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PRACTICE GUIDES

Swiss M&A

First Edition

Contributing Editors
Ueli Studer, Kelsang Tsün and Sophie Stählin

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Swiss M&A

Practice Guide

Contributing Editors
Ueli Studer, Kelsang Tsün and Sophie Stählin

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Introduction

Ueli Studer, Kelsang Tsün and Sophie Stählin[1]

This is the first edition of the *Practice Guide – Swiss M&A* published by Lexology Getting The Deal Through. It provides a topical analysis of the legal framework, opportunities, challenges and risks that arise in connection with M&A transactions in Switzerland. As applicable, each chapter also specifically deals with matters of particular relevance in M&A transactions 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, in continuation of previous Lexology Getting the Deal Through publications answering key questions around Swiss M&A.

We, from UBS's Group Corporate Legal team, have assisted in the selection of the chapters for the *Practice Guide – Swiss M&A* and in bringing together authors known for their expertise and vast experience in M&A and related fields of law. We are very pleased to have been able to attract this selection of experts from very 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, in particular in the M&A area.

The 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. Since 2014, UBS has undertaken a series of internal transactions changing its legal structure to improve the resolvability of the group in response to 'too big to fail' requirements. In December 2014, UBS Group AG became the holding company of the group. In 2015, UBS AG transferred its Swiss booked personal and corporate banking and wealth management business 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

1 Ueli Studer and Kelsang Tsün are in-house lawyers at UBS Group AG and Sophie Stählin is a senior associate at Quadra Attorneys at Law Ltd.

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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 include:

- the sale of UBS AG's Asset Management's fund administration servicing units in Luxembourg and Switzerland;
- the joint venture between UBS AG and Japan's leading trust bank combining UBS's wealth management expertise with comprehensive local trust banking capabilities; and
- the sale of a majority stake in UBS's B2B fund distribution platform Fondcenter to another post-trade service provider, creating a top two B2B fund distribution platform in Europe, Switzerland and Asia.

When advising UBS Group and its business divisions on internal and external corporate transactions, reorganisations and, in particular, on M&A transactions, we are naturally confronted with the legal issues and challenges that are described in the following chapters and in particular with 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' covering M&A transactions involving Swiss financial institutions. Moreover, UBS as a financial group is subject to consolidated supervision by FINMA. Therefore, and 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 discussion with FINMA on the extent to which the transaction may have an effect on UBS as a whole from a regulatory perspective might be required. 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. Finally and 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 is in addition to the data protection issues arising within M&A transactions as set forth in the chapter 'Data Privacy and Cybersecurity'.

In conjunction with the above-mentioned issues relating to financial institutions M&A, we often deal with the structural complexity of the UBS Group, in particular when it comes to carve-out transactions concerning parts of the UBS business. The business of UBS is divided into four business divisions – Global Wealth Management, Personal & Corporate Banking, Asset Management and the Investment Bank – that operate through various group entities. Moreover, and as mentioned above, Group Functions (ie, the shared services functions of the group) are consolidated in separate service companies. Consequently, if UBS sells a business the identification and carve-out of the relevant assets is a key process to be undertaken. The chapter 'Key Intellectual Property Issues in M&A Transactions' addresses the complexity as regards intellectual property.

Swiss M&A market

Below we provide a brief overview of the Swiss M&A market, also covered in more detail in the chapters 'Private M&A' and 'Public M&A'. Although Switzerland is a small country, M&A activity in Switzerland has remained high for the past few years. On the one hand, Switzerland is home

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to many large multinational companies, which are global market players. On the other hand, Switzerland provides a favourable framework for M&A transactions, inter alia, with its stable economy, straightforward legal framework and almost no investment restrictions.

While the number of M&A deals in Switzerland in 2019 declined by around 25 per cent compared with 2018, the M&A deal volume more than doubled (Source: Dealogic). This trend was significantly driven by companies transforming and reshaping their portfolios. We estimate that corporates are adopting a 'wait and see' attitude with respect to bold M&A moves and instead of seeking inorganic growth through acquisitions, companies are increasingly focusing on corporate clarity, streamlining their operations through joint ventures, demergers and spin-offs. Furthermore, low or negative interest rates are likely to motivate M&A activity, and financial sponsor-led M&A remains strong, with an increase in worldwide LBO volume of 7 per cent compared with 2018 and accounting for about 8 per cent of global M&A volumes in 2019.

M&A activity has been strong in sectors exposed to secular growth and benefiting from transformative technological trends, with the pharmaceuticals and life sciences sector being in the forefront with three transactions among Switzerland's top five transactions with respect to deal volume in 2019, as shown in the table. This also includes the 2019 blockbuster transaction, the 100 per cent Alcon spin-off from Novartis. This transaction, where UBS acted as joint financial adviser, has shown to be the largest spin-off in Switzerland and the second largest spin-off in history after the spin-off of AbbVie from Abbott Laboratories in 2013. In contrast, sectors with low intrinsic growth, such as power and utilities, consumer and retail as well as the financial industry, experienced a reduction in M&A activity.

Top five announced M&A transactions in 2019 with a Swiss target*

	Acquirer	Target	Deal value (US$ billion)
1	Novartis shareholders	Alcon	31.4
2	EQT Partners, ADIA	Nestlé Skin Health	10.1
3	DSV	Panalpina	5.4
4	DXC Technology	Luxoft	2.0
5	PolyOne	Clariant's Masterbatch business	1.6

Source: Dealogic
* Excluding ZF Friedrichshafen's acquisition of WABCO Holdings as country and state of incorporation are US and Delaware

As regards 2020, the first draft of this introduction had set forth a promising outlook with a healthy pipeline of M&A activity. However, with the coronavirus market turmoil this has suddenly changed. Many transactions have been either cancelled or postponed for various reasons. Parties may be uncertain of the lasting effect the coronavirus crisis may have on a given transaction and its business plan or a party may be forced to focus and employ its resources on crisis management rather than M&A activity. It remains to be seen how the coronavirus crisis will evolve, but at the time of writing it seems likely that the current situation will cause a shift in M&A dynamics, at least in the short and medium term. We expect that many companies will experience financial challenges that may cause a longer-term reduction of M&A activity and also distressed M&A and restructuring work, in more general, may play a more important role in the M&A market

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as described in the chapter 'Distressed M&A in Switzerland'. Moreover, the covid-19 pandemic is likely to have an effect on how parties weigh risks within due diligence and deal negotiations. For instance, force majeure or MAC clauses will become increasingly important for deal teams to negotiate going forward.

Last but not least, we should like to extend a sincere thank you to all the contributing authors and our colleagues from the Group M&A Legal team for their thorough review and thoughtful comments on this introduction. Special thanks go to Alain Bee, the former head of the Group Corporate Legal team, for performing most of the preparatory work for this publication.

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Structuring Cross-border Transactions

Dieter Gericke and Marc Hanslin[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, are 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 includes some default provisions

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(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), entering a binding agreement by a foreign or foreign-controlled buyer may already require government 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 certificate(s), handover of the share certificate(s) to the acquirer or instruction of the central custodian of intermediated 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, the transfer of shares in a limited liability company may be subject to the consent of the shareholders' meeting, each 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.

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 (Swiss Merger Act) (principle of universal succession).

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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 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 earlier than that). 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 of important 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.

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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 hidden reserves on all other types of assets are taxable at normal rate.

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 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 acquirers wanted 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 case, 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

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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 this has to be checked in specific cases, in our experience, for example, Austria, Belgium, France, Italy, Liechtenstein, Luxembourg, Portugal, Romania and Spain, the US states of Delaware and North Carolina, the British Virgin Islands, the Bahamas, Bermuda 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 commercial register.

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

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 adequately considered

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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 hidden reserves 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 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

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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 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

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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.

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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. In addition to this, the distribution of such capital contribution reserves created by an immigration quasi-merger is not subject to the limitations introduced by the Federal Act on Tax Reform and AHV Funding, in force since 1 January 2020. More challenging are cross-border mergers and demergers, since such transactions may trigger taxable realisation of hidden reserves on the respective assets as well as withholding taxes, or do not permit safeguarding tax assets. 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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2

Pricing

Philippe Weber and Manuel Werder[1]

Introduction

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

At the same time, Switzerland is the 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 almost half of the 50 largest deals involving Switzerland in 2019.

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]

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1 Philippe Weber and Manuel Werder are partners with 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.

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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 2019 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 five years.

By contrast, during the same period closing accounts transactions have partly lost importance in the market and decreased by some 20 per cent to approximately 35 per cent in 2019.[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.

It remains to be seen whether the covid-19 crisis will result in a return of closing accounts and other post-signing price-adjustment mechanisms (eg, hybrids and earn-outs), but initial signs of this are visible.

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.

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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.

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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,

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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 and/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 and/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.

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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.

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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.

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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.

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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.

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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 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 and/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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3

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 ratione loci must be determined first.

Where a claim for an alleged breach of data protection law 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 disclosed sensitive data about employees of the French subsidiary to the prospective buyer unlawfully, the affected employees may bring a claim before a Swiss court[5]

1 David Vasella is a partner with 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.

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and then opt 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] For example, a share purchase agreement between a Swiss and a UK company, or between a German and an Italian company, will usually 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.

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. While there is no final draft of the revised FDPA (rev-FDPA) yet, most of the proposed amendments have passed through the parliamentary debate. Based on the current draft, we expect that GDPR compliance will generally imply compliance with the rev-FDPA, with minor exceptions. The further debate is likely to focus on profiling, which will be a new concept under Swiss law, and on the scope of the information obligation and access right. Along with the FDPA, the FDPO will be revised. There is no finite schedule for the further debate, but we expect the rev-FDPA and the revised FDPO (rev-FDPO) to enter into force as of 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, or to inform data subjects, etc), which he or she cannot under the current FDPA. On the other hand, the individuals responsible for certain breaches of data protection law may be liable to fines of up to 250,000 Swiss francs, provided they have acted intentionally and provided 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, or transfers abroad in breach of transfer restrictions will be liable to a fine.

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; cf 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.

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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:[9]

- Due diligence phase: a prospective buyer or bidder or, in 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.[10] 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.[11] 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 requirement (very detailed, in some instances). For example, the GDPR requires all data processing to be lawful, fair and transparent and as little intrusive as possible,[12] but what is lawful is subject to detailed provisions,[13] and transparency is regulated comprehensively as well.[14] In addition, transfers of personal data abroad are restricted,[15] data processors must be bound by an appropriate agreement,[16] and data subjects have a number of rights,[17] most impor-

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

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

11 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.

12 Article 5 GDPR.

13 Articles 6, 9-10 and 47-49 GDPR.

14 Articles 12 et seq GDPR.

15 Articles 44 et seq GDPR.

16 Article 28 GDPR.

17 Articles 12 and 15 et seq GDPR.

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tantly 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[18].

In order 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 are kept and who will have access to the data. A 'processor', on the other hand, is a party that processes data on behalf and only for the purposes of the controller, for example, the provider of a data room.[19] 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.[20]

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(s).[21] 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.[22]

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,[23] the only

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18 Article 5(2) and 30 GDPR.

19 cf articles 4(7) and 4(9) GDPR.

20 Article 26 GDPR.

21 See Peter Schantz, in: Simitis/Hornung (eds), *Datenschutzrecht*, 1st ed 2019, article 6 GDPR No. 128.

22 cf Schantz, article 6 GDPR No. 128.

23 Article 9(1) GDPR. However, not all data that may reveal sensitive information are 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.

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legal ground available in M&A transactions is explicit consent.[24] 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.[25]

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,[26] which raises the question if disclosing employee data ahead of a potential transaction is necessary for the employment. The question remains open, but the 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.[27]

Where personal data are transferred abroad to a recipient in a country that is not considered to provide adequate data protection (and that is not certified under the Swiss-US or EU-US Privacy Shield, for transferees located in the US)[28], the transferor will need to ensure that the transfer is based on adequate safeguards, such as the EU Model Clauses[29] (usually slightly tweaked where data are transferred from Switzerland in order to account for Swiss law). A seller and prospective buyer may therefore need to enter into an agreement incorporating the EU Model Clauses in order for the seller to be able to transfer personal data to the buyer.

Data minimisation, proportionality, purpose limitation, and data security

The principles of proportionality, data minimisation and purpose limitation[30] require the parties to consider carefully the extent of personal 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 but not all customer data to carry out verification or testing. If and when disclosure of personal data is

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

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

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

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

28 The Privacy Shield is a programme where US companies can self-certify to adhere to the Privacy Shield principles. Certified companies are considered by the EU Commission and the FDPIC to provide adequate protection for personal data within the scope of the relevant certification.

29 The EU Model Clauses are a set of three standard contractual clauses recognised by the European Commission and the FDPIC as providing sufficient protection for transfers abroad to countries with inadequate data protection. Note that under the FDPA the data exporter must notify the use of the EU Model Clauses to the FDPIC (article 6(3) FDPA).

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

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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, in order 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, but which 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,[31] data should be transferred securely.

Transparency (information)

The principle of transparency[32] 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 for the party providing information for the due diligence process to review the relevant privacy notices, even though it is questionable if 'transactions' really are a separate processing purpose that must be notified to the subjects.[33] If they are found to be lacking, that party may wish to update the notice(s)[34] or provide additional information about a potential transaction in generic terms if that is a viable option at this stage.[35] This applies for all subjects whose data are 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.[36]

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

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

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

34 For example, include 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.

35 cf articles 13(3) and 14(4) GDPR.

36 Article 14(5)(b) GDPR; cf 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 not 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, cf, eg, §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)).

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Focus areas

The comments above deal with the data protection framework around due diligence reviews. A different point though 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 be further processed by the buyer, and if consent by the affected data subjects (usually the seller's end customers, for example, 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.

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).[37] However, in order 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 if 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.[38] 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.[39]

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.[40]

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

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

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

40 Article 6(1)(f) GDPR.

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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.[41]

Focus areas for a due diligence review

If personal data are 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;[42]
- where the processing is based on consent (for example, processing for electronic direct marketing), whether consent has been properly collected and documented, and generally 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 will 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, but which 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

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

42 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.

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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, different from 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.[43] 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.[44]

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 HIPAA[45], which protects health information, or the CCPA[46]). 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), provided that 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;

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43 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'.

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

45 Health Insurance Portability and Accountability Act.

46 California Consumer Privacy Act.

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- 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;
- a document explaining the company's security measures to protect key data;
- '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 whistleblowing 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;
- 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 its data protection implementation programme 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

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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, respectively, 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, under 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 will not require a joint controller agreement in terms of article 26 GDPR.

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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 are an important asset. As regulation becomes tighter and data become 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.

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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) and intellectual property rights (IPRs). Apart from trademarks, patents and other classical IPRs, trade secrets and in particular software form the backbone of many modern businesses.[3] Proper identification, description, allocation of and 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 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 at all.

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1 Peter Widmer is an attorney-at-law and partner at FMP Fuhrer Marbach; Peter Bigler is an attorney-at-law, former associate at FMP Fuhrer Marbach and currently legal adviser at the Swiss Federal Institute of Intellectual Property. This chapter purely reflects the personal experiences and opinions of the authors.

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 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/.

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When preparing M&A deals, pitfalls lurk. Therefore, many M&A deals fail completely.[4] Others succeed, but fail to pay back the money invested in them. One of the main reasons is lack of understanding of the involved firms' IP, its scope and limits.[5] Flawed M&A deals may in particular lead to either buyer, seller or their affiliates lacking access to vital IP after the deal or even to unintended forfeiture of said rights.

The starting point must therefore always be the identification of the IPRs relevant for the intended transaction, their analysis, description and appropriate listing. Registers such as the Swiss IP register[6] may give stakeholders an overview over registered rights. But such registers do not necessarily show complete or up-to-date information: Past changes of ownership of IPRs of interest may not (yet) be reflected in the current registry records. This applies all the more for longer chains of assignments that may have occurred over the years and were never completely reflected in such registers. The entries also do not necessarily show whether the rights 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.[7]

Such pitfalls occur even more frequently in relation to unregistered rights such as copyrights[8], which form the basis for software protection in Switzerland. Software usually grows over the years with many parties involved, other software elements (both proprietary and open-source) integrated and adapted, leading to complex ownership questions.[9]

Finally, in a globally connected economy, IP issues can have considerable cross-border effects, such as in bankruptcy of an affiliate company owning certain core IPRs. Such IPRs can be business-critical for a going concern of the parent group's surviving entities in many different jurisdictions. Of course, strategies such as ringfencing of IPRs can be deployed to mitigate such risks. 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 ringfenced 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 measures in the case of infringement of own IP.

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

4 The most recent notable example was the failed merger between the Swiss Telecom Providers Sunrise and UPC in late 2019.

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

6 www.swissreg.ch.

7 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.

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

9 See 'Joint ownership in IPRs'.

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Definition issues

Identifying and taking stock of the relevant IPRs

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

In a share deal, IPRs do not change hands directly, but the ownership of the company holding those rights does. Thus the careful identification and analysis of IPRs flagged for such transaction is crucial under numerous aspects. First, such transaction may have an impact on underlying licence rights connected to the use of certain of the flagged IPRs. This can be relevant if the change of ownership results in the termination of business-critical licence agreements. Second, some of these IPRs may in fact 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 IPRs for continued use in its own organisation.

In an asset deal, where a part of the business is to be carved out and sold to an independent third party or joint venture with minority interest of the seller, stakeholders must ensure that the necessary IPRs are properly identified and allocated to the target entity that acts as the seller within a group of companies. In such scenarios, ownership of IPRs is often scattered across various companies. This requires identifying ownership of IPRs flagged for transfer within the group so they can properly be allocated to the carved-out business. 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 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 group entity has contributed to the value of IPRs flagged for transfer to the third-party buyer. The differentiation between legal and economic ownership is also 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 IPRs flagged for transfer is crucial for a successful transaction. This 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,[10] dedicated search providers may assist in accessing additional databases relating to registered IPRs. The majority 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, many companies may seize this as an opportunity to review and streamline their IP

10 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).

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portfolio. It may also be the first step to provide for a group or company-wide IP policy in an effort to facilitate evaluation, management, protection, use and enforcement of IPRs while avoiding duplications of IP workstreams and cutting costs at the same time.

Types of IPRs to be considered

In order to identify and list IPRs flagged for transfer, 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

The most frequently relevant core IPRs in Switzerland are trademarks and patents. Both are registered rights, meaning their owner is granted protection upon registration in the relevant registers. Patents[11] are governed by the Federal Act on Patents for Inventions and its corresponding regulation.[12] 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.[13] Less frequent but still relevant are industrial designs, which aim at the protection of a new characteristic visual presentation of products or parts of these.[14]

Apart from these core 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 be different from the core 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.[15] These company names grant their owners certain defensive rights[16] against other similar junior company names and are thus considered as valuable IPRs. As company names and trademarks may not overlap in relation to scope of the protective and exclusionary rights they confer, it is crucial 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 consist of the umbrella brand too and are used as names of links to web content (ie, a client-facing application) that may be part of the proposed transaction.

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11 Including Supplementary Protection Certificates for Medicinal Products.

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

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

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

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

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

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In sum, M&A agreements should not only clarify future use and protection of the traditional IPRs, but should also address if and how the buyer will be allowed to use the existing company name in the case of a share deal, and/or if and how the distinctive branding elements are permitted to be further used or even registered as part of new trademarks, company names, domain names and/or names of social media channels, in particular in the case of an asset deal.

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 as in, for example, the United States. Instead, the Swiss Copyright Act grants copyright to the natural person who created the work and thus upon its creation, a mechanism known as the 'creator principle'.[17] While this saves the creator a lot of administrative work, it makes tracking of the owner(s) of copyrighted works much more complex. Additionally, in practice copyrighted works are often the result of cooperation between several individuals who may be employees of one but also of several different entities. Thus this may result in joint authorship situations, which complicate ownership questions and transfers considerably.[18]

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 many lack the right to grant the proposed buyer the necessary sublicences to use such software. To answer these complex ownership questions and properly transfer software, it is therefore crucial to trace the chain of assignment, all contracts and other documents regarding development and expansion of software flagged for transfer.

Apart from software, know-how in the sense of trade secrets, specific work products, business relationships, etc may qualify as intangible assets and enjoy protection under the rules of the Unfair Competition Act.[19] However, identifying and listing these assets may prove difficult. Nonetheless, 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.[20]

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

18 See 'Joint ownership in IPRs'.

19 Federal Act against Unfair Competition, SR 241.

20 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, p638–647.

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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. IPRs are of no or limited value to the buyer if they are flawed. IP due diligence is therefore a vital part of any preparation for an M&A transaction.

After all relevant IPRs have been inventorised, the next step must be listing all 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 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 IPRs flagged for transfer 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, for example, threatening administrative trademark cancellation actions,[21] 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 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

21 Article 35a Trade Mark Protection Act.

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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 IPRs flagged for transfer 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 relevant 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 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 IPRs flagged for transfer? If such IPRs cannot be transferred to the seller, does another company (such as the parent) have to become a party of 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 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 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.[22] 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 the corporate identity.

22 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).

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Strategies such as ringfencing, where vital IPRs are separated from the operating business, are therefore a tested option. Ownership of business-critical 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 ringfenced ownership of IP may complicate the transfer of such IPRs in subsequent M&A transactions, monetisation of valuable IPRs in licensing scenarios with third parties, as well as in enforcement measures 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.[23] 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.[24] Unless agreed otherwise, joint owners may only use and dispose of the work with the consent of all other owners.[25] 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 and/or software), employees of different entities and contractors often exchange ideas and work closely together. In hindsight it is often controversial as who simply 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 ownership of software-related IPRs that are flagged for transfer.

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 to use the jointly owned IPRs independently of one another. Last, detailed documentation of the project, including all agreements, correspondence, meeting notes, etc can help prove contributions and allocation of disputes later on.

23 Article 3 section 2 Patents Act.

24 Article 7 section 1 Copyright Act.

25 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, art. 3 N 29.

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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 gets automatically assigned to the employer. Nevertheless, Swiss law provides for regulations on exceptional automatic transfer of ownership in relation to specific IPRs.[26] 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 for 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 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, the comprehensive copyrights are not transferred in whole, but only those specific rights (such as use rights) necessary to the agreed-upon purpose are transferred. 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 IPRs flagged for transfer 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 compromise the M&A negotiations eventually. 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 such joint venture company or to permit such entity to register and own rights consisting of IPRs of one of the joint venture partners. As a general rule, the latter scenario should be avoided in order to minimise the risk of losing control over valuable own IPRs.

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26 As an example, Article 332 section 1 Code of Obligations.

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Licensing issues

As shown above, most IP issues relating to M&A transactions boil down to the question 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[27] and performing a careful IP due diligence[28] will give a good overview over the different categories of IPRs as well as of 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, the stakeholders must check whether any of the IPRs flagged for transfer have been licensed to third parties or other companies within the group and, in the affirmative, 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 the agreement to the M&A target in the first place or that require 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.

Other issues to consider

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 the IP due diligence, the buyer will learn about the potential weaknesses and issues of the IPRs flagged for transfer. 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.[29]

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.[30] 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.

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

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

29 See also Bryer/Simensky, p2.27.

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

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Tax issues

Finally, IPRs in M&A transactions may also have considerable tax implications. While not within the scope of this chapter, it is worth mentioning that any transfer of IPRs has to be carefully analysed from a tax perspective. Last but not least, 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

IPRs are a major part of any M&A negotiation. Handling IPRs properly can therefore make or break M&A deals. Even if shortcomings in the 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 IPRs, the comprehensive documentation of contracts in relation to 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 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 at all.

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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 infrastructure 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 in 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.

1 Stefan Kramer and Benedikt Maurenbrecher are partners and Manuel Baschung is an associate with 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.

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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 must 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 are not subject to a licensing requirement but are 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) are 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 start their activity within one year of the Act's coming into force must report immediately to FINMA and after starting their activity generally must satisfy the licensing requirements. No later than one year after FINMA has authorised a supervisory organisation tasked with the supervision of portfolio managers and trustees, they must 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.

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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 in the bank 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 associations 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 to FINMA.

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.[6] 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 once a year.[7]

As these reporting obligations also cover indirect acquisitions, they must be observed, for example, if 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,

4 Banking Act, articles 3bis–3quater; Financial Institutions Act, article 43.

5 Banking Act, article 3 paragraph 3; Financial Institutions Act, article 8; Insurance Supervision Act, article 5.

6 Banking Act, article 3 paragraph 5; Financial Institutions Act, article 11 paragraph 5.

7 Banking Act, article 3 paragraph 6; Financial Institutions Act, article 11 paragraph 6.

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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 does not require explicit authorisation from FINMA. However, 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.[8]

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, no new licence application is 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 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. Even smaller takeovers are subject to approval if the business area of the acquirer is thereby expanded.
- Where a licensed financial institution acquires a business that is not related to the industry and insofar as this affects the business or administrative organisation described in the licence, a respective amendment must be discussed with FINMA.

8 Insurance Supervision Act, articles 5 and 21.

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- 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 also apply:
- Mergers, demergers and conversions of insurance companies generally require the approval of FINMA.[9] Authorisation will be granted only if the insurance companies concerned continue to meet the material conditions for authorisation after the transaction has been completed.
- Asset deals involving a transfer of an insurance portfolio also 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 must 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).

9 Insurance Supervision Act, article 3 paragraph 2, article 5 paragraph 1.
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.

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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(s) is therefore typically carried out based on documents that

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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(s).

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 23ter; Financial Institutions Act, article 65.

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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 they 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).

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 the 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 68 employees (58.1 FTE) as at the end of 2018 (most recent annual report available).

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 shall 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 may change. In March 2020, the Swiss parliament asked the Federal Council (Switzerland's executive body) to propose foreign investment control legislation, aimed in particular at protecting Swiss know-how, employment, public order and safety. The Federal Council is required to elaborate a proposal for such regime for further review in parliament within two years.

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 by 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

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- 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 case of a merger) or the controlled and controlling undertakings (in 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 case of 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 in case the

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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. While certain preparatory work for the concentration's implementation after closing is allowed, 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.

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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 that have to designate at least one joint representative. In the case of an acquisition of control, the notification obligation is with the undertaking(s) that acquire the control (ie, the buyer), but neither the target nor 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 undertaking(s) have to submit. In particular, these are the following:

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

The following documents need to be provided to ComCo:

- most recent annual accounts and reports of the undertakings concerned;
- any agreement affecting or related to the concentration;
- offer documentation, in 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. Markets are 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 market entries as well as the estimated costs of market entry; structure of supply and demand; importance of research and development; 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. 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

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the European Commission (Form CO) if the concentration has already been notified there, in particular where markets are broader than national.

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). Any exhibits may 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 upon completeness and indicate what information it requires in addition, if any.

Upon formal submission of the notification, a one-month review period for ComCo to assess the concentration begins (Phase I). If a certain concentration has in parallel to be notified 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 needs to 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 pre-notification contacts), the review period has not 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; such conditions or obligations need, however, 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 for their views directly to the 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 the primary point of contact for the parties. The Secretariat

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may request further information from the parties at any time, and parties are obliged to provide the requested information. In Phase II proceedings, the Secretariat may issue extensive requests with short deadlines (of a few days) that will absorb considerable resources with 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 so 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 case of in-depth investigation (Phase II), ComCo will both publish its opening of such 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 may share information with the European Commission, based on the agreement between the EU and Switzerland concerning cooperation on the application of their competition law. Such 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 other competition authorities. However, ComCo may request a waiver of confidentiality from the parties to be able to exchange information with such further 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 the decision of the ComCo. An appeal to the Federal Administrative Court has to be made within 30 days as of 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 in case they are manifestly incorrect or have been established in violation of legal provisions. Appeals to the Federal Supreme Court have to be filed within 30 days as of 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 the judgments of the Federal Supreme Court are issued faster than the Federal Administrative Court's.

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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*) is still pending with the Federal Administrative Court in March 2020, 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 undertaking(s) obliged to file a notification – the merging undertakings or the undertaking acquiring control – may be fined with up to 1 million Swiss francs, and in repeated cases with up to 10 per cent of their overall Swiss turnover. In addition, responsible individuals may be fined with 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, the 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. Last, 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 with 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 with 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 independent from other market participants. Single-firm dominance liable to eliminate competition is in practice effectively excluded in the

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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 others, 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 the competitive concerns can be addressed by conditions or obligations. Conditions have to be implemented prior to 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. Other than 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 the ComCo. In practice, both structural and behavioural remedies have been implemented. Other than in particular 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

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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 merger control review only if they are directly related to and necessary for the concentration. For such assessment, ComCo considers the practice of the European Commission and in particular follows the criteria set out in the European Commission's Notice on Ancillary Restraints.

Other than under EU competition law, ancillary restraints are, however, 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 under 'Threshold for intervention: dominance plus', the current Swiss test for the substantive assessment of concentrations – dominance plus – is subject to legislative review. In February 2020, the Federal Council (Switzerland's executive body) announced that it will submit a proposal for an amendment of the Cartel Act in the autumn of 2020, introducing a new substantive merger control test, the significant impediment to effective competition test (SIEC test), as known from EU competition law.

The potential 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', namely 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

For the first time, in 2019 ComCo 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. ComCo considered this case given in a recent concentration in the logistics sector (*Gateway Basel Nord*).

Three companies, the Swiss Federal Railways (SBB), Hupac and Contargo, planned a large terminal with gateway function for combined transport. Because of the layout, lower shunting costs and volume bundling, major efficiency gains are to be achieved. SBB, Hupac and Contargo are vertically integrated and have high market shares in the upstream and downstream markets.

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The investigation revealed the possibility of eliminating effective competition on the markets for certain cargo-handling services. With respect to the efficiency gains, ComCo considered that the large terminal will lead to considerable improvements in combined transport and significant savings of cost and time, mainly related to rail freight transport and operator services. ComCo concluded that the improvement of competitive conditions outweighed the disadvantages in the markets for cargo-handling services and therefore cleared the concentration unconditionally.

Focus on coordinated effects

As mentioned under 'Threshold for intervention: dominance plus', the threshold for intervention by ComCo based on single-firm dominance is rather high: even with market shares of up to 70 per cent, an intervention is regularly not possible. An intervention in the case of lower market shares may be possible based on the theory of harm of collective dominance, where it is assumed that the merged entity may enter into collusive practices together with another company. 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 these effects was recently 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 in Switzerland, 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 in the market for broadband internet for end-customers in those areas where only two network infrastructures were available, that is, 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 reasonable position that Sunrise would continue its expansion strategy and 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.

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Private M&A

Christoph Neeracher, Philippe Seiler and Raphael Annasohn[1]

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. However, the general trend toward an increasingly complex regulatory environment is leading to higher requirements and costs for participants in the Swiss market.

A notable change in Swiss corporate law implemented in November 2019 concerns the regime for the disclosure of the beneficial owner of shareholders acquiring, alone or in concert with third parties, more than 25 per cent in a Swiss company. The amendments removed some of the uncertainty surrounding the old rules regarding the reporting on beneficial ownership, which were introduced in 2015 as part of the global effort to combat money laundering and the financing of terrorism as well as to facilitate international processes for the automatic exchange of information among tax authorities. Importantly, they clarified that where there is no beneficial owner (ie, no natural person exercising direct or indirect control over the acquiring shareholder by analogy with the consolidation rules of Swiss accounting law), which is frequently the case in private equity structures, the shareholder must make a negative declaration to this effect. However, at the same time, new criminal offences were introduced to the effect that failure to comply with the obligations to disclose the beneficial owners is now subject to a fine. The same applies for intentional breaches of directors' obligations relating to the keeping of a share register and register of beneficial owners. These newly introduced criminal sanctions apply in addition to corporate consequences of non-compliance with disclosure duties, which include the suspension of voting rights and the loss of property rights until due notice is given. Another key pillar of the new rules is the de facto abolition of bearer shares. After a transitional period and subject to few exceptions (notably companies with shares listed on a stock exchange), Swiss

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stock corporations will no longer be allowed to issue bearer shares. If bearer shares are still outstanding by the end of the transitional period of 18 months, they will be converted by law into registered shares.

Further important legislative changes from a private M&A perspective include the entering into force of the Financial Services Act, the Financial Institutions Act and their respective implementing ordinances in January 2020, as part of a general overhaul of Switzerland's financial regulatory framework. From a tax perspective, in 2019 Swiss voters adopted the Federal Act on the Tax Reform and AHV Financing (TRAF), aiming, inter alia, at the abolition of the arrangements of status companies that are internationally no longer accepted. Overall, TRAF will result in higher taxes for large corporations, while small and medium-sized enterprises will generally pay lower taxes than previously. The details of both these topics are dealt with in a separate chapters of this publication.

Development of private M&A activity[2]

The overall Swiss M&A market continued to see strong activity in 2019 amidst economic and geopolitical uncertainty, although overall deal numbers and transaction values did not quite match up to the record levels experienced in 2018.

Private M&A transactions accounted for the majority of the overall Swiss M&A market both in terms of number of deals and deal value in 2019. However, private M&A activity is often driven by public M&A transactions and vice versa. For example, following a public-to-private transaction, which typically involves a public tender offer and subsequent squeeze-out and subsequent delisting, there are usually disposals or bolt-on acquisitions to focus, transform or grow the target company's business. Conversely, for private equity sponsors in particular, IPOs have gained significance as an exit strategy, sometimes also as part of a dual-track approach.

Private equity firms continue to be an important pillar of the Swiss M&A market, being involved in almost half of the 50 largest Swiss deals in 2019. While deal values fell only by 2.2 per cent compared with 2018, 2019 saw a decrease of deal numbers by 21 per cent compared with the previous year (126 private equity deals in 2019). Successful fundraising ensured that private equity sponsors had the necessary dry powder to make acquisitions. Additionally, with private equity sponsors typically being highly leveraged, they have particularly benefited from low interest rates and generally favourable borrowing conditions. In order to cope with rising valuations, private equity firms have increasingly been pushing to break new ground and straightforward deals have therefore become fewer. This represents a general trend in the Swiss private M&A environment, which continued to become more competitive and sophisticated in 2019.

Further factors for ongoing strong M&A activity 2019 in our view were Switzerland's stable political and regulatory environment, with very few investment restrictions, in combination with a high number of 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 Nestlé's and Migros's divestments) and so have consolidation waves in various sectors (such as healthcare and telecommunications, media and technology (TMT)). Buy-and-build strategies have also been more frequently pursued by financial sponsors

2 Numbers taken from KPMG's *Clarity on Mergers & Acquisitions*, January 2020.

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recently, whereby purchasing multiple companies in the same or similar industries has helped bolster deal numbers.

The traditionally important financial sector saw only limited Swiss M&A activity in 2019. Deal volumes in the financial industry fell to an all-time low and accounted for only 7 per cent of transactions.

Cross-border transactions have always been key to Switzerland's M&A landscape and continued to be a driving force in 2019 – putting aside the spin-off of Novartis AG's subsidiary Alcon Inc, the largest Swiss deals of the past year all had in common a cross-border element. The significance of cross-border deals can also be seen 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.

While deal pipelines promised a solid start to 2020, issues surrounding the covid-19 pandemic have put an at least temporary halt to several planned transactions and caused a dislocation of financial markets. Thus, while the current environment also offers opportunities, general M&A activity has slowed down and it will be crucial to see how quickly the markets recover and activity is resumed.

Landmark transactions[3]

Nestlé SA's sale of Nestlé Skin Health SA to a consortium led by EQT and Abu Dhabi Investment Authority for US$10.2 billion marked the largest Swiss private M&A transaction in 2019 and the second largest of the year overall (surpassed only by the spin-off of Novartis AG's subsidiary Alcon Inc and listing of the shares on SIX Swiss Exchange and the New York Stock Exchange, which boasted a transaction value of US$31 billion). Other big-ticket Swiss equity transactions in 2019 include RRJ Capital's acquisition of Gategroup Holding AG from HNA Group Co Ltd, valued at US$2.8 billion, and Sika AG's acquisition of Parex Group SA from CVC Capital Partners Limited, with a deal value in excess of US$2.5 billion.

Another standout transaction in Swiss private M&A 2019 was the sale of Takeda Pharmaceutical Company Limited's Xiidra business to Novartis AG, which is exemplary for the strong M&A activity in the pharmaceutical industry in Switzerland last year.

In late 2019, a noteworthy (and purely Swiss) transaction was the sale of the Swiss broadcasting group 3 Plus Group to CH Media, one of the largest media companies in Switzerland. This deal can be seen as an example of high activity in the TMT sector and the consolidation wave.

Notable private M&A deals signed in the first quarter of 2020 include the sale of department store operator Magazine zum Globus AG along with eight associated prime real estate properties by Migros-Genossenschafts-Bund to a joint venture of SIGNA and CENTRAL Group as well as the investment of a 25 per cent stake in Ringier AG by La Mobilière.

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 envisaged form of transaction. However, owing to the recent sellers' market and the ongoing trend towards an ever more competitive and sophisticated market, structured

3 Numbers taken from KPMG's *Clarity on Mergers & Acquisitions*, January 2020.

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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, parties proceed to 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 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) for the seller and covenants (such as continuation of the business, direct and indirect partial liquidation tax covenants 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.

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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

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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 2020, buyer polices 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, also 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 for 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

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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. Conversely, deferred purchase price elements (such as earn-outs) or vendor loans have been seen less often in recent deals.

Conditions

Owing to the sellers' market we have experienced into early 2020, 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. A notable example for the latter was the IPO of KKR backed SoftwareONE Holding AG on SIX Swiss Exchange in October 2019.

We have also increasingly seen 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

Mariel Hoch and Florentin Weibel[1]

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 of

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foreign investment control. Political aspirations to introduce wider foreign investment control in Switzerland are, however, increasing. 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 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. Further, the law on stock companies, which forms part of the Swiss Code of Obligations, is currently under review and several changes strengthening minority rights have been proposed. The changes are not yet final and the date of entry into force is not yet known.

Development of public M&A activity and landmark transactions

The development and performance of the overall Swiss M&A market, including public M&A deals, continued to see strong activity in 2019 (as described in the chapter on private M&A). Even

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though private M&A transactions accounted for the majority of the overall Swiss M&A market both in terms of number of deals and deal value in 2019, there were a number of large and noteworthy public M&A deals and TOB procedures.

The largest public M&A deal of the year 2019 was the public exchange offer submitted by DSV A/S, Denmark, for all publicly registered shares in Panalpina Welttransport (Holding) AG with a transaction volume of approximately 4.6 billion Swiss francs. The public tender offer was announced on 1 April 2019 and settled on 19 August 2019. At the end of the public tender offer, 98.44 per cent of all Panalpina shares had been tendered into the offer. Following the subsequent statutory squeeze-out of the remaining public shareholders, Panalpina was taken private and delisted from SIX Swiss Exchange.

The purchase of the 25 per cent interest held by Electricité de France in Alpiq Holding SA by EOS Holding SA and other investors financed by a mandatory convertible bond from Schweizer Kraftwerksbeteiligungs-AG and the subsequent public tender offer by the latter regarding the remaining publicly held shares in Alpiq Holding SA marked another important public M&A transaction in 2019.

Moreover, in April 2019, the public tender offer by CMA CGM SA, France, regarding CEVA Logistics AG, Switzerland, which was announced in November 2018, was settled. Upon expiry of the public tender offer, the bidder and the persons acting in concert with the bidder held 97.89 per cent of the shares in CEVA. Other public tender offers in 2019 include the public tender offer by Behr Birger Cellpack BBC AG for the publicly held shares in Groupe Baumgartner Holding SA.

Besides the above-mentioned public tender offers, in 2019 the TOB was involved in a number of share buyback programmes as well as a number of procedures relating to the applicability of public takeover rules. Noteworthy, in particular, are the TOB and FINMA decisions regarding the restructuring measures of Schmolz + Bickenbach AG and the approval of an exemption to the mandatory bid obligation. In this procedure, which was subject to much attention by the media and the public, the TOB first denied such an exemption to the mandatory bid obligation, whereas FINMA overruled the TOB and confirmed such an exemption in the subsequent appeals procedure. In another recent procedure, the TOB confirmed twice and upon objection by a minority shareholder the general validity of the opting-out clause to the mandatory bid obligation included in the articles of association of LEM Holding SA.

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;

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- 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 which 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, 33¹/₃ 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

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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.

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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 $33^{1}/_{3}$ 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 $33^{1}/3$ 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 'Development of public M&A activity and landmark transactions' 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 $33^{1}/_{3}$ 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,

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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 which would allow the bidder to exceed the $33\frac{1}{3}$ 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.

In order 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.

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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 $33^1/_3$ 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

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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).

In order 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

Issues surrounding the covid-19 pandemic have put a (temporary) halt to several planned public M&A transactions with regard to public companies whose shares are listed on Swiss stock exchanges. While the current environment and generally low level of stock prices also offers opportunities with regard to public M&A deals, general M&A activity has slowed down and it will be crucial to see how quickly the markets recover and activity is resumed.

Apart from the most recent events surrounding covid-19, there has been a continued trend of private equity investors looking to take over Swiss listed targets. Also, shareholder activists have started to play a role in Swiss public M&A transactions whereby they may have the role of a catalyst (eg, Cevian in the DSV offer for Panalpina) or the role of a blocking force if the offer price is deemed too low.

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Distressed M&A in Switzerland

Emanuel Dettwiler and Lukas Bopp[1]

Introduction

Businesses rise and fall and, with them, 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 risk 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 with Kellerhals Carrard.

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

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In 2018, the number of openings of bankruptcies in Switzerland reached almost 14,000, up from 13,000 just two years earlier and an all-time high.[3] According to the Federal Statistical Office, the total financial losses resulting from ordinary and summary bankruptcy proceedings passed the 2 billion Swiss francs mark.[4] All this has been happening in a sound, even thriving business environment. It is obvious that such figures will go even higher should the economic environment turn, which, following the latest developments around the spread of covid-19, is quite likely to happen in the coming months.

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, cf 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.

3 Press release of the Federal Statistical Office of 11 April 2019.

4 Press release of the Federal Statistical Office of 11 April 2019.

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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 no longer be changed at a later stage.

In order 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, the 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 higher 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 an extensive due diligence covering a large part of the relevant financials, documents, etc of the target company, previously carefully arranged by the seller. The 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. The 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 upon 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

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made available for a due diligence will not be comprehensive and well structured like 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 to delay the process. While there are risks related to such behaviour, it often allows the buyer to push down the price further.

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 avoiding regulatory or licensing issues. The documentation required for the transaction is simpler than the one for an asset sale. With the board of directors and the management under considerable time pressure, often caused by the 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 efforts into the due diligence, and all this, 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 a 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 and 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 and/or shareholders for damaging the company by depriving it of its assets.[5] 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.

5 cf article 754 SCO.

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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 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 most times only one will be successful and the others will be left with nothing else 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 finds the troubled company to be in much more difficulty than expected or because the company reassesses its situation and finds ways to restructure itself or the circumstances having led to the distress improve significantly. In addition, a buyer may overdo it by driving down the price too much, and 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 case, 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 any more against the creditors, which may result in 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,[6] each

6 cf article 754 SCO.

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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 of the supply chain and key customers to secure the revenue. As soon as doubts will arise about the survival chances of a company, key employees will seek to leave the 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 about 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 avoid that the buyer will prevail 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 and/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, re-increasing it again.[7] This measure reinforces the equity base of a company and renders it less prone to overindebtedness. It is sometime chosen to replace 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.
- 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 and/or precede an M&A transaction.

7 cf article 732a SCO.

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Distressed M&A in Insolvency

Overview

When a Swiss company becomes insolvent, Swiss law provides (mainly) two types of insolvency proceedings: On the one hand there is a conventional bankruptcy proceeding in the course of which assets of a debtor are liquidated and the proceeds are distributed to the creditors. In the conventional bankruptcy proceeding we must further distinguish between ordinary bankruptcy proceedings for large companies or complicated conditions and summary proceedings for small or rather simple bankruptcies. On the other hand, there exists 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.

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 are initiated, the company loses the right to dispose of its assets. The shareholders and the board of directors have no longer any decision power 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 require, therefore, according to Swiss bankruptcy law, at some stage 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 take place 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 a company could – usually due to the lack of liquidity – not be continued, and had to be 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 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[8] 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.[9] 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

8 BGE 131 III 280, 284.

9 Article 256 paragraph 3 provides that assets of a significant value can only be sold, if the creditors were granted the right to made higher bids.

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bankruptcy administration. As the bankruptcy administration is in Switzerland a state authority 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 was enough liquidity to continue the business until after the second creditor's assembly, the acquisition of a distressed business out of bankruptcy might be a good opportunity for investors. The employees of the bankrupt business have not to be taken over and a potential buyer can therefore chose whether it wants to restructure the workforce with the acquisition. Also, the provision on a mass dismissal of employees[10] or for a social plan obligation[11] 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 as an ordinary sale, can already 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 from the opening of bankruptcy proceeding. 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 business as a whole or parts of it 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.

10 cf article 335d et seq SCO.

11 cf article 335h et seq SCO.

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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.

Yet, 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 in order to protect their interest, 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 to the court or a fairness opinion of an M&A adviser. 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 interest 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. Yet, in contrast to an acquisition in a bankruptcy proceeding, the provision 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 from 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, however, be approved by the majority of the creditors and must be sanctioned by the court. The latter requires that the sale is in the best interest of the creditors, which requires at least that they receive for their unpaid claims not less than what they would receive in an ordinary bankruptcy proceeding.

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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.

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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:

- leverage resources such as capital, human resources or technology;
- share risk, cost and resources, thereby minimising potential financial exposure; and
- 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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1 Pascal Richard and Petra Hanselmann are partners with Baker McKenzie.

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.

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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, the 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.
- 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 invest(s) 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

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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(s) 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 JVC's statutory auditor), who has to confirm in writing that the report is complete

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

6 Article 635 CO and 652e CO.

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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.

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- 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.

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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'.

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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.

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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.

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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.

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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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Acquisition Financing

Philip Spoerlé and Markus Wolf[1]

Introduction

In the past couple of years, there has been 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, the United Kingdom and the United States. A further trend is an increased participation of private debt funds in acquisition financings, which usually take the second lien senior debt or junior debt tranche.

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 M&A financing transaction or participate in a club deal structure. In the syndication phase, the arrangers invite smaller cantonal banks or other local banks to participate in the financing. Small and medium-sized domestic acquisition financing transactions are also regularly financed by a single bank or a small syndicate 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 like Citibank, HSBC, Bank of America Merrill Lynch and others. In some instances, such financings are also arranged out of London. Larger acquisition financing 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 the loan structure is implemented.

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).

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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 to finance the purchase price of and other costs and expenses related to the acquisition. Traditionally, the term loan consists of a non-amortising (bullet) term loan element and an amortising term loan element (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 enhanced by a working capital facility 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 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 debt.

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 is 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 securities. 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 at a Swiss stock exchange (see 'Public takeover bids' for further information).

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.

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 managed to have the transaction documented under the LMA recommended form of investment grade documentation or to push the leveraged documentation more towards this standard by reducing the number of restrictions and obligations of the borrower and the target group under the credit agreement. For smaller transactions and bridge financings, major Swiss banks also frequently use their own standard bilateral facility documentation, which is enhanced to cater for the specific acquisition context.

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At the point in time the acquirer or sponsor has to submit a binding offer for the acquisition, usually a commitment letter will be in place. This letter is often based on the LMA standard mandate letter 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. Bids which are made on the basis of a financing that is already fully documented 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 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 credit documents are in German. 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.

Security structure and guarantor accession

Types of security

The most commonly used forms 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; and
- pledges over bank accounts of the acquirer, the target group or both.

In certain cases, security is taken over real estate assets, 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 has to give up 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

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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 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 has to 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 credit documentation usually requires an accession of certain material subsidiaries of the target group to the credit 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 between 10 and 30 business days following closing of the acquisition before they must grant a guarantee or 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 credit documentation will usually be longer (normally up to 90 or even 120 calendar days following the closing). In addition, if the guarantee or security 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 is of a downstream nature.

Limitations

Swiss corporate law does not have any specific rules on financial assistance and also does not provide for any thin capitalisation or similar rules. However, there are several 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.

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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 (upstream or cross-stream guarantee or security interest) as well as certain other acts having a similar effect (such as, eg, an indemnity or the waiving 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 freely 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 meet 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, in order to mitigate the imperfections of such security interests from a Swiss law perspective, certain steps are taken in accordance with standard market practice. First of all, 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 credit 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 credit 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.

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Enforcement

With respect to the enforcement of Swiss law-governed security interests, it has to be differentiated between private enforcement or realisation proceedings and official enforcement proceedings pursuant to Swiss statutory law.

If possession of the relevant asset serving as collateral is transferred to the secured parties or the 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 them 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 closely 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

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to have sufficient comfort to issue the required confirmation, the review body usually closely follows the negotiation of the credit 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(s) providing the acquisition financing and those provisions in the credit documentation that enable the lender(s) 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, eg, status, power, authority and change of control);
- relate to the validity of a significant aspect of the acquisition financing (such as, eg, the provision of collateral);
- relate to a material breach of contract on the part of the bidder (such as, eg, 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 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 (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 (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.

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.

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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 (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 (affiliated 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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1 Manuel Werder and Valerie Meyer Bahar are partners with Niederer Kraft Frey Ltd.

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rights and obligations are transferred to the buyer automatically as a matter of law, unless an employee rejects such 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.

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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 such 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.

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- 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 of 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 such 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. Such 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.

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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 such 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 also 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

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- 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 increase the likelihood that also 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 such 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. In order to allow for the maximum protection of the employer, such 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 the 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

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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.

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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 commune of incorporation, the effective corporate federal, cantonal and communal income tax rate on net profits before tax varies between approximately 12 and 21 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. 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

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withholding tax regime may, however, soon be partly remodelled (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 company 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).

It is to be noted that 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 turnover register).

Exceptions apply inter alia in the case of tax-neutral reorganisations, intercompany transfers of at least 10 per cent shareholdings 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.

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)).

The Federal Act on Tax Reform and AHV Financing

The Federal Act on Tax Reform and AHV (social security) Financing (TRAF) entered into force on 1 January 2020 and has a significant impact on the Swiss tax landscape.

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TRAF repealed the privileged tax regimes, namely holding, mixed and domicile company taxation at the cantonal level, and finance branch and principal companies' taxation at the federal level. As compensation, the new legislation included a provision to avoid over-taxation on untaxed hidden reserves for companies transiting out of a privileged tax regime at cantonal or communal tax level (special rate resolution). It further introduced a mandatory OECD-compliant patent-box regime and an optional super-deduction for R&D expenditures. Both instruments were implemented at cantonal level only. A number of the cantons make use of the maximum allowed deduction of 90 per cent for the qualifying income from patents and similar rights (eg, Zurich and Zug). Others implemented more restricted deductions in the range of 10 to 50 per cent (eg, Geneva with a maximum allowed deduction of 10 per cent and Neuchatel with a maximum deduction of 20 per cent). At the same time, most of the cantons significantly lowered their corporate income tax rates and some cantons make use of the possibility under TRAF to reduce the taxable basis on qualifying participations, patents and similar rights and intercompany loans for cantonal capital tax purposes. TRAF also included a notional interest deduction, which, however, is only available in the canton of Zurich.

Further, for Swiss-resident individuals, TRAF leads to a higher taxation on dividends from qualifying participations. The taxable dividend inclusion increased from 60 to 70 per cent at the federal level and to at least 50 per cent at the cantonal level. In the area of international taxation, TRAF entitles Swiss permanent establishments of foreign companies to receive foreign tax credits under certain conditions.

As an important change, TRAF introduced a restriction on the capital contribution principle (see 'Withholding tax'), 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 or income tax for Swiss-resident individuals on capital contribution reserves paid out) if the company makes a distribution out of taxable reserves of at least the same amount. A comparable rule applies in 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.

Contemplated Swiss withholding tax and securities transfer tax reform

On 3 April 2020, the Swiss Federal Council submitted a reform proposal to the consultations procedure. The reform proposal foresees a replacement of the current debtor-based regime applicable to interest payments with a paying agent-based regime for Swiss withholding tax. This paying agent-based regime:

- subjects all (Swiss and non-Swiss) interest payments made by paying agents in Switzerland to individuals resident in Switzerland to Swiss withholding tax; and
- exempts from Swiss withholding tax interest payments to all other persons, including to Swiss-domiciled legal entities and foreign investors.

If the reform proposal is approved, a Swiss paying agent would have to levy and pay Swiss withholding tax on interest payments and the like of domestic and foreign notes, provided that the beneficiary is an individual resident in Switzerland. The contemplated Swiss withholding tax reform is a welcome 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).

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In addition, the reform proposal also includes an exemption of Swiss bonds from securities transfer tax.

The consultation procedure is open until July 2020. The parliamentary debates are not expected before 2021 and entry into force, if adopted, is not expected before 2022. The exact measures of the proposed reform may be changed as a result of the consultations procedure and/or the parliamentary debates.

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 2021 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, for example, 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). The ruling exchange does, however, not concern Swiss tax rulings relating to a unilateral reorganisation or transaction.

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 with 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

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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, eg, for VAT (if seller does not carry on a business and deregisters for VAT purposes) 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 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.

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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 communes as economic change of ownership of the underlying Swiss real estate.

If a registered 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 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 for a potential indirect partial liquidation triggered (see comments below). The respective five-year blocking period may need to be respected by a buyer.

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 operating company (see 'Acquisition financing').

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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.

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 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.

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. 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 assets

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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 the following two 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 in relation to TRAF). The Swiss Federal Tax Authority has, against this background, established a practice 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 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. 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.

Acquisition financing

Swiss acquisitions are often being 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 often the better conditions for acquisition financing: Switzerland still levies a 1 per cent issuance stamp duty on equity contributions by direct shareholders (abolition of this tax has been discussed, but plans are on hold) and bank lending to a Swiss company needs to comply with the Swiss 10/20 Non-Bank-Rules, 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 thus 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.

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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 to use a higher or lower interest rate remains open, if the respective arm's-length character can be evidenced.

Landmark transactions

DSV's merger with Panalpina

On 1 April 2019, DSV A/S and Panalpina Welttransport (Holding) AG announced that they had reached an agreement on the terms and conditions of a combination by way of a public exchange offer to all Panalpina shareholders. The transaction had an enterprise value of approximately 4.6 billion Swiss francs. From a Swiss tax perspective, it was structured as a tax-neutral quasi-merger (share-for-share exchange).

Spin-off of the Alcon eye care devices business

On 9 April 2019, Novartis completed the carve-out and spin-off of Alcon, a global leader in eye care and the largest eye care device company in the world, with complementary businesses in surgical and vision care. The Alcon shares were successfully listed on the SIX Swiss Exchange Ltd and the New York Stock Exchange, with Alcon's market capitalisation reaching 28 billion Swiss francs at close of trading on the SIX Swiss Exchange. They are also included in the Swiss Market Index, which comprises the 20 largest Swiss listed stocks. The spin-off was structured as a tax-neutral demerger for Swiss tax purposes (ie, with two tax-neutral demergers): first the tax-neutral demerger of the Swiss Alcon business, followed by a holding demerger of Novartis by transferring the participations in the Alcon subsidiaries to a new Swiss holding (Alcon Inc) and distributing the shares in Alcon Inc to its shareholders.

Clearstream's majority stake in Fondcenter

In January 2020, Clearstream (a Deutsche Börse Group company) acquired a majority stake in Fondcenter AG, UBS's fund distribution platform. The combination of Fondcenter with Clearstream's Fund Desk will create a leading provider of fund services. The companies had reached a joint agreement by which Clearstream acquired 51 per cent of Zurich-based fund distribution platform Fondcenter from UBS for 389 million Swiss francs. UBS retained a minority of 49 per cent. Completion is expected for second half of 2020. The transaction involved inter alia carve-outs with intragroup transfers and a tax-neutral demerger as a preparatory step at the level of UBS.

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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. Furthermore, if the foreign company to be merged with a Swiss company has hidden reserves and the merger is made at book values, generally no step-up of the income tax values for Swiss tax purposes is available. However, as from 1 January 2020, there is 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. As mentioned above, 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 (see TRAF) 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').

Landmark transactions

Most cross-border transactions (into Switzerland) have happened over the past 10 years and where 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 about the past five years many relocations or inbound transfers covered offshore entities. A recent and public case was the

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relocation of CEVA Group from the Marshall Islands to Switzerland. This was structured as a tax-neutral downstream merger into a Swiss subsidiary. Another transaction (not implemented) was the intended combination of Huntsman and Clariant, with a tax-neutral share-for-share transfer of Huntsman into Clariant; these plans were aborted at the end of 2017.

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 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. Thus the acquisition financing agreements require specific language to cover this topic and are often subject to Swiss tax ruling confirmations;
- no tax consolidation for income tax purposes and thus limited options for a debt push-down; this should be reflected when modelling the purchase price or tax benefits of the financing; and
- repatriation of funds from the Swiss target to serve the external debt without triggering indirect partial liquidation limitations (in the case of Swiss individual sellers, eg, by arm's-length upstream loans) or dividend withholding tax leakage; non-refundable withholding tax on dividends may apply either due to the situation of the seller (eg, old reserves practice) or if the acquisition company is not entitled to a full withholding tax refund under an applicable double-tax treaty. The withholding tax reduction under a double tax treaty especially requires, apart from beneficial ownership and fulfilment of the general conditions (shareholding quota, minimum holding period), that the acquisition company has sufficient substance from the perspective of the Swiss Federal Tax Authority. The withholding tax exemption under a double tax treaty has to be applied for in order to benefit from a reduction

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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 legal entity 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 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.

The latest tax reform (TRAF), as described above, 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 will 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, the OECD approach on challenges arising from the digitalisation of the economy, which will have an impact on the global tax framework) 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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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, 162 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).

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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

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3 See also Rolf Wattter, 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).

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of 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. One notable exception is the European Union as well as other European countries such 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 multi-tiered 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 multi-tiered 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).

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Settlement facilitation by arbitrators is another option. By way of example, article 15(8) of the Swiss Rules of International Arbitration 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 2018, 544 cases ended with final awards, whereas 458 ended with either a settlement, withdrawal or termination.

Proposed new legislation

Two legislative projects are under way with regard to international arbitration and litigation in Swiss courts.

The Swiss Parliament is in the process of revising Chapter 12 of the Swiss Private International Law Act. The proposed amendments seek to selectively adjust and amend statutory rules on international arbitration and to 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. The bill, which was published in October 2018, is currently being debated in the federal parliament. The most controversial issue is the proposal to allow parties to use English before the Swiss Federal Court when challenging awards.

New legislation has also 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 Wattter, Lessons learnt aus 20 Jahren M&A-Litigation, EIZ Europa Institut Zürich, Volume 186, 7, 8 (2018)

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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.

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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 Wattter, Lessons learnt aus 20 Jahren M&A-Litigation, EIZ Europa Institut Zürich, Volume 186, 7, 17 (2018).

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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 chambers of commerce of Basel, Bern, Geneva, Lausanne, Lucerne, Lugano, Neuchâtel and Zurich have established the Swiss Chambers' Arbitration Institution (SCAI), which administers arbitration proceedings. Its arbitration rules, the Swiss Rules of International Arbitration, are available in 18 languages, with English being the official one.

Use the model arbitration clause

Recommendation 3

Reputable arbitration institutions such as the ICC or SCAI 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.

Multi-tiered 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

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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.

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Appendix 1

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Raphael Annasohn is a partner. He 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.

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Lukas Bopp has been 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 Bopp 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 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 Bopp has an excellent international network.

Emanuel Dettwiler

Kellerhals Carrard Basel KlG

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 senior associate 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 the head of Homburger's Competition | Regulatory team. His practice focuses on Swiss and EU competition and antitrust law as well as on commercial public and administrative

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law and 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 telecommunication, infrastructure and transport, as well as in public procurement.

He is a member of various national and international competition law associations. He 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.

Dieter Gericke

Homburger AG

Dieter Gericke heads Homburger's Corporate | M&A team as well as the Homburger China group. Dieter Gericke's 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

Baker McKenzie

Petra Hanselmann is a partner in Baker McKenzie's Zurich office. 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. Petra joined Baker McKenzie in 2005 and again in 2011. From 2007 to 2011 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.

Marc Hanslin

Homburger AG

Marc Hanslin is an associate in Homburger's Corporate | M&A team and member of the Homburger China group. His practice focuses on corporate and commercial law and M&A, as well as on capital markets law. Marc Hanslin regularly publishes in his areas of practice.

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,

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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

Homburger AG

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.

Benedikt Maurenbrecher

Homburger AG

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 he 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;

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dismissals; and the transfer of employees in M&A transactions and restructurings, including mass dismissals. She regularly handles employment litigation relating, inter alia, to wrongful termination and bonus claims.

Christoph Neeracher

Bär & Karrer AG

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

Baker McKenzie

Pascal Richard is a partner in Baker McKenzie's Zurich office. 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. Before joining the firm in 2016, 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.

Susanne Schreiber

Bär & Karrer AG

Susanne Schreiber is a partner 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.

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Susanne Schreiber is a German attorney-at-law and tax adviser as well as a Swiss-certified tax expert. 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.

Philippe Seiler
Bär & Karrer AG
Philippe Seiler is a partner. 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
Baker McKenzie
Philip Spoerlé is a senior associate in Baker McKenzie's Zurich office and a member of the Banking & Finance and Capital Markets Practice Groups. He graduated from the University of St Gallen (MA in Law & Economics, 2011) and obtained a PhD (Dr iur) from the University of St Gallen in 2015 for his doctoral thesis on the bearer share and the corporate law provisions implemented by the FATF Implementation Act. Prior to joining Baker McKenzie, Philip Spoerlé worked for a global investment bank in the area of FICC (fixed income, currencies and commodities) securities trading from 2012 to 2013. Philip Spoerlé's practice focuses on leveraged and structured finance, debt and equity capital markets, derivatives, financial instruments and corporate restructurings. He further is a member of the CG&R and Healthcare industry focus groups. He is admitted to practise in Switzerland and recognised as an authorised issuer's representative at the SIX Swiss Exchange.

Sophie Stählin
Quadra Attorneys at Law Ltd
Sophie Stählin is a senior associate at Quadra Attorneys at Law Ltd, Zurich, advising and representing domestic and international clients on corporate and commercial law as well as white-collar crime matters. Before returning to private practice in 2020, Ms Stählin worked as a senior legal counsel in the Group Corporate Legal team at UBS until 2019 advising on M&A transactions as well as on securities, regulatory, corporate law and corporate governance matters affecting the UBS Group. Before joining UBS, Ms Stählin was an associate at the Swiss law firm LALIVE focusing on corporate and commercial law as well as white-collar crime matters. Ms Stählin is a Swiss-qualified attorney and holds degrees from the University of Basel (MLaw) and the University of Pennsylvania Law School (LLM).

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Richard Stäuber

Homburger AG

Richard Stäuber is a partner in Homburger's competition and regulatory practice, focusing on Swiss and EU competition and antitrust law.

Richard Stäuber 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 procedures, dawn raids and leniency proceedings. Richard Stäuber further 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 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 handled 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 in International Arbitration by *Who's Who Legal* (2018, 2019, and 2020).

Ueli Studer

UBS Group AG

Ueli Studer is a managing director at UBS and head of the Group Functions Legal team, a global team of around 60 lawyers across all regions, providing globally coordinated legal advice on regulatory, corporate, contractual, transactional and technology matters of group relevance. Mr Studer joined UBS in 2006 and has since held three distinct management positions within UBS's legal department. For eight years, he led the Legal Corporate Finance & Structured Transactions team dealing with bespoke, large and complex transactions. Mr Studer then served as Head Legal Products & Distribution, combining several teams under one cross-divisional roof providing legal support to the firm's value chain before assuming his current role. 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).

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Kelsang Tsün

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Kelsang Tsün is an executive 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, M&A transactions as well as on corporate law, treasury and contracting matters affecting the group. Prior to that, Mr Tsün was leading 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 a partner in the Information Technology, Intellectual Property and Competition Team. He advises and represents companies on all questions of information and technology law. He specialises in data protection, intellectual property and contract law, especially in connection with the monetisation of data and the digitisation of business processes, and supports in 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 (Journal for Data Law and Information Security), swissblawg (the biggest legal blog in Switzerland) and datenrecht.ch (a platform on data law). He is a certified information privacy professional (CIPP/E). Before joining the firm, David Vasella worked at a large business law firm in Zurich for a number of years.

David Vasella speaks German and English. He is registered in the Zurich Bar Registry.

Gerald Virieux

VISCHER

Gerald 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.

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Philippe Weber

Niederer Kraft Frey Ltd

Philippe Weber is the managing partner of 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.

Florentin Weibel

Bär & Karrer AG

Florentin Weibel's practice focuses on domestic and cross-border public and private M&A transactions, M&A-related litigation and general corporate, commercial and regulatory matters.

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

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on IP-related matters and is past chair of the Trademark Standing Committee of the International Association for the Protection of Intellectual Property (AIPPI).

Markus Wolf

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Markus Wolf is a senior associate 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.

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Appendix 2

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