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# **Switzerland**

## Negotiated M&A Guide

Corporate and M&A Law Committee

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## 1. Introduction

This guide gives an overview of the law dealing with negotiated M&A transactions in Switzerland.

This guide deals such rules as in effect on at 31 August 2010. This guide does not constitute legal advice. Anyone involved in negotiated M&A transactions should seek specialist advice.

## 2. General Background

The field of M&A transactions relating to privately held Swiss entities or parts of entities is governed by a multitude of statutes and case law precedents. Despite the economic importance and frequency of such transactions, there is no specific statute governing the acquisition of a company whose shares are not listed at a stock exchange. General rules on the sales of goods as set forth in Articles 184 et seq. of the Swiss Code of Obligations ("**CO**") apply. These rules are specified by case law and complemented by additional rules.

Mergers of entities, restructurings such as spin-offs or conversions from one company form into another one (e.g., from a limited liability company into a stock corporation) are governed by the Swiss Act on Mergers, Demergers, Transfers of Assets and Transformations enacted in 2004 ("**Merger Act**").

## 3. Structure of a Sale and Purchase Transaction

Sale and purchase transactions with respect to privately held enterprises in Switzerland are in almost all cases structured as a share deal, an asset deal (either a classic asset deal or a regulated spin-off) or as a merger.

### 3.1 Share Deal

#### 3.1.1 Characteristics

In a share deal, the seller sells and the buyer buys a certain percentage of the outstanding participation rights in a target company on the basis of a sale and purchase agreement.

In Switzerland, companies are most often organized in the form of a stock corporation or, less common, a limited liability company. The participation rights in such corporations and companies are called shares (or for LLCs also quotas).

#### 3.1.2 Effects of the Transaction on the Target Enterprise

The sale of a company by way of a share deal has in general no effect on the target company's assets, liabilities, contracts, employees and governmental authorizations.

As the whole company is transferred, individual assets or liabilities must not be transferred but stay with the target company. Also all employees stay employed with the target company and neither the target company nor the employee can derive any right from the share deal.

In case of contractual change-of-control provisions, the transaction may trigger certain rights of the contractual counterparty of the target company, most often a right to terminate the contract or a right to re-negotiate certain terms and conditions.

Last but not least, while governmental authorizations, permits and licenses relating to the target company's business stay generally in place and remain unaffected by the transaction, the change-of-control may also trigger duties to comply with certain requirements of regulated

industries, such as banking, insurance or gaming (e.g., disclosure duties to and approval rights by supervisory authorities).

### 3.1.3 Transfer of Title

The transfer of title to the target company's shares is effected as follows:

- a) *Stock corporation.* Shares in a stock corporation may be issued as bearer shares or registered shares, either in certificated or un-certificated form, and either with or without transfer restriction. While certificated bearer shares are transferred by way of physical delivery only, the transfer of certificated registered shares additionally requires an endorsement or, alternatively, a written assignment declaration. Un-certificated shares are transferred by written assignment only.<sup>1</sup> If the company's articles of incorporation provides for a transfer restriction, a valid transfer additionally requires a resolution of the board of directors of the target company approving such transfer.
- b) *Limited liability company.* Shares (or also called quotas) in a limited liability company are un-certificated and transferred by way of written assignment and also a resolution of the shareholders meeting to approve the transfer, unless the articles of association provides otherwise.

## 3.2 Asset Deal

### 3.2.1 Characteristics

In an asset deal, the buyer acquires the assets and liabilities of a target company instead of buying the shares in such company. Therefore, the target company itself is party to the asset sale and purchase agreement and recipient of the consideration. Each individual asset (and, possibly, liability) is transferred from the target company to the buyer. Therefore, the asset deal has far-reaching effects on the selling and the buying enterprise.

From a tax point of view, if the seller is a Swiss company, an asset deal is generally less attractive than a share deal, as: (i) at the level of the target company, an asset deal triggers corporate income tax on the difference between the book value and the purchase price of the assets, and (ii) when the purchase price is distributed to the shareholders, the resulting gain has to be distributed as a (potentially taxable) dividend. By contrast, any gain resulting from a share deal is basically tax free for a Swiss individual seller. However, from a buyer's perspective, an asset deal is more attractive than a share deal, as an asset deal allows the buyer to depreciate the acquisition costs.

Overall, in most cases, the share deal is preferred. Normally, the asset deal is chosen if the buyer only wants to buy a rather limited number of assets and liabilities of the company, or if the buyer wants to make sure that no unknown liabilities transfer to the buyer. However, due to the differing tax consequences described above, an asset deal often results in a higher purchase price than a share deal.

### 3.2.2 Effects of the Transaction on the Target Enterprise

The sale of an enterprise by way of an asset deal has multiple effects on the target enterprise's assets, liabilities, contracts, employees, governmental authorizations and tax situation.

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<sup>1</sup> Publicly traded shares, however, are nowadays mostly issued in the form of book-entry securities (*Bucheffekten; titres intermédiés*) which are transferred by entry into the securities book of the target company in accordance with the Swiss Act on Book-Entry Securities which entered into force on 1 January 2010.

As individual assets are transferred, the parties must follow the specific transfer modalities required for each specific asset (unless the parties file for the registered transfer of assets pursuant to the Merger Act). Shares are transferred as described in Section 3.1.3. Liabilities may only be transferred with the approval of the creditor. Contracts may only be transferred with the approval of the contractual counterparty.

As in almost all European countries, employees are, by operation of law, automatically transferred to the purchaser with the assets if the transferred assets form an enterprise or an organizational division and the employees were employed in such enterprise or organizational division. However, an employee has a right to reject such transfer and terminate the employment agreement with a statutory (not the contractual) notice period.

Governmental authorizations, permits and licenses are usually granted *ad personam*, in view of qualities and assurances of the holder itself, and therefore most often need to be re-applied for.

In principle, any difference between the book value and the purchase price of the assets is subject to corporate income tax at the level of the selling entity. By contrast (with the exception of real estate capital gains taxes under certain circumstances), a share deal does not trigger tax consequences for the target company.

### 3.2.3 Transfer of Title

#### a. Registered Transfer of Assets pursuant to Merger Act

The Merger Act provides for the possibility to transfer an entirety of assets and liabilities by way of registration in the commercial register. The transfer is effectuated *uno actu* by operation of law by the filing of a transfer agreement, including an inventory list. The obvious advantage is that the parties do not have to follow the specific transfer modalities required for each specific asset or the assumption of liabilities. However, the big disadvantage is that the formalities have to be followed very strictly under the scrutiny of the commercial registry and, as transactions registered in the commercial register are published in the Swiss Commercial Gazette, such transfer is in the public domain. In addition, in cross-border transfers to a foreign acquirer, the application of the registered transfer under the Merger Act is often impossible as the Federal Commercial Registry requires in such cases the relevant foreign jurisdiction provide an equivalent institution, and that is rarely the case. For these reasons, the registered transfer of assets is not as widely used as could be expected.

#### b. Individual Transfer of Assets and Liabilities

If the transfer is not effectuated by way of a registered transfer of assets, each asset needs to be transferred following the specific transfer rules required for such asset. For example, transfer requirements are (i) for claims: a written assignment declaration, (ii) for movable assets: physical delivery (possession), and (iii) for trademarks: written assignment declaration.

Liabilities may only be transferred with the approval of the creditor. In that context, the parties must make sure *vis-à-vis* the creditor that the buyer wants to assume the liability while at the same time releasing the original debtor. Otherwise, the buyer only undertakes to internally indemnify the original debtor against any claim of the creditor or, alternatively, jointly assumes the liability as additional debtor without releasing the original debtor.

In order to “transfer” contracts, the consent of the contractual counterparty is required. Such consent must be given in the form required by the contract. From a legal point of view, it is a tripartite agreement pursuant to which the transferor, the transferee and the contractual counterparty agree on the transfer of the contract.

### **3.3 Merger**

Mergers of companies are regulated in the Merger Act. The Merger Act determines the substantive and formal requirements to effect a merger and the rights of the involved shareholders. In an arm's-length transaction, the governing bodies of both merging entities determine and negotiate the value of their entities and the share conversion ratio to be set forth in a merger agreement.

Swiss law provides for two forms of mergers, the absorption and the combination merger.

#### **3.3.1 Absorption Merger**

In an absorption merger, the absorbing company takes over and amalgamates with the dissolving company. The assets, liabilities, contracts, employees and governmental authorizations of the dissolving company transfer to the absorbing company *uno actu* by operation of law. The shareholders of the dissolving company receive shares in the absorbing company in exchange for their shares in the dissolving company. Following the merger, the dissolving company is deleted from the commercial register.

#### **3.3.2 Combination Merger**

In a combination merger, two companies combine and amalgamate into a newly founded third company. The assets, liabilities, contracts, employees and governmental authorizations of the dissolving companies transfer to the newly founded company *uno actu* by operation of law. The shareholders of two dissolving companies receive shares in the newly founded company in exchange for their shares in the dissolving companies. The two original companies are dissolved and deleted from the commercial register.

## **4. Overview over the Process of an Individually Negotiated Sale and Purchase Transaction**

In a professionally structured Swiss M&A transaction the process includes the following elements: Pre-agreements such as a confidentiality agreement and a letter of intent frame and define the first phase of a potential acquisition (see Section 4). A due diligence examination allows the purchaser to screen and value the target company (see Section 5). The legal documentation phase consists of the drafting, negotiation and conclusion of a detailed sale and purchase agreement and its subsequent closing (see Section 6).

## **5. Pre-Agreements**

### **5.1.1 Confidentiality Agreement**

In a first phase, the parties normally enter into a confidentiality agreement (also called non-disclosure agreement), in particular to allow the seller to reveal certain non-public information about the target company to the potential buyer and to protect against such information's unauthorized use.

### **5.1.2 Letter of Intent**

Once the seller and the buyer agree on the basics of the transaction, it is very common in Switzerland to enter into a letter of intent to structure the deal and to agree on certain aspects of the transaction process. The letter of intent regularly contains the following points:

- a) Description of the transaction and the common goal;
- b) Description of the main terms and conditions;

- c) Description of when and how the potential buyer may conduct due diligence;
- d) Possibly, an agreement relating to exclusivity for the potential buyer during a certain period of time;
- e) Confidentiality (if not exhaustively regulated in a confidentiality agreement);
- f) Clause identifying which provisions are binding and which are non-binding for the parties;
- g) Clause regarding the assumption of costs;
- h) Applicable law; and
- i) Jurisdiction/Arbitration.

Normally, points a) to c) are non-binding as they are subject to further analysis, negotiations and documentation of the parties. The remaining points are usually binding provisions.

### 5.1.3 Lock-up (or Voting) Agreements with Major Shareholders

In the context of negotiated M&A transactions, lock-up or voting agreements are considered to be agreements with a shareholder of a company in which such shareholder undertakes vis-à-vis the potential buyer (i) not to sell his shares in the target company to a third party, or to sell his shares to the potential buyer under certain conditions, and (ii) to vote in favor of a certain transaction. Although quite rare, under Swiss law potential buyers may enter into such lock-up or voting agreements with major shareholders; such agreements are valid and binding upon the parties. They can even be conditioned upon the successful acquisition of the target company by the potential buyer.

## 6. Due Diligence

Today it is generally accepted in Switzerland that the acquisition of a company requires a due diligence examination in at least four areas: the target company's products, financials, tax and legal situation. Depending on the target company and type of transaction, the due diligence may be expanded to further fields, such as pensions, insurance, health and safety and environmental aspects.

The due diligence process is targeted to at least partially mend the information deficit of the buyer with respect to the target company. The purpose of the due diligence is at least two-fold: First, the buyer wants to understand the purchase object and identify defects, deficiencies and risks; these have an impact on the value, thus, influence the price calculation regarding the target and the potential legal protection required by the buyer in the acquisition agreement. Secondly, the due diligence can furnish valuable information to prepare the business integration process with respect to the target company after closing of the transaction.

## 7. Sale and Purchase Agreement

For a valid sale and purchase, Swiss law requires as essential terms only to identify the parties (seller and buyer), the object of the sale and the purchase price. However, the parties normally add various provisions which address certain of their mutual and/or individual needs. The types of provisions and their content heavily depend on the object of the sale and its characteristics, the structure of the transaction as well as the sophistication and bargaining power of the parties.

Sections 7.1 et seq. outline some of the key provisions of a sale and purchase agreement under Swiss law:

## 7.1 Preamble/Recitals

In the preamble or recitals, the parties usually describe in more or less detail the background of seller, purchaser and target company as well as the context of the transaction. The preamble has no binding effect on the parties; however, in case of a dispute with respect to the interpretation of the agreement, it may help to understand the intentions of the parties.

## 7.2 Object of Purchase

The contract should identify in detail the object of the purchase: in a share deal the shares to be sold/purchased, if possible indicating not only the quantity but the individual share number and nominal value of each share; in an asset deal: the assets and liabilities related to the enterprise to be sold listed item by item (by reference to the relevant annexes).

## 7.3 Purchase Price

The purchase price can be freely determined by the parties. It is generally (i) a fixed amount stipulated in the agreement, or (ii) an amount determinable based on a calculation methodology set forth in the agreement, or (iii) a combination of the two.

It is advisable to state fixed amounts as far as possible and to only refer to a calculation methodology if the parameters for the calculation are not yet known at signing. The most common case in which the parameters are not yet known at signing is the final determination of the purchase price based on closing financial statements. The parties will agree on the adjustment of the preliminary purchase price paid at closing based on the recalculation of the price using the agreed calculation formula and the financial statements drawn up as at the closing. Another important example in which the parameters are not known at signing and at closing is the "earn-out". In an earn-out, the parties agree that all or part of the purchase price will depend on future results of the target company. Earn-out arrangements are often chosen when the parties do not share the same view on the future results or profitability of the target company and/or the seller is still active in the target company during the earn-out period. Most of the times, the earn-out is EBIT or EBITDA based.

## 7.4 Payment of Purchase Price

### 7.4.1 Full Payment at Closing

Following the traditional Roman law principle "*do ut des*" [*"I give so that you give"*] at closing the buyer and the seller exchange the purchase object(s) and the purchase price. The performance by one party of its obligations under the sale and purchase agreement takes place in mutual interdependence with the other party's performance of its contractual obligations.

### 7.4.2 Partial Payment at Closing

A buyer is generally interested in not paying the entire purchase price at closing. Depending on the bargaining power, the buyer may prevail with this wish. There are several ways to achieve that:

#### a. Holdback

The holdback designates that a part of the purchase price is not paid at closing but held back by the buyer until a certain point in time in the future. This can have several reasons, from the liquidity preferences of the buyer to the assurance of certain ancillary arrangements. The arrangement can also be described as a payment in installments and is rather buyer-friendly. The buyer has the advantage of paying later and that any of its claims for violation of the seller's

representations and warranties can be offset against the outstanding purchase price payment. The seller does not receive the full purchase price and bears the risk of the buyer's willingness to pay and its creditworthiness.

#### b. Escrow

In order to avoid the above-mentioned disadvantages, a seller normally insists on an escrow arrangement instead of a holdback. In an escrow arrangement, the buyer pays a portion of the purchase price to an independent third party designated by the parties, the escrow agent. The escrow agent enters into an escrow agreement with the seller and the buyer pursuant to which it holds on to the money on behalf of the parties and only pays out the money portion pursuant to contractually agreed instructions. Such instructions are normally the payment (i) to the seller after a certain period of time, normally the expiration of the general time limit for claims based on a violation of representations and warranties, or (ii) based on a court judgment or an arbitral award, or (iii) based on mutual instructions by the parties. In Switzerland, normally fiduciaries, lawyers (both using deposit banks) or, less common, directly banks, are used as escrow agents. The escrow arrangement avoids certain drawbacks for the seller, but the escrow arrangement has also a cost.

## 7.5 Representations and Warranties

The Swiss statutory regime of a sale and purchase provides the buyer with a basic set of representations, the so-called implied qualities, but these only refer to the object of the purchase. In Switzerland, the Swiss Federal Supreme Court held that based on the applicable law on the sale of goods in a share deal, the objects of the sale and purchase are only the shares and not the enterprise itself, not even when 100% of the shares change hands. Therefore, the statutory regime on the sale of goods does not offer any comfort or protection to a buyer with respect to the central issue as to whether the underlying target enterprise is free from defects. As a consequence, the buyer regularly insists on an elaborated set of additional representations and warranties of the seller specifying and assuring certain actual qualities of the target enterprise.

### 7.5.1 Examples of Customary Representations and Warranties

In a professional M&A environment, a seller is often asked to give representations and warranties which address subject matters under a sale and purchase agreement summarized as follows:<sup>2</sup>

- a) *Capacity of seller.* Seller's right and authority to enter into the acquisition agreement and to perform the obligations thereunder; no violation of any of the constituting documents of the target company by the contemplated transaction.
- b) *Title to shares:* Seller's sole legal and beneficial ownership of the shares, free and clear of any encumbrance.
- c) *Status of the company.* Due incorporation and valid existence of the target company under the laws of Switzerland; no bankruptcy or dissolution.
- d) *Financial statements.* Compliance of the relevant financial statements with the applicable reporting standard and adequate reflection of the financial position of the target company.

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<sup>2</sup> The following are generic subject matters for representations and warranties which, in one form or another, are found in many Swiss and international acquisition agreements. It is hereby emphasized that these provisions need detailed specification and elaboration dependent on the specific transaction and, importantly, due to the fact that their specific meaning has to be interpreted and shaped under Swiss law. In addition, the buyer often requires further representations and warranties specifically geared to the target company on the basis of the findings of the due diligence.

- e) *No material adverse change.* No material adverse change in the financial position or operations of the target company.
- f) *Taxes.* Due and timely filing of all tax returns; timely payment of all taxes due; no contingent taxes.
- g) *Authorizations.* Existence of all necessary authorizations and permits to conduct the business.
- h) *Compliance with laws and regulations.* Compliance by the target company with all applicable laws and regulations.
- i) *Material Contracts.* Disclosure of all material contracts of the target company; no termination or right to terminate or default; all contracts at arm's length.
- j) *Employees.* Disclosure of all terms and conditions of the employment of all employees of the target company; no notice of termination by any key employee.
- k) *Social security and pensions.* Compliance of target company's pension plan with all statutory requirements; due and timely payment of all social security and pension contributions.
- l) *Intellectual property.* Full unencumbered title to target company's intellectual property ("IP"); complete registrations in the relevant countries and classes in the name of the target company; valid license for all necessary IP not owned.
- m) *Real property.* Valid title to its land and premises, either by way of property or by way of a (long-term) rental agreement.
- n) *Plant and machinery.* Good working order and proper maintenance of plant and machinery, if any.
- o) *Insurance.* Customary insurance coverage; policies in full force and effect; no claims.
- p) *Litigation and proceedings.* No actual legal action, proceeding, suit, litigation, prosecution, investigation, enquiry or arbitration in which the target company is involved.
- q) *Competition law.* Neither party to any agreement nor carrying on any practice that contravenes any antitrust or similar legislation in any relevant jurisdiction.
- r) *Environment.* Compliance with all applicable environmental laws and regulations; existence of all necessary environmental permits.

## 7.5.2 Qualifications

### a. Buyer's Knowledge

One of the battles most ferociously fought in many transactions is the issue regarding the effects of the buyer's knowledge on claims for the violation of representations and warranties. Should the knowledge acquired by the buyer from the seller or in the due diligence "qualify" and limit the representations and warranties given by the seller or not? There are good reasons for both positions and the matter is often decided by the negotiation leverage of the parties.

The starting point is the legal framework and for once the Swiss Code of Obligations is clear: The seller is only liable for defects that the buyer did not know at the time of the purchase. For defects

that the buyer could have known by applying ordinary diligence, the seller is only liable if he/she warranted their absence.

However, this statutory regime is not mandatory. The parties are free to change those rules in their transaction and this is regularly done. Depending on the facts of the particular transaction and the negotiation leverage of seller and buyer, the parties will agree whether the knowledge of buyer is limiting the representations and warranties of seller in full, partially or not at all.

#### b. Duty to Investigate

Pursuant to the statutory regime on the sale of goods, a buyer needs to examine the purchased objects in due course to ascertain the condition of the purchased object. If he/she fails to do so, the purchase is deemed to be approved with respect to deficiencies which could have been detected by way of a customary examination. If at some later point in time deficiencies appear which could not have been detected by way of a customary examination, such defects need to be notified immediately to the seller.

The Swiss Federal Supreme Court is very strict in its interpretation of "examination in due course" and "immediate notification". But again, the statutory regime is not mandatory. The parties can agree on different terms and conditions with respect to the examination of the purchased object. It goes without saying that the examination of an enterprise requires considerable time and, accordingly, it is normal for the parties to a share deal generally to waive Article 201 CO and replace it with an alternative regime pursuant to which the buyer is usually entitled to examine and make claims under the representations and warranties during a time period ranging from approximately six to approximately 36 months.

### 7.5.3 Survival of Representations and Warranties

In Switzerland, representations and warranties normally survive closing. Normally, a buyer will have between six and 36 months to make a claim for violation of representations and warranties. In many cases, the parties agree on a time period of 18 or 24 months. This often makes sense as the buyer should at least have at his disposal one full audit cycle (i.e. 12 months) plus some time to fulfill the audit and subsequently to make his/her claim.

Certain representations and warranties require longer periods in order to address specific situations. Sellers are often asked to grant for claims for tax, social security, pension and environmental claims a time period of the applicable statute of limitations plus some months (usually between one and six) to make a claim.

Last but not least, it is not uncommon to have a time period of 10 years for the title representation.

### 7.5.4 Remedies

It is standard in Swiss sale and purchase agreements to exclude the statutory remedy of rescission of the contract (*Wandlung; résiliation du contrat*). Normally, at closing, the buyer takes over the operational responsibility with respect to the target company. The buyer leads the company, makes strategic decisions, employs and terminates employees, makes and declines deals, etc. The face of the target company is changed. It follows that the buyer can never give back the same enterprise as it received at the time of closing. Based on this awareness, in Switzerland, it became customary to exclude the statutory remedy of rescission of contract in the context of the purchase of an enterprise.

Often, the parties also agree on a *de minimis* amount for each single claim, a threshold (tipping basket or real threshold) which needs to be reached before the parties start to talk about indemnification, and an overall cap for all claims.

Last but not least, the parties may agree on certain exclusions from damages, such as damages covered by insurance, the tax effect (the amount in taxes saved as a consequence of the damage suffered), and damages with respect to which the target company entered a provision into its books.

## **7.6 Indemnities**

In some instances, the parties identify a particular risk whose realization lays in the future and its occurrence is either sure or not sure. As the risk is in itself distinct, buyers often insist on a specific indemnity/guarantee with respect to that particular risk. One of the reasons for providing for an indemnity is that often such indemnities are not made subject to any *de minimis*, threshold or cap. From a legal perspective, the claims are distinct. While a claim under a representation and warranty is a claim for violation of contract, a claim under an indemnity/guarantee is a claim for performance.

## **7.7 Covenants of the Buyer and Seller**

Covenants set forth certain obligations of the seller and the buyer to do, or refrain from doing, something. Most often the acquisition agreement differentiates between pre-closing and post-closing obligations:

### **7.7.1 Pre-Closing Covenants**

The pre-closing covenants usually obligate the seller to conduct the business of the target company between signing and closing in the ordinary course of business as conducted in the last one, two or three business years. This assures the buyer that what it saw in the due diligence will most probably still be the case after closing.

Furthermore, as after signing the buyer is in a vested remainder with respect to the target company, the buyer wants to be consulted with respect to certain significant transactions within the business of the target company. This may be problematic under competition law aspects.

Last but not least, the parties normally need to work together in order to receive the necessary clearance and approval from the merger control authorities. This requires constructive and open cooperation.

### **7.7.2 Post-Closing Covenants**

Post closing, two obligations are most common: First, a provision of a non-compete duty pursuant to which the seller undertakes not to compete with the target company for the next few years. While in employment contracts non-competes in excess of three years are illicit, in the context of the sale of an enterprise, depending on the particular circumstances of the case, a non-compete of up to five years seems possible.

A second obligation is the non-solicitation of employees of the target company. The seller normally undertakes not to solicit or even employ any of the target company's employees for a certain period of time.

In the case of violation of those undertakings, as damage is very hard to prove the buyer often insists on instituting a contractual penalty with a fixed amount.

## 7.8 Conditions Precedent to Closing

Conditions precedent to closing make the transaction unenforceable unless certain conditions are met. The following are customary conditions precedent:

### 7.8.1 Governmental Approvals

Generally, in Switzerland the acquisition of an enterprise does not require a governmental approval or permit. However, (i) certain significant mergers and (ii) acquisitions of special types of enterprises do require certain governmental approvals:

#### a. Merger Control

Under the current Swiss merger control legislation, the concentration of enterprises must be notified to the Swiss competition authorities if, in the last accounting period prior to the concentration, the enterprises concerned reported (i) a joint turnover of at least 2 billion Swiss francs or a joint turnover in Switzerland of at least 500 million Swiss francs; and (ii) at least two of the enterprises concerned reported an individual turnover in Switzerland of at least 100 million Swiss francs.

Alternatively, a transaction must also be notified if the Swiss competition authorities have previously issued a legally binding decision stating that one of the undertakings concerned is dominant in a specific market related (horizontally, vertically, or adjacent) to the activities at issue in the transaction.

The term concentration means (i) the merger of two or more enterprises that are independent of each other or (ii) any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more independent enterprises or a part thereof.

The above notification thresholds are considered to be relatively high in comparison to international standards. A transaction can be notified prior to the conclusion of the final agreement. However, the parties will have to demonstrate a good faith intention to enter into a binding agreement and to complete the transaction. Once the notification has been submitted, the authorities will conduct a preliminary investigation and must decide within one month whether there is any need to initiate an in-depth investigation of the transaction. If initiated, the in-depth (Phase II) investigation must be completed within four months. Therefore, the entire procedure (Phase I preliminary assessment and Phase II in-depth investigation procedure) must not exceed five months. While closing of the transaction is prohibited prior to the notification and clearance or expiration of the preliminary investigation phase, the competition authorities may allow a preliminary closing if there are important reasons for such preliminary closing. In the past, this instrument was mainly used in order to allow the reorganization of failing companies. Recently, however, the competition authorities have also allowed a preliminary closing in the case of a pending public takeover bid. However, it has been made clear that there is no general exception for public bids (contrary to the situation according to the European merger control rules) and that each case will be assessed individually.

#### b. Acquisition of Certain Types of Businesses

*Banks and Insurance Enterprises:* In Switzerland, banks and insurance companies require a license issued by the Swiss Financial Market Supervisory Authority FINMA. Once licensed, they are subject to ongoing supervision by FINMA to monitor continued compliance with licensing conditions and other statutory and regulatory requirements. One requirement to obtain and maintain the license is that each individual or entity which (i) directly or indirectly holds at least 10% of the capital or the votes in a bank or insurance company, or (ii) otherwise has significant

influence on the company management (collectively "**Qualified Participation**"), must ensure that its influence does not adversely affect the prudent and solid management of the bank or insurance company. Changes with respect to Qualified Participations must be reported to FINMA prior to the transaction by the selling and the acquiring party. Although the law does not expressly impose a prior approval requirement, in substance parties are well advised to treat such requirement as a condition precedent to closing, inform FINMA in advance and obtain FINMA's opinion on the change of ownership early in the process.

*Radio and Television Enterprises:* In Switzerland, radio and television enterprises require a concession issued by the Swiss Federal Department of the Environment, Transport, Energy and Communications (DETEC). The transfer of a concession requires the prior written approval of the DETEC. As a transfer of a concession includes a change of ownership with respect to more than 20% of the capital or the shares in the concession holder.

Other types of businesses which trigger an approval requirement and/or a confirmation of the concession or license to conduct a certain type of business are for instance: *schools, casinos, body leasing (Personalverleih, location de services), and production of and trade in arms and munitions (Kriegsmaterial, materiel de guerre)*. This list is non-exhaustive.

#### c. Acquisition of Residential Real Estate by Foreign Purchasers

Last but not least, the acquisition of certain residential real estate by foreigners requires the prior approval of the relevant authority.

#### 7.8.2 Other Approvals

The transaction may be made dependent on certain third party approvals such as for instance the consent of contractual counterparties.

#### 7.8.3 Correctness of Representations, Warranties and Guaranties and Compliance with Covenants

Often the buyer does not want to be forced to close the transaction unless the seller has confirmed that the representations, warranties and guaranties have always been and are correct also at closing and that the seller has complied with all covenants.

#### 7.8.4 No Material Adverse Effect

Another protection for the buyer is the no material adverse change condition precedent. The buyer may refuse to close the transaction if the target company has suffered a material adverse change, e.g., in its financial condition or its operations.

#### 7.8.5 Due Diligence

It is also common that if the buyer's due diligence is not fully completed at signing, the buyer will condition the consummation of the transaction on the satisfactory completion of due diligence.

#### 7.8.6 Financing Condition

In certain circumstances, it is necessary and justified to make the acquisition contingent on the availability of financing to the buyer.

#### 7.8.7 No Exercise of Rights of First Refusal or Rights of First Offer

The sale of the shares may be subject to rights of first refusal or rights of first offers of third parties, such as co-shareholders or the like. In such cases, the parties make the transaction conditional upon the waiver of such third-party rights.

#### 7.8.8 Board or Committee Approval

In some organizations or entities, the negotiators must submit the signed agreement to a board or an investment committee or the like. In such cases, it is necessary to include a condition precedent to that effect.

#### 7.8.9 Consequence: Right to Terminate the Acquisition Agreement

If a condition precedent is not met or waived within a certain time period (so-called long-stop date), the transaction is not consummated and a party may terminate the acquisition agreement. It is important to provide for a termination mechanism in the contract, because otherwise the transaction is hanging in the balance for ever, unless both parties agree to void the contract.

### 7.9 Miscellaneous Provisions

In this Section, the parties regulate topics like who assumes the costs and taxes in connection with the transaction. In Switzerland, it is standard that each party bears its own costs and taxes imposed. In private equity and venture capital transactions, it is generally the target company that bears the transaction costs, to the extent this is acceptable from a tax point of view.

Also, the parties agree on the terms and conditions relating to the confidentiality of the existence and the content of the sale and purchase agreement. If a public announcement is planned, the parties often agree who will be in charge of the drafting and dissemination and what rights the other party has (approval, information, consultation).

Further provisions cover questions such as in what form the parties deliver notices to each other, whether rights under the contract may be assigned, whether claims under the contract can be set off against each other, that the present contract contains the entire agreement of the parties relating to subject matter of the contract, that amendments to the contract must be in writing, that in case of invalidity of a clause the contract shall survive with a valid clause which is as close as possible as the invalid clause. Last but not least, we recommend a provision which sets forth that the terms printed in italics in the contract constitute Swiss legal terms describing the meaning of the terms in the English language, and that this shall be taken into account when interpreting the contract.

### 7.10 Dispute Resolution

Disputes in M&A transactions can be solved by ordinary courts or by arbitration.

#### 7.10.1 Ordinary Courts

Disputes stemming from M&A transactions involving a Swiss target are generally civil matters which can be brought in civil court in Switzerland. As from 1 January 2011, the civil proceedings in each of the Swiss Cantons are governed by a new Federal Swiss code of civil procedure. The language of the proceedings is German if the court is situated in the German part of Switzerland, French in the French part of Switzerland and Italian in the Italian part of Switzerland. Within certain limitations, the parties to a contract can choose which court will have jurisdiction and which law will be applicable to their contract. Normally, the parties agree that Swiss law shall be applicable and that a specialized civil court such as the Commercial Court of the Canton of Zurich

will have jurisdiction. The Swiss judiciary system is fully independent and reputed to be fair and efficient by international standards.

#### 7.10.2 Arbitration

In cross-border transactions, i.e., a transaction involving a foreign buyer or a foreign seller, the preferred route is arbitration. Arbitration is usually quicker than proceedings before state courts. Arbitrators are neutral and normally specialized in the field and industry of the dispute. Their awards are confidential and enforceable in most countries, contrary to court judgments.

The parties are free to designate their arbitrator(s) and they can select the applicable law, the seat of the arbitration, the language of the proceedings and their legal counsel. Switzerland has the Swiss Rules on International Arbitration (see <https://www.sccam.org/sa/en/rules.php>), one of the most modern and reliable set of arbitration rules. As a result, arbitration under the Swiss Rules is a widespread, cost-effective mechanism for cross-border dispute resolution.

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