Global Private M&A Guide - Limited External Content - Switzerland

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# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

The focus of a legal due diligence in the context of mergers and acquisitions in Switzerland will mainly depend on the industry involved as well as the target company's age, size and structure (start-up, market leader, etc.). However, the following issues are typically considered in a due diligence: corporate matters (e.g., issues in connection with evidencing a proper share history of the target company often arise), commercial contracts (e.g., change of control or exclusivity provisions in material agreements), financing/loan agreements, real estate (e.g., land register entries, leases), employment matters, IP, litigation, regulatory and compliance issues (e.g., environmental law, data protection, industry-related compliance).

A legal due diligence usually entails a review of the relevant documents which are in the vast majority of cases provided in virtual data rooms. Issues identified by the parties or their respective counsels are then generally either remedied prior to signing or dealt with when negotiating the terms of the transaction (e.g., conditions precedent to closing, reduction of purchase price or specific indemnities).

**Pricing and payment**

Swiss law does not require an independent appraisal for private share or asset deals. Financial due diligence is common, especially for larger transactions.

Independent appraisers are usually involved by the parties if the share purchase agreement includes a post-closing purchase price adjustment. In such cases, a provision is common according to which any party may refer the determination of the purchase price adjustment to an independent expert if the parties cannot agree on a proposed adjustment.

In general, apart from tax considerations, there are no restrictions with regard to pricing, currency or payment of the purchase price in relation to a share or asset deal provided that a minimum purchase price must be agreed.

**Signing/closing**

Share sale

The purchase of shares of a Swiss company is usually agreed upon in a comprehensive share purchase agreement. While no notarization is needed, a share purchase agreement is almost exclusively concluded in writing and will govern the rights and obligations of the parties.

Asset sale

The structure, content and form of an asset purchase agreement will depend on the assets in question (a public deed is required in case of a transfer of real estate). Swiss law enables the universal transfer of assets and liabilities (e.g., a business) by operation of law under the Merger Act. The Merger Act entails an enhanced protection of creditors, in particular the three-year joint and several liability of the transferor of liabilities. This is one of the reasons why asset deals are today still usually carried out by way of an individual transfer of assets and liabilities. However, the universal transfer of assets and liabilities under the Merger Act may be particularly useful where several real estate properties are to be transferred, in which case only one public deed is required and all the real estate properties concerned are transferred at the time the transfer agreement is registered with the commercial register.

Closing

In major transactions, signing and closing will often not occur simultaneously, either due to mandatory approvals (e.g., merger control approval) or closing being subject to certain further conditions precedent.

## Approvals/registrations

**Foreign investment restrictions**

Switzerland does not have a foreign investment screening procedure in place.

**Antitrust/merger control**

Switzerland has a mandatory and suspensory merger control regime, which means that transactions that meet the relevant criteria need to be notified to the competition authority and cleared before they can be completed. For further information, see the more detailed section on "Antitrust/merger control".

## Employment

**Share sale**

In share deals, there is no change in the relationship between employer and employee. As a consequence, neither consent from employees nor notices to employees are required due to the sale of the shares as such.

**Asset sale**

In an asset sale that involves the transfer of a business (or part of a business) as a going concern, employees belonging to the business automatically transfer to the buyer by operation of law, and the parties to the transfer of business are not free to choose which employees will transfer with the business. Employees have a right to object to their transfer within one month from the time they are duly informed about the transfer. This information has to be provided in text format and its content is subject to legal requirements.

Terms and conditions of employment in principle have to remain unchanged after the transfer and the new employer has to recognize the employees' years of service. The buyer as the legal successor of the former employer also becomes fully liable for all employment-related liabilities. Compensation for the automatic assumption of liabilities should be addressed in the transaction documents.

The employer has a duty to inform the works council, or if no works council exists, the employees regarding the reason of the transaction and its legal, economic and social implications in due time before completion. Unless measures affecting the employees are planned in conjunction with the transaction (e.g., split of operations, carve-outs of employees, relocations, dismissals), there is no general legal obligation to consult with works councils or the employees regarding the asset deal and the transfer of the employees. Consultations, if required, may take several weeks and, thus, may significantly impact the timing of the implementation of the respective reorganizations or operational changes.

**Pensions**

Pension schemes and the transfer of pension liabilities need to be considered carefully in the transaction context, including that Swiss defined contributions plans qualify under International Financial Reporting Standards (IFRS) as defined benefit plans and that such requalification may result in unfunded actuarial liabilities.

## Tax

In case of an asset deal, the assets sold are generally subject to VAT. However, groups of assets and liabilities that comprise a single autonomous business unit may be transferred by using a declaration procedure instead of invoicing with VAT ("transfer of a going concern" or TOGC). Special transfer taxes may apply, in particular in case of a transfer of real estate. The costs of financing are, in principle, fully tax-deductible. However, if financing is provided by a related company, or provided by third parties but guaranteed by a related company, the tax regulations on the maximum debt-to-equity ratios will have to be observed and interest payments made have to comply with the arm's length standard.

In case of a share deal, the transfer of shares is exempt from VAT. It may be subject to securities transfer tax if the seller, the buyer or an intermediary is a professional securities dealer within the meaning of the Stamp Act. In some cantons, a share deal may also be subject to real estate transfer tax. In addition, in a share deal tax liabilities embedded in the acquired company are indirectly transferred to the buyer. This may apply to the deferred withholding tax liability on the distributable reserves of the acquired company that are not necessary, from a commercial point of view, for the company's ongoing operations, and if the applicable withholding tax rate on dividend distributions to the seller (as former shareholder) would have been less favorable than the rate on distributions to the buyer (the "old reserves" doctrine). These reserves remain tainted and subject to the (less favorable) rate applicable to the seller as a former shareholder when distributed to the buyer.

A capital gain realized by a Swiss resident individual on the sale of shares held as private assets (as opposed to business assets) is, as a general rule, tax-free. Depending on how the acquisition is structured, in particular if the buyer finances the acquisition with assets of the acquired company, the tax authorities may requalify the tax-exempt capital gain realized by an individual seller as a partial liquidation distribution, and requalify and subject a part of the gain to ordinary income taxation of the seller. It is thus common practice in Switzerland for a private individual seller to ask for a corresponding representation or an indemnification in the event that the transaction could qualify as an indirect partial liquidation.

A debt push-down through a merger of an acquisition vehicle and the target company is usually not accepted by the Swiss tax authorities for the purpose of obtaining a tax deduction of the financing costs, as it is usually argued that the merger represents a tax avoidance scheme. Besides that, a debt push-down may trigger the above-mentioned indirect partial liquidation.

A restructuring, in particular mergers, spin-offs and transformation of a legal form, may qualify as a tax neutral restructuring provided that certain general and, depending on the nature of the transaction, other transaction-specific conditions are met. The general requirements are (1) continuation of the tax liability in Switzerland and (2) the book values remain unchanged during the restructuring.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective tax rate of 15% for large businesses in each jurisdiction in which they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), through the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

The sale and purchase of a Swiss business can take a number of different forms but there are basically three mechanisms for taking control of a business in Switzerland: by the acquisition of shares, by the acquisition of assets or by a merger.

The most common form of acquisition is the purchase of shares. The sale of assets is mainly used in acquisitions pertaining to a business unit or divisions not organized in one or more separate legal entity(ies). Asset deals are also more frequent when it comes to the acquisition of real estate. Mergers are more frequently used for internal reorganization purposes, including in connection with post-acquisition integration, but can in certain circumstances also be used in acquisitions.

Auction processes are becoming more and more frequent in Switzerland. Such processes are typically administered by investment banks or other financial/M&A advisers, who put together the teaser, information memorandum and virtual data room, and organize procedural matters by way of process letters. In the course of the auction process, the bidders are initially requested to submit non-binding indicative bid letters and, at a later stage, so-called binding bid letters as well as a mark-up of the seller's draft SPA. Although referred to as "binding bid letters," these letters are very rarely legally binding under Swiss law. An auction process is usually used as a tool to put time pressure on the buyer to wrap up its due diligence in a very short period of time and to enable the seller and its advisers to compare the offers, not only in terms of pricing, but also in terms of warranties and covenants required by potential buyers.

The Merger Act contains specific rules on mergers. A merger is defined as the combining of all assets, liabilities and contractual obligations of two or more companies. There are two types of mergers in accordance with the Merger Act: (i) the absorption merger, where one company absorbs another — the transferring company being liquidated, and its assets and liabilities transferred to the absorbing company; and (ii) the combination merger, where all companies merge into a new company — all merging companies are liquidated and their assets and liabilities are transferred to a new company. The shareholders or quotaholders or other members in the transferring company generally become members in the absorbing company and the transferring company is dissolved.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The main forms of corporate entity in Switzerland are:

share corporations (Aktiengesellschaft/AG; société anonyme/SA; 'corporations'); and

limited liability companies (Gesellschaft mit beschränkter Haftung/GmbH; société à responsabilité limitée/Sàrl, 'LLCs').

## What are the different types of limited liability companies?

The two types of limited liability companies available under Swiss law are the share corporation (AG/SA) and the limited liability company (GmbH/Sàrl). Both company forms are quite similar. The minimum share capital required in the case of a share corporation is CHF 100,000 (of which, however, only CHF 50,000 must mandatorily be paid-in) and in the case of a limited liability company CHF 20,000 (which needs to be fully paid in). The shareholders of a limited liability company must be registered in the commercial register and thus become public, whereas the shareholders of a share corporation do not need to be disclosed in the commercial register. In general, the share corporation offers more flexibility to the shareholders than a limited liability company. For example, the minimum par value of a share in the case of a limited liability company must be at least CHF 100, while the minimum par value can be CHF 0.01 in the case of a share corporation. For this reason, the share corporation is typically used if certain flexibility is required with regard to the split of the share capital, such as in private equity set-ups. The limited liability in turn is often used by US groups as it allows a "check-the-box" election for US tax purposes, which is not possible with a share corporation.

## Is there a restriction on shareholder numbers?

No, in Swiss limited liability companies (GmbH) and share corporations (AG), the number of shareholders can be one or several.

## What are the key features of a share sale and purchase?

An acquisition of shares (or share sale) is, from a transactional point of view, much simpler than an acquisition of assets, because: (i) no individual transfers of title to the various assets of the target company are necessary and all the liabilities of the company are transferred with the target company without having to observe any special transfer formalities or to obtain any consent or release from creditors; or (ii) no special formalities or registrations are required (as in case of a transfer of assets and liabilities under the Merger Act).

## What are the key features of an asset sale and purchase?

Since the entry into force of the Merger Act on 1 July 2004, it has been possible to conduct sales and acquisitions of assets as:

transfers of assets and liabilities under the Merger Act; or

transfers of defined assets and liabilities under the Swiss Civil Code and the Swiss Code of Obligations (CO) (a single transfer).

The advantage of the new regime under the Merger Act is that one single deed of transfer is sufficient for the assets and liabilities to be transferred by operation of law (as opposed to an acquisition of assets structured as a transfer of defined assets and liabilities in which the transfer of each and every asset and liability must be made in the form provided for in the Swiss Civil Code and the CO). The advantage of single transfers is that the buyer acquires only the liabilities listed in the agreement and transferred in that transaction. In addition, the terms of a single transfer of assets and liabilities can be kept confidential, while the documents governing a transfer of assets and liabilities under the Merger Act need to be filed with the commercial register, to which third parties may obtain access.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

It is common in Swiss transactions to execute a letter of intent or term sheet. A letter of intent or term sheet is usually not binding on the parties with the exception of specific provisions contained therein and explicitly referred to as binding, such as exclusivity, confidentiality, break fee, governing law and jurisdiction.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity**: A term sheet typically includes provisions on exclusivity.

**Break fee**: A term sheet sometimes includes provisions on break fees. If a break fee is agreed, it is usually also included in the term sheet.

**Confidentiality**: A term sheet typically includes provisions on confidentiality.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

If included in the term sheet, there are no separately negotiated agreements on confidentiality, exclusivity and break fees in addition. However, it is possible — and in particular with regard to confidentiality not uncommon — to execute a separate agreement that is already executed ahead of the term sheet. Typically, the term sheet would then refer to such separate agreement(s).

## Is there a duty or obligation to negotiate in good faith?

Under Swiss law, and irrespective of the existence (and/or terms) of any document such as a letter of intent or a memorandum of understanding, entry into negotiations imposes certain duties on each party involved. In particular, each party has a general duty to negotiate in good faith, which may mean (for example) advising the other party about any decision not to pursue the transaction and not to continue negotiations in those circumstances.

While the conduct of negotiations does not in itself impose any duty to conclude an agreement or proceed with the contemplated transaction, a bad faith withdrawal from negotiations or other breaches of the pre-contractual duty to negotiate in good faith may cause the relevant party to be in breach of the requirement to act in good faith, so that the party in breach may be obliged to indemnify the other party for losses or damages that result from such breach. Note, however, that such indemnification would extend to costs incurred unnecessarily, as opposed to any lost profits or other potential losses. This form of pre-contractual liability is also known as the '*culpa in contrahendo*.'

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Fairly common

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash free/debt free and working capital adjustment are very common. NAV adjustment is rarely seen.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is usually the buyer/target company.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely; frequently reviewed by an audit firm (i.e., accountants), but only occasionally audited.

## Is an earn-out common?

Frequency/market practice: Earn-outs are fairly common in private equity transactions, but less common in other transactions.

## Is a deposit common?

Frequency/market practice: Rarely

## Is an escrow common?

Frequency/market practice: Fairly common, particularly with private individual sellers

## Is a break fee common?

Frequency/market practice: Rarely

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Fairly common

## Is the MAE general or specific?

Frequency/market practice: Both are seen, but frequently specific following negotiation.

## Is the MAE quantified?

Frequency/market practice: Fairly common; increasingly seen

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Rarely; waterfall provisions uncommon. Under Swiss law, a judge may reduce scope of a non-compete clause to a legally permissible level.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Common (in conjunction with a non-compete)

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Common (in conjunction with a non-compete)

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; it is generally obtained in private deals. Note that there may be competition law issues around potential 'gun-jumping.'

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Rarely; if seen, it is often subject to the buyer's right to terminate.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers are commonly seen, but often not quantified (other than specific representations and warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers depend on risk-sharing in the deal, often qualified to best knowledge after due enquiry of a specified list of members of senior management.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Rarely

## Is disclosure of the data room common?

Frequency/market practice: Very common; typically fair disclosure is standard.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common; repetition at completion is common.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: No; only at signing and at closing.

## Is a bring-down certificate at closing common?

Frequency/market practice: Bring-down certificates are not very common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: Fairly common; true and accurate is in all material respects common, but there is often a carve-out for fundamental representations and warranties, which must be absolutely true.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: This is reasonably common when representations and warranties are qualified by materiality thresholds.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: This is largely dependent on bargaining power, extent of due diligence and risk-sharing. The amount is typically 10%-30%, but also possibly up to 50%, subject to a higher cap for title and specific representations and warranties.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: They usually only apply to warranties.

## What are the common exceptions to the cap?

Frequency/market practice: Key representations and warranties are generally excepted (e.g., title, capitalization, authority). Often, tax and specific areas of concern are also excepted, sometimes with specific higher caps. Separate caps can be negotiated.

## Is a deductible or basket common?

Frequency/market practice: Deductible is more often resisted and a tipping basket is more common.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: The general survival is 12-24 months; there are typically longer periods for title and tax than general representations and warranties. There may be a special duration for other representations and warranties on a case-by-case basis, e.g., on environmental issues.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Fraud is generally carved out (consistent with statutory law).

## Is warranty insurance common?

Frequency/market practice: Rarely; increasingly common, particularly in private equity exits.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Fairly common.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common; common for amounts actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common; common for amounts actually received.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: This is required by law for warranty damages, and usually incorporated in the purchase agreement.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Fairly common; part of the disclosure concept.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes

## What is the common governing law?

Frequency/market practice: Swiss law

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Arbitration is still more common, frequently in Geneva or Zurich according to the rules of arbitration of the Swiss Chambers of Commerce (Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution).

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: This is negotiated on a case-by-case basis.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: Fairly common; a tax deed is uncommon.

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