a term loan facility to finance the purchase price of, and other costs and expenses related to, the acquisition. Traditionally, the term loan facility consists of a non-amortising (bullet) term loan element and an amortising term loan element (the TLA/TLB structure). If the acquisition financing is combined with a (full or partial) refinancing of the financial indebtedness of the target group, the bidder's existing debt, or if it is required to satisfy the working capital needs at the level of the target group, the financing will be supplemented by a working capital piece that takes the form of a revolving credit facility. Frequently, a portion of the revolving credit facility can be utilised for letters of credit, bank guarantees or overdrafts under ancillary facility arrangements. In a high leverage scenario, further layers of second lien senior or junior debt will be added. Such debt can take the form of mezzanine loan or high-yield bond instruments. Junior debt may also include a payment-in-kind element which provides that there will be no interest payments until the maturity of the principal.

As a pre-condition for the financing, the financing providers usually require evidence that a certain minimum amount of equity or quasi-equity (ie, subordinated shareholder loans) has been injected into the target group or that the target group has a minimum economic equity. Furthermore, sponsors may also be required to provide evidence that the target group has a certain amount of cash or cash equivalents or available credit limits under long-term committed credit facilities in order to demonstrate that the target group has sufficient liquidity to finance its ongoing activities. This may be of particular relevance in structures where the financing package does not include a working capital facility.

Legal framework

Switzerland has not enacted any specific primary legislation covering acquisition finance or leveraged finance transactions. Instead, such transactions are structured within the general legal framework. Applicable legislation for lending transactions includes the Swiss Code of Obligations, which governs the granting of loans and the taking of certain security interest such as security assignments, as well as the Swiss Civil Code, which governs the establishment of share pledges, mortgages and other security. Furthermore, professional lenders are subject to applicable anti-money laundering, know-your-customer and similar regulations. Special rules apply for public takeover offers with respect to companies listed on a Swiss stock exchange (see 'Public takeover bids').

Also, with the exception of consumer credits where special rules apply, lending by foreign banks into Switzerland on a strict cross-border basis does currently not require any licence under Swiss banking laws and is not subject to the supervision of the Swiss Financial Market Supervisory Authority (FINMA). However, certain restrictions may become applicable where security is taken over real estate in Switzerland that is not used for commercial purposes. While the Swiss inbound cross-border regime for financial services is generally liberal, licence and other regulatory requirements may apply if employees of a foreign bank are physically present in Switzerland (eg, because of frequent travel to Switzerland) or if local infrastructure is used. Finally, the granting of loans in Switzerland or to persons in Switzerland for the purpose of financing transactions with financial instruments qualifies as a financial service according to the Swiss Federal Act on Financial Services (FinSA). In certain instances, it may not be entirely clear whether a traditional acquisition finance transaction would also be covered by the FinSA. If this were the case, the relevant lenders would have to comply with the requirements for the provision of financial services under the FinSA, which include code of conduct rules, organisational requirements, the duty to register with a register of client advisers and the duty to affiliate to an ombudsman's office. Whereas this is not an issue for Swiss banks (who fulfil all of these requirements), it may be worth taking a closer look if certain lenders are foreign banks or debt funds.

Documentation

Larger acquisition finance transactions with a value of more than 30 million Swiss francs (or its equivalent) are usually documented on the basis of the Loan Market Association (LMA) recommended forms of facilities agreements for leveraged acquisition finance transactions. Strong borrowers or sponsors may manage to have the transaction documented under the LMA recommended form of investment grade documentation or to push the leveraged documentation more towards the investment grade standard by reducing the number of restrictions and obligations of the borrower and the target group under the finance documents. For smaller transactions and bridge financings, major Swiss banks also frequently use their own standard bilateral facility documentation, supplemented by drafting that caters for the specific acquisition context. Finally, if the syndicate consists only of Swiss banks, the parties often agree to reduce the complexity of the documentation by eliminating certain elements or optionalities provided for in the LMA's suite of leveraged documents. The relevant facilities agreements are often referred to as 'Swiss LMA Light' facilities agreements in the Swiss market.

At the point in time the acquirer or sponsor has to submit a binding offer for the acquisition, usually a commitment letter for the financing will be in place. This letter is often based on the LMA recommended forms of mandate letter (best efforts or underwritten) or another standard established by the relevant arrangers. Depending on the negotiation power of the acquirer, it may also be possible that the seller accepts a highly confident letter issued by the arranger. In some cases, bids are backed by financing that is already fully documented. Stapled financing arrangements (ie, financing packages that are arranged by sellers and offered to potential purchasers) are rarely seen in the Swiss market.

Acquisition financings that are arranged by Swiss banks or provided by a club of Swiss banks are typically documented under a Swiss law-governed credit facilities agreement. The vast majority of financings that exceed an amount of 20 million Swiss francs (or its equivalent) are documented under an agreement in the English language. The main reason for this is that in such cases the (future) syndicate may also include lenders from non-German-speaking jurisdictions and that the lenders want to avoid having an additional restriction for future transfers of their exposure, which is likely to be the case if the finance documents are in German. Further, the LMA recommended forms in the English language offer widely accepted drafting for standard provisions, which makes negotiations more efficient. However, in cases where the syndicate includes smaller cantonal banks or other local banks or where the borrower has a specific preference for an agreement in the German language, the transaction may also be documented in German.

Incremental (or accordion) facilities and extension options

In the borrower-friendly environment of the past years, documentary features have emerged in the Swiss leveraged finance space that afford borrowers some flexibility regarding the size and the tenor of the financing. The most common features are incremental facilities (also referred to as 'accordion' facilities because the total commitments will expand if incremental debt is incurred) and extension options.

Under the incremental facility feature, a borrower is given the flexibility to incur, subject to meeting certain pre-agreed parameters, additional credit facility commitments. These will typically benefit from the same guarantee and security package as the existing credit facility commitments. From a borrower's perspective, the advantage of incremental debt is its simplicity: because the incremental feature is pre-baked into the facilities agreement, there is no need to amend the financing documentation. As a result, borrowers benefit from a short execution timetable once the incremental debt has been fully allocated. This makes incremental facilities attractive for the financing of bolt-on acquisitions or capital expenditure.

Extension options provide for a mechanism by which a borrower may effect an extension of the tenor of the financing by pushing out the termination date set out in the facilities agreement. Typically, extension options are uncommitted, meaning that individual lenders may refuse the extension of their commitments. Sometimes, uncommitted extension options are combined with a yank-the-bank feature, pursuant to which the borrower may replace non-extending lenders. Catering to the lenders' internal decision-making procedures required for extending the tenor of financing arrangements and the time required to complete such procedures, facilities agreements usually provide for a particular period prior to the original termination date during which an extension option may be exercised.

Events of default and clean-ups

Swiss-law-governed facilities agreements in acquisition finance transactions typically contain the full (standard) set of events of default as suggested by the LMA recommended forms of facilities agreements for leveraged acquisition finance transactions. In sponsor deals, the sponsor will usually be able to negotiate rather long remedy periods for the failure to comply with general obligations as well as misrepresentations. Furthermore, strong sponsors will usually be granted an equity cure right for breaches of certain financial covenants. The equity cure right requires that a new investment in the form of hard equity or subordinated shareholder loans be made into the borrower group and such new investment will typically be deemed (and must sometimes be applied) to reduce senior debt, whereas an EBITDA cure is rarely accepted. Furthermore, the possibility to exercise the cure right is usually limited to a certain number of cures during the lifetime of the financing and may not be invoked in two consecutive testing periods.

Besides an equity cure right, Swiss law-governed facilities agreements in the leveraged finance context frequently include a clean-up concept that applies to both the financed acquisition as well as permitted future acquisitions. Clean-up features allow the debtor group to 'bring its house in order' following the relevant acquisition and prevent cross-contamination of 'bought defaults'. Clean-up defaults are often limited to financial covenant breaches, breaches of general obligations under the facilities agreement as well as misrepresentations (in each case other than in relation to sanctions and anti-corruption law covenants). It depends on the specific transaction which clean-up period will be accepted by the lenders. In practice, we typically see a clean-up period that is no longer than 30 days after the closing date for the financed acquisition and 30 days after the consummation of any permitted acquisition.

Security structure and guarantor accession

Types of security

The most common types of security taken in leveraged acquisition finance transactions are the following:

- guarantees by material group companies of the acquirer group and, upon accession, the target and material group companies of the target group;
- pledges over shares in the target company and, depending on the transaction, certain material group companies;
- security assignments of certain trade receivables, insurance claims and intragroup claims;
- assignments of claims or rights under the acquisition agreement and related documents (such as due diligence reports); and
- pledges over bank accounts of the acquirer, the target group or both.

In certain cases, security is taken over real estate, which is typically created by way of a pledge or security transfer of mortgage certificates. Fixed charges or floating charges are not available under Swiss law. Short-term bridge financings may also be unsecured, which is particularly the case for borrowers with a strong negotiation position and an acquisition that is seen as a strategic fit by the lenders.

The procedures for the establishment of Swiss-law-governed security interests depend on the form of the security and on the type of asset serving as such. As a general rule, the creation of a security interest over movable assets requires possession of those assets to pass from the security provider to the secured parties or a security agent. No security over movable assets can be created by registration into a public register, with the exception of security over ships and aircraft – two assets that define ownership based on a register entry. Owing to the requirement that the security provider must not have exclusive control over the movable asset used as collateral, security packages will only in very rare cases include any transfer for security purposes or pledge of inventory as this may not only lead to a disruption of the daily business of the security provider but also be hardly manageable for the secured parties or the security agent. In respect of security interests over movable assets (other than ships and aircraft), Swiss law generally does not provide for any approval, filing, registration or similar requirements. A special regime applies to security over real estate: while a pledge or security transfer of (paper) mortgage certificates as such does not require any notarisation or registration, the creation of mortgage certificates and any increase of the nominal amount of mortgage certificates need to be notarised and registered in the land register. Finally, it should be noted that although notification is generally not required under Swiss law to create and perfect a security interest, notification may be advisable in order to prevent third parties (such as third-party debtors in the case of an assignment of receivables or the pledge of bank accounts) from being able to validly discharge their obligations by making payment to the security provider.

There is no tax payable on the grant of a security interest, guarantee or a suretyship under Swiss law except for taxes payable in certain cantons for the creation of mortgages. The fees for notarisation and registration (where required) vary from canton to canton. Typically, the value of the mortgage to be created serves as the basis for the calculation of applicable taxes, notarisation and registration costs.

Accession of target subsidiaries

In the acquisition financing context, the finance documentation usually requires an accession of certain material subsidiaries of the target group to the credit facilities agreement in a capacity as guarantor. In addition, such subsidiaries are typically required to provide transaction security in accordance with certain agreed security principles.

With respect to a Swiss subsidiary of a target, there are no specific waiting periods that must be observed before such subsidiary may grant a guarantee or security. That said, the corporate purpose clause contained in the respective guarantor's or security provider's articles of association may need to be amended to expressly permit the granting of upstream or cross-stream guarantees and security, and further adjustments may need to be made (eg, increasing the nominal amount of mortgage certificates). Therefore, Swiss subsidiaries are typically given a certain period of time following closing of the acquisition before they must provide a guarantee or grant security. If the target group also includes non-Swiss subsidiaries that will act as guarantors, security providers or both, the relevant time period for the granting of security and accession to the finance documentation will usually be longer (normally up to 90 or even 120 calendar days following the closing). In addition, if the guarantee or security package is of an upstream or cross-stream nature, the restrictions set out under 'Limitations' will apply. As a general rule, no restrictions will apply if the guarantee or security package is of a downstream nature.

Limitations

Swiss corporate law does not provide for any specific rules on financial assistance and does not provide for any thin capitalisation or similar rules. However, there are capital maintenance provisions protecting the nominal capital as well as the reserves of Swiss corporations. Based on these provisions, a Swiss corporation may not make any payment to its parent company unless such payment is made:

- as a formal dividend;
- in the course of a formal reduction of the relevant company's share capital; or
- on the basis of an agreement that is made on arm's-length terms.

The same applies to any payments to sister companies. No restrictions apply to downstream payments to a wholly owned subsidiary unless the subsidiary is in financial distress.

It is the prevailing view in Switzerland that the granting of a guarantee or security interest to a third party (eg, a lender under an acquisition facility agreement) for obligations of a parent or a sister company as well as certain other acts having a similar effect (such as, eg, an indemnity or a waiver of rights for the benefit of a parent or a sister company), are subject to the same limitations as an actual payment. This ultimately has the effect that the value of any upstream or cross-stream credit support is limited to the amount the security provider could distribute to its shareholders as a dividend at the time payment is demanded under the guarantee or the security interest is enforced. Payments under any upstream or cross-stream credit support may further have certain tax implications. For example, they may trigger Swiss withholding tax at a current rate of 35 per cent in case they do not satisfy the arm's-length test for tax purposes.

Swiss law does not provide for any whitewash or similar measures to avoid the consequences of an upstream or cross-stream guarantee or security. However, it is standard market practice that the following steps be taken in order to mitigate the imperfections of such credit support arrangements: First, the lenders will usually require that the corporate purpose clause contained in the articles of association of any Swiss security provider explicitly permits the granting of upstream or cross-stream security. Additionally, it is typically ensured that the finance documents and the relevant upstream or cross-stream transactions are properly approved by the competent corporate bodies, which includes an approval by the shareholders' meeting of the respective security provider. Finally, the finance documents usually contain limitation language that addresses the free equity limitation.

Contractual subordination

Under Swiss law, there are two types of contractual subordination. First, there are subordination undertakings pursuant to article 725 paragraph 2 of the Swiss Code of Obligations pursuant to which a creditor subordinates its claims for the benefit of all other creditors of a particular debtor. Second, there are bilateral subordination agreements pursuant to which a creditor subordinates its claims for the benefit of one prior ranking creditor or a group of prior ranking creditors. Subordination arrangements in the context of acquisition finance transactions (eg, in intercreditor agreements between senior lenders and junior lenders, or between primary creditors and intragroup lenders) typically take the form of bilateral subordination agreements.

Subordination undertakings pursuant to article 725 paragraph 2 of the Swiss Code of Obligations should be fully honoured by a liquidator and a bankruptcy administrator as that subordination is disclosed in the debtor's financial accounts. By contrast, bilateral subordination agreements are not reflected in the debtor's financial accounts. Hence, there is a risk that the bilateral subordination will not be honoured by a liquidator or bankruptcy administrator. In order to address this uncertainty, bilateral subordination agreements typically provide that the subordinated creditor assigns its claims in relation to the subordinated debt to the prior ranking creditors. Sometimes, it is stipulated that such assignment will take effect only from the opening of insolvency proceedings over the debtor.

Enforcement

With respect to the enforcement of Swiss-law-governed security interests, it has to be differentiated between private enforcement or realisation proceedings on the one hand and official enforcement proceedings pursuant to Swiss statutory law on the other hand.

If possession of the relevant asset serving as collateral is transferred to the secured parties or a security agent acting on their behalf (which is, eg, the case for a pledge over shares), a private realisation is only permitted if the security provider has consented to this method of enforcement in advance. It is market standard for Swiss-law-governed security agreements to contain such a consent. In case of collateral where legal title to the asset is transferred to the secured parties (which is, eg, the case for an assignment for security purposes of trade receivables, intragroup loans or claims under the acquisition documents), private realisation is the only enforcement method that is available.

In the course of a private realisation, the secured parties (through the security agent) may sell the assets serving as security to a third party or declare to acquire such assets for their own account. Any such transaction must be made for market value. Once the transaction has been effected, the security agent will apply the net proceeds from enforcement towards the discharge of the secured obligations. Any surplus must be turned over to the security provider. The timeline for the enforcement by way of private realisation largely depends on how difficult it is to find a purchaser and to determine the market value of the assets serving as security. For example, if listed shares with a clearly determinable market value serve as collateral, the enforcement may be effected in a couple of days or weeks. By contrast, in the case of shares in privately held companies and, in particular, if the security provider challenges the price applied, the enforcement process may take several months or even years.

If the secured parties choose to enforce by way of official enforcement proceedings, they will have to apply for the commencement of debt collection proceedings with the competent debt collection office. Such proceedings entail multiple stages, some of which require court involvement, and may be rather cumbersome. After the secured parties have progressed through all stages of the debt collection proceedings, the debt collection office will sell the assets serving as collateral in a public auction or, if the security agreement so permits (which is typically the case), by way of a private sale. Once the transaction has been effected, the debt collection office will forward the net enforcement proceeds to the secured parties for application in or towards the discharge of the secured obligations. The debt collection office will pay any surplus directly to the security provider. The enforcement by way of official enforcement proceedings typically takes several months. If the security provider makes use of all the remedies available under the debt collection proceedings, such proceedings may even take several years.

Based on the above, private enforcement will in most circumstances be more favourable for the secured parties than official debt collection proceedings as it is less cumbersome and can be completed rather quickly.

Public takeover bids

Under Swiss law, any public takeover offer requires, among other things, the publication of an offer prospectus. Swiss takeover law provides that the offer prospectus must contain the material information on the financing of the offer as well as confirmation by the independent review body (which is typically a Big Four audit firm) that the bidder has taken all necessary measures to ensure that the funds required for the takeover bid will be available at settlement. In order to have sufficient comfort to issue the required confirmation, the review body usually closely follows the negotiation of the finance documentation (in particular the facility agreement).

According to the Swiss Takeover Board Circular No. 3 (Examination of Public Takeover Offers) dated 26 June 2014 (as amended), the independent review body in particular has to review the creditworthiness of the lender or lenders providing the acquisition financing and those provisions in the finance documentation that enable the lender or lenders to refuse to make available the loan or loans required for the acquisition. As a general rule, such provisions are only permissible if they:

- correspond to a condition in the public takeover offer;
- relate to an essential legal condition with respect to the bidder (such as status, power, authority and change of control);
- relate to the validity of a significant aspect of the acquisition financing (such as the provision of collateral);
- relate to a material breach of contract on the part of the bidder (such as pari passu, negative pledge, merger or non-payment); or
- relate to a significant deterioration of the bidder's ability to pay.

Taxation

Withholding tax

Under Swiss domestic tax laws, there is no withholding tax to be deducted by a Swiss obligor on interest payments to be made under a credit facilities agreement if the 'Swiss non-bank rules' are complied with. These rules provide that:

- the number of finance parties holding a participation or sub-participation in the credit facility that do not qualify as banks in their country of incorporation must not exceed 10 (the 10 non-bank rule); and
- the total number of direct or indirect financial creditors of any Swiss obligor that do not qualify as banks in their country of incorporation must not exceed 20 (the 20 non-bank rule).

A breach of the Swiss non-bank rules may trigger the application of Swiss withholding tax, currently calculated at a rate of 35 per cent. However, if there is an applicable double taxation treaty, the withholding tax may be recoverable by a lender in full or in part.

At the time of writing, a legislative proposal is pending to change the Swiss withholding tax act that would, if and when enacted, result in the abolition of the Swiss non-bank rules.

In addition, interest payments to foreign banks in respect of credits that are secured by mortgages encumbering real estate in Switzerland are in principle subject to a source tax. However, the source tax will, depending on the applicable double taxation treaty, if any, either not be deducted at all, only be deducted at a reduced rate or the amount of the tax will be fully or partially recoverable.

Tax deductibility and thin capitalisation thresholds

As a general rule, interest on debt owed to unrelated parties (eg, bank debt incurred in connection with an acquisition) is fully tax-deductible for Swiss corporate income tax purposes. However, as it is not possible to consolidate the accounts of companies in Switzerland for tax purposes (except for VAT purposes), the purchaser (if it is a Swiss company) may only deduct interest on debt incurred to finance the acquisition from its own earnings and not from the earnings of the acquired company. Furthermore, if the purchaser does not have ordinarily taxable income (eg, a holding company benefiting from participation relief on dividend payments), the deduction of financing costs is not effective from a tax point of view.

By contrast, for tax purposes, the deduction of interest payments on loans from related parties may be limited by the application of the Swiss thin capitalisation rules. According to regulations issued by the Federal Tax Administration, there is a maximum borrowing ratio prescribed for each class of assets. For example, cash or bank accounts can be leveraged by up to 100 per cent of their value, short-term assets by up to 85 per cent of their value, intellectual property by up to 70 per cent of its value and participations by up to 70 per cent of their value. The aggregate amount of borrowings calculated by applying those borrowing ratios basically corresponds to the maximum aggregate amount of debt that a Swiss company is allowed to have with regard to related parties to remain compliant with the limits permitted by the Federal Tax Administration. When calculating the maximum leverage, the relevant assets may be valued at their fair market value.

If the debts on the balance sheet exceed the limits allowed by the Federal Tax Administration, the excess portion of the debt incurred from related parties is considered hidden equity and interest paid on the excessive portion of the debt might be disallowed as a deductible expense.

The arm's-length principle should be respected in any case where the lender and the borrower are related parties for Swiss tax purposes. In this context it should be mentioned that the Federal Tax Administration publishes safe haven interest rates on an annual basis.

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Labour and Employment

Manuel Werder and Valerie Meyer Bahar[1]

Transfer and dismissal of employees

Overview

In Swiss M&A transactions, there are two key issues with regard to labour and employment law:

- the transfer of the target's employees to the buyer, if the two companies are to be merged or otherwise combined; and
- the dismissal of the target's (or both the target's and the buyer's) employees, if the M&A transaction is to be combined with a restructuring of the workforce of the new company.

Transfer of employees

The applicable regime for the transfer of employees depends on whether the transaction is structured as a share deal or an asset deal.

Share deals

A mere change in the ownership of the shares in the target does not have an impact on the employment relationships with the target's employees. In share deals, the employment agreements between the target company and its employees are not affected by the transaction and remain in full force and effect.

Under Swiss law, it is generally possible to implement unilateral changes to the terms of the employment agreement to the detriment of the employees, provided certain requirements are met and the notice period is respected when making such changes.

Asset deals

General principle: transfer of all employees

In asset deals that qualify as a transfer of a business undertaking, all employees working for the transferred business and the employment agreements with such employees with all respective

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rights and obligations are transferred to the buyer automatically as a matter of law, unless an employee rejects the transfer. If only a part of a business is transferred (eg, only the manufacturing department, but not the sales department), the same principle applies to all employees who by way of their function belong to the transferred part.

The same principle applies to transactions that are structured as mergers, demergers or transfers of assets in the form of a universal succession according to the Swiss Merger Act.

The seller and the buyer are jointly and severally liable for any claims of the employees that fell due prior to the transfer or that fall due until the date on which the employment relationship could be or is terminated as a result of the refusal of the transfer (see 'Refusal of transfer and termination'). While the seller and the buyer are free to agree on a different cost-bearing regime, this arrangement is only effective between them and does not affect their joint and several liability in relation to the employees.

Procedure: information and consultation obligations

Information obligation

If employees are transferred in an asset deal, merger or demerger, the employees' representatives or, if there is no employees' representation in place, the employees of all involved companies need to be informed about the reason for the transfer and the legal, economic and social consequences of the transfer for the employees.

In the case of a merger, the employees of both companies (ie, the transferring and the surviving company), must be informed.

Consultation obligation

Where measures affecting the employees are envisaged as a result of the transfer, the employees' representatives or, if there is no employees' representation in place, the employees themselves must be consulted in good time before the relevant decisions are taken.

Such measures may include dismissal, change of workplace or other work conditions. The requirement to consult in good time means that there must be sufficient time for a consultation (ie, for the employees to make proposals how such measures might be avoided or their impact mitigated), and for those suggestions to be taken into account by management.

As a rule of thumb, a period of two weeks is considered to be sufficient for the consultation, and there should be some additional days for the management to consider the suggestions, if any. Thus there should ideally be three to four weeks from the time when the employees are first informed to the time when the decision about the transaction is taken by the shareholders' meeting of the parties involved.

Sanction in case of violation of the information and consultation obligation

In the sphere of a mere transfer of employees, there are few sanctions in the case of a violation of the information and consultation obligations, in particular as it will generally not be possible for the employees to establish any claim for damages on such grounds.

However, in the case of mergers, demergers and transfers of assets governed by the Swiss Merger Act, if the information and consultation obligations have not been complied with, the employees' representative may request an injunction to prevent the respective transaction from being registered in the Swiss Registry of Commerce.

Refusal of transfer and termination

The general principle is that all employees and employment relationships are transferred, including employees who are unable to work (eg, because of illness). Any agreement between the seller and the buyer by which the circle of transferred employees is limited is invalid as a matter of law (no cherry-picking).

However, the employee may refuse to transfer to the new employer on the basis of the information received by way of the information obligation, or any of the involved companies may terminate the employment relationship:

- Refusal: if an employee refuses the transfer, the employment agreement of the employee is terminated pursuant to the statutory (not contractual) notice period.[2]
- Termination: the mandatory transfer of all employees in the case of an asset deal does not affect the target's or, after the transfer, the new employer's right to terminate the employment relationship with its employees in accordance with the terms of the employment agreement, in particular the contractual (or statutory) notice period (see also 'Dismissal of employees').

However, in view of the mandatory and automatic transfer of all employment relationships, employees who have refused the transfer, or employees whose employment relationship has been terminated by the target, will also transfer to the new entity if the applicable notice period has not yet expired at the time of the transfer, and the (new) employer is obliged to perform the employment contract until the date the employment contract effectively ends.

The parties to an M&A transaction often wish to avoid the transfer of employees who either refused to transfer, or whose employment relationship has been terminated. This can either be achieved by planning sufficient time from the initial information and consultation and the issue of notices until the transfer date, or by entering into mutual termination agreements with the employees, providing for an earlier termination date and compensating the employees accordingly.

Finally, while the terms of the employment relationship remain unchanged by the transfer, the buyer may seek to change such terms after the transfer. An exception to this rule applies with regard to collective bargaining agreements, which continue to remain in force for a year, unless they end earlier.

Dismissal of employees

Mass dismissals

The dismissal rights of the employer are not affected by an M&A transaction. As is the case outside of an M&A situation, if a significant number of employees are to be dismissed, the specific rules governing mass dismissals must be adhered to:

- mass dismissals are defined as notices of dismissal given by the employer to employees of a business within 30 days of each other for reasons not pertaining personally to the employees and that affect:

2 Seven days during the probation period, one month during the first year of service, two months in the second to ninth years of service and three months thereafter, all such notice periods to expire at the end of a calendar month.

- at least 10 employees in a business normally employing more than 20 and fewer than 100 employees;
- at least 10 per cent of the employees of a business normally employing at least 100 and fewer than 300 employees; or
- at least 30 employees in a business normally employing at least 300 employees.

The goal of the mass dismissal proceeding is primarily the protection of the labour market against a sudden rise in unemployment in a certain regional area and segment of the labour market. It is thus, as a matter of principle, permitted to stagger dismissals over a longer period in order not to reach the thresholds set out above in individual 30-day periods, which trigger the mass dismissal proceedings.

Once an employer intends to make mass dismissals, it has an information and consultation obligation: the employer must furnish the employees' representative or, where there is none, the employees themselves with all appropriate information and, in any event, with the reasons for the mass dismissals, the number of employees to whom notice may be given, the number of employees normally employed and the period during which the employer plans to issue the notices of termination.

The employees must then be consulted, namely, at least be given the opportunity to formulate proposals on how to avoid such dismissals or limit their number and how to mitigate their consequences. Such information must then be considered by the employer before deciding on whether to move ahead and issuing the notices of termination. In order to comply with the requirements, the employees should be given about two weeks to consult, and the employer then has to review their suggestions, if any, before deciding on the mass dismissal. A violation of this consultation obligation may render the notices of termination issued in the realm of the mass dismissal abusive, entitling the employee to a penalty payment equal to up to two monthly salaries.

The cantonal employment office has to be notified of any intended mass dismissal. The notification must include the information given to the employees as well as the results of their consultation, and is a prerequisite for the subsequent dismissals to be valid.

The notices given in a mass dismissal are subject to the terms of the employment agreement and Swiss law, in particular with regard to the applicable notice period.

Social plan

A social plan is an agreement by which an employer and employees set out measures to avoid dismissals or to reduce their numbers and mitigate their effects.

The employer is obliged to enter into negotiations with the goal of establishing a social plan if it normally employs at least 250 employees and intends to make at least 30 employees redundant for reasons that have no connection with them personally within a 30-day period. Dismissals over a longer period that are based on the same operational or corporate decision are counted together.

If there is an obligation to negotiate, the employer must, if there is a collective bargaining agreement in place, negotiate with the employee associations that are party to such agreement. If there is no collective bargaining agreement, the negotiation will take place with the employees' representative or, if there is none, directly with the employees.

If no agreement can be found between the parties, an arbitral tribunal is appointed, which will issue the social plan in the form of a binding arbitral award.

HR due diligence

The following is a selection of HR legal topics that typically arise in Swiss M&A transactions and consequently form part of HR due diligence and contractual clauses in transaction agreements.

Management retention

In general

In a broad number of transactions, in particular in private equity and venture capital transactions, management retention is of utmost importance. The buyer often achieves this goal by payment of retention boni or the allocation of shares in the target or the buyer.

The granting of a participation typically results in a variety of corporate law issues relating to the allocated shares, such as transfer restrictions, call options, tag-along and drag-along rights, etc, which are typically addressed in a shareholders' agreement.

Non-compete obligations

The legal due diligence typically includes the verification whether the target company's key employees are bound by contractual non-competition and non-solicitation clauses, and whether the enforceability of such clauses has been strengthened by a contractual penalty.

Non-compete clauses may be found in employment agreements or shareholder agreements.

Non-compete obligations under Swiss law

During the term of the employment, the obligation not to compete with the employer is inherent in the employee's duty of loyalty, which as a matter of law forms part of any employment arrangement.

Employees working full-time for an employer are therefore in general restricted from accepting any employment function with any other employer and are in particular obliged to refrain from running a competing business for their own account or from working for or participating in such a business. Part-time employees may work for other employers if such activity does not create any damage to the employer, in particular if the employer is not a competitor to the existing employer or if the activity is not harmful in any way to the existing employer.

After the term of the employment, the employee has, as a matter of principle, no obligation not to compete with the employer. An obligation to refrain from engaging in any activity that competes with the employer for a certain period of time after the end of the employment relationship must be explicitly agreed between the employer and the employee in writing, and is subject to a variety of legal restrictions.

Limitations of non-compete clauses

Swiss law sets strict prerequisites in order for contractual non-compete obligations entered into in the realm of an employment relationship to be valid, based on the principle that employees must be permitted to change their employer and to continue earning their living without a non-compete obligation excessively compromising their future economic activity. The enforcement of a non-compete obligation is thus often difficult. The following applies:

- first, the prohibition of competition is binding only where the employee has, in the course of the employment relationship, gained knowledge of the employer's clientele or manufacturing and trade secrets and where the use of such knowledge might cause the employer substantial harm; and
- second, the prohibition must be appropriately restricted with regard to time, place and scope. Typical post-contractual non-compete obligations are entered into for a period of 12 months (by law, the maximum length is three years), for the region or country where the employee was active, and limited to the activities or field of business of the employer in which the employee was involved.

Clauses providing for an excessive prohibition of competition may be restricted by a court at its discretion, taking into account all relevant circumstances.

While no compensation must be paid in order for the non-compete obligation to be valid, payment of such consideration will also increase the likelihood that a far-reaching non-compete obligation would be upheld by a court, as such compensation eases the financial impact the obligation not to compete has on the employee.

Consequences of breach

An employee who infringes the non-compete undertaking is liable to compensate the employer for any damage suffered as a result of such competing activity. The burden of proof that such damage indeed occurred is borne by the employer. In practice, it is often difficult – if not outright impossible – to establish the monetary damage suffered by the employer as well as a line of causation (adequate causation) between the competing activity and any damage.

Therefore, employment agreements often foresee that an infringement of the non-compete undertaking is sanctioned by the obligation of the employee to pay a contractual penalty. To allow for the maximum protection of the employer, such a contractual penalty clause should provide:

- that actual damages are owed in addition to the contractual penalty;
- for the non-competition undertaking to remain in place even if the employee has paid the contractual penalty; and
- that the employer may, in addition to the agreed contractual penalty and any further damages, ask for specific performance and insist that the behaviour that constituted a breach of the employment contract be discontinued.

Extinguishment of non-compete clauses

If the employer terminates the employment agreement, a non-compete agreement in the contract of employment is extinguished. An exception applies – and the non-compete obligation remains in force – if the termination was based on a valid reason attributable to the employee. If the employee terminates the employment agreement, the non-compete obligation remains in force, unless his or her dismissal is for a valid reason that is attributable to the employer.

If the non-compete obligation is extinguished owing to termination by the employer, it is possible to agree on a new non-compete obligation (eg, in a termination agreement). However, at this time, the employee will normally only assume such an obligation if he or she is compensated for it.

Finally, non-compete undertakings are extinguished once the employer demonstrably no longer has a substantial interest in their continuation.

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Transaction boni

In the course of an M&A transaction, transaction boni are often promised to the management of the target company or another group of involved employees as compensation for their extraordinary efforts in the context of the preparation and implementation of the transaction.

Such transaction boni are typically promised and paid by the target company. Depending on the transaction structure and the timing of the payment, this may result in the buyer economically bearing the payments. Furthermore, although the target company may be the formal employer, the extraordinary services are typically rendered for the ultimate benefit of the seller, who may be different from the employer. This raises complex intercompany dealing, accounting, tax and pensions issues.

M&A agreements therefore typically contain representations that the target company has not promised transaction boni to its employees or to third parties.

Contractual provisions

Notice periods

Contractual notice periods of more than three months or fixed-term contracts without the possibility of early termination may negatively affect the possibility of dismissing employees of the target company, and should thus be identified.

Severance payments and golden parachutes

Provisions on severance payments (such as golden parachutes) included in employment contracts may render the dismissal of employees expensive and therefore negatively affect the target company's legal right to terminate employment agreements in accordance with the applicable notice periods. M&A agreements often contain representations that the employment agreements of the target company do not contain such provisions.

In listed companies, such severance payments or golden parachutes for management are prohibited as a matter of Swiss law, notwithstanding any contractual agreement to the contrary.

Bonus provisions

Bonus provisions typically form part of the HR due diligence in order to determine whether the target company's HR budget is aligned with its contractual legal obligations.

Swiss law differentiates between discretionary bonus payments that are paid at will by the employer, and bonus payments that form part of the compensation to which the employee is contractually entitled. Whether a bonus belongs in one or the other category depends on the contractual agreement between the parties, the communication and the handling of such payments in the past, and the amount of the bonus relative to the fixed salary.

Bonus provisions are often the source of disputes, in particular in dismissal situations, and therefore require proper analysis.

Intellectual property clauses

In the context of the acquisition of a target company whose business model heavily depends on intellectual property rights, it is important to verify whether the target company owns all intellectual property rights that it needs for the operation of its business and whether the target company may owe any compensation to any of its employees for inventions and designs potentially produced outside the performance of their contractual obligations.

The pertinent rules under Swiss law are the following. As a matter of law, inventions and designs produced by the employee alone or in collaboration with others in the course of his or her work for the employer and in performance of his or her contractual obligations belong to the employer, whether or not they are protected.

By contrast, inventions and designs produced by the employee in the course of his or her work for the employer but not in performance of his or her contractual obligations belong to the employee. However, in the employment agreement the employer may reserve the right to acquire such inventions and designs against compensation. According to applicable law, the compensation must be appropriate with regard to all relevant circumstances and in particular the economic value of the invention or design, the degree to which the employer contributed, any reliance on other staff and on the employer's facilities, the expenses incurred by the employee and his or her position in the company.

An employee who produces an invention or design outside the performance of his or her contractual obligations must notify the employer thereof in writing, and the employer must inform the employee within six months if it wishes to acquire the invention or design or release it to the employee.

Terms of employment

Time recording, overtime and excess hours

Swiss public law governs the working time of employees as well as the admissibility and compensation of overtime work, work at night, at weekends and on public holidays. These rules apply to all employees, with the exception of top management.

In order to ensure compliance with such laws, employers in Switzerland are obliged to account for the working hours of the employees. This requires the introduction of a time recording system and working time regulations, setting out the general obligations and principles concerning working time and the recording of working time and absences. The existence of the recording system and working time regulations typically forms part of the legal due diligence.

As a matter of principle, the performance of overtime and excess hours must be paid out with a 25 per cent wage supplement. However, the employer and the employee may agree in writing that the performance of overtime and up to 60 excess hours per year may be compensated by the monthly salary. Furthermore, the parties may agree that overtime work and excess hours be compensated by time off in lieu, or be paid out without a wage supplement. The compensation of overtime work and excess hours may have a significant impact on the payroll costs of the target. Furthermore, accrued overtime and excess hours typically form part of the legal due diligence because of the respective accrued payment obligations of the target company.

Policies and regulations; collective bargaining agreements

In the context of due diligence, the existence of policies and regulations required by law and best practice rules is typically verified, for example, for the reimbursement of expenses (these regulations are also important from a tax perspective), data protection, use of electronic communication, confidentiality undertakings and prevention of insider trading, non-discrimination and prevention of sexual harassment, etc. The absence of such regulations may expose the target company to liability or sanctions.

Furthermore, a part of legal due diligence should review whether the target company's employees fall within the scope of a collective bargaining agreement, which may contain terms that apply in addition to the terms of the employment agreement, usually to the advantage of the employees.

Collective bargaining agreements, as well as social plans (eg, owing to past restructurings), may also contain commitments by the employer with regard to the employees or restrictions on the employer's contractual right to terminate employment relationships, and thus may have an impact on the profitability of the target company.

Health and safety laws

Swiss law requires the employer to safeguard the employee's personality rights, personal safety and health and integrity, and ensure that proper moral standards are maintained. The employer must take all measures that by experience are necessary, feasible using the latest technology and appropriate to the particular circumstances of the workplace, provided such measures may reasonably be expected in the light of each specific employment relationship and the nature of the work.

Depending on the industry in which the target company is active, the law, collective bargaining agreements or industry standards may require the employer to implement specific health and safety protections.

Freelancers and consultants

Under Swiss social security law, whether an individual or a company controlled by an individual legally qualifies as an external service provider or employee depends on the circumstances of the individual case and not the designation of the contractual relationship.

In particular, if an individual is subject to the directions of the principal and integrated in the organisation of the principal, he or she may qualify as an employee notwithstanding the fact that the underlying agreement is structured as consultancy, mandate or other agreement implying the independent provision of services.

Such requalification of freelancers or consultants exposes the target company to potential pension payment obligations as well as the general obligations of an employer (eg, with regard to holidays, continued salary payments in case of illness or accidents and dismissal) and thus may lead to significant payment obligations.

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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 (ie, 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 12 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.

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. The most 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

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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. The Swiss withholding tax regime may, however, soon be partly remodelled with respect to interest (see 'Contemplated Swiss withholding tax and securities transfer tax reform').

Stamp duties

Issuance stamp duty

The issuance of new share capital as well as any contributions into the reserves of a 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 Swiss francs received in the context of a recapitalisation, to the extent that the contribution eliminates losses in the balance sheet).

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:

- 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 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 certificates or

0.3 per cent for foreign certificates) (half of the tax for each party that does not identify itself as a securities dealer or as an exempt party).

The impact of the first decision may remain limited since it caused an intended change to the law adopted by the Swiss parliament in December 2021, which may introduce in most cases an exemption from securities transfer tax for the purchase and sale, as well as the intermediation in the purchase and sale, of Swiss or foreign shares representing at least 10 per cent of a company's share capital by a Swiss company qualifying as securities dealer due to its holding of significant securities (see 'Contemplated Swiss withholding tax and securities transfer tax reform').

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. 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.

Contemplated Swiss withholding tax and securities transfer tax reform

On 17 December 2021, the Swiss parliament adopted a reform concerning the Swiss Withholding Tax Act and securities transfer tax. The reform foresees the abolition of Swiss withholding tax on interest payments by Swiss debtors (ie, including interest payments on newly issued bonds, but not including interest on current accounts of Swiss resident individuals with Swiss banks), as well as the abolition of the securities transfer tax on domestic bonds.

As already mentioned, the purchase and sale of participations in domestic or foreign companies is currently subject to a securities transfer tax of 0.15 per cent or 0.3 per cent, respectively, if a Swiss securities dealer that qualifies as such due to its holding of significant securities acts as a party or as an intermediary. With the reform, the brokerage as well as the purchase and sale of participations of 10 per cent or more in a Swiss or foreign company's share capital shall be exempt from securities transfer tax if the participation qualifies as fixed assets as defined in article 960d CO.

The contemplated Swiss withholding tax reform is a welcomed step to strengthen the Swiss capital market, as Swiss legal entities as well as non-Swiss investors would not suffer potential Swiss withholding tax on interest payments from Swiss debtors (eg, a Swiss bond). It is accommodated by the abolition of Swiss securities transfer tax on Swiss bonds, which makes it more attractive to purchase Swiss bonds over a Swiss securities dealer, as well as the mentioned abolition of the securities transfer tax on the sale of participations. However, a referendum has been filed against the reform, so that it will be put to a vote in autumn 2022. The outcome of the vote is still uncertain. If approved by voters, the reform would apply from the beginning of 2023 (for the abolition of Swiss withholding tax in the areas mentioned; for the other parts of the reform, the Swiss Federal Council may determine the entry into force).

In addition, the Swiss Federal Council approved a reform proposal for the withholding tax ordinance, which concerns the domestic notification procedure (instead of the withholding and reclaim and refund procedure) on dividend distributions by a Swiss company to its Swiss parent company. The relevant participation quota will be reduced from 20 per cent to 10 per cent and the notification procedure can be applied by Swiss companies, foundations or associations as shareholders (instead of only corporations as at present).

Recent changes relevant for financial institutions

The prolongation of the withholding exemption on interest paid on 'coco-bonds' or write-off bonds, respectively, until 31 December 2026 keeps these instruments attractive to foreign investors. The planned withholding tax reform (mentioned above) will further contribute to the attractiveness of the Swiss capital market and also make other Swiss bonds attractive to corporate investors and will lead to attractive new business opportunities for Swiss financial institutions.

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:

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). The amortisation period may also be shorter or longer, depending on the expected lifetime of the respective intangible.

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

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 or 2.5 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, sellers generally prefer a share deal owing to the applicability of the participation relief (federal and cantonal or communal level). Corporate sellers may benefit from participation relief 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 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 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 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.

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.

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 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.

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 – it is required that:

- the company performs services in the market or towards affiliated entities;
- the company has its own personnel; and
- the personnel expenses are appropriate, that is, 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
- 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. This court decision brings new possibilities for pre-deal structuring for mixed holding companies, that is, it should be sufficient for tax neutrality if one participation of over 50 per cent in an operationally active Swiss 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 listed companies – see above). The Swiss Federal Tax Authority has, 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 cases 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 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 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). The tightened-up practice is especially relevant for investments by private equity funds.

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 (which would become obsolete with the planned withholding tax reform, as mentioned above), 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. With the planned withholding tax reform mentioned above, we expect that acquisition financing to a Swiss company will become more attractive. 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. The Federal Tax Authority annually publishes safe haven maximum and minimum interest rates for intercompany loans. The safe haven rates are quite low, but 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

Novartis sells its Roche stake

On 3 November 2021, Novartis agreed to sell 53.3 million Roche bearer shares in a bilateral transaction to Roche for a consideration of US$20.7 billion. Novartis had acquired the stake between 2001 and 2003 for approximately US$5 billion. The investment has delivered dividends in excess of US$6 billion to date.

CSL Limited acquires all shares in Vifor Pharma Ltd

On 14 December 2021, global biotechnology leader CSL Limited announced a tender offer for all shares in Vifor Pharma Ltd, a global speciality pharmaceutical company with leadership in iron deficiency, nephrology and cardio-renal therapies. The offer values Vifor Pharma at US$11.7 billion.

Nestlé sells parts of its L'Oreal stake

On 7 December 2021, Nestlé sold part of its stake in L'Oreal back to the cosmetics manufacturer for US£11.76 billion. Nestlé will own only 20.1 per cent of the French company after selling 22.3 million L'Oréal shares.

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. If the foreign company to be merged with a Swiss company has hidden reserves, generally no step-up of the income tax values for Swiss tax purposes was available since tax followed the accounting treatment. However, 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. 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 asset 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 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. 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 within five years of a quasi-merger.

Landmark transactions

Most cross-border transactions (into Switzerland) have happened over the past 10 years and were structured as quasi-mergers. 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. In the past five years or so, many relocations or inbound transfers have covered offshore entities.

Recently, Swiss companies have been taken over in de-SPAC transactions by listed special purchase acquisition companies (SPAC). After the acquisition of Swiss-based Global Blue group by the SPAC Far Point Acquisition Company in 2020, another de-SPAC transaction involved Roivant Sciences. It merged with Montes Archimedes Acquisition Corporation (MAAC), a SPAC. Roivant had an initial market capitalisation of US$7.3 billion following the merger. The transaction delivered up to US$611 million of gross proceeds to fund current development and discovery programmes through the contribution of up to US$411 million previously held in MAAC's trust account, and a US$200 million private placement priced at US$10 per share.

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 by making use of exemptions for reorganisations (eg, certain share contributions);
- limited interest deductibility for intragroup financing owing to thin capitalisation limitations and low safe-haven interest rates;
- Swiss 10/20 Non-Bank-Rules to avoid 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; 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. This rule would become obsolete with the planned withholding tax reform;

- 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 the extended international transposition) 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.

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 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; and
- 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).

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 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 securities dealer – if the evidence is not provided within a short time frame, 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.

The latest tax reform and the reduction of income and capital tax rates by cantons, further increased the attractiveness of Switzerland as a tax jurisdiction. The lower tax rates have an impact on valuation models in M&A transactions, for instance, for post-tax cashflow, but also the value of tax losses and the valuation of transitional measures (eg, separate cantonal tax rate until 2024 for certain income). The impact of potential future developments at the international level (eg, Pillar One and Pillar Two of the OECD) 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.

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Post-Merger Integration

Petra Hanselmann and Pascal Richard[1]

Introduction

Successful M&A transactions need to deliver the value expected by the buyer when doing the acquisition. Poor performance in dealing with post-merger integration[2] is often the reason why acquisitions do not realise their full potential. Bringing together businesses with different cultures and integrating different management structures, IT systems and trading relationships often proves very challenging, in particular in a multinational environment. Experience shows that effectively managing the post-acquisition integration phase by developing a robust integration plan and effective implementation process is of paramount importance for the overall success of an M&A transaction.

A number of legal aspects frequently arise during integrations. In this chapter, we outline the typical process for the development of a post-acquisition integration plan and summarise some of the most common legal aspects to be taken into consideration in post-merger integration projects from a Swiss legal perspective.

Integration planning

Starting integration planning early – even before the signing of the transaction – allows a faster and more efficient implementation of the integration. The main phases of an integration are typically structured as follows:

- Programme set-up: the set-up of a robust integration programme is crucial as it will avoid later issues and problems in the integration process. An appropriate programme design and structure facilitates an efficient integration programme. In particular, careful consideration should be given to the appointment of an integration director. As the integration process is a heavy-change management exercise typically affecting the personal interests and jobs of many employees, it is recommended that the selected integration director is an

1 Petra Hanselmann and Pascal Richard are partners at Pestalozzi Attorneys at Law Ltd.
2 Also referred to as post-acquisition integration.

experienced and respected senior personality from the business, who brings credibility and trust to the integration process. Equally important is the establishment of the programme's governance. Strong leaders should be selected to sponsor and manage the integration programme and the individual work streams. The establishment of the principal roles and responsibilities need to take place early in the process.

- Planning phase: the management of the acquiring company must determine the key strategic business objectives and develop an integration blueprint in consideration of the future operating model and the synergy case. The integration blueprint is a strategic and operational document that is established in the early weeks of an integration programme. Its main purpose is to build alignment between the involved parties across a number of key dimensions, such as the strategic and financial rationale for the transaction, the principles and priorities of the integration programme, the degree and pace of integration, critical dates and milestones, organisation design and key appointments. A main part of the value created by an M&A transaction is generated with synergies between the two businesses. During the early stage of the transaction, a synergy case is typically prepared with a top-down approach. During the integration process, the synergy case needs to be bottom-up developed and validated. A small working team should validate the defined sources of synergy benefit (cost synergies) and identify new opportunities for increased return (revenue synergies) as early as possible.
- Integration and implementation: based on the integration blueprint, detailed step lists are created for the individual steps in each workstream and jurisdiction indicating the documents required and the timing of each individual step. The detailed step lists serve as a basis for the actual implementation process in the various jurisdictions. The management and implementation of the various steps ultimately depends on the size of the integration process, the geographical scope and the steps involved. In the implementation phase, regular status update calls among the various workstreams are typically scheduled to ensure an ongoing smooth process and to identify any unexpected issues early in the process. Depending on their size and complexity, post-acquisition integration projects may take several years. The implementation of the integration and the execution of the synergy case benefits from systematic programme reporting and tracking. A special focus needs to be put on managing people issues and communication.

Integration projects usually create a substantial workload to be dealt with. For this reason, specialised external advisors are typically engaged to support the in-house teams. As the in-house team's knowledge is crucial, it is important that outside counsel and the in-house legal team work very closely together to achieve the best result.

Legal aspects

Due diligence

In order to start preparing the integration programme, certain initial information must be available, such as the jurisdictions involved or the tax situation of involved companies, and it needs to be verified, inter alia, if real estate is in place, if works councils are appointed or collective bargaining agreements apply or if contracts with change-of-control clauses exist. Ideally, the information required to start the integration planning relating to the acquired business will already have been collected in the course of the acquisition due diligence. Otherwise, a limited due diligence is typically required at the initial stage of the integration planning process. In addition, it might also be necessary for due diligence to be conducted on the buyer's existing entities involved in the post-acquisition integration in order to identify any potential legal and other issues that might affect the integration process. In particular, in the case of the acquisition of a competitor, it is important that the parties comply with potential antitrust restrictions when sharing information prior to signing or between signing and closing.

Statutory mergers

Overview

A key aspect of the integration process is often the consolidation of several entities in the same jurisdiction so that at the end of the integration process only one entity per jurisdiction remains. Entity consolidation in Switzerland can be achieved either by statutory merger or by an asset transfer with subsequent liquidation. Typically, a merger is less cumbersome than an asset transfer with subsequent liquidation and thus, when it comes to entity consolidations, the preferred method in Switzerland from a legal perspective is a statutory merger.

The merger process in Switzerland is governed in the Swiss Merger Act (SMA). The SMA provides for two types of statutory mergers: merger by way of absorption, whereby an entity is merged into another entity; and merger by way of combination, whereby the merging entities are merged into a newly established entity. In integration situations, merger by way of absorption is the preferred merger form. The merger becomes effective with its registration in the commercial register at the domicile of the surviving entity.[3] Depending on the domicile of the merging entities, the merger documentation must be in German, French or Italian. The merger documentation can be bilingual (for example, German and English) with the official language of the competent commercial register to prevail.

The SMA provides for an ordinary merger procedure and a simplified merger procedure. The simplified merger procedure is applicable in the case of a merger of a wholly owned subsidiary into its parent company or if a company is merged into its sister company.[4] In a simplified procedure, the merging entities, inter alia, are not required to:

- establish a merger report;
- have the merger agreement examined by auditors; or
- submit the merger to their shareholders for approval.

Compared to the ordinary process, the simplified merger procedure in particular saves time and costs for the following reason: if the option of a simplified merger is not available, each shareholder must basically receive a pro rata portion of the shares in the merged entity, which leads to additional cost and timing issues as the exchange ratio must be calculated in advance and confirmed by the auditors in their merger report.[5]

Thus, in order to benefit from the simplified merger procedure in an integration process, as a first step it often becomes necessary that a share ownership structure is created where

3 Article 22 SMA.

4 Article 23 SMA.

5 The calculation of the exchange ratio requires comparable financial information of the merging entities, which might not be available and thus needs to be prepared in advance.

the dissolving entity becomes either a wholly owned direct subsidiary or a sister company of the surviving entity into which it will be merged. It should be noted that the simplified procedure is not applicable in Switzerland in the case of a reverse merger (ie, the merger of the parent into its wholly owned subsidiary). In such situations, the ordinary merger procedure applies.

Documents

In the simplified merger procedure, the following documents are required:

- a board resolution of the members of the board of directors of the merging entities approving the merger;[6]
- a merger agreement between the merging entities setting out the key terms of the merger;[7]
- the (audited) balance sheets of the merging entities;[8] and
- the application to the commercial register of each merging entity.[9]

With the exception of the balance sheets, such documents can be established rather quickly. In cases where additional steps such as a change of directors, a name change or a change of the objects of the surviving entity are implemented, additional documents will be required, depending on the specific steps.

Merger balance sheet

Article 11 SMA provides that all companies involved in a merger need to establish an (audited) balance sheet that must not be older than six months at the date when the merger agreement is signed. If the balance sheet date is older than six months or if material changes have occurred to the financial position of a company involved in the merger, an (audited) interim balance sheet must be established. The relevant balance sheets or the interim balance sheets required for a merger must be audited if the relevant company is subject to an audit. The (audited) balance sheet of the dissolving entity constitutes the merger balance sheet. The merger balance sheet must be attached to the merger agreement, and forms part of the documents to be submitted to the commercial register; in other words, it becomes publicly available.[10] The balance sheet of the surviving entity does not need to be submitted to the commercial register and thus becomes not publicly available. In particular, it is not necessary to provide to the commercial register any pro forma financial statements showing the financial position of the entity after the merger.

The establishment of the audited balance sheets of the merging entities is often a gating item in the integration process. To save costs, a Swiss merger is ideally timed in such a way that the audited year-end financial statements of the merging entities can be used in connection with the merger. In cross-border acquisitions, however, the business year of the acquired company

6 Article 12 SMA.
7 Article 12 SMA.
8 Article 11 SMA.
9 Article 21 SMA.
10 Companies that do not wish to disclose unnecessary information to the public may redact the numbers from the past financial year in the audited balance sheet submitted to the commercial register and should not voluntarily submit the income statement in addition (as only the balance sheet is required from a legal perspective).

group often does not match with the business year of the buyer group, which limits the window in which a merger in Switzerland can be completed based on the year-end financial statements. Thus, the time and cost required to establish (audited) balance sheets in connection with the merger of Swiss entities might be important elements in the overall planning of the integration.

Retroactive effect

A merger in Switzerland can have retroactive effect from a tax and accounting perspective. However, from a tax perspective such retroactive effect is only possible if the merger is registered in the commercial register at the latest within six months of the merger balance sheet date (ie, if the merger balance sheet date is 31 December, the merger must be registered in the competent commercial register on or before 30 June of the following year). Owing to this tax regulation, and given that 31 December is the business year-end date of the majority of Swiss companies, the Swiss commercial registers suffer from a heavy workload particularly at the end of June and the end of December. It is, therefore, recommendable to have the merger documents pre-examined by the competent commercial register early enough in the process to ensure that the merger is ultimately registered in time.

Transfer of contracts

In a statutory Swiss merger, all assets, liabilities, employees and contracts are automatically transferred by operation of law to the surviving entity at the date when the merger is registered in the commercial register.[11] However, contracts of the transferring entities might contain non-assignment, change-of-control or similar clauses that trigger the counterparty's termination rights as a consequence of the merger. It is therefore important that the contracts of the transferring entity are reviewed in advance of an intended merger. In cases where important contracts contain any of the aforementioned clauses, the consent of the counterparty should be obtained prior to the merger being implemented. Change-of-control clauses are often not applicable in any change of control within the same group, which is typically the situation in a post-integration process. Nevertheless, in the case of important contracts it is in any event advisable to double-check. Since it can be time-consuming to obtain the consent of a contractual counterparty, the due diligence exercise on the contracts should be started early in the integration phase to avoid any delays in the overall integration process.

Employees

Under Swiss law, the employees of the dissolving entity are automatically transferred to the surviving entity upon registration of the merger in the competent commercial register.[12] See 'Employment', below, for details of the information and consultation process.

Creditors' notification

The merging entities must notify their creditors by publishing three times a call to the creditors in the Swiss Official Gazette of Commerce and inform them of their right to request sureties for their claims within a three-month period following the effective date of the merger. The

11 Article 22 SMA.

12 Article 333 paragraph 1 of the Swiss Code of Obligations (CO).

creditors' call can be waived if an independent auditor confirms in an auditor's report that there are no claims known or expected that are not covered by the freely distributable equity of the merging entities.[13]

Timing

The overall timing required for the implementation of an intra-group merger in Switzerland depends on the specific situation, but is on average approximately one to four months. Timing is mainly driven by the time required to establish the (audited) balance sheets of the merging entities, the employee notification process and the time required to collect the required signatures.

Asset transfers

Overview

As part of the integration process, assets may need to be transferred from one group entity to another. Swiss law provides for two different processes to implement an asset transfer. An asset transfer can be implemented either by way of an asset transfer in accordance with article 69 et seq SMA, also referred to as a bulk transfer, or an individual asset transfer.

Bulk transfer versus individual asset transfer

In the case of a bulk transfer, all assets (and liabilities, if any) are transferred by operation of law upon registration of the asset transfer in the competent commercial register of the transferring entity.[14] Article 71 SMA requires that the asset transfer agreement must contain a detailed inventory of the assets, liabilities, contracts and employees to be transferred. As the asset transfer agreement must be submitted to the commercial register to be registered, the details of the assets, liabilities, employees and contracts to be transferred become publicly available. While it is possible to anonymise the names of employees and counterparties to contracts, the details of the assets and liabilities, as well as the number of employees and contracts, still remain largely evident.

In the case of an individual asset transfer, assets and liabilities are not transferred by operation of law. Rather, an individual transfer of ownership is required. The steps required depend on the kind of assets being transferred. The benefit of an individual asset transfer is that the transfer contract remains confidential and that no dealing with the commercial register is required. The timing of the process remains fully under the control of the involved entities.

A bulk transfer is particularly beneficial if real estate located in different locations is to be transferred. In such cases, the transfer of the real estate becomes effective at the same time as registration of the asset transfer agreement with the competent commercial register. In comparison, if real estate is transferred by way of an individual asset transfer, each individual piece of real estate must be separately registered in the land register at the place of the real estate in order for the real estate transfer to become effective.

13 Article 25 paragraph 2 SMA.

14 Article 73 SMA.

Transfer of contracts

In the case of an individual asset transfer, the transfer of a contract requires the consent of the counterparty to the respective contract. Depending on the importance of the contracts, such consent can either be obtained explicitly or a counterparty can merely be informed about the intended transfer of the contract. In the latter case, implied consent is assumed if the informed counterparty does not explicitly object to the transfer and continues to perform the contract after it has been notified. Given that in post-acquisition integrations the transfer of contracts is made among companies of ultimately the same group, the 'implied consent' approach is often chosen. However, depending on the situation and the importance of the contract, it can be advisable to work with explicit consent.

In the case of a bulk transfer, it is not entirely clear if (as in the case of a merger) contracts are transferred automatically by operation of law upon registration of the asset transfer in the commercial register or if the consent of the counterparty must be obtained as well. Although majority doctrine in Switzerland is of the opinion that contracts shall transfer automatically upon registration in the commercial register without consent being required, the situation remains unclear as long as no decisive judicial practice exists. Thus, to be on the safe side, it is still recommended to at least notify a contractual counterparty about the intended transfer and to obtain their explicit or at least implied consent.

Employees

If a business or part of a business is transferred, the employees pertaining to the business are automatically transferred to the acquiring company under Swiss law.[15] See 'Employment', below, for details of the information and consultation process.

Cross-border relocations and mergers

Overview

In certain situations, it might be desirable to move the seat of a foreign entity to Switzerland or the seat of a Swiss entity to a foreign jurisdiction without liquidation of the entity (cross-border relocation), or to merge a Swiss-domiciled entity with a foreign domiciled entity or vice versa (cross-border merger). From a Swiss legal perspective, both the relocation or merger out of Switzerland and the relocation or merger from a foreign jurisdiction into Switzerland are basically possible, subject to the respective foreign jurisdiction allowing such cross-border relocations or mergers.

Inbound[16]

From a Swiss legal perspective, the process of the transfer of the seat of a foreign company to Switzerland is rather straightforward. A shareholders' meeting must be held in front of a notary at which the shareholders of the foreign company decide to transfer the seat without liquidation to Switzerland and adopt the new Swiss articles of association. At the shareholders' meeting, evidence must be presented to the notary that:

15 Article 333 paragraph 1 CO.

16 Articles 161 and 163a Swiss international private law act (IPLA); articles 126 and 146 Commercial Register Ordinance (CRO).

1 the foreign company validly exists;
2 the foreign law allows the cross-border relocation;
3 the existing foreign company form may be transferred to a Swiss company form;
4 the board of directors has resolved that the company has decided to move its main business activities to Switzerland; and
5 a Swiss-qualified auditor has confirmed that the capital requirements according to Swiss law are fulfilled; ie, that the company has the required minimum share capital as required under Swiss law[17] and shows no capital loss or over-indebtedness.

Evidence for items (2) and (3) is typically provided in the form of a legal opinion either by the Swiss Institute of Comparative Law in Lausanne or by a foreign lawyer confirming that the mentioned requirements are fulfilled. The legal opinion must be in the official language of the competent commercial register or accompanied by a translation, and all documents must be notarised and apostilled. In order for the auditors to issue their confirmation, an (interim) balance sheet of the relocating entity must be established prior to the relocation and attached to the audit confirmation.

From a Swiss perspective, the transfer of the domicile is completed with the registration of the company in the commercial register at the new domicile of the company in Switzerland. The overall process and timing depends to a large extent on the requirements of the foreign jurisdiction and if certain restructuring measures must be implemented prior to the relocation.[18] If the relocating company must be de-registered from the company register in the foreign jurisdiction, the relocation might lead to the situation that the company is simultaneously registered in two different countries for a certain period. The legal consequences that could arise from such a double registration are not fully clarified. It is therefore advisable to coordinate the relocation process as much as possible in order to keep the double-registration period short.

The process for a cross-border merger into Switzerland is similar to the Swiss statutory merger process. In addition, evidence is required that the foreign company has allowed the cross-border merger to Switzerland and in particular the concept of universal succession (ie, the transfer of all assets, liabilities, contracts and employees by operation of law upon registration in the relevant commercial register in Switzerland).

Outbound[19]

The relocation of the domicile of a Swiss entity to another jurisdiction is mainly driven by the requirements of the foreign jurisdiction. For the Swiss entity to be deleted from the commercial register in Switzerland, evidence must be provided that the foreign law allows the cross-border relocation and that the company continues to exist in the foreign country.[20] Further, an audit

17 100,000 Swiss francs in the case of a limited company (AG) or 20,000 Swiss francs in the case of a limited liability company (GmbH).
18 Such as, for example, a capital increase to meet the minimum share capital requirements under Swiss law.
19 Articles 163 and 163b IPLA and articles 127 and 146 CRO.
20 For example, an excerpt from the commercial register of similar documents evidencing the registration in the foreign jurisdiction.

report must confirm that any creditor claims have been fulfilled or secured or that the creditors agree to the deletion of the company from the commercial register in Switzerland, and the tax authorities must confirm that all taxes have been paid. In the case of a relocation or merger out of Switzerland, the creditors of the Swiss company must be notified three times in the Swiss Official Gazette of Commerce about their right to request security for their claim. The relocation process may in any event only be completed once the mandatory two-month waiting period after the creditors' call has lapsed.

Filing/approval requirements and competition

Two further key topics that parties in transactions will need to consider early on in the process relate to structural concerns – namely, filing and approval requirements (eg, merger control or foreign investment control) upon a change of control in a target business – and behavioural concerns; namely, collusion between competitors.

Filing/approval requirements

Typically, a filing/approval requirement prohibits parties from implementing a transaction before the expiration of the relevant waiting periods after having notified the transaction and before obtaining approval by the competent authorities. In Switzerland, a merger control filing requirement applies based on article 9 of the Swiss Cartel Act of 6 October 1995 (CartA) setting out the requirements for a transaction to be notified with the Swiss Competition Commission (COMCO). If a transaction is subject to merger control approval by COMCO or any other enforcement agencies, the parties are under a standstill obligation between signing and closing. In such a case, parties must refrain from implementing the transaction, for example, by legally transferring the relevant assets. This applies even if the involved parties are not competitors and the relevant actions do not give rise to any antitrust concerns. As a consequence, during the standstill period the parties must avoid any kind of implementation actions. Any such actions that the parties must avoid during the standstill period are commonly referred to as 'gun jumping'. Parties who jump the gun may be subject to fines imposed by enforcement agencies under applicable merger control rules.[21] Further, the parties may be faced with the opening of an ex officio review of the transaction by enforcement agencies and the nullity of the transaction agreement until clearance or rescission of the transaction in the case of prohibition by enforcement agencies under applicable law.[22]

In connection with the integration process, gun jumping includes not only the actions that typically occur at closing and relate to the legal transfer of assets (eg, transfer of shares), but also other actions in connection with the integration planning process by which the transaction is implemented de facto. Therefore, the buyer should not, for example, seek to influence the target's commercial decisions, in particular, neither interfere with the target's customer and supplier relationships nor pricing policies and should also not exercise any influence in relation to dismissing or hiring any employees in the target. It is obvious that the gun-jumping framework creates tension with the restricted actions obligations in the transaction agreement under which

21 eg, article 51 CartA.

22 eg, articles 34 and 35 CartA.

the seller usually commits to refraining from a considerable number of actions without seeking the buyer's consent during the suspension period.

For the integration process, it is thus key that the parties put a process in place that addresses the parties' interest in integrating their businesses while still complying with applicable antitrust laws. An effective integration planning process enables the parties to proceed without fear of violating the rules and should in particular cover the following areas:[23]

- assets: what can be done to plan the combination of assets (as well as protect asset value in the interim);
- products and services: what can and cannot be done in relation to joint business plans, branding and product lines;
- customers and suppliers: what can be communicated to customers and how it should be said;
- personnel: what planning can take place in relation to employees' salaries and pensions; and
- systems (IT, finance, etc): data is a key asset but what kind of systems integration planning is permitted.

Collusion between competitors

Regardless of any filing and approval requirements, if the parties to a transaction are competitors, caution needs to be exercised with respect to exchanging information in connection with the integration process as sharing certain information may infringe applicable antitrust laws. In Switzerland, in cases of infringement, the COMCO may impose fines.[24] Before closing, parties are still considered independent companies that are subject to applicable antitrust rules against collusion. Consequently, the parties must continue to behave like competitors up to closing, which means the parties must not enter into anticompetitive agreements and generally must not exchange any competitively sensitive information (eg, information on commercial strategies, current or prospective pricing, costs, salaries and benefits, margins, capacities, market shares, local sales, territories, customers, suppliers, R&D and technology)[25] prior to closing. To the extent necessary to plan post-closing integration, competitively sensitive information of the target may be disclosed to representatives of the acquirer that are not engaged in the day-to-day operations or marketing strategies concerning any overlapping business (clean team), and must be aggregated or redacted by a clean team before any exchange of such competitively sensitive information effectively takes place.

Employment

General

A further key topic in every post-merger integration exercise is the management of employment matters. The fact that a buyer of a newly acquired business will typically expect cost synergy effects may cause uncertainty for the staff of the acquired business. It is of utmost importance to address human resources considerations as a top priority in post-merger integration planning in order to protect the value of the acquired business. Among legal considerations, this should

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23 *Post-Acquisitions Integration Handbook*, BakerMcKenzie (editor), 2017, p53.

24 Article 49a CartA.

25 Article 5 CartA.

include operational aspects such as retention strategies and the bridging of any cultural differences between the buyer and the acquired business.

Post-merger integration planning will typically deal with merging entities of the newly acquired business, transferring or consolidating assets in the buyer group structure, harmonising the terms and conditions of employment contracts and downsizing the workforce. When taking any such measures, the legal framework protecting employee rights should be carefully taken into consideration.

Merger of entities/transfer of assets

Consolidation of an acquired business may be carried out, inter alia, by way of merging the respective entities of the acquired business or by transferring the relevant business by way of a transfer of assets, liabilities, contracts and employees. Regardless of the method chosen, under article 333 paragraph 1 of the CO, the employment relationships pertaining to the relevant entity or business together with all rights and obligations pass to the acquirer unless the employee rejects the transfer of the employment relationship. In the case of such a rejection, the employment relationship terminates subject to the statutory notice period.[26] There is a mandatory joint and several liability of the transferor and the acquirer with respect to any employee claims that became due and payable before the transfer and after the transfer during the contractually applicable notice period or the statutory notice period in the case of a rejection of the transfer by the employee.[27] If the transferred employment relationships are subject to a collective employment contract, the acquirer must comply with its terms for a period of at least one year unless the collective employment agreement ends before this period by expiration or termination.

Further, the employer has a duty to inform the employee representation or, in its absence, the employees of the reason for the transfer and the legal, social and economic consequences for the employees. Such information has to take place in due time before the completion of the transfer. Typically, the information is made as soon as a transaction is publicly announced. If any measures affecting the employees are planned, the employee representation or, in its absence, the employees, in addition to the information requirement, need to be consulted in due time before the decisions regarding these measures are taken. In the case of a breach of information and consultation rights, the transfer will generally remain legally valid but the employees may be entitled to claim for damages. However, if consultation obligations are breached and employment relationships are transferred by way of a bulk transfer or a merger under the SMA, the employment representation may request that the court blocks the entry of the bulk transfer or the merger in the commercial register.[28]

Harmonising of terms and conditions/downsizing

Upon a transfer of an employment relationship, the terms and conditions of that employment relationship remain in place. However, it will ultimately be in the buyer's interest that the terms and conditions are harmonised and consolidated within the employment framework applicable

26 Depending on the duration of the employment relationship, the statutory notice period ranges between one and three months.

27 Article 333 paragraph 3 CO.

28 Article 28 paragraph 3 and article 77 paragraph 2 SMA.

within the buyer group, thereby integrating the new employees into the work environment and culture of the buyer group. This will inevitably necessitate a change of the terms and conditions of the transferred employment relationships. Generally, under Swiss law, any changes in the employment relationship will require the consent of the employee.

If consent is not provided, the employer will need to formally give notice to the employees that their employment relationships will be terminated within the applicable notice periods or will continue under the new terms and conditions. This may result in a collective dismissal,[29] which triggers additional information and consultation obligations towards the employee representation or, in its absence, the employees. In the case of a collective dismissal, the information and consultation will include stating in writing the reason for the collective dismissal, the number of employees concerned, the number of employees employed and the period in which the dismissals shall be made.[30] The employer is not bound to any proposals made by the employees. However, the employer nevertheless needs to carefully take such proposals into consideration. An infringement of the consultation obligations may generally result in a penalty payment in the amount of a two-month salary on the grounds that the dismissals are viewed as abusive. Further, the employer needs to provide the local labour office with a notification of the collective dismissal and provide a copy of the notification to the employee representation or, in its absence, the employees. The notification will need to include the outcome of the consultation.[31] The concerned employment relationships will terminate 30 days after the notification unless the termination notice regarding the concerned employment relationships becomes effective at a later date owing to any contractual or statutory notice periods. Thus, a failure to give the notification may result in the concerned employment relationships remaining in existence. A consultation aiming at downsizing the staff may be combined with a consultation that is required in the case of a transfer of employment relationships in the context of a merger or a transfer of assets (see above).

29 Article 335d CO.
30 Article 335f CO.
31 Article 335g CO.

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Shareholder Activism in Switzerland

Rashid Bahar, Annette Weber and Valérie Bayard[1]

Introduction

Shareholder activism covers a broad range of activities by shareholders who attempt to exercise significant influence over a listed company's management and operations and, consequently, activist shareholders do not form a homogeneous group: quite to the contrary, they range from large institutional investors who consider that active engagements is a part of their stewardship role, to financiers seeking an opportunity to increase their returns by exercising their voice, to funds specialised in shareholder activism who are on the lookout for companies waiting to be targeted by a campaign. Activists also pursue varying goals: some aim at creating shareholder value and increasing their returns by influencing the strategy (eg, by calling for higher pay-outs), pushing for divestments or, on the other side, opposing a merger or, more indirectly, by effecting a change at board or management level. Others aim at improving the target company's footprint on environmental, social or governance (ESG) issues.

Activists use different channels to achieve their goals: the playbook of a typical activist campaign starts by building a stake that can serve as a platform for their campaign. They will initiate their approach through informal channels by engaging with the board of directors or launching a media campaign to convince the court of public opinion that they deserve to be heard or, more negatively, that the incumbent board and management did not achieve its goals. If they do not succeed, they may escalate by submitting a proposal to a general meeting or, even, seek representation on the board of directors of a company. The specific mode of engagement depends not only on the goals of the shareholder, but also on its stake in the target company. The larger the stake, the more pressure the shareholder will be able to exert on the company. Shareholders with smaller stakes will be limited to informal methods of engagement, making a statement at the general meeting or, possibly, make a proposal, unless they can coalesce with other investors to gain more influence. A large shareholder can request the board to call an

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extraordinary general meeting, obtain representation on the board of directors or blur the line between activism and private equity, by taking control of a company.

In this chapter we provide an overview of the legal framework for shareholder activism in Switzerland and look at some precedents of shareholder activism in Switzerland. We consider in particular how the corporate law reform in 2020,[2] which will enter into force on 1 January 2023, will further facilitate the engagement of shareholders in a Swiss listed company.

Selected Swiss cases of shareholder activism

Historically, Switzerland was largely spared institutionalised shareholder activism. The shareholdings in large companies were often too dispersed to allow activists to step in, while many small and medium-sized listed companies were controlled by a founding family or, at least, tight-knit networks of investors. This is not to say that shareholder actions were unheard of: occasionally, large blockholders sought to influence management. Notably, in the 1990s, financiers tried to shake up management of large banks and Nestlé Ltd before that weathered critical voices at its general meetings after promoting formula over breastfeeding. In the same vein, the Ethos Foundation, a foundation launched in 1997 by two public pension funds to promote socially responsible investment, has sought to position itself as home-grown voice for shareholder engagement. The practical impact of these efforts was, however, more limited than in other jurisdictions.

Since then, the situation has changed. Even if shareholder activism remains less prevalent in Switzerland than in other jurisdictions, activist campaigns have become more frequent and many companies have been forced to respond to them. In 2016, Cevian Capital built up a stake of 6.2 per cent in ABB Ltd and then engaged with its board to unlock shareholder value by divesting its power grid activities. This step eventually led Cevian to take a seat at the board of directors of ABB and actively contribute to the strategy. In 2017, it was the Nestlé's turn to be targeted by Third Point LLC, which was critical of the lack of strategic focus of Nestlé's management. Although Third Point LLC, with 40 million shares worth 3.28 billion Swiss francs, did not purchase a sufficiently large stake to engage formally with Nestlé, its open letters to the chair were sufficient to push Nestlé to react and take a number of steps to increase its buy-back programme and dividend pay-out ratio as well as, ultimately, sell off its skin care division.

In 2017, GAM Holding AG, the Swiss holding company of the GAM investment management group (GAM),attracted the attention of Rudolf Bohli and his investment fund RBR Capital Advisors (RBR).[3] After reaching a stake of approximately 3 per cent in GAM, RBR started to criticise the company's costs structure and, in particular, its compensation policy, demanding far-reaching cost-cutting measures. To obtain support for its ideas, RBR set up a dedicated website under the address www.freegam.ch and subsequently placed several items on the agenda of the upcoming annual general meeting. While these requests were rejected by the general meeting, Bohli and RBR's campaign against GAM's compensation policy was successful, forcing GAM to revise its

2 Obligationenrecht (Aktienrecht), AS 2020 4005 (revCO).

3 Thomas Rautenstrauch/Janis Hummel/Benjamin Bitschnau, *Aktionärsaktivismus bei Schweizer Publikumsgesellschaften*, Hochschule für Wirtschaft Zürich (HWZ) Working Papers Series 2022, p26.

variable compensation package. RBR sold its participation in GAM in the same year, making a great profit.[4]

The activist campaign concerning Clariant AG, a chemical company with registered office in Muttenz, Canton Basel Landschaft (Clariant), was triggered by Clariant's planned merger with its US competitor Huntsman. In 2017, David Winter, David Milestone and Keith Meister joined forces to convince Clariant to reconsider the envisaged merger. Through a partnership named White Tale, the activist group significantly increased its stake in Clariant reaching almost 25 per cent of the company's share capital.[5] Since the dialogue initiated with Clariant's management was not proving successful, White Tale published an open letter addressed to the company's senior management asserting once more their view that the merger would not lead to increased shareholder value and asking them to propose alternatives to the deal, or White Tale would reject the merger at the shareholder meeting. In October 2017, Clariant announced that it had abandoned the merger project. In January 2018, White Tale sold its participation.[6]

In 2019, Panalpina Welttransport (Holding) AG, the holding entity of the Swiss logistics group Panalpina based in Basel (Panalpina), became the target of the Danish company DSV. In a first stage, the takeover failed to get the support of one of its major shareholders, Ernst Göhner Foundation (EGF), owner of 46 per cent of the company's share capital. In response, activist shareholders Cevian Capital and Artisan Partner Fund challenged the limitation of voting rights in Panalpina's articles of association, threatening legal action. First, EGF was exempted from such limitation and kept exercising all its voting rights and, second, the limitation meant a de facto veto right on any takeover proposal, because every acquirer would make its offer subject to the elimination of such limitation, meaning that EGF's consent was indispensable for an offer to succeed.[7] Panalpina and EGF relented and proposed to eliminate the contested provision from the articles of association. However, before the extraordinary general meeting could take place, DSV presented an improved offer that was accepted by the company and supported by all parties, activists included.[8]

Similar to the Clariant case, in 2019, the plan by Sunrise Communications Group AG (Sunrise) to acquire its competitor UPC Switzerland was sabotaged by Sunrise's largest shareholder Freenet, a German mobile operator. In August 2019, Freenet announced that it would vote against the deal, because it considered the agreed price to be too high. Sunrise reacted by modifying the terms of the transaction with UPC; however, a few days before the general meeting, the board of directors considered that there was still no majority to support the deal and called off the general meeting.[9] The termination of the share purchase agreement cost Sunrise the payment of a 50 million Swiss francs break-up fee. Nevertheless, the abandonment of this transaction was only temporary. In 2020, the parties recommenced their discussions and agreed on a reversal of the deal structure

4 ibid, p27.

5 ibid, p33.

6 ibid, p34 et seq.

7 David Ledermann, *Shareholder activism in Switzerland*, Ethical boardroom, 3 August 2020 (https://ethicalboardroom.com/shareholder-activism-in-switzerland/).

8 David Oser/Karin Mattle, The Shareholder Rights and Activism Review: Switzerland, in: Francis J Aquila, The Shareholder Rights and Activism Review, 2021, https://thelawreviews.co.uk/title/the-shareholder-rights-and-activism-review/switzerland.

9 Ledermann, *Shareholder activism in Switzerland*.

with UPC as buyer and Sunrise as target. In August 2020, UPC owner Liberty Global and Sunrise agreed that Liberty Global would make an offer for all publicly held shares of Sunrise. The terms of this transaction satisfied Freenet, which agreed to sell all its shares in Sunrise.[10]

Finally, in 2020, in the case of ARYZTA AG, a food business company specialising in baked goods based in Schlieren (ARYZTA), Cobas and Veraizon, two activist shareholders holding approximately 17 per cent of the company's shares requested an extraordinary general meeting and proposed the replacement of five members of the board of directors (including the CEO) by three new board members. They further proposed the election of two of the three proposed candidates as members of the remuneration committee.[11] Although the board of directors initially resisted and proposed a new chair, this candidate withdrew his candidacy and four of the five members targeted by the shareholders announced that they would resign shortly before the extraordinary general meeting, leaving the field to the slate proposed by the shareholders. At the meeting, the EGM voted to dismiss the last of the five members targeted by the shareholders and elected the slate proposed by the shareholder group, which dissolved itself. A month later, Elliott Advisors (UK) Limited approached the board of directors with proposing to make a tender offer for the shares of ARYZTA. After its offer was turned down by the board, Elliott let its offer lapse without pursuing its efforts any further.

As these precedents show, activist campaigns have been successful in Switzerland. They have caused companies to revise their dividend policy and divest significant parts of their business. They have prevented mergers, pushing, in some instances, the parties to revise the terms of the merger. They also facilitated reforms at board level and even, indirectly, changes of control. Notably, in most cases, the level of engagement remained informal, although it was often highly publicised. In only a few cases did the activists need to exercise their rights as shareholders to achieve their goals, and courts did not need to act in these cases. Nevertheless, these campaigns played out in the shadow of the law, which made this level of engagement possible and thus shaped the structure of the debates. Against this perspective, the legal foundations constitute the starting point to understand shareholder activism in Switzerland.

Legal framework

The legal framework governing shareholder activism in Switzerland is mostly laid out in the Swiss Code of Obligations of 30 March 1911 (CO, SR220), the statute that, among others, governs Swiss corporations. As such it defines, among other things, the corporate governance structure of Swiss companies and the rights of shareholders at the shareholder meeting and the proxy voting system.

In addition, the Ordinance Against Excessive Compensation in Listed Companies of 20 November 2013 (OaEC, SR221.331) gives shareholders further rights at general meetings of listed companies. In particular, it includes say-on-pay rules and gives shareholders the right to vote on the compensation of the board of directors and the executive management of

10 Oser/Mattle, op cit.

11 See Veraizon Press Release of 21 May 2020, Aryzta: Shareholder group led by VERAISON requests extraordinary general meeting and proposes Urs Jordi as new chairman, 21.May 2020, available at https://veraison.ch/en/news/page/2/. Oser/Mattle, op cit.

the company.[12] Further, the OaEC grants shareholders the power to elect on an annual basis members of the board of directors and its chair individually[13] and to appoint the members of the remuneration committee (the only mandatory committee for Swiss listed companies).[14] Finally, it reinforces the power of shareholders by prohibiting companies and depositories from seeking proxies to represent shareholders at the general meeting and mandating the appointment of an independent proxy elected by the general meeting whose task is to collect proxies for the general meeting and vote them at the meeting based on the express instructions provided by shareholders.[15]

Swiss corporate law underwent a major reform process in the past decade that led to the corporate law reform of 2020, which will enter into force on 1 January 2023. As part of this process, the principles of the OaEC will be transposed into the CO.[16] Furthermore, the corporate law reform amends both the rules governing the proxy voting system[17] and the rights of shareholders at the general meeting[18] to facilitate shareholder engagement. Moreover, in line with international trends, in particular with developments under EU law, Switzerland is introducing several additional ESG-related obligations by amending the CO and adopting implementing ordinances. Among others, larger Swiss listed enterprises or companies supervised by the Swiss Financial Market Supervisory Authority (FINMA) will be subject to non-financial reporting obligations and enterprises whose registered office, central administration or principal place of business is in Switzerland must comply with certain due diligence and transparency obligations if they have business abroad involving conflict minerals or potentially child labour.[19] Although these obligations do not give rights to shareholders directly, they enhance the disclosure and responsibility of subject companies paving the way for shareholder activism.

In connection with mergers and acquisitions of companies, the Federal Act on Mergers, De-Mergers, Transformation and Transfer of Assets of 3 October 2003 (Merger Act, SR221.301) provides for information[20] and voting rights of shareholders[21] as well certain safeguards for minority shareholders. Finally, in addition to the statutory framework, the Swiss Code of Best Practice for Corporate Governance defines principles that Swiss listed companies should consider. The Swiss Code of Best Practice is, however, not mandatory and, even then, only aspires to a comply or explain approach.

In parallel to the framework created by corporate law, the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (FMIA, SR958.1) and its implementing ordinances, the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 25 November 2015 (FMIO, SR958.11),

12 Article 18 OaEC.
13 Articles 3 and 4 OaEC.
14 Article 7 OaEC.
15 Articles 8 to 10 OaEC.
16 See articles 626, 689b to 689f, 710 (1), 712 and 732-735d revCO.
17 Articles 689b to 689f revCO.
18 Article 699b CO.
19 Obligationenrecht (Indirekter Gegenvorschlag zur Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt'), Änderung vom 19 Juni 2020, AS 2021 846.
20 Articles 14 and 16 Merger Act as well as articles 39 and 41 Merger Act.
21 Article 18 Merger Act and article 43 Merger Act.

the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 3 December 2015 (FMIO-FINMA, SR958.111), and the Ordinance of the Swiss Takeover Board on Public Takeover Offers of 25 November 2015 (TOO, SR954.195.1), regulate exchanges and capital markets. In particular, they require investors who acquire a shares or equity derivatives in a listed company to disclosure obligations if they reach or cross various threshold starting at 3 per cent of the share capital registered in the commercial register.[22] The FMIA also governs takeover bids. Investors with a shareholding of 33⅓ per cent or more in a company subject to the mandatory takeover bid rule, are required to submit a public tender offer for all outstanding shares in the company. The rules on disclosure of major shareholdings and takeover bids are applicable not only to listed companies incorporated in Switzerland but also to foreign companies whose equity securities have at least in part a primary listing in Switzerland.[23] The FMIA also provides for rules against market abuse such as insider trading, market or price manipulation,[24] which should also be considered in connection with activist campaigns. Unlike other jurisdictions, however, neither the FMIA nor the listing rules of the Swiss exchanges regulate the governance of listed companies or, more specifically, the conduct of general meetings or the proxy process, which are consequently governed exclusively by the CO, the OaEC and soft law, such as the Swiss Code of Best Practice.

Stake-building

The first step in any activist campaign will be to build a stake in the target company and then seek to leverage it to engage with the board before ultimately reaping the fruits of the campaign.

In this respect, it is important to review the articles of incorporation of the target company. Swiss corporate law allows companies to issue shares with preferential voting rights, which, although they represent a smaller share of the share capital, carry the same weight as common shares.[25]

Moreover, listed companies may limit shareholders' voting rights by setting a percentage limit for which an acquirer may be recognised as a shareholder with voting rights.[26] If an acquirer exceeds the limit, it will be entered in the share register as a shareholder without voting rights with regards to the shares exceeding that limit. As a consequence, the acquirer is not entitled to vote in respect of the shares exceeding the threshold. Such provision in a company's articles of association may prevent activist shareholders from exerting significant influence on the company.[27] As part of an anti-avoidance provision, the company can require shareholders seeking to be recognised with voting rights to declare that they own their shares for their own

22 Article 120 et seq FMIA.
23 Article 135 FMIA.
24 Articles 143 and 144 as well as articles 154 and 155 FMIA.
25 Article 693(1) CO. The voting preference is, however, capped at a 10:1 ratio (article 693 (2) CO) and does not apply to the election of the auditors, experts required to analyse the management, a special audit or the decision to hold directors, officers or auditors liable (article 693 (3) CO).
26 Article 685d (1) CO.
27 Article 685f CO.

account and not for the benefit of a third party.[28] This requirement will be extended under the corporate law reform to exclude shareholders who do not economically own their shares (eg, because they borrowed them under a securities lending arrangement or already agreed to sell them).[29] These rules condition the access to voting rights on the registration of the shareholder in the share ledger. Consequently, shareholders who fail to complete this step cannot exercise their voting rights, even if, as a matter of principle, they are entitled to be registered. As a practical matter, sizable stakes in many listed companies are not registered and as a side effect are forced into a passive role, which accordingly increases the weight of shareholders who did get registered. In addition to the registration requirements, the articles of association may restrict the number of voting rights of a holder of several shares.[30] This mechanism creates an additional cap on shares that can be used to limit the influence of an activist.

Often, activists will seek to avoid drawing attention on this effort to prevent the board from taking preventive measures and other investors to piggyback on the opportunity. While the FMIA does not govern shareholder activism per se, the rules on the disclosure of substantial shareholdings, takeover bids and market abuse have a significant influence on activist campaigns: Indeed, the rules on the disclosure of shareholdings constitute a hurdle for stake-building among existing shareholders and also constitute the first alarm bell that rings when a person starts to build a stake in a company. The FMIA requires any person who directly or indirectly or acting in concert with third parties acquires or disposes of shares or acquisition or sale rights relating to shares in a company with its registered office in Switzerland whose equity securities are listed (at least in part) in Switzerland or a company with its registered office abroad whose equity securities have at least in part a primary listing in Switzerland, and thereby reaches, falls below or exceeds the thresholds of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔ per cent of the voting rights (whether exercisable or not), to notify its stake to the company and to the relevant stock exchange within four trading days.[31] These rules apply not only to direct positions in shares but also extend to synthetic positions through cash-settled equity derivatives[32] and provide for dedicated regimes for stakes acquired through securities lending.[33] These rules tend to be strictly enforced and cases of non-compliance, if they come to light, tend to be sanctioned, making it difficult for an activist to build a secret stake in a Swiss company.

Beyond disclosure, the mandatory bid rule kicks in at the threshold of 33⅓ per cent of the voting rights requiring the holder or the group of holders of shares to submit an offer to all holders of equity securities.[34] Swiss law allows companies, however, to raise the threshold for a mandatory bid all the way up to 49 per cent through an opting-up[35] or even disapply the rules on mandatory bids completely through an opting-out clause in its articles of association.[36]

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28 Article 685d (2) CO.
29 Article 685d (2) revCO.
30 Article 692 (2) CO.
31 Article 120 (1) FMIA.
32 Article 15 FMIO-FINMA.
33 Article 17 FMIO-FINMA.
34 Article 135 (1) FMIA.
35 Article 135 (1) FMIA.
36 Article 125 (3) and (4) FMIA.

Therefore, in this area as well, a careful analysis of the articles of incorporation is necessary to understand the legal framework applicable to a given company.

Persons are deemed to act in concert if they coordinate their conduct regarding the acquisition or disposal of shareholdings or the exercising of voting rights with each other by contract, other organised arrangement or by law.[37] A typical example of such coordination would be a shareholder agreement, but also any another arrangement (implicitly or explicitly) to join forces to reach a common goal may be sufficient.[38] Nevertheless, discussions among shareholders about their planned voting behaviour in the context of an upcoming general meeting do not trigger an acting in concert for the purpose of these provisions.[39] This constitutes an important safeguard for shareholder activism, although the line between coordination in view of a general meeting that does not constitute a concerted action and a concerted action to exercise control that does may blur in practice, which is why caution is advisable before engaging with other shareholders.

In contrast to US corporate laws, Swiss law does not permit the use of poison pills in connection with takeover bids. Quite to the contrary, Swiss takeover law bars the board of directors from making substantial changes to the assets and liability of the company once a tender offer is announced or published and, when facing competing bids, requires the board to treat all offerors on an equal footing.[40]

The main forum for shareholder activism: the general meeting

Under Swiss law, shareholders do not have any legal right to engage with the board of directors or contact other shareholders except at the general meeting. While, as part of Swiss corporate practice, the board of directors, generally acting through its chair, will engage with large shareholders out of the meeting and are often open to listen to their grievances, this practice is not mandated by law and remains largely informal. Activists can also put pressure on a board of directors by using the media to its advantage. They can use these channels as well as social media to reach out to other shareholders. More importantly, they may also try to leverage the public opinion to force the board to respond to their vindications, in particular, when they relate to ESG-related matters.

However, if these efforts do not yield the expected results, activists ultimately need to turn to the general meeting to raise their voice, be heard by other shareholders and, possibly, cause the company to respond to their demands. As a matter of Swiss corporate law, the general meeting of shareholders votes on a number of issues, including approving the annual report and the allocation of profits as well as dividend payments,[41] the election of the chair,[42] the

37 Article 12 (1) FMIO-FINMA.

38 Bahar, in: Werro/Amstutz/Trigo Trindade (eds), Commentaire Romand CO II, 2nd edn, 2017, art 120-121 FMIA, N 36; Weber/Baisch, in: Watter/Bahar (eds), Basler Kommentar Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz (BSK FinfraG), 3rd edn, 2019, art 121 FMIA N 10.

39 CR CO II-Bahar, art 120-121 FMIA, N 35; BSK FinfraG-Weber/Baisch, art 121 FMIA N 16.

40 Articles 132(2) and 133(2) FMIA.

41 Article 698 (2)(3) and (4) CO.

42 Article 4 (1) OeAC.

members of the board of directors[43] and remuneration committee[44] as well as the auditors,[45] most changes to the articles of incorporation[46] and capital increases, by directly resolving to increase the share capital,[47] by creating conditional capital to issue shares in connection with convertible bonds or employee stock participation plans,[48] or by authorising the board of directors to issue new shares.[49] Under the OaEC, the general meeting is also required to vote annually on the compensation available for the members of the board of directors and executive management.[50] Furthermore, the Merger Act requires the approval of the general meeting for mergers, demergers and changes of legal structures.[51] Therefore, a number of issues need to be presented to the shareholders for approval and an activist can have a direct impact by exercising its voting rights and getting the vote out.

The general meeting is also generally called upon to grant the discharge to the members of the board of directors and management.[52] The formal effect of the discharge is to release the directors and executives from liability to the company and shareholders who voted in favour of the discharge, while requiring dissenting shareholders to commence legal action within six months of the general meeting if they intend to seek redress.[53] The scope of the discharge is limited, however, to facts that were disclosed to the general meeting or were generally known at the time of the vote. Withholding the discharge has an important symbolic value in corporate Switzerland, conveying the message that shareholders were not satisfied with the performance of the directors and executives and is often a channel for activists to target management and the board of directors, while remaining short of challenging the re-election of sitting members of the board.

At the same time, the board of directors retains exclusive authority over certain matters such as the management of the company's activities and the appointment of executives,[54] placing a limit on the reach of shareholder activism unless there is a willingness to take a seat at the board of directors. If an activist wants to force a change in the company's strategy or reshape its management, it needs to replace one or more members of the board of directors. The CO provides for a simple majority of the votes represented at a general meeting (unless the articles of association state a different rule).[55] While the election of new board members typically occurs at the ordinary general meeting, there is no rule that prevents the election of new members at extraordinary general meetings, although the articles of incorporation may provide for a higher quorum to remove members of the board. Practically speaking, the need to do so

43 Article 698 (2)(2) CO.
44 Article 7 (1) OaEC.
45 Article 698 (2)(2) CO.
46 Article 698 (2)(1) CO
47 Article 698 (2)(1) and (6) CO cum article 650 CO.
48 Article 698 (2)(1) and (6) CO cum article 653 CO.
49 Article 698 (2)(1) and (6) CO cum article 651 CO.
50 Article 18 OaEC.
51 Article 18, 26 and 64 Merger Act.
52 Article 758 CO.
53 Article 758 (1) and (2) CO.
54 Article 716(2) and 716a (1) CO
55 Article 703 CO.

has strongly decreased as, under the OaEC, the mandate of board members, chair and members of the compensation committee needs to be renewed on an annual basis, preventing the use of staggered boards for listed companies.[56]

Agenda setting power of the board of directors and shareholders' rights to call a meeting and make proposals

The agenda of the general meeting is set by the board of directors, who therefore can channel requests from shareholders. However, by law, shareholders who represent at least 10 per cent of the share capital have the right to request the board to convene an extraordinary general meeting, while shareholders together representing shares with a nominal value of 1 million Swiss francs may demand to slate an item on the agenda.[57] The request to convene a general meeting or to slate an issue on the agenda must be made in writing setting out the details of the agenda items and its motions. Should the board of directors fail to act upon such a request within a reasonable time, shareholders may seek an order by the competent court.[58] Overall, the hurdle is set very high for large listed companies. Even the requirement to hold shares representing 1 million Swiss francs in nominal value can be prohibitive if the market value of the shares is few orders of magnitude more than the nominal value as is often the case. Therefore, a number of Swiss listed companies opted voluntarily for lower thresholds. Nevertheless, many companies did not do so.

In response, the threshold to call a general meeting will be lowered to 5 per cent of the share capital or the voting rights[59] and, more importantly, the threshold to table an issue on the agenda will be lowered to 0.5 per cent of the share capital, which should facilitate shareholders to raise their voice.[60] The corporate law reform will also change the rules regarding shareholder proposals within an agenda point: whereas until now any shareholder had the right to make a proposal, the new rules will provide for a differentiated approach: shareholders holding 0.5 per cent of the share capital will be allowed to make a proposal in advance of the general meeting[61] and ask the board to include their proposal on the proxy sheet sent to shareholders together with a concise explanation of their proposal.[62] Shareholders falling short of this threshold will continue to have the right to make a proposal at the meeting,[63] which, unless it is backed by coalition of shareholders with a significant stake or is preceded by a costly campaign to collect proxies, is very unlikely to succeed.

In this respect, the corporate law reform is likely to facilitate campaigns by shareholders, who alone or in a coalition with other shareholders reach the threshold of 0.5 per cent of the share capital, which remains a substantial investment when dealing with companies with a large capitalisation.

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56 Article 4 and 7 OAEC.
57 Article 699 (3) CO.
58 Article 699 (4) CO.
59 Article 699 (3)(1) revCO.
60 Article 699b (1)(2) revCO.
61 Article 699b (2) revCO.
62 Article 699b (3) revCO.
63 Article 699b (5) revCO.

Access to other shareholders, the proxy voting system and electronic voting

The main challenge for shareholder activism lies, however, at an earlier stage: as a matter of Swiss corporate law, the share ledger listing the identity of registered shareholders is not a public document and shareholders are not entitled to consult it except to ascertain their own entry in the ledger.[64] In this respect, activist shareholders fight an uneven battle with the incumbents: the board of directors can use this information to reach out to major blockholders and ascertain their support prior to the general meeting, while outsiders will have no other choice than initiate a media campaign to be heard and reach out to other shareholders.

Additionally, the board of directors has a large influence on the general meeting through its attributions related to the preparation of the meeting and the proxy voting system: under Swiss corporate law, votes at the general meeting need to be cast in person or through a proxy.[65] Historically, banks and other depositories as well as companies themselves acted as proxy and, through this channel, mustered considerable influence over the general meeting. This practice was stymied to a limited extent by the corporate law reform of 1991[66] before it was banned outright under the OaEC in 2013: instead, institutional representation for shareholders can only be carried out through to an independent proxy, who is elected on an annual basis at the annual general meeting.[67] Even then, the proxy forms continue to be prepared and distributed by the board of directors rather than the independent proxy directly.[68]

The corporate law reform of 2020 does not overhaul this regime. However, it seeks to level the playing field by limiting the communication of the independent proxy with the company ahead of a general meeting. From 1 January 2023, independent proxies will be allowed to provide the company with general information regarding the instructions received from shareholders at the earliest three days prior to the general meeting provided that the independent proxy discloses the information to the general meeting of the company.[69] This rule seeks to prevent the board of directors from using information received from the independent proxy to get out votes if the ballot looks tight.

The proxy voting system set forth by the OaEC and the corporate law reform do not prevent a shareholder from appointing another representative for a general meeting.[70] On this basis, some activists have launched campaigns seeking to collect proxies to vote at the general meeting. Such exercises are, however, costly and complicated as an outsider cannot, as would be the case, for example, under US proxy rules, use the corporate resources to distribute the materials to shareholders and must therefore find other channels to interact with them. They remain therefore rather anecdotal episodes.

Beyond the proxy voting system, the digitalisation of the general meeting is arguably the next frontier in this area. While the OaEC already provides a requirement for Swiss listed companies to give its shareholders the possibility to submit instructions to the independent

64 Böckli, Schweizer Aktienrecht, 2009, 4th edn, §6 N 334; CR CO II-Trigo Trindade, art 686 N 40-41.

65 Article 689 (2) CO.

66 Article 689c and article 689d CO.

67 Article 8-11 OaEC.

68 See also article 689b (3) revCO.

69 Article 689c (2) revCO.

70 Article 689b (1) revCO.

proxy electronically,[71] the corporate law reform not only perpetuates this requirement[72] but also provides the possibility to hold general meetings virtually to the extent the articles of association expressly allow virtual meetings.[73] The decision to hold a general meeting virtually will be with the board of directors and, in contrast to electronic instructions, virtual general meetings are not mandatory for Swiss listed companies. It remains to be seen whether companies will opt for this option at all, in particular as a virtual meeting is deemed to be rather unfavourable for the board in the case of proxy fights.

Conclusion and outlook for board of directors

Overall, Swiss law offers a variety of options to shareholders that they can use in case they wish to influence a company. This prediction is confirmed by the experience of the recent years, which showed an increase in shareholder activism in Switzerland. Nevertheless, although Swiss corporate law does favour the incumbent board of directors and management, the OaEC, the corporate law reform and ESG-related obligations give shareholders more rights and tools to raise their voice. It is therefore likely that these reforms will further support the trend of recent years and lead to more shareholder activism in Switzerland. In parallel, we expect that institutional investors and activists will place an increased focus on ESG and, therefore, these topics are likely to be increasing the basis for shareholder activism.

In this context, boards of directors of Swiss listed companies should be prepared to respond to shareholder activists by regularly reviewing potential issues, including strategic orientation, dividend distribution and buy-back policy and ESG questions, regularly engaging with key shareholders and investors and monitor the positions of proxy advisers to understand shareholder sentiment and, rather than waiting for a disclosure of a substantial shareholding pursuant to article 120 FMIA, monitoring trading activity and major movements in the share ledger (including the evolution of the number of shares without a shareholder of record). The preparation should further include a plan to respond to direct engagements by activists as well as a communication playbook to deal with media engagement by activist shareholders in order to react appropriately and maintain the confidence of all relevant stakeholders, including other shareholders, employees and business partners. As in many other matters of corporate governance, defining the right approach is, however, more an art than a science.

71 Article 9 (1)(3) OaEC.

72 Article 689c (6)(3) revCO.

73 Article 701c to 701f revCO.

21

Dispute Resolution

Gérald Virieux and Mladen Stojiljković[1]

Litigation versus arbitration

Arbitration

In the majority of M&A transactions in Switzerland, the parties choose arbitration over litigation. There are many reasons for this.

To begin with, arbitration allows the parties to appoint arbitrators with the qualifications (eg, in corporate law, accounting, etc) and experience (in negotiating M&A transactions, resolving complex commercial disputes, etc) the parties consider necessary. Given that few high-stakes M&A disputes end up in state courts, judges rarely have comparable levels of experience.

Arbitration is flexible. It allows the parties to tailor the procedure to their particular needs. As long as the parties agree, there are few limits to what they can do in structuring the proceedings. They can choose the language of the proceedings, the number of submissions, the duration of time limits, the availability and extent of document production, the degree of confidentiality, etc. In arbitration, parties generally have more control over the proceedings, particularly regarding the taking of evidence. They can submit written witness statements and expert reports, and they can cross-examine the other party's witnesses and experts. In contrast, in litigation, the court controls the taking of evidence. Witnesses and experts are heard only if the court allows it. Also, only court-appointed experts may give expert testimony, and the parties have no right to cross-examination. Normally, the judge examines the witnesses, and the parties may ask a few additional questions if the judge permits it. In addition, in most Swiss courts there is no verbatim transcript of the hearing. Instead, witness depositions are only summarised by the court in the minutes of the hearing. The summary made by the court rarely conveys the exact meaning, nuances and subtleties of what the witnesses say. Witness testimony in state-court proceedings can thus be extremely frustrating.

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Arbitration is less formalistic. In state courts, it can be difficult to obtain full compensation in commercial cases involving complex damages calculations.[2] Even though, as a matter of law, the substantiation requirements and evidential burdens are not materially different in litigation and arbitration, courts tend to apply these rules more strictly and in a manner that, at times, may insufficiently take into account the complexity of the case.

Arbitration and its users are also more up to date with regard to modern technologies and how they are used in the M&A process. Most courts still use paper submissions, though electronic submissions are gradually becoming more common.

In addition, in arbitration, the procedural calendar is more predictable. At an early stage in the proceedings, arbitral tribunals consult the parties and devise a procedural timetable that includes all major steps in the arbitration. This includes not only the dates for the parties' submissions, but also the hearing date, and frequently an indication of when the parties can expect the final award. Such predictability is rare in Swiss state-court proceedings, where party-agreed procedural calendars are unheard of. Instead, courts set deadlines in reaction to the parties' submissions. Swiss courts have considerable discretion as to how to organise the proceedings and they rarely consult the parties before they exercise their discretion. This can lead to substantial delays in the proceedings, depending on the court's own agenda and workload.

Speed and finality are also important aspects. While the duration of a typical M&A arbitration rarely exceeds two to three years, it is not uncommon for similar disputes in Swiss courts to take longer in the trial court alone, not even considering the duration of an appeal. In arbitration, however, the arbitral award is final and enforceable from the date of its notification to the parties (unless suspensive effect is granted on appeal). Arbitral awards are not subject to appeal with full review of facts or law. Instead, there are only limited grounds on which arbitral awards can be challenged, largely for procedural errors.

Finally, enforcement aspects are important and must be considered as well. In an ideal world, the losing party would comply and promptly pay what is stipulated in the award. Alas, in reality this is rarely the case. Often, the prevailing party must take steps to enforce the award. For cross-border transactions involving parties in different jurisdictions, arbitration has a clear advantage over state-court proceedings in this respect. Indeed, at the time of writing, 169 countries were party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (the New York Convention). All major jurisdictions are party to the New York Convention, including all European countries and the United States. The New York Convention facilitates arbitration in two respects: First, it guarantees that the arbitration agreement entered into by the parties will be recognised and enforced by the courts of member states. This prevents recalcitrant parties from defeating the dispute mechanism agreed by the parties by initiating court proceedings in their home jurisdiction or in another favourable jurisdiction. Second, it guarantees that the arbitral award will be recognised and enforced in the member states. By contrast, as we shall see below, treaties facilitating the recognition and enforcement of state-court judgments are rare.

2 See also Harold Frey/Dominique Müller, Arbitrating M&A Disputes, in: Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, 1115, 1135 (2018) (discussing the substantiation requirements in M&A litigation and arbitration).

Arbitration is sometimes perceived as an expensive means of resolving disputes. That is not necessarily the case. In some instances, arbitration can be cheaper than state-court proceedings, if only because challenges against the arbitral award are more limited. One effective way of keeping the costs under control is to opt for institutional arbitration, that is, arbitration administered by an institution, such as the International Chamber of Commerce or the Swiss Chambers' Arbitration Institution (see 'A few words of advice for M&A dealmakers'). The arbitration rules of such institutions determine in a precise way the costs of administering the case, and cap the arbitrators' fees, thereby providing predictability. Other options include appointing a sole arbitrator rather than a three-member tribunal, agreeing to an expedited procedure, or, where appropriate, agreeing on limited document production.

Litigation

Even though arbitration is the preferred means to resolve M&A disputes, occasionally some cases still end up in the court system. The reasons for this can be manifold.

Certain disputes are practically only decided in the courts, such as challenges of shareholders' resolutions to approve or disapprove a merger, or appraisal law suits (actions in which shareholders submit their shares for valuation to the court rather than accepting the deal price).[3] In other cases, litigation is chosen because the party with more bargaining power has imposed it on the other. The practical difficulties for claimants, who bear the burden of proof, to obtain damages awards in complex high-stakes disputes may work to the advantage of respondents. The seller may thus attempt to impose state-court litigation on the buyer in the hope that it will make the buyer's life more complicated in the event of a dispute.

Not all state-court cases are created equal. Much will depend on the court and how experienced it is in resolving M&A disputes. Parties generally prefer, when they have a choice, courts with experience in commercial disputes in economic centres over smaller courts in rural areas, which may not be equally experienced and have fewer resources.

Most commercial cases are decided in one of Switzerland's main commercial hubs: Zurich and Basel for the German-speaking part of the country, and Geneva for the French-speaking part. Commercial courts in other cantons (Aargau, St Gallen and Berne) also regularly decide commercial disputes. The Zurich Commercial Court has the highest caseload in the country and enjoys a reputation as being business-minded and pragmatic. It is composed of judges (lawyers) and commercial judges with in-depth experience in specific business segments such as banking, insurance, auditing, construction, etc. The Zurich Commercial Court has a high success rate in facilitating settlements. The majority of cases before the Zurich Commercial Court end in a settlement, voluntary withdrawal or claim recognition by the defendant. When cases are not settled early, the Zurich Commercial Court tends to decide based on the documents before it, rarely ordering witness testimony or expert evidence.

In contrast, Geneva does not have a commercial court, and commercial disputes are decided by the ordinary court of first instance. Complex cases, however, are assigned to experienced judges. Contrary to the Zurich Commercial Court, witness testimony is common in Geneva. However, as mentioned previously, witness depositions are only summarised in the minutes of

3 See also Rolf Watter, *Lessons learnt aus 20 Jahren M&A-Litigation*, EIZ Europa Institut Zürich, Volume 186, 7, 8 (2018) (mentioning public takeovers and proxy fights as being decided in courts).

the hearing, and much of what witnesses say is lost in the process. In addition, contrary to arbitration, counsel for the parties are essentially prohibited from talking to potential witnesses prior to the witness hearing. Witness hearings are therefore much more unpredictable compared with arbitration because the trustworthiness and actual knowledge of the witness cannot be assessed in advance of the hearing. This typically leads legal counsel in state-court proceedings to avoid relying on witness evidence, or at the very least limit witness evidence to what is strictly necessary, such as when no other means of proving certain facts are available.

As mentioned above, treaties facilitating the recognition and enforcement of state-court judgments are rare. The Hague Judgments Convention was concluded in 2019 but has not yet entered into force. In March 2022, the Swiss Federal Council announced its intent to sign the Hague Judgments Convention.

One notable exception is the Lugano Convention, which applies between the European Union as well as Switzerland, Norway and Iceland. Between those countries, judgments are easily and swiftly enforced pursuant to a largely uniform set of rules. Outside of those countries, however, the recognition and enforcement of a Swiss court judgment will be entirely governed by local law, with unpredictable results. The risk is high that the losing party will seek to challenge the Swiss judgment and relitigate the case before the local enforcement court. If, foreseeably, the judgment may need to be enforced in a country outside the European Union, Norway or Iceland, where no international instrument applies, then state-court proceedings are not recommended. Contrary to widespread belief, state-court proceedings are not necessarily cheaper than arbitration. Much will depend on the amount in dispute and the issues at stake, as well as the number of levels of appeal. For smaller disputes, state-court proceedings may end up being cheaper, even when taking appellate proceedings into consideration. For larger disputes, however, the court costs – which are set in proportion to the amount in dispute – can climb rapidly. One additional thing to bear in mind with state-court litigation is that the amount of attorney's fees granted to the prevailing party does not necessarily cover that party's actual legal representation costs.

Others forms

In M&A disputes, parties frequently combine arbitration or litigation with other means of dispute resolution or prevention.

This includes expert determination. The idea is to outsource disputes relating to certain technical issues, such as questions of accounting, to an accounting or industry expert, without going through the process of an entire arbitration. Expert determination is often used in connection with purchase price adjustment mechanisms. But, as always, the devil can be in the detail. Sometimes the exact delineation of tasks between expert and arbitrator is not clear. This requires attention and care in formulating expert determination and arbitration clauses. Parties tend to prefer locked-box transactions precisely to avoid disputes related to purchase price adjustments. Another mechanism frequently seen in practice is multitiered dispute resolution clauses.

Such clauses can come in different forms. The idea is to provide several steps to help settle or narrow the dispute before the parties resort to arbitration. That is why the first step or tier involves either negotiation, conciliation or mediation. It can also provide that both sides should first escalate the matter internally, say to the CFO or CEO, and only after a negotiation or cooling-off period can the next step be taken. The Swiss Federal Court recently held that omitting certain mandatory steps in a multitiered dispute resolution clause does not necessarily deprive the arbitral tribunal of its jurisdiction; rather the tribunal should as a rule stay the proceedings and allow the parties to complete the step that was omitted (DTF 142 [2016] III 296).

Settlement facilitation by arbitrators is another option. By way of example, article 19(5) of the Swiss Rules of International Arbitration (2021) provides the following:

> *With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps.*

Settlement facilitation has a long tradition in Switzerland. Against this background, it should not be surprising that a considerable number of M&A dispute settle.[4] But this is true not only for M&A disputes. High settlement rates are common across all types of disputes. According to the latest available statistics of the Swiss Chambers' Arbitration Institution, from 2004 to 2019, 588 cases ended with final awards, whereas 490 ended with either a settlement, withdrawal or termination.

New legislation

On 1 January 2021, the Swiss Parliament enacted the revised Chapter 12 of the Swiss Private International Law Act. The amendments made to Chapter 12 selectively adjust and amend statutory rules on international arbitration and further strengthen Switzerland's position as the premier venue for arbitration. Geneva and Zurich are today among the world's leading venues for international commercial arbitration. One of the most salient features of the revised act is that challenges of arbitral awards before the Swiss Supreme Court can now be made in the English language. Exhibits can also be filed in English, without the need to provide a translation. The Supreme Court will, however, render its decision in one of Switzerland's official languages (German, French or Italian).

New legislation has been proposed with regard to state-court litigation. In February 2020, the Swiss Federal Council issued a bill to amend the Swiss Civil Procedure Code. One of the primary goals of the bill is to facilitate the enforcement of rights by lowering cost barriers (particularly the amount the courts can ask as an advance for costs, which today is higher than in most other jurisdictions in Europe). The bill also includes proposals to allow parties to choose a commercial court for international disputes, and to allow cantons to provide for English as the language of the proceedings. Parties should also be able to use English in appeals before the Swiss Federal Court if they used English in the cantonal court. It remains to be seen whether the bill will become law. If it does, it will significantly increase the attractiveness of the Swiss Commercial Courts for international disputes, including for M&A disputes.

4 See, eg, Rolf Watter, *Lessons learnt aus 20 Jahren M&A-Litigation*, EIZ Europa Institut Zürich, Volume 186, 7, 8 (2018).

Overview of common M&A disputes in Switzerland

M&A disputes can arise in all phases of the deal: pre-signing, between signing and closing, and post-closing.

Pre-signing disputes

Pre-signing disputes are not very common. Under Swiss law, the parties are in principle free to end negotiations at any time so long as they have not acted in bad faith. This is a high threshold that is difficult to prove. Even if bad faith can be proven, compensation is typically limited to reliance damages (the economic position quo ante).

Confidentiality covenants may sometimes give rise to disputes. In merger negotiations, sharing business secrets with a potential buyer may be a risky business, particularly when that buyer is a competitor. It is impossible to un-disclose a secret once it is out. Therefore, such disputes typically focus on the right amount of compensation.

Disputes for failing to close

Disputes between signing and closing often relate to conditions precedent (eg, merger control approval) or covenants (obligations to ensure or avoid certain actions until closing) set forth in the transaction document. Disputes over such issues can occur, for example, during a financial crisis or if one of the companies becomes financially distressed and fails to close. But such disputes are not common. This is because, in this phase of the deal, the parties' interests are still aligned and both want to close the transaction. Where closing fails, however, this can have significant consequences. In a recent major arbitration, the transaction failed to close and the seller had to sell the target at a significant discount, after which it sued the buyer for failing to fulfil the covenants. The case eventually settled.

Post-closing disputes

The majority of M&A litigations in Switzerland involve post-closing issues. In such disputes, the purchasing party realises or suspects that it did not receive what it was entitled to expect.

Price adjustment disputes are quite common. In many cases, the parties agree to submit such disputes to experts. But experience shows that arbitration is sometimes unavoidable, particularly where issues of fact and law are disputed. Parties rarely want an accounting firm to decide legal questions of how certain accounting standards ought to be interpreted or whether the collectability of certain receivables was correctly estimated. Given that the line between the tasks of the expert and the arbitrator can be blurry under Swiss law, disputes sometimes include the issue of whether a prior expert determination is binding on a court or arbitral tribunal.

Earn-out disputes may be the most common post-closing dispute of all. While earn-out clauses may seem like a good idea in the negotiation phase, they tend to increase the risk of post-closing disputes. After closing, the seller no longer has access to the company and is unable to influence its business operations. This scenario may distort the parties' incentives post-closing. Thus earn-out disputes often revolve around the issue of whether the buyer's underperformance could be for reasons for which the buyer should be responsible (eg, bad business judgement or even manipulation). Swiss law will deem a condition precedent fulfilled where a party has in bad faith prevented it from occurring. Share purchase agreements often include a right of the seller to access the buyer's books and records in order to verify earn-out calculations.

Post-M&A disputes also often revolve around alleged misrepresentations or breached warranties. Many such disputes involve issues of contract interpretation. In Swiss law, extrinsic evidence is admissible to prove the likely intent of the parties even where the text of the contract as such seems unambiguous. This is because, in Swiss law, what is decisive is not necessarily the objective meaning of the contract but the parties' true and common understanding at the time they entered into the contract (article 18 Code of Obligations). Sometimes, the issue can arise as to what the seller and the buyer knew at the time of contracting. This, in turn, can make it necessary to look deep into the negotiation history, including the due diligence disclosures, adding to the complexity of such disputes.

In a considerable number of Swiss M&A disputes, the buyer's inspection and notification duties may become an issue.[5] Did the buyer inspect the purchased object soon enough, did it notify the seller soon enough, was the notification sufficiently detailed? Such questions regularly come up. These issues, however, can largely be avoided with careful contract drafting.

A few words of advice for M&A dealmakers

M&A transactions come in different shapes and sizes. However, whether you advise clients on M&A transactions, or whether you are the seller's or buyer's CEO or in-house counsel, there are a number of essential points you should keep in mind that could prevent a costly dispute or, at the very least, make things a lot easier in the unfortunate event there is one.

The infamous 'midnight clause'

Recommendation 1

Discuss choice of law and dispute resolution from the onset. It is never pleasant to address dispute resolution mechanisms when negotiations have barely begun. Unfortunately, precisely because no one wants to contemplate the possibility of a dispute when negotiations begin, dispute resolution mechanisms are all too often discussed at the last minute (hence the term 'midnight clause') and given little attention, if any. This can be a grave mistake. Setting the framework for dealing with possible future disputes from the onset is just as important as discussing price and warranties, and since it is a necessity, the parties might as well do it at the very beginning of the negotiation process. There is nothing worse than discovering, after months of hard work on the terms and conditions of the transaction, that, because of differing company policies or past experience, the parties are unable to agree on arbitration versus state-court litigation, Geneva courts versus Zurich courts, or Swiss law versus English law.

Bottom line: get these (seemingly uninteresting, but crucially important) aspects out of the way from day one.

Choose a reputable arbitration institution

Recommendation 2

Parties should choose a reputable arbitration institution. The best known is certainly the International Chamber of Commerce in Paris (ICC). The ICC scrutinises each award before it

5 Rolf Watter, *Lessons learnt aus 20 Jahren M&A-Litigation*, EIZ Europa Institut Zürich, Volume 186, 7, 17 (2018).

is issued, which ensures quality. Arbitration under the auspices of the ICC and the ICC Rules of Arbitration is often the preferred choice for cross-border transactions.

In Switzerland, the Swiss Arbitration Centre administers arbitration proceedings under the Swiss Rules of International Arbitration.

Use the model arbitration clause

Recommendation 3

Reputable arbitration institutions such as the ICC or the Swiss Arbitration Centre provide model arbitration clauses, and you should use them. These clauses have been carefully devised and are the result of decades of experience. In other words, model arbitration clauses are tried and tested. There is rarely any benefit in departing from the model clause. Unfortunately, time and again, the parties amend the language of the model clause or add elements that are ambiguous or, worse, can defeat the entire arbitration clause.

Multitiered dispute resolution clauses (ie, clauses providing that the parties must seek to resolve their dispute amicably before initiating arbitration proceedings) can sometimes cause mischief if certain possibly mandatory steps have not been complied with. Here, too, we recommend using standard clauses such as those relating to the ICC Mediation Rules.

Another recurring example is mixing the arbitration clause with choice-of-court language taken from another contract or document. It is not rare for dispute resolution lawyers to come across arbitration clauses containing extra language saying that the parties agree on the exclusive jurisdiction of a certain state court, without specifying the relationship between the two. This can potentially result in both the arbitration and the choice-of-court clause being ineffective.

Bottom line: copy and paste the model arbitration clause and stick to it. Be wary of the other party's seeking to modify it; it may have a hidden agenda.

Keep organised records

Recommendation 4

Keep an organised and comprehensive record of all phases of the transaction, from the first day of the negotiations to the signing of the contract. Except for disputes turning exclusively on a purely legal issue (these are rare), facts will almost always play an essential part in an M&A dispute. Having access to the relevant information and documentation can thus make the difference between losing or winning the case. It is no secret nowadays that people tend to change jobs often: in no time, those who were involved on a given transaction will have moved on to other positions and may be out of reach. It is therefore very important to keep a well-organised and comprehensive record of the transaction.

Under Swiss law, draft contracts exchanged between the parties during the course of the negotiations can be useful to show the parties' intention on a given aspect, or how a specific clause is to be interpreted and applied. Cover emails may shed light on the parties' understanding of a specific word they used, the scope of a representation or the extent of a particular warranty, to name but a few. The record should therefore include all documents created in connection with the negotiation phase, such as letters of intent, factsheets, offers, confidentiality agreements, document request lists, draft contracts, final contract and closing memorandum. Ideally, the record should also include all communications between the parties (ie, mostly emails nowadays). Of course, the sheer volume of communications in certain complex transactions may make it impractical to keep copies of every single email. Modern e-discovery tools and service providers may help.

Larger transactions will often involve sophisticated buyers and sellers using no less sophisticated tailor-made tools for record-keeping purposes. However, for smaller transactions, there is a simple way to keep an effective and practical record of the transaction without needing dedicated software: all it takes is creating an Excel spreadsheet and making an entry for each relevant circumstance (meeting, email, draft contract, etc), with the corresponding date, and then link the entry to a document in an associated database. If a dispute arises years after the deal was made, the only thing that needs to be done is hand over the Excel document with the associated database to outside counsel, and outside counsel will have a well-organised, chronological overview of the relevant facts, with direct links to supporting documents. The time spent in creating and maintaining the database during the negotiation process will be nothing in comparison with the savings on legal costs. This will also greatly reduce the risk of missing valuable arguments.

Conclusion

Arbitration is the preferred means of dispute resolution for high-profile, high-stakes M&A disputes, or disputes involving a cross-border aspect. As a premier venue for arbitration, Switzerland's arbitration law offers the parties flexibility, predictability and finality. In some cases, however, state courts can be an alternative, especially for smaller or purely local transactions. Parties are well advised to consider the advantages and potential drawbacks of each dispute resolution mechanism and keep organised records. Consulting outside counsel early in the process may prevent issues at a later stage.

Appendix 1

About the Authors

Markus Aeschbacher

Bratschi Ltd

Markus Aeschbacher is a partner at Bratschi Ltd and co-head of the industry group construction, real estate and hotels. For many years he has been practising in construction and real estate law, with a focus on real estate transactions, construction and planning contracts and turnkey and general contractor agreements. His international and national clients predominantly include professional investors, property developers and real estate companies. He represents parties in national and international disputes before civil courts and arbitral tribunals. Markus Aeschbacher graduated from the University of St Gallen (lic iur HSG) and the Georgetown University Law Center in Washington DC (LLM) and holds the degree of Certified Specialist SBA Construction and Real Estate Law.

Raphael Annasohn

Bär & Karrer AG

Raphael Annasohn is a partner. He has broad experience in international and domestic M&A transactions in various industries, focusing on private M&A and private equity, corporate reorganisations and restructurings, as well as corporate law and general contractual matters, in particular shareholders' agreements. Furthermore, he specialises in the fields of venture capital and startups and assists clients in their ongoing commercial activities.

Rashid Bahar

Advestra AG

Rashid Bahar is a founding partner of Advestra. Before that he was partner at a leading Swiss law firm for eight years. Rashid Bahar is an expert on corporate law and financial market regulations. He advises clients on transactional and regulatory matters. Financial institutions frequently seek his advice on M&A matters and their regulatory implications. Rashid is a professor at the University of Geneva, where he teaches corporate law as well as law and economics. He has extensively published and is an editor of the leading commentary in Swiss financial market regulation as well as the *Swiss Business Law Review*.

Manuel Baschung

Homburger AG

Manuel Baschung is an associate in Homburger's banking and finance team. His practice focuses on financial markets and banking law, as well as financial services regulation.

Valérie Bayard

Advestra AG

Valérie Bayard is an associate at Advestra. She advises clients on capital market transactions, as well as on regulatory matters. One of her main areas of practice is assisting banks and issuers in the context of IPOs, capital increases and various securities law matters. She also advises financial services providers on compliance with their regulatory duties. Furthermore, Valérie assists companies on M&A and financing transactions and advises clients in general corporate and contract law matters.

Peter Bigler

Legal adviser at the Swiss Federal Institute of Intellectual Property

Peter Bigler graduated from the University in Berne as a Bachelor of Law (2009) and a Master of Law (2011). After being admitted to the Swiss Bar in 2013, Mr Bigler became a research assistant at the University of Berne, Institute for Economic Law. In 2016, he joined FMP Fuhrer Marbach & Partners, his main practice area being intellectual property law, IT law, new technologies, unfair competition and the intersections thereof. Mr Bigler has advised many Swiss and international companies on a broad spectrum of legal issues, contractual negotiations, litigation, IP strategy and enforcement. In 2020, Mr Bigler joined the Swiss Federal Institute of Intellectual Property as a legal adviser.

Lukas Bopp

Kellerhals Carrard Basel KlG

Lukas Bopp has been a partner at Kellerhals Carrard since 2014. His practice focuses on all aspects of national and international insolvency and restructuring matters, including the conduct of insolvency-related litigation, attachment of assets, recognition and enforcement of foreign judgments and insolvency proceedings. Lukas represents foreign creditors in Swiss-related insolvency proceedings and supports foreign trustees in the recovery of assets located in Switzerland. He is co-head of Kellerhals Carrard's insolvency practice group. He regularly publishes on issues relating to bankruptcy, conflict of laws and litigation. As a long-time member of INSOL Europe, Lukas has an excellent international network.

Matthias Courvoisier

Baker McKenzie

Matthias Courvoisier is a partner in Baker McKenzie's Zurich office and the head of the firm's capital markets practice group. He is also a member of the firm's European capital markets steering committee. For more than 20 years Matthias has worked on capital markets law and mergers and acquisitions legal matters, including litigation in these fields. He is a co-editor of the commentary on the listing rules of the SIX Swiss Exchange and he has written various articles on capital markets law-related topics.

Matthias served as a member of the committee tasked with drafting the standards for auditing public takeover offers and the rules of the SIX Swiss Exchange on the listing of SPACs. He is a regular speaker at the Zurich capital markets' events and webinars and other seminars.

Matthias focuses his practice on capital markets transactions in Switzerland, including public takeovers, IPOs and other equity capital market transactions. He has extensive experience working on M&A transactions and represents clients involved in capital markets-related litigation cases.

Emanuel Dettwiler

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An experienced M&A and corporate lawyer, Emanuel Dettwiler advises clients on a wide range of international and domestic public and private transactions. His particular focus lies on distressed M&A transactions and restructurings, where he regularly supports clients in challenging situations. His clients are active in various industries, mainly in life sciences, technology and IT. He also advises on demanding corporate law topics and assists clients in both equity and debt financing matters, as well as selected contract law issues. He regularly publishes and lectures in his areas of expertise. An active member in a number of international associations and alliances, Emanuel enjoys a strong international network. As a former management consultant, Emanuel has an in-depth understanding of the commercial aspects of problems presented to him and honours the real needs of demanding corporate clients.

Cyrill Diefenbacher

Bär & Karrer AG

Cyrill Diefenbacher is a partner at Bär & Karrer AG. He has broad experience in national and international corporate tax matters.

He advises clients on tax-related questions in the area of M&A transactions, restructurings and financing, and also has broad experience in advising clients in the area of tax compliance. He frequently works on M&A transactions (buy-side or sell-side advice over all stages of the transaction, advice on management incentive schemes), restructurings and reorganisations and provides advice on various national or international corporate tax matters. His area of expertise includes Swiss VAT.

Cyrill Diefenbacher regularly speaks in the area of M&A tax or corporate tax law and publishes specialist articles in the field of taxes. He is a lecturer at the EXPERTsuisse Swiss Certified Tax Expert education programme.

Marcel Dietrich

Homburger AG

Marcel Dietrich is head of Homburger's competition and regulatory teams. His practice focuses on Swiss and EU competition and antitrust law, on commercial public and administrative law, and on regulated markets. He has extensive and longstanding experience in all areas of competition law, ranging from merger control to administrative and civil antitrust litigation.

He also advises on compliance matters and internal investigations. With regard to regulated markets, he specialises in energy, healthcare and pharma, media and telecommunications, infrastructure and transport, as well as in public procurement.

He is a member of various national and international competition law associations, and is the chairman of the Zurich Bar Association's committee on competition law. He regularly publishes and lectures on various subjects of competition law, commercial public and administrative law.

Ion Eglin

Bratschi Ltd

Ion Eglin is a partner at Bratschi Ltd, was heading its industry group construction, real estate and hotels, and is now the firm's chair.

For many years Ion Eglin has had a strong focus on hospitality law: He advises professional and private investors and hotel owners on hotel transactions and is involved in many national and international hotel development projects. He has a particular expertise in the various types of agreements between hotel owners and hotel operators, such as hotel management agreements, hotel lease agreements, franchise agreements and all auxiliary agreements.

Ion Eglin is a recognised practitioner in *The Legal 500* and *Who's Who Legal*, which classified him in 2022 as 'Thought Leaders Global Elite' in hospitality law.

Dieter Gericke

Homburger AG

Dieter Gericke heads Homburger's corporate/M&A team as well as the Homburger China group. His practice focuses on M&A (including public takeovers and defence), equity capital markets (including IPOs), private equity and corporate governance. He advises on matters of corporate law as well as securities regulations.

Dieter Gericke has advised on various landmark transactions, such as the takeover of Syngenta by ChemChina, the sale by Nestlé to and merger of Alcon with Novartis and the unsolicited takeover of Converium by SCOR.

Petra Hanselmann

Pestalozzi Attorneys at Law Ltd

Petra Hanselmann is a partner at Pestalozzi Attorneys at Law Ltd. Petra graduated from the University of Zurich Law School in 2002 and, after her bar admission in Switzerland in 2005, she obtained an LLM in corporate law from New York University in 2007. From 2007 to 2022 she worked with other major law firms in Zurich and New York. Petra's professional practice is focused on advising domestic and international clients in the areas of mergers and acquisitions, private equity and corporate reorganisations. She has broad experience in particular in cross-border M&A, international joint ventures, carve-out transactions and post-merger integrations with a focus on the industrial, technology and finance sectors.

Reto Heuberger

Homburger AG

Reto Heuberger heads Homburger's tax team. His practice focuses on tax planning and the structuring of M&A transactions, reorganisations, relocations, investment management structures, family offices and trusts.

Mariel Hoch

Bär & Karrer AG

Mariel Hoch's practice focuses on domestic and cross-border public tender offers and mergers, private M&A transactions, general corporate and securities matters, including proxy fights, hostile defence matters and corporate governance. She also represents clients in M&A-related litigation.

She has advised a broad range of public and private companies and individuals in Switzerland and abroad in a variety of industries, including healthcare, pharmaceuticals, technology, financial services, retail, leisure, transport and industrial products.

She also serves on listed and non-listed companies' boards and has expertise in board committee work.

Stefan Kramer

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Stefan Kramer is a partner in Homburger's banking and finance and capital markets teams. He regularly advises on asset-based financings (covered bonds and securitisations), banking regulation (including regulatory capital transactions) and derivative markets regulations. Other areas of work include insolvency law and financial markets infrastructure.

Stefan Kramer advises on all regulatory aspects, including banking and stock exchange regulations and derivatives market regulations. He is head of Homburger's restructuring/insolvency working group and regularly works on insolvency-related matters, including recovery and resolution planning and cross-border recognition of insolvency measures.

He regularly publishes on banking and financial market matters and is an editor of the Commentary on the Swiss Banking Act as well as the Commentary on the Swiss Financial Market Infrastructure Act.

Joanna Long

UBS Business Solutions AG

Joanna Long is a director in the group corporate legal team at UBS and a member of the group M&A legal team. Her practice focuses on group own account Swiss and international M&A

transactions. She also advises on domestic and international internal reorganisations, corporate law and corporate governance matters. Prior to joining UBS in 2019, Ms Long worked at Bär & Karrer AG, focusing on private M&A, private equity and corporate law. She relocated to Switzerland in 2017, having practised for several years at a Luxembourg business law firm advising large international groups and private equity houses. Ms Long is an Irish-qualified lawyer, admitted to the Roll of Solicitors in Ireland and holds a law degree from University College Dublin (BCL European). She is admitted as a Solicitor of the Senior Courts of England and Wales.

Benedikt Maurenbrecher
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Benedikt Maurenbrecher is a partner at Homburger and heads its banking and finance team and co-heads its capital markets team. His practice focuses on banking, finance and capital markets. He is experienced in a broad range of transactions, notably in the areas of equity capital markets, secured and unsecured lending, covered bonds, securitisation, regulatory capital and derivatives. He is an Authorised Issuers' Representative at the SIX Swiss Exchange.

Benedikt Maurenbrecher also advises on domestic and cross-border aspects of banking, securities and investment fund regulation, and regularly represents market participants in related regulatory proceedings and civil litigation. He is a lecturer in law at the University of Zurich. He is the co-chair of the Banking Committee and a member of the Securities Committee of the International Bar Association.

Valerie Meyer Bahar
Niederer Kraft Frey Ltd
Valerie Meyer Bahar is a partner at Niederer Kraft Frey. She advises and represents clients in commercial and corporate litigation, with a focus on shareholder and employment litigation; in international and national arbitration; and in all aspects of corporate employment law.

Valerie advises on all aspects of employment law, for example, on the drafting and implementation of employment agreements; staff and time regulations; compensation matters; dismissals; and the transfer of employees in M&A transactions and restructurings, including mass dismissals. She regularly handles employment litigation relating to, inter alia, wrongful termination and bonus claims.

Christoph Neeracher
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Christoph Neeracher is a partner and head of private M&A/private equity. He specialises in international and domestic M&A transactions (focusing on private M&A and private equity transactions, including secondary buyouts, public-to-private transactions and distressed equity), transaction finance, venture capital, startups, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders' agreements) and all directly related areas such as employment matters for key employees (eg, employee participation and incentive agreements).

He is experienced in a broad range of national and international transactions on both the sell and buy sides (including corporate auction processes) and the assistance of clients in their ongoing corporate and commercial activities. Additionally, Christoph Neeracher represents clients in litigation proceedings relating to his specialisation.

Pascal Richard

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Pascal Richard is a partner at Pestalozzi Attorneys at Law Ltd. Pascal graduated from the University of Berne in 2003 and was admitted to the Zurich bar in 2006. He holds an LLM from the College of Law of England and Wales and is qualified as a solicitor of the Senior Courts of England and Wales. Previously, Pascal worked as legal counsel in the legal department of a Swiss defence and technology group of companies and as an associate and partner respectively in business law firms in London and Zurich. Pascal advises listed and non-listed clients on domestic and international M&A, joint venture and carve-out transactions in particular in the financial services industry, as well as general corporate and commercial matters.

Thomas Schönenberger

Bratschi Ltd

Thomas Schönenberger has been a partner at Bratschi Ltd since 2008 and served as the firm's chair from 2017 to 2022. He is co-head of the industry group construction, real estate and hotels. Being a Certified Specialist SBA Construction and Real Estate Law since 2014, he advises Swiss and international corporations, predominantly professional investors and real estate companies, in all matters of construction and real estate law. Furthermore, he advises clients in corporate M&A transactions. Admitted to the Swiss Bar in 2001, Thomas Schönenberger is also an experienced litigator in the field of real estate and construction law.

Susanne Schreiber

Bär & Karrer AG

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.

She frequently works on vendor or buy-side transactions for private equity clients, multinationals or individuals, covering due diligence and pre-deal structuring, as well as carve-outs and post-merger integration from a tax perspective.

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 international law firm in Germany and for one of the big four companies in Zurich, where she last headed the Swiss M&A tax department.

Franz Schubiger

Pestalozzi Attorneys at Law Ltd

Franz Schubiger co-heads Pestalozzi's life sciences group and is a member of the corporate/M&A group in Zurich. His practice focuses on corporate law, M&A, corporate finance, private equity and venture capital, complex restructurings as well as general contract and commercial law. He regularly advises in the fields of life sciences, including pharma, consumer healthcare and medtech, as well as consumer goods and retailing industries, ICT, e-commerce and online business.

Beat Schwarz

Pestalozzi Attorneys at Law Ltd

Beat Schwarz is a partner and member of Pestalozzi's corporate/M&A group in Zurich. He focuses on corporate, contract and commercial law as well as on corporate and finance transactions, in particular M&A, private equity and venture capital, joint ventures, restructurings and debt capital markets. As part of his domestic and cross-border transaction advisory practice involving listed and non-listed companies, he is regularly involved in insurance and other financial services' corporate, contract and regulatory work, as well as in merger control proceedings.

Philippe Seiler

Bär & Karrer AG

Philippe Seiler is a partner at Bär & Karrer AG. He has broad experience in international and domestic M&A transactions in various industries. Philippe Seiler does not only cover large transactions and takeovers but also focuses on small and medium-sized M&A transactions and private equity transactions, as well as venture capital and startup transactions. Furthermore, he specialises in regulatory matters in the fields of life sciences and healthcare.

Philip Spoerlé

Niederer Kraft Frey Ltd

Philip Spoerlé is a partner at Niederer Kraft Frey Ltd, where he is a member of the firm's capital markets, financing and corporate/M&A practice groups. Philip is a corporate finance specialist with a main focus on complex debt and equity-linked financing structures. Philip regularly represents lenders, borrowers and sponsors in high profile leveraged acquisition financings, art financings, real estate financings and lombard, export and project finance structures. Philip's practice also includes advising underwriters and issuers on all aspects of ECM and DCM transactions, including public takeovers, equity investments, block trades, IPOs, rights offerings and convertible bonds issues. In addition, he regularly acts as advisor in securitisation and synthetic credit-linked transactions, the issuance of financial instruments, corporate restructurings, private equity and venture capital investments and general corporate and commercial matters.

Richard Stäuber

Homburger AG

Richard Stäuber is a partner in Homburger's competition and regulatory teams, focusing on Swiss and EU competition and antitrust law.

He has broad experience in representing businesses in all areas of competition law before authorities and courts, including cartel and abuse of dominance proceedings, national and international merger control proceedings, dawn raids and leniency proceedings. He regularly advises clients on distribution arrangements, cooperation projects and licence agreements. His areas of expertise also include regulated markets, in particular the healthcare and telecommunications sectors, as well as administrative law.

With a background in both law and economics and an active member in Swiss and international professional associations, Richard Stäuber publishes and lectures in his areas of specialisation.

Mladen Stojiljković

VISCHER

Mladen Stojiljković is a counsel in the dispute resolution team of VISCHER in Zurich. He focuses his practice on complex litigation and international arbitration. He also serves as an arbitrator. Mladen's experience in litigation and arbitration spans a wide range of industries and issues, including M&A-related disputes, engineering and construction, patent licensing and financial services. He has also handles matters involving foreign governments and foreign officials. He holds degrees from the University of Zurich (lic iur, PhD) and Columbia Law School (LLM). Mladen was named a Future Leader by *Who's Who Legal* in International Arbitration (2018–2021) and Litigation (2020).

Ueli Studer

UBS Switzerland AG

Ueli Studer is a managing director at UBS and, as general counsel Switzerland, a member of UBS Group Legal's management team. In this role, he serves as UBS divisional general counsel personal and corporate banking, including WM Switzerland and, regionally, as general counsel of the Region Switzerland. He is also a member of the executive board of UBS Switzerland AG as the entity's general counsel. Mr Studer joined UBS in 2006 and has since held four distinct management positions within UBS's legal department. For eight years, he led the legal corporate finance and structured transactions team dealing with bespoke, large and complex transactions. After that, Mr Studer served as head legal products and distribution, combining several teams under one cross-divisional roof providing legal support to the firm's value chain. In 2018, Mr Studer assumed the role as head group functions legal, providing globally coordinated legal advice on regulatory, corporate, contractual, transactional and technology matters of group relevance before assuming his current role as general counsel Switzerland in 2021. Before joining UBS, Mr Studer worked for the Swiss law firm Bär & Karrer AG for several years advising domestic and global companies on M&A, capital markets and financing transactions. Mr Studer is a Swiss-qualified attorney and holds degrees from the University of Berne (lic iur) and the University of London (LLM).

Oliver Triebold

Schellenberg Wittmer Ltd

Oliver Triebold is a partner in Schellenberg Wittmer's mergers and acquisitions group in Zurich. He specialises in cross-border and domestic M&A transactions, private equity and venture capital investments, corporate governance matters, corporate restructurings and commercial business transactions.

Kelsang Tsün

UBS Business Solutions AG

Kelsang Tsün is a managing director at UBS heading the group corporate legal team within the group functions legal team. Group corporate legal advises on large internal corporate transactions and reorganisations and M&A transactions, as well as on corporate law, treasury and contracting matters affecting the group. Prior to that, Mr Tsün led the group treasury legal team and also served as legal counsel in the legal corporate and institutional clients team, advising on complex domestic and international financing transactions. Before joining UBS in 2010, Mr Tsün worked at a business law firm in Zurich for a number of years advising Swiss and international clients on corporate and commercial law matters, with a focus on M&A as well as financing and restructuring transactions. Mr Tsün is a Swiss-qualified attorney and holds a degree from the University of St Gallen (lic iur HSG).

David Vasella

Walder Wyss Ltd

David Vasella is the head of the information technology and intellectual property team at Walder Wyss. He advises and represents companies on all questions of information and technology law. He specialises in data protection, information security issues and generally in data law, especially in connection with the monetisation of data and the digitisation of business processes, and supports data protection law compliance. He regularly gives talks and publishes in his fields of expertise.

After studying law at the University of Fribourg (licentiate degree 2002), he became a member of the bar association in Zurich in 2004 and received his doctorate at the University of Zurich in 2011 in the field of capital market and unfair trading practice law (summa cum laude; awarded the Prof Walther Hug Prize and Issekutz Prize). David Vasella is co-editor of digma (the *Journal for Data Law and Information Security*) and datenrecht.ch (a platform on data law). He is a certified information privacy professional and manager (CIPP/E, CIPM).

David Vasella speaks German and English. He is registered in the Zurich Bar Registry.

Gérald Virieux

VISCHER

Gérald Virieux is the head of the dispute resolution team of VISCHER's Geneva office. He represents Swiss and foreign clients before state courts and arbitral tribunals in connection with commercial disputes. Gerald's practice focuses notably on disputes involving cross-border aspects, and on the recognition and enforcement of foreign court decisions and arbitral awards.

Gerald holds a Master in Business Law from the University of Geneva and an LLM in International Arbitration from the University of Miami Law School.

Christoph Vonlanthen

Schellenberg Wittmer Ltd

Christoph Vonlanthen is a specialist in mergers and acquisitions, growth equity, corporate governance and capital markets.

Christoph is a partner based in both the Geneva and Zurich offices, and has vast experience accumulated in Switzerland, New York and London in market-leading transactions, including buyouts, divestitures, spin-merge transactions, exchange offers, divestitures, carve-outs, rights offerings and IPOs in a range of industries. He regularly advises strategics, financial sponsors and investment banks on complex cross-border assignments. Christoph also assists fund managers and institutional investors on structured investments, co-investments and secondary sale transactions.

Annette Weber

Advestra AG

Annette Weber is a founding partner of Advestra. Before that she was a senior associate at a leading Swiss law firm. The focus of Annette's practice is capital market transactions, including a broad spectrum of equity capital market transactions, such as IPOs, rights offerings, spin-offs, or private placements as well as debt capital market transactions – bonds, convertible bonds as well as hybrid and regulatory capital instruments. She represents both issuers and banks. Annette practice also covers sustainable capital markets issuances. Annette further regularly advises clients on corporate and securities laws as well as corporate governance matters, in particular for listed companies.

Philippe Weber

Niederer Kraft Frey Ltd

Philippe Weber is a partner at Niederer Kraft Frey. He often represents Swiss and international clients in some of the largest and most complex corporate/M&A, capital markets and banking transactions in Switzerland and regularly counsels public companies on how to successfully navigate critical governance and compliance matters.

Philippe also regularly advises companies, boards and other parties on takeover law, governance and compliance and represents clients in such matters before regulators, including the SIX Swiss Exchange, the Swiss Takeover Board, the Swiss Financial Markets Supervisory Authority FINMA and other Swiss and foreign regulators.

Manuel Werder

Niederer Kraft Frey Ltd

Manuel Werder is a partner at Niederer Kraft Frey. His practice focuses on corporate law and M&A, including private equity and venture capital transactions, often with an Asian aspect. He has expertise in large, complex, cross-border acquisitions, mergers, divestitures and corporate restructurings. His M&A expertise crosses all industries, including financial, industrials and services.

Manuel advises Swiss and international financial institutions and corporations active in different industries in M&A, corporate, commercial, contract, securities and stock exchange law. His expertise also includes investment and shareholders' agreements, joint ventures, commercial contracts and employment law.

Peter Widmer

FMP Fuhrer Marbach & Partners

Peter Widmer has been a partner of FMP Fuhrer Marbach since 1988. His practice is focused on all relevant aspects of IP, including litigation in all Swiss courts. He serves his clients in German and English. One main field of expertise is the strategic protection of signs (trademarks, company names, trade and domain names) in a multinational context with the full range from evaluation and clearance of new signs, to their protection and enforcement, including aspects of unfair competition, antitrust law and copyright law. Mr Widmer has successfully negotiated a number of complex trademark coexistence and delimitation agreements with worldwide application. The second focus is patent litigation, with a special knack for complex and intricate cases in all technical areas. Furthermore, Mr Widmer's practice involves all aspects of contracts, again with a clear focus on IP-related matters, including licences, coexistence and delimitation agreements, and agreements on assignment of IP rights in complex transactions. Mr Widmer is the author of publications in IP. He is a speaker or moderator at numerous national and international symposia on IP-related matters and is past chair of the Trademark Standing Committee of the International Association for the Protection of Intellectual Property.

Markus Wolf

Baker McKenzie

Markus Wolf is a partner in Baker McKenzie's banking & finance and restructuring & insolvency teams in Zurich, and a lecturer on private law at the University of St Gallen (HSG). He graduated from the University of St Gallen (MA in Law & Economics, 2010 and Dr iur, 2012) and the University of Sydney (LLM, 2016). He previously worked in the firm's Sydney office and was seconded to the legal team of one of Switzerland's leading banks. Markus Wolf advises lenders, borrowers and sponsors on leveraged acquisition, corporate, project, export and property financing transactions. He regularly acts for Swiss and foreign creditors and debtors in domestic and cross-border financial restructurings and formal insolvency procedures.

Appendix 2

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