Private Mergers and Acquisitions in Switzerland: Overview

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Q&A guide to private mergers and acquisitions law in Switzerland.

The Q&A gives a high-level overview of key issues including corporate entities and acquisition methods, preliminary agreements, main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, competition, and environmental issues.

Corporate Entities

1. What are the main corporate entities commonly involved in private acquisitions?

In Switzerland, acquisition vehicles are primarily organised as:

- A corporation (*Aktiengesellschaft/société anonyme/società anonima*) (AG/SA).
- A limited liability company (*Gesellschaft mit beschränkter Haftung/société à responsabilité limitée/società a garanzia limitata*) (GmbH/S.à.r.l./S.a.g.l.).

An AG is a company in which one or more persons or commercial enterprises participate. Generally, the AG (and not its shareholders, except for situations in which, for example, the corporate veil is pierced) is liable for its obligations to the extent of the AG's assets. An AG can issue registered shares. If its equity securities are listed on a stock exchange or shares are issued as intermediated securities, the AG can issue bearer shares. An AG must have a share capital of at least CHF100,000, of which at least 20% of the nominal value of each share (at least CHF50,000 in total) must be paid in. If bearer shares are issued, 100% of the nominal value of each share must be paid in.

A GmbH is a company in which one or more persons or commercial enterprises participate. Subject to any provision in the articles of association (articles) to the contrary, the GmbH (and not its quotaholders, except for situations in which, for example, the corporate veil is pierced) is liable for its obligations to the extent of the GmbH's assets. A GmbH must have a company capital of at least CHF20,000, which must be fully paid in.

Put simply, AGs and GmbHs are used in a private M&A context due to liability and tax considerations.

For more information on the key corporate features of different trading vehicles in Switzerland see, *Practice Note, Trading Vehicles: Overview (Switzerland)*.

Ways to Acquire a Private Company

2. How are private acquisitions commonly structured and what factors apply to the choice of structure?

Share purchases are the most common way to acquire privately held companies. Whether a transaction should be structured as a share or asset purchase requires case-by-case assessment. Important factors in the assessment are often:

- Whether the business to be transferred is already in a stand-alone legal entity (or group of entities) or the buyer prefers to cherry-pick the objects of transfer (see *Transfer of Assets/Liabilities*).
- Tax considerations, specifically the benefits of a step-up for the buyer in an asset purchase or tax-free capital gains for the seller as an individual in a share purchase (see *Tax Considerations* and *Practice Note, Acquisition Structures: Comparing Asset and Share Purchases (Switzerland): Tax Considerations – Asset Purchases*).
- Whether objections from certain shareholders are expected.

Asset purchases can be conducted either:

- In the traditional way, with individual transfers of all assets and liabilities to be transferred.
- Through an instrument of transfer of assets and liabilities (*Vermögensübertragung/transfert de patrimoine/ trasferimento di patrimonio*), under the *Swiss Merger Act 2003 SR 221.301* (Merger Act).

Mergers are rarely used to acquire a private company. Compared to a share purchase, a merger has the disadvantages of greater disclosure obligations, more complex documents and procedures, and the risk of more complex post-closing litigation, as foreseen in the Merger Act. However, mergers are very commonly used in internal restructurings.

For further information, see *Private Mergers & Acquisitions Toolkit (Switzerland), Transaction Structure* and *Acquisition Structures Toolkit (International)*.

Share Purchases and Asset Purchases

3. What are the main advantages and disadvantages of a share purchase (compared to an asset purchase)?

Transfer of Assets/Liabilities

Share purchase. In a share purchase, the principle is that the buyer acquires the target company as is. Assets, liabilities, and contracts remain with the target company and are therefore acquired indirectly by the buyer.

Exceptions to this principle may apply in certain areas, for example:

- Change of control clauses in contracts.
- Licences.
- Regulatory items.
- A transfer of residential real estate to foreign buyers.

The parties may agree a carve out or carve in of certain assets, liabilities, and contracts before closing the share purchase.

Asset purchase. In an asset purchase executed through a transfer of assets and liabilities under the Merger Act, all assets and liabilities listed in an inventory attached to the transfer agreement are transferred by operation of law to the buyer. Therefore, the parties can in principle cherry-pick the object of transfer. However, there are exceptions, for example:

- Employment relationships (see *Question 30 and Question 31*).
- Certain liabilities, for example, environmental liabilities (see *Question 34*).

It is disputed and therefore unclear whether the statutory asset transfer under the Merger Act includes the transfer of contracts. For more information see, *Practice Note, Acquisition Structures: Comparing Asset and Share Purchases (Switzerland): Merger Act Asset Transfers Versus Contractual Asset Purchases*.

The Merger Act provides that the seller and the buyer are jointly and severally liable for debts incurred before the transfer of assets and liabilities, principally for up to three years from the date of the publication of the transfer in the Swiss Official Gazette (*Schweizerisches Handelsamtsblatt/Feuille officielle suisse du commerce/Foglio ufficiale svizzero di commercio*).

In an asset purchase performed the traditional way, there is no automatic transfer of assets and liabilities. Again, there are exceptions, for example, employment relationships and certain liabilities. Therefore, cherry-picking is generally possible, although certain transfer formalities must be complied with.

Complexity of the Transaction

Share purchase. The principle documents required are the share purchase agreement and the various documents required to close the transaction (see *Closing*).

The buyer is generally unable to cherry-pick and therefore will seek protection for certain general risks and risks identified during due diligence, through representations and warranties and specific indemnities, among other things.

Asset purchase. In principle, the same is true for an asset purchase, i.e. the principal documents required are the asset purchase agreement and the various documents required to close the transaction (see *Closing*). However, an asset purchase often leads to more complex closing actions, for example, updating various registers, and obtaining third party contractors' or authorities' consents. If an asset purchase is performed:

- In the traditional way, all the assets and liabilities to be transferred must be identified and individually transferred/ assumed, and third-party consents and approvals are usually required.
- Through a transfer of assets and liabilities under the Merger Act, all relevant assets and liabilities are transferred by operation of law. However, there are disadvantages to this type of transfer (for example, disclosure obligations that make the transaction transparent) and uncertainties (because it is unclear whether contracts transfer by operation of law, that is, without third party consents).

An asset purchase with a sale of all or substantially all assets constitutes a factual liquidation. This may first require formally putting the selling company into liquidation or changing its purpose (see *Shareholder Approval*).

An asset purchase avoids the problem of trying to locate missing minority shareholders.

Tax Considerations

Share purchase. In a share purchase:

- If a corporate shareholder holds the shares, participation relief applies, if the requirements are met.
- If the seller is an individual tax resident in Switzerland, the seller may, in certain circumstances, benefit from tax-exempt capital gains (see *Share Sale*).
- Amortisation of the shares in the target held by the buyer is limited to cases of a decrease in value.
- In principle the target company carries over the base cost of capital assets.
- After the acquisition, the buyer can use the carried forward tax losses of the target company during the residual tax loss carry-forward period.
- In general, there are no tax consequences for the target company.
- The buyer takes over deferred historical tax risks.
- The sale of shares may be subject to securities transfer tax if a Swiss securities dealer is involved in the transaction (see *Share Sale*).
- The buyer may not be able to offset financing costs against future profits of the target company (no debt push down).

Asset purchase. In an asset purchase:

- The base cost of capital assets can be stepped up which may benefit the buyer (allowing greater relief from corporation tax on capital gains on later sales because of higher future amortisation in case of a step-up).
- A tax-exempt capital gain is not available for Swiss tax resident individual shareholders.

Other Factors

In an asset purchase, the buyer can grant security to lenders over the assets acquired. In a share purchase, any security taken over the target company's assets may constitute prohibited financial assistance (although a private company can give financial assistance if it is not an unlawful reduction of capital) (see *Question 24*).

For further information, see *Practice Note, Acquisition Structures: Comparing Asset and Share Purchases (Switzerland)*.

Auctions

> 4. Are sales of companies by auction common? What is the typical procedure and what regulations (if any) apply?

In a sellers' market, auction sales are very common. Accordingly, the seller should clarify at the very beginning of the auction process that it is not obliged to accept any bid or to consider any offer tendered, and generally reserve its discretion to vary the auction procedures. The seller should also expressly disclaim liability for any information in the information memorandum or otherwise, and should emphasise the function of the final sale agreement in this respect.

Generally, no regulations apply to auctions in private deals, except the principle to act in good faith.

An acquisition of a private company structured as an auction sale usually commences with the seller or its financial adviser distributing a teaser and a confidentiality agreement. On execution of the confidentiality agreement, the financial adviser distributes one or several bid process letters and an information memorandum to prospective bidders, inviting them to submit indicative offers for the target company or business.

Foreign Ownership Restrictions

> 5. Are there any restrictions on acquisitions by foreign buyers?

There is no general Swiss foreign direct investment (FDI) control regime. In March 2020, the Swiss Parliament tasked the government with proposing a Bill to introduce a new FDI control regime. In December 2023, the government published a draft Bill on the screening of FDI. According to this Bill, investment screening will focus on:

- State-controlled investors.

- Domestic companies operating in particularly critical sectors, for example:
    - defence equipment;
    - dual use goods;
    - electricity transmission and production;
    - water supply;
    - health; and
    - telecoms and transport infrastructures.

As a next step, the Parliament will debate the introduction of a new FDI regime.

Generally, notification to or clearance from a governmental agency is not required when a foreign-owned (or foreign-controlled) company or foreign individual acquires a Swiss company. However, purchases in certain business areas face restrictions, for example:

- Residential real estate.
- National defence.
- Banking.
- Insurance.
- Electricity.
- Other areas of national importance.

For further information, see *Practice Note, Regulation of Foreign Investment in Switzerland*. See also *Quick Compare Chart, Regulation of Foreign Direct Investment in Switzerland*.

Preliminary Agreements

6. What preliminary agreements are commonly made between the buyer and the seller before negotiating or executing the primary acquisition documents?

Letters of Intent

Letters of intent (LOIs) (also called heads of agreements, heads of terms, and memorandum of understanding) are sometimes entered into in acquisitions.

LOIs typically contain the following key points:

- Parties.
- Envisaged structure of the acquisition (for example, share or asset purchase, and pre-closing carve outs or carve ins).
- Price or price formula.
- Other major terms sometimes listed in short form in a term sheet annexed to the LOI.
- Timing, in particular concerning due diligence, signing, and closing.
- Tax and costs.
- Choice of law, jurisdiction, or arbitration clause.

LOIs are normally not agreements, that is, normally not binding. However, LOIs impose an obligation on each party to negotiate in good faith, which includes the obligation to inform the other party about matters it should be aware of, for example, if the negotiations are subject to the approval of a corporate body. A breach of this obligation amounts to a fault in the conclusion of a contract (*culpa in contrahendo*) and may involve the payment of damages.

Sometimes LOIs also contain binding provisions, for example, provisions on:

- Confidentiality.
- Exclusivity.
- Break fees.
- Governing law and jurisdiction.
- Arbitration.

Confidentiality clauses (also called non-disclosure clauses) are common in LOIs if the non-disclosure issues are not dealt with in a separate agreement (see below, *Non-Disclosure Agreements*). Exclusivity and break fee clauses (with the seller as beneficiary or the buyer as the beneficiary in a reverse break fee clause) are rarer.

Prudent parties state explicitly in the LOI which provisions are binding and which provisions are not binding.

LOIs should not be entered into in every acquisition. They only make sense if the envisaged transaction is more complex, and the process leading up to signing is expected to be time-consuming and costly. In this case, a brief list (term sheet) with certain already agreed deal terms may increase efficiency in the drafting process.

For further information, see *Practice Note, Key Documents for Acquiring a Private Company (Switzerland): Preliminary Agreements – Letter of Intent*. See also *Preliminary Agreements (Private Company Acquisitions) Toolkit (International): Letters of Intent*.

Exclusivity Agreements

For exclusivity clauses in LOIs, *see above, Letters of Intent*. It is also possible to agree on exclusivity in a separate, stand-alone agreement called an exclusivity agreement (or lock-out agreement).

Exclusivity agreements are agreements in which one party, normally the seller, agrees not to negotiate with another party (normally another prospective buyer) for a certain period of time.

Exclusivity agreements are legally binding, valid, and enforceable, even if they do not provide for consideration.

Specific performance is, in theory, possible, but in practice is rarely granted. Since quantifying the damage is usually difficult in cases of a breach of contract, it is advisable to include a penalty clause in the exclusivity agreement.

For further information, see *Practice Note, Key Documents for Acquiring a Private Company (Switzerland): Preliminary Agreements – Exclusivity Agreement*. See also *Preliminary Agreements (Private Company Acquisitions) Toolkit (International): Lock-out Agreements*.

Non-Disclosure Agreements

For confidentiality (non-disclosure) clauses in letters of intent, *see above, Letters of Intent*. It is possible to agree on confidentiality in a separate, stand-alone non-disclosure agreement (NDA).

In an NDA, the parties agree not to disclose information received from the other party to third parties. Therefore, they are usually mutual but can also be drafted in a way that only one party, normally the seller or the target company, is the beneficiary. NDAs are normally concluded at the very beginning of an acquisition and are often replaced by the confidentiality clause in an LOI or the acquisition agreement.

Negotiations of NDAs often focus on:

- What information is to be kept confidential and for how long, for example, only information provided by the seller/ target, and whether there are carve-outs for public information or information obtained by third parties.
- Which third parties, for example, advisers, are permitted recipients of confidential information.
- Liability, for example, liquidated damages.

Further issues are often included in an NDA, particularly clauses relating to the non-solicitation of employees or protection of IP rights in so far as permitted by applicable anti-trust laws.

Specific performance is, in theory, possible, but in practice, rarely granted. Since quantifying the damage is usually difficult in cases of a breach of contract, it is advisable to include a penalty clause in the NDA.

Practice Note, Key Documents for Acquiring a Private Company (Switzerland): Preliminary Agreements – Confidentiality (or Non-Disclosure) Agreement. See also *Preliminary Agreements (Private Company Acquisitions) Toolkit (International):Confidentiality Agreements*.

Due Diligence

7. How is due diligence typically carried out and what main areas does it usually cover?

Generally, it is more common to conduct due diligence before signing. Nearly all due diligences are performed through a virtual data room (VDR). Most often, buyers request a red-flag report.

In an auction, the information provided to buyers is sometimes staggered, that is, limited in the first stage. Later, once the number of bidders is decreased, more extensive information is provided. In a negotiated sale, staggering the due diligence is uncommon.

The scope and main areas to be covered in a due diligence vary widely. They often depend, among other things, on the specific business, the envisaged deal structure, and the risk assessment of the buyer.

The following areas are mainly covered by a legal due diligence:

- Share capital (including title) and corporate structure (including board and shareholder matters).
- Financial arrangements and related transactions.
- Key contracts, often customer and supplier contracts.
- Movable property, real estate, and leases.
- Intellectual property (IP), information technology (IT), and data protection.
- Employment, pensions, and related insurances.
- Permits and regulatory matters.
- Compliance.
- Tax.
- Environment and operational safety.
- Litigation and disputes.

For further information, see *Practice Note, Due Diligence for Private Acquisitions (Switzerland)*. See also *Due Diligence in M&A Transactions and Joint Ventures Toolkit (International)*.

Consents and Approvals

8. What are the main consents and approvals typically required for an acquisition?

Corporate Approvals

For share and asset purchases, the buyer and the seller must duly approve the transaction's signing and closing. If the buyer, the seller, or both are Swiss AGs, this usually requires the board's consent (and not the consent of the shareholders' meeting).

A share purchase with a Swiss AG as the target company may require approval of the target's board of directors (board), depending on the types of shares it has. The transferability of bearer shares (if they can be issued (see *Question 1*) is not restricted by corporate law and cannot be restricted by the articles.

Non-listed registered shares, which have not yet been fully paid in, can only be transferred with the company's consent (that is, in principle, the board), unless they are acquired by inheritance, division of estate, matrimonial property law, or compulsory execution.

The articles can stipulate that non-listed registered shares can only be transferred with the company's consent (that is, in principle, the board of directors). However, consent can only be refused if either:

- There is a valid reason stated in the articles.
- The company offers to acquire the shares from the party divesting them within the applicable deadline after the request for consent is made for the company's own account, the account of other shareholders, or the account of third parties at their real value.

Further, for non-listed registered shares, the company (that is, in principle, the board) can refuse entry in the share register if the buyer fails to expressly declare that they have acquired the shares in their own name and for their own account.

Shareholders' agreements may provide further contractual restrictions on the transferability of shares (for example, call options, right of first refusal, drag along, and tag along rights).

Shareholder Approval

AG. If a buyer intends to acquire less than 100% of the target company's share capital the buyer should identify at very beginning of the transaction whether the target company's shareholders have entered into a shareholders' agreement that provides for rights of first refusal, call options, pre-emptive rights, or drag along and tag along rights. If so, the buyer should make sure, for example, by obtaining waiver declarations, that none of these rights could hinder the closing of transaction.

If the buyer issues new shares as consideration for the acquisition, the buyer's shareholders' meeting must approve the necessary capital increase and the cancellation of the existing shareholders' subscription rights with a qualified quorum. The cancellation requires a valid reason (often given in an acquisition context) and equal treatment of the shareholders. The capital increase also must be approved by the board. If the buyer has an authorised share capital (which will be abolished by the end of 2024 at the latest) or a capital band, its board can increase the share capital, issue new shares, and cancel the existing shareholders' subscription rights if the above criteria are met.

GmbH. If the target company is a Swiss GmbH, the transfer of its quotas (shares) requires the consent of the quotaholders' meeting unless the articles provide otherwise. An assignment of quotas and an undertaking to assign quotas must be in writing. The assignment of quotas requires in principle the approval of the quotaholders' meeting.

Under Swiss corporate law, there are extensive options to limit the assignability of quotas. In fact, assignability can be (and in practice is) restricted to a far greater extent than permitted in an AG.

Again, particularly, if a buyer intends to acquire less than 100% of the target company's quota capital the buyer should identify at very beginning of the transaction whether the target company's shareholders have entered into a shareholders' agreement that provides, or if the articles provide, for rights of first refusal, call options, pre-emptive rights, or drag along and tag along rights. If so, the buyer should make sure, for example, by obtaining waiver declarations, that none of these rights could hinder the closing of transaction.

Asset purchases. If an asset purchase causes the sale of all, or substantially all, assets of the target company, it may constitute a factual liquidation. In this case, the target company may be required to enter into liquidation or change its purpose through a resolution of the shareholders' meeting that must be recorded in a public deed. Additionally, the target company's shareholders' meeting may need to approve the signing (execution) and closing of the asset purchase. This shareholders' resolution must also be recorded in a public deed.

Contractual Consents

In a share purchase, contracts generally remain with the target company and are therefore acquired indirectly by the buyer subject to, for example, change of control clauses.

In an asset purchase performed through a transfer of assets and liabilities under the Merger Act, all assets and liabilities listed in an inventory attached to the transfer agreement are transferred by operation of law to the buyer. Accordingly, notification or consents are not required. However, it is unclear whether this principle applies to contracts to be transferred (see *Transfer of Assets/Liabilities*).

In an asset purchase performed in the traditional way, except for employment relationships and certain other relationships (see *Transfer of Assets/Liabilities* and *Question 31*), there is no automatic transfer of assets and liabilities. Accordingly, creditors whose claims are to be transferred must be notified, and they must agree to the transfer. Other counterparties to contracts also have to be notified and their consent obtained to the transfer of any related contracts.

Regulatory Approval

See *Question 5* and *Question 33*.

Main Documents

9. What are the main documents in an acquisition and who generally prepares the first draft?

The main acquisition documents are:

- The share purchase agreement or the asset purchase agreement (generally prepared by the buyer's counsel).
- The disclosure letter, if any, qualifying representations and warranties (generally prepared by the seller and its counsel).

It is common for the seller to prepare the first draft of all these documents in an auction sale.

In an asset purchase, there are also lists (generally prepared by the seller) defining:

- The assets (in a broader sense).
- Agreements and employment relationships to be transferred.
- Liabilities to be assumed.

In an asset purchase, a transitional services agreement for the services to be provided by the seller or an entity of the seller's organisation to the buyer are very common.

For further information, see *Practice Note, Key Documents for Acquiring a Private Company (Switzerland)* and *Private Mergers & Acquisitions Toolkit (Switzerland): Share Purchase Agreement* and *Asset Purchase Agreement*. See also *Share Acquisition Documents Toolkit (International).*

Acquisition Agreements

10. What are the main substantive clauses in an acquisition agreement?

Share purchase. The key substantive clauses in a share purchase agreement are:

- Definitions (often in an annex to the agreement).
- Sale and purchase of the shares.
- Consideration including purchase price adjustment (see *Question 22*).
- Closing including conditions precedent and closing mechanics (see *Question 14* and *Question 15*).
- Representations and warranties.
- Remedies including limitations.
- Further covenants including specific indemnifications, non-compete/non-solicitation, no leakage/actions between signing and closing, confidentiality, and public announcement.
- Miscellaneous provisions including tax, costs, amendments, notices, governing law, and jurisdiction/arbitration.

For further information, see *Private Mergers & Acquisitions Toolkit (Switzerland), Share Purchase Agreement*.

Asset purchase. The key substantive clauses in an asset purchase agreement are:

- Definitions (often in an annex to the agreement).

- Objects of sale and purchase.
- Consideration including purchase price adjustment and value added tax (VAT) treatment.
- Closing including conditions precedent and closing mechanics.
- Representations and warranties.
- Remedies including limitations.
- Employee and employee benefits matters.
- Further covenants including transition arrangements, specific indemnifications, non-compete/non-solicitation, no leakage/actions between signing and closing, confidentiality, and public announcement.
- Miscellaneous provisions including tax, costs, amendments, notices, governing law, and jurisdiction/arbitration.

For further information, see *Private Mergers & Acquisitions Toolkit (Switzerland), Asset Purchase Agreement*.

Warranties and Indemnities

11.Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

The representations and warranties and indemnities are typically included in the acquisition agreement or sometimes in an annex to the acquisition agreement.

Representations and warranties and indemnities are generally either:

- Representations and warranties under Article 192#196a and 197#210 of the *Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations SR 220* (Code of Obligations) (the statutory purchase law provisions).
- Guarantees under Article 111 of the Code of Obligations (more applicable for specific indemnities).

Whether they qualify as one or the other, or something else (for example, an obligation to do something or an obligation to assume certain liabilities), must be assessed in each case.

Representations and warranties and indemnities can relate to the following, among others:

- Organisation and good standing.
- Enforceability and authority, and no conflict.
- Capitalisation of the company and subsidiaries (including ownership in shares).

- Financial statements.
- Books and records.
- Real and personal property.
- Condition and sufficiency of assets.
- Accounts receivables.
- Inventories.
- No undisclosed liabilities.
- Tax.
- No material adverse changes.
- Employee benefits.
- Compliance with legal requirements, and governmental authorisations.
- Legal proceedings and orders.
- Absence of certain changes and events.
- Contracts.
- Insurance.
- Environmental matters.
- Employee and consultants.
- Labour disputes and compliance.
- IP rights.
- Relationships with related persons.
- Customers and suppliers.
- Product liability and warranties.
- Brokers and finders.
- Disclosure.
- Litigation.

(Categorised according to the American Bar Association (ABA) Model Stock Purchase Agreement.)

In mid-sized and bigger transactions, it has become common for a buyer in a seller-friendly market to take out W&I insurance.

12. What are the main limitations on warranties?

Limitations on Warranties

Common limitations on representations and warranties are:

- Disclosure against representations and warranties.
- Knowledge or materiality qualifications or both in representations and warranties.
- A requirement of a notice of breach of representations and warranties.
- Time limits for bringing representation and warranty claims.
- *De minimis* rules (exclusion of smaller representation and warranty claims).
- Tipping baskets (also known as threshold or first dollar baskets), or deductible baskets (also known as excess only baskets).
- Statute of limitations.
- Cap on the liability of the seller for representation and warranty claims.
- Rules regarding conduct, in case of third-party claims which amount to a breach of representations and warranties.

Qualifying Warranties by Disclosure

In deviating from Article 200 of the Code of Obligations, the parties often agree to limit the seller's liability under the representations and warranties (or at least under certain representations and warranties not considered to be fundamental), by way of either:

- General disclosure, that is, disclosure of the whole data room against all representations and warranties (in so far as disclosure is fair) which is more common.
- Specific disclosure against specific representations and warranties.

13. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

Most frequently, the sole remedy the parties provide in acquisition agreements for breaches of representations and warranties is damages (normally irrespective of any fault of the seller), sometimes preceded by the seller's right to cure the defect in question. Less common is the right of the buyer to reduce the purchase price.

The statutory right of the buyer to rescind the acquisition agreement is normally contractually excluded.

It is disputed to what extent certain statutory remedies, for example, in cases of a material error or fraud, can be contractually excluded or modified.

Time Limits for Claims Under Warranties

For most representations and warranties, the agreed time limit is usually between 12 and 36 months. For general representations and warranties, it is most often between 12 and 24 months. Recently, the authors have seen a slight trend increasing the agreed time limit within these periods.

For certain (sometimes called fundamental) representations and warranties, the time limit is usually between five and ten years, for example, relating to:

- Title to shares, for example, as part of the capitalisation of the company and subsidiaries.
- Tax.
- Environmental issues.

Signing and Closing

Conditions Precedent

14. What common conditions precedent are typically included in a private acquisition agreement?

Conditions precedent can typically include:

- Governmental approvals, for example, by competent competition authorities or banking or insurance regulators.
- No material adverse change.
- Accuracy of representations.
- Due performance of covenants.
- Third-party consents.

- Collection of tax rulings.
- Certain clean up-actions.
- Reorganisation of the target company including, but not limited to, carve outs, and carve ins.

Normally, the parties include a covenant in the acquisition agreement to use best efforts to ascertain that the conditions precedent are fulfilled until a certain date (long-stop or drop-dead date). They normally also agree the consequences if this date is not met, that is, by providing withdrawal rights for the parties.

Main Steps at Signing and Closing

15. What are the main steps at signing and closing in a private share sale and asset sale? What main documents are commonly produced and executed?

Signing

The following documents are commonly produced and executed at signing meetings:

- The share purchase agreement or asset purchase agreement. Compared with the share purchase agreement, the asset purchase agreement extensively identifies the object of transfer (including assets, liabilities, contracts, and employees) and the required closing actions (see also *Transfer of Assets/Liabilities* and *Complexity of the Transaction*). In addition, if an asset purchase agreement transfers real estate located in Switzerland, the agreement requires notarisation by a local Swiss notary.
- The disclosure letter, if any (in which the seller makes disclosures against representations and warranties in the share purchase agreement or asset purchase agreement).
- A power of attorney (if an attorney needs to be appointed to execute documents in the absence of one of the parties).

If signing and closing do not occur simultaneously, arrangements and protections to cover the time between signing and closing include:

- Pre-closing covenants, for example, to operate the business in the ordinary course and best-efforts to achieve closing.
- Conditions to closing (see *Question 14*).
- Purchase price adjustments (see *Question 22*).
- Specific indemnities.

Closing

Share purchase. The following documents are commonly produced and executed at closing meetings of share purchases:

- Endorsement of share certificates or written declaration of assignment (the instrument required to transfer title to the shares).
- A resolution of the target's board approving the share transfer (if applicable).
- The target's updated share register providing for the buyer as a new shareholder (if applicable).
- The resignation letters for the resigning members of the target's board (if any).
- A banker's confirmation that the purchase price has been wire transferred and received.
- Share certificates for consideration shares (if applicable).
- Vendor loan agreement (if applicable).
- Release of any security or guarantees or both (if applicable).
- Escrow agreement (if applicable).
- Buyer's notification to the target's board disclosing the new beneficial owner.
- An updated register of the beneficial owner of the target, providing for the new beneficial owner of the target.
- Bring-down disclosure to get the W&I insurance policy (if applicable).
- Closing minutes.
- Typical main post-closing steps include:
- An extraordinary shareholders'/quotaholders' meeting at which the shareholders/quotaholders:
    - take note of the resignation of the directors and officers effective as from the closing date;
    - grant discharge to the resigning directors and officers for their acts or omissions before the closing date; and
    - appoint the new directors.
- The change of signatories in the commercial register and in relation to the banks.
- Provision of information to the employees, contractual partners, and the public.

Asset purchase. The following documents are commonly produced and executed at closing meetings of asset purchases:

- The instruments required to transfer title to the transferred assets, for example, granting of possession, declaration of assignments, and tripartite agreements.
- Applications to relevant registers, for example, the land register, commercial register, and trade mark register (if applicable).
- The banker's confirmation that the purchase price has been wire transferred and received.
- Vendor loan agreement (if applicable).

- Transitional services agreements (if applicable).
- Escrow agreement (if applicable).
- Closing minutes.

Typical main post-closing steps include:

- The transfer of employees from the seller's pension fund to the buyer’s pension fund.
- The fulfilment of any duties in connection with VAT.
- Co-operation regarding “wrong pocket assets” (if any).
- Provision of information to the public.

For further information, see *Practice Note, Signing and Closing: Private Acquisitions (Switzerland)* and *Signing, Closing, and Opinions Toolkit (International)*.

Execution of Documents

16. How are documents executed by companies in your jurisdiction? Are there specific formalities to execute certain types of documents?

Representatives of Swiss companies can generally represent the company either individually or with joint signatory power by two. Signatory powers can be verified in the publicly accessible excerpt of the commercial register. In the M&A context, it is common to provide proof of authorisation through respective minutes of the competent body (for example, board minutes).

Under Swiss law, the validity of a contract is not subject to it being in a particular form, unless a particular form is prescribed by law. Despite this, contracts are usually executed in writing. Where the law requires a contract to be in writing, an amendment generally must also be in writing. All persons on whom the contract imposes obligations must then sign the contract. Where the law requires a contract to be made in a certain form, a proxy must also comply with that form.

In principle, in Switzerland, a share purchase agreement for the sale of shares in an AG can be concluded without observing a certain form (for the instrument of transfer, see *Question 17*).

The assignment of a quota in a GmbH, and an obligation to assign, subject to any contrary statutory provision, must be made in writing.

The legal formalities for an asset purchase agreement depend on the objects of sale. In practice, it is in writing or in a public deed, signed by the company's legal representative, for example, a member of the board or a proxy.

Notarisation is required for asset purchases transferring real estate properties located in Switzerland.

Transactions including certain corporate actions require notarisation, for example:

- A shareholders' meeting resolving on a merger.
- A shareholders' meeting changing the articles.
- Board minutes for closing an increase of the share capital.

Further, the signatures of the persons signing the power of attorney for the incorporation of a Swiss AG or GmbH and for real estate acquisition contracts must be legalised.

Swiss law does not impose special formalities for the execution of documents by foreign companies other than those imposed on a Swiss company. However, it is common that the party located outside of Switzerland furnishes proof of authorisation, for example, an excerpt from the commercial register.

Transferring Title to Shares

17. What formalities are required to transfer title to shares in a private company?

AG

Registered shares in an AG without restricted transferability are transferred by handing over possession of the duly endorsed share certificates representing the shares or, if no such share certificates are issued, by a written declaration of assignment, unless the shares qualify as ledger-based securities (*Registerwertrechte/droit-valeurs inscrits/diritti valori registrati*).

A resolution of the target's board regarding entering the buyer into the share register as a new shareholder and the respective entry are also required. However, both have no constitutive effect, which means that legally, solely the endorsement of the share certificates or the written assignment declaration is required to transfer title, unless the shares qualify as ledger-based securities in which case the transfer is subject to the provisions of the registration agreement.

Registered shares in an AG with restricted transferability are transferred by handing over possession of the duly endorsed share certificates representing the shares or, if no share certificates are issued, by a written declaration of assignment, unless the shares qualify as ledger-based securities in which case the transfer is subject to the provisions of the registration agreement. In any event, a resolution of the target's board approving the share transfer and the buyer's entry into the share register as a new shareholder are also required. Finally, the buyer must be entered into the share register of the target company, which, however, has no constitutive effect.

To the extent still permissible (see *Question 1*), bearer shares in an AG are transferred by handing over possession of the share certificates representing the shares or, if no share certificates are issued, by a written declaration of assignment.

No tax must be paid on the share transfer documents. However, the securities transfer tax might be triggered (see *Question 25*).

GmbH

To transfer quotas in a GmbH, the Code of Obligations (Articles 785, 786, 790 and 791) provides that:

- The assignment of a quota and an obligation to assign must be in writing.
- An assignment of a quota requires the consent of the target company's quotaholders' meeting (however, the articles may deviate from this).
- The buyer must be entered into the target company's quota register (which does not have a constitutive effect).
- The name, address, and place of origin of the quotaholders, together with the number and the nominal value of their quotas, must be entered in the commercial register (which does not have a constitutive effect).

No tax must be paid on the quota transfer documents. However, the securities transfer tax might be triggered (see *Question 25*).

Reporting Obligations

Acquirers of shares or quotas in a company, solely or acting in concert with third parties, who thereby attain or exceed the threshold of 25% of the share/quota capital or voting rights, must notify the beneficial owner of the target company within one month from the closing of the acquisition.

Non-compliance with the above disclosure duties results in the following sanctions:

- Voting rights attached to the shares or quotas which should have been disclosed are suspended.
- Distribution rights (dividend and liquidation proceeds) can only be exercised on meeting the disclosure obligations.
- Distribution rights are forfeited if the disclosure obligations are not met within the one-month period.
- In case of belated notification, distribution rights can only be exercised for rights originating since the notification.

Seller's Title and Liability

18. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

The Code of Obligations provides that the seller is liable if there are deficiencies in the title to the shares. However, since the legal provisions are unclear in many respects, the parties tend to contractually set up their own rules, by providing for a specific representation and warranty relating to title to the shares, which is normally:

- Not qualified by buyer's knowledge.

- Independent of any fault of the seller.
- Not affected by *de minimis* rules, baskets, or a cap (or the parties agree a higher cap than for other representations).
- Given for a longer period than the other representations.

19. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements, or similar matters?

Seller

If the parties signed an LOI, they must act in good faith during the negotiations. Therefore, each party is obligated to inform the other party about matters it should be aware of in light of the principle of good faith (see *Letters of Intent*).

In addition, the parties are obligated not to make misrepresentations and misleading statements to the other party. A pre-contractual relationship exists and gives rise to this obligation even if there is no LOI and the parties are simply negotiating.

A breach of the obligation to act in good faith gives rise to pre-contractual (*culpa in contrahendo*) liability and may involve payment of damages (see *Letters of Intent*). Whether a claim still exists after the acquisition agreement has been concluded is controversial, at least if the acquisition agreement does not regulate this matter.

Advisers

In theory, advisers may become liable based on tort or similar legal constructions. However, corresponding actions are rare. As the advisers' behaviour in relation to a third party is deemed to be the party's behaviour they are mandated by, it is more common for the respective party (that is, their principal) to be sued.

Governing Law and Arbitration

20. Can a share purchase agreement provide for a foreign governing law? Is an arbitration provision usually included in private M&A documents?

Choice of Law

Usually, the parties choose local law, that is, the law of the country where the target company's registered seat is located.

However, a share purchase agreement can provide for a foreign governing law (for example the law of the country where the seller's or buyer's registered seat is located). In this case, provisions of national law would not apply. However, mandatory Swiss laws, for example, relating to tax, employee protection, competition, and the mechanics of transferring the shares would still apply (where relevant). The parties may, for example, choose a foreign governing law if the seller sells several target companies located in different countries directly to the buyer at the same time and the parties want all share purchase agreements to be governed by the same substantive law.

Arbitration

Arbitration clauses tend to be included in share purchase agreements if foreign parties from non-German-speaking countries are involved. If specific criteria are met, arbitration clauses in share purchase agreements are enforceable in Switzerland, and Swiss courts respect the parties' choice.

Switzerland is a party to the *New York Convention*, which ensures the enforcement of foreign arbitration awards worldwide.

If the parties agree on an arbitration clause they choose, for example, the *Swiss Rules* or the *ICC Rules*. Depending on the transaction size, the parties typically agree on one or three arbitrators.

Private M&A-related disputes are typically resolved out of court (or by an arbitral proceeding). Sometimes, a party files a lawsuit in court but they usually enter into a settlement agreement before judgment is delivered.

Consideration and Acquisition Financing

Forms of Consideration

21. What forms of consideration are commonly offered in a share sale?

Forms of Consideration

The most common form of consideration is cash, either from the buyer's own resources or funded by debt.

Sometimes shares in the buyer or its parent, or vendor loans by the seller are used, often combined with cash consideration.

A vendor loans is one form of deferred purchase price payment. Another form is earn-out payments, that is, possible further purchase price payments based on certain future events. Future events are normally linked to the future performance of the target company, for example, turnover or profits.

Factors in Choice of Consideration

The most relevant factor for the seller in the choice of consideration is whether it wants cash and a complete exit from the target company's business, or to retain an interest in the combined business.

If a buyer has insufficient cash or is unable or unwilling to raise what it requires from third parties or both, it will need to consider whether to satisfy some or all of the consideration in shares or vendor loans, or to provide for an earn out. The buyer may also see value in issuing shares as consideration, to ensure that the seller (particularly if the seller is a key individual manager) has a continuing commitment to the combined business.

For further information, see *Consideration and Acquisition Finance Toolkit (International)*.

Price Adjustments and Deferred Consideration

22. How is the price typically assessed and agreed? Is the price commonly adjusted?

The target company's value (that is, usually the enterprise value) is often determined by the discounted cash flow method. However, the parties also value the target company by, for example, conducting a comparable company analysis or using the multiples approach. The price to be paid for the target company is based on the valuation but negotiated between the parties.

Often payments on closing are adjusted post-closing, depending on, for example, a certain net debt or a certain net working capital of the target company at closing.

However, locked box mechanisms and purchase price adjustment (PPA) are very common in Switzerland. In a locked box mechanism, payments on closing are not adjusted and "leakage-language," that is, clauses to prevent the leakage of substance from the target company between signing and closing is required.

In auctions, the parties tend to agree on the locked box mechanism, particularly if, for example, not much time has elapsed between the balance sheet day and the closing date (that is, usually the first and second quarter) or an audited interim balance sheet has been prepared. In contrast, in auctions, PPA is used more often if the closing takes place in the third or fourth quarter.

For further information, see *Earn-Out, Locked Box, and Retention Toolkit (International)*.

23. Do buyers typically pay the price in full on closing, or is deferred consideration common?

Buyers typically pay the price in full on closing. In the current market, sellers are still predominantly frequently successful in avoiding any deferred consideration. The parties rarely agree a form of security for representation and warranty claims. If the parties agree on security, they tend to use bank guarantees or price retentions/holdbacks. Escrow accounts are not regularly used as security due to compliance issues (know your customer (KYC) issues) with banks and negative interest rates. However, this may change in the future due to the rise in interest rates.

Financial Assistance

24. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

According to the predominant but disputed view, a target company can provide or secure financing of a transaction up to its freely disposable equity if both:

- The shareholders' meeting of the Swiss target company resolves on and approves the granting of the loan or of the security interest.
- The upstream financial assistance is allowed by the Swiss target company's articles (which includes the purpose of group support and financial assistance) and is in the interests of the Swiss target company.

Exemptions

No general exemptions exist.

Tax

Transfer Tax

25. What transfer taxes are payable on a share sale and an asset sale?

Share Sale

Securities transfer tax. A sale of shares is subject to securities transfer tax if at least one of the parties or intermediaries involved qualifies as a Swiss securities dealer. However, certain transactions and parties are exempt (see *Question 26*).

Swiss securities dealers include banks and bank-like financial institutions as defined by Swiss banking law and investment fund managers. It also includes individuals, companies, partnerships, and branches of foreign companies whose essential activities consist in trading or acting as intermediaries in deals involving taxable securities.

In addition, Swiss companies not in the securities trading business qualify as securities dealers if they hold taxable securities with a book value exceeding CHF10 million.

Securities transfer tax must be reported and paid by the relevant securities dealer, and is usually contractually borne 50:50 by the seller and buyer.

Real estate transfer tax. Depending on the Swiss canton (state) where the real estate property is located, real estate transfer tax is levied on the sale of the majority of the shares in a real estate property company.

Asset Sale

Securities transfer tax. This tax applies, depending on whether taxable securities (for example, shares, bonds, and fund units) are sold and whether one of the parties or intermediaries involved qualifies as a Swiss securities dealer (*see above*, *Share Sale*).

Real estate transfer tax. Depending on the canton (state) where the real estate property is located, real estate transfer tax is levied on the sale of Swiss real estate property. Additionally, notary and land registry fees may apply. Depending on the location of the property, these fees may be substantial.

> 26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate transfer tax liability?

Share Sale

Securities transfer tax. Certain parties qualify as exempt investors, for example, foreign public authorities, foreign central banks, Swiss and foreign funds, foreign social security entities, foreign banks, and brokers. No securities transfer tax is due from an exempt party.

Securities transfer tax can be avoided if the sale of the shares qualifies as tax neutral group internal restructuring.

Real estate transfer tax. Real estate transfer tax can also be avoided if the sale of the shares qualifies as tax neutral group internal restructuring.

Notary and land registry fees. These fees are not triggered in a share deal as legal title to the property remains unchanged.

Asset Sale

See above, *Share Sale*.

Corporate Taxes

27. What corporate taxes are payable on a share sale and an asset sale?

Share Sale

Income tax. Income tax is generally levied at the federal, cantonal, and communal level. In a few cantons (states), income tax is also levied by the districts.

A capital gain derived from a sale of shares is subject to corporate income tax. However, participation relief applies, if the requirements are met (see *Question 28*). Capital losses are tax-deductible. The tax rates vary depending on the canton and the community.

The corporate income tax liability may be reduced if the IP box, R&D super deduction, or notional interest deduction can be applied. On 18 June 2023, Swiss voters approved a constitutional amendment in a public vote allowing the implementation of the OECD/G20 project on minimum taxation whereby large multinational corporations with an annual turnover of at least EUR750 million should pay at least 15% tax on their profits in each country. In Switzerland, 21 of the 26 cantons levy tax rates that are lower than the required 15%. If the minimum tax rate is not reached, the shortfall will be levied by means of a supplementary tax. The minimum tax was introduced as of 1 January 2024.

Real estate capital gain tax. Certain cantons levy a separate real estate capital gain tax on the sale of the majority of the shares in a real estate company. Capital gains subject to real estate capital gain tax are exempt from income tax at the cantonal/communal level.

Asset Sale

Income tax. Capital gains derived from a sale of assets are subject to corporate income tax. The effective tax rates vary depending on the canton and the community (*see above, Share Sale*). However, no participation relief applies if the sold assets are not qualifying participations (see *Question 28*).

Real estate capital gain tax. Depending on the canton where the real estate property is located, capital gains from the sale of real estate by (Swiss or foreign) companies are subject to corporate income tax or a combination of corporate income tax and real estate capital gain tax (*see above, Question 27*).

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate corporate tax liability?

Share Sale

Income tax participation relief. The participation relief applies to capital gains from a disposal of a qualifying participation (at least 10% of the nominal share capital or reserves) by a corporate shareholder, if the holding period of at least one year is met.

As a result, the corporate income tax liability is reduced by the ratio between the net participation income (taking into account administrative and financing costs) and the total net profit. The participation exemption leads to a virtual tax-free capital gain, as it typically reduces all or most of the corporate income tax liability.

If the seller is a Swiss tax resident individual, the seller can benefit from tax-exempt capital gains on the sale of privately held participations unless, among other things:

- The sale is considered as an indirect partial liquidation (re-qualification of the tax-exempt capital gain into taxable income).
- The sale price is partially re-qualified as income from employment.

These income tax consequences can be avoided if the transaction is properly structured or mitigated and if the share purchase agreement contains respective covenants.

Asset Sale

See above, *Share Sale*. There is no tax-exempt capital available for Swiss tax resident individual shareholders.

Other Taxes

29. Are other taxes potentially payable on a share sale and an asset sale?

VAT

The sale of shares is exempt from VAT. However, the sale of assets is subject to VAT.

The notification procedure may apply in a transfer of all or part of the business assets under the Merger Act if both the seller and the buyer are taxable persons for Swiss VAT purposes. If the conditions for the notification procedure are met, the tax liability is fulfilled by reporting the transaction to the Swiss Federal Tax Administration instead of payment of the VAT.

The notification procedure is mandatory if the transfer is between related persons or if the VAT charge exceeds CHF10,000. If the CHF10,000 threshold is not met, the notification procedure is optional.

Swiss Withholding Tax

If the buyer acquires a Swiss company and benefits from a more advantageous tax treaty rate than the rate applied to distributions to the seller, the "old reserve practice" may apply. This means that for subsequent dividend distributions, the prior (higher) tax treaty rate will still apply to those freely distributable reserves which already existed at the time of the transaction.

Depending on the buyer and the acquisition structure chosen, the tightened practice of the Swiss Federal Tax Administration regarding the (extended) international transposition may need to be considered. The refund of Swiss withholding tax may be fully, or partially, denied on future dividend distributions of the target (in the worst case, up to the purchase price).

For an overview of key tax issues relating to the structure and tax costs after closing of a cross-border acquisition, see *Tax (Private Company Acquisitions) Toolkit (International)*.

Employees

Information and Consultation

30. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset Sale

Article 333a of the Code of Obligations states the following:

- If employees are transferred as part of an asset sale, the seller (as the employer) must inform the employees' representatives or, if none, the employees directly, in due time before closing, about the reason for the transfer and the legal, economic, and social consequences of the transfer for the employees.
- If, as a result of the transfer, measures affecting the employees are planned (for example, a change of usual place of work) the employees' representatives or, if none, the employees directly, must be consulted in due time before the decision on these measures is taken, which is either before or after signing of the asset purchase agreement.

If these consultation and information rights are breached, the asset sale does not automatically become null and void. However, the employees' representatives or each employee concerned can block the acquisition by injunctive relief.

It is disputed whether the employees' representatives or employees can have closing of the acquisition prohibited until the rights have been complied with. They can at least sue for damages.

If the asset sale is in the form of a restructuring according to the Merger Act, the employee's representatives or each employee have more possible measures, for example, blocking the registration of the acquisition in the relevant registry of commerce.

Share Sale

Unless there are specific information/consultation requirements under collective bargaining agreements or similar agreements, the common view is that the provisions of Article 333a of the Code of Obligations do not apply to share sales. However, court judgments in the EU state that the EU rules corresponding to Article 333a of the Code of Obligations (transfer of undertakings

(protection of employment) (TUPE) rules) may apply to share sales. The common view on the non-applicability of Article 333a of the Code of Obligations should therefore be approached with some caution.

For further information, see *Employees (Private Company Acquisitions) Toolkit (International)*.

Transfer in a Business Sale and Other Protections

31. Are employees automatically transferred to the buyer in a business sale? What other protection do employees have against dismissal in the context of a share sale or asset sale?

Transfer in a Business Sale

If the seller transfers the company or a part of it to a buyer in an asset sale, an employment relationship and all related rights and obligations pass to the buyer as of the day of the transfer, unless the employee objects to the transfer (in which case the employment relationship with the buyer terminates as per the end of the notice period provided by law). This applies both to an asset sale performed through a transfer of assets and liabilities under the Merger Act and the traditional way (see *Question 2*).

If a collective employment contract governs the transferred relationship, the buyer must comply with it for one year after the transfer unless it expires or is terminated sooner. If the employee refuses the transfer, the employment relationship ends on the expiry of the statutory notice period. Until then, the buyer and the employee must perform the contract.

The seller and the buyer are jointly and severally liable for any employee claims falling due before the transfer or between the transfer and the date on which the employment relationship could normally be terminated or is terminated following a refusal of the transfer.

In insolvency proceedings, the seller and the buyer can opt out of the respective provisions on the automatic transfer of the employment relationships.

Other Protections

It is disputed whether employees who are dismissed by the seller or the buyer in connection with a transfer are protected under the unfair dismissal rules.

In certain circumstances, employees have the right to be consulted before a decision on measures affecting the employees is made (see *Question 30*).

Pensions

32. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private Pension Schemes

Private pension schemes are mandatory. Therefore, an employer must conclude an accession agreement with a separate legal entity. This legal entity, normally a foundation, is set up by the employer or, more commonly, by an insurance company or other third party. The legal entity is the owner of the private pension scheme, which is mainly financed by the employer and normally the employees.

Pensions in a Business Transfer

A share or asset deal does not, as such, affect the separate legal entity that owns the private pension scheme, but may affect it indirectly. For example, in some instances, the legal entity must be fully or partly liquidated, and assets resulting from the liquidation are passed on to the legal entity newly in charge of the employees concerned. A full or partial liquidation is heavily regulated and supervised by the cantonal authorities that supervise the legal entities.

Competition/Anti-Trust Issues

33. Do private acquisitions have to be notified to a competition law regulator in certain circumstances?

Notification and Regulatory Authorities

Concentrations meeting certain thresholds are subject to pre-merger control as set out in the *Federal Act on Cartels and other Restraints of Competition 1995, SR 251* (Cartel Act). They must be formally notified (by written submission) to the *Swiss Competition Commission* before any closing/implementation steps.

Irrespective of any turnover thresholds, a concentration must be notified to the Swiss Competition Commission if one of the involved undertakings has been held in a final decision to be dominant in a market in Switzerland, and the concentration concerns this market, an adjacent, or an upstream or downstream market (Article 9, Swiss Cartel Act).

For more information, see *Practice Note, Competition Law in Switzerland: Overview* and *Country Q&A, Competition Law in Switzerland: Overview*.

For details of the latest jurisdictional thresholds see *Merger Control Quick Compare Chart: Switzerland*.

Substantive Test

The Competition Commission performs a special market dominance test. A concentration can be prohibited or authorised subject to conditions and obligations if it both:

- Creates or strengthens a dominant position that might eliminate effective competition.
- Does not improve competition in another market so that any harmful effects of the dominant position are outweighed.

(Article 10, Cartel Act.)

Environment

34. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

Under the *Federal Act on the Protection of the Environment 1983, SR 814.01* (Environmental Protection Act (EPA)) the contaminator is responsible for the clean-up of the contaminated land. The contaminator is primarily the person who actually caused the contamination, but also the person who controls the contaminated land, for example, the owner, or potentially the lessee, of the contaminated land. The general rule is that clean-up costs are allocated between the person who caused the contamination (as a rule of thumb, between 70% and 90% of the costs) and the person who controls the contaminated land.

In some cases, it is unclear to what extent the liability of the person who caused the contamination is passed on in an asset purchase. The prevailing view is that the liability is passed on if control of the contaminated land is passed on from the seller to the buyer together with an associated business which caused the contamination. The liability of the person who controls the land is not passed on in the case of a sale of the land, in particular if the clean-up causing the costs is not yet planned or decided on.

If the target company is either the person that caused the contamination or the person that controls the contaminated land, the target company remains that person, even if its shares are sold in a share purchase.

A buyer is often well advised to conduct environmental due diligence if potential contamination on land controlled (for example, through ownership or as a lessee) by the target company become apparent, or if the target company potentially caused contamination.

Risks associated with contamination are usually dealt with in the transaction agreements by representations and warranties, or specific indemnities. Depending on the specifics of the case, contamination may require:

- Clean-up measures before closing.
- A change of the deal structure (asset deal, rather than a share deal), or the prior carve out of certain assets or business.

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Recent transactions

- Advising Liberty Media Corporation (Nasdaq: FWONA, FWONK) on the acquisition of Dorna Sports, S.L., the exclusive commercial rights holder to the MotoGP™ World Championship.
- Advising Montana Tech Components AG and SIX-listed Aluflexpack AG on Constantia Flexibles' acquisition of a majority of shares of Aluflexpack from Montana Tech Components and the public tender offer for the remaining shares.
- Advising Inflexion on the acquisition of a majority stake in dss+ from Gyrus Capital.
- Advising TX Group (SIX: TXGN) on the acquisition of Clear Channel Switzerland, a driver for innovation in the Out-of-Home (OOH) advertising business.
- Advising Infineon Technologies AG on the acquisition of 3db Access AG.
- Advising a consortium led by Energy Infrastructure Partners on the acquisition of about 20% of Fluxys Group, an operator of gas pipelines and LNG terminals across Europe.
- Advising TX Group (SIX: TXGN) on the creation of a corporate joint venture with Ringier, La Mobilière and General Atlantic resulting in a leading digital marketplace group.

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- Advising Swiss Marketplace Group on the acquisition of a majority stake in Flatfox AG from Mobiliar.
- Advising TX Group (SIX: TXGN) on the acquisition of Clear Channel Switzerland, a driver for innovation in the Out-of-Home (OOH) advertising business.
- Advising Medgate on the acquisition of a majority of its shares by the Otto Group.
- Advising Montana Aerospace (SIX: AERO) on the acquisition of Asco Industries.
- Advising TX Group on the creation of a corporate joint venture with Ringier, La Mobilière and General Atlantic resulting in a leading digital marketplace group.
- Advising the British private equity investor Bridgepoint on the acquisition of Infinigate group, a leading value-added cyber security solutions distributor.
- Advising Dovista A/S, part of the Danish VKR Group, on the purchase of Arbonia's Windows Division.

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Recent transactions

- Advising TX Group (SIX: TXGN) on the acquisition of Clear Channel Switzerland, a driver for innovation in the Out-of-Home (OOH) advertising business.
- Advising the financial investor Sagard NewGen on the acquisition of a minority stake in Unit8 SA, Switzerland's fastest-growing AI company.
- Advising Cembra Money Bank AG (SIX: CMBN), a leading Swiss provider of financing solutions and services, on the acquisition of Byjuno AG and its sister company, Intrum Finance Services AG, two major providers in digital payments in Switzerland.
- Advising Komax Holding AG (SIX: KOMN), a globally active technology group based in the Canton (state) of Lucerne, on its *de facto* merger with Metall Zug AG (SIX: METN).
- Advising Constellation V Fund and the minority shareholders on the sale of 75% of the shares in Swiss E-Mobility Group (Holding) AG, which is a market-leading provider of e-mobility solutions within the DACH region and operating the largest pure-play e-bike retail chain "m-way" in Switzerland.
- Advising JENOPTIK AG (Xetra: JEN) on the acquisition of SwissOptic AG, a specialist in developing and manufacturing optical components and assemblies, primarily for the medical technology, semiconductor, and metrology industries.
- Advising the owner family of Lista Office Group, a planner and organiser of offices, on the sale of this group to a subsidiary of the furniture manufacturer Zhejiang Henglin Chair Industry Co., Ltd. (SSE: 603661).

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Recent transactions

- Advising Liberty Media Corporation (Nasdaq: FWONA, FWONK) on the acquisition of Dorna Sports, S.L., the exclusive commercial rights holder to the MotoGP™ World Championship.

- Advising GetYourGuide AG on its USD194 million series E financing round led by Blue Pool Capital.
- Advising Boston Consulting Group (BCG), the leading global strategy consultancy on the acquisition of QuantisG, a pioneering environmental sustainability consultancy headquartered in Switzerland.
- Advising International Flavors & Fragrances Inc (NYSE:IFF) on the divestiture of its Microbial Control business unit to LANXESS.
- Advising DPE Deutsche Private Equity (DPE), the leading growth investor in the DACH region on the close of DPE Continuation Fund I with a fund size of about EUR708 million.
- Advising Cinerius Financial Partners AG on the acquisition of a majority stake in Entrepreneur Partners AG.
- Advising Riverside Company, a global private equity investor on the acquisition of ACTANDO SA, a global learning organisation that provides technology-enabled learning solutions to life sciences commercial teams.
- Advising Bouygues Energies & Services, the Swiss market leader in the areas of building technology, on the sale of its Helion business unit, which specialises in photovoltaics, heat pumps, and e-mobility, to the AMAG Group.
- Advising +ND Capital on the acquisition of Dutch cell therapy company CellPoint by Belgian biotech company Galapagos NV (Euronext &NASDAQ: GLPG).

Languages. German, English, French

Professional associations/memberships. Registered with the Swiss and Zurich Bar Registry and admitted to practice in all Switzerland.

Publications. Publishes regularly on his areas of practice.

END OF DOCUMENT

RESOURCE HISTORY

Law stated date updated following periodic maintenance.

This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 01 April 2024.

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Toolkit

Employees (Private Company Acquisitions) Toolkit (International) • Law stated as at 01-Mar-2024
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