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PRIVATE COMPANY ACQUISITIONS

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Country Q&A

Private acquisitions in Switzerland: overview

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CORPORATE ENTITIES AND ACQUISITION METHODS

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

In Switzerland, acquisition vehicles are primarily organised as a corporation (*Aktiengesellschaft*) (*AG*), and in rare cases as a limited liability company (*Gesellschaft mit beschränkter Haftung*) (*GmbH*).

An AG can issue registered shares or bearer shares and offer such shares to the public and have its shares listed on a stock exchange. 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) has to be paid in (unless bearer shares are issued, in which case 100% of the nominal value of each share must be paid in).

A GmbH must have a company capital of at least CHF20,000 which has to be fully paid-in.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

In an AG:

- The transferability of bearer shares is not restricted by corporate law and cannot be restricted by the articles of incorporation.
- Non-listed registered shares, that have not yet been fully paid up, can only be transferred with the consent of the company (that is, in principle the board of directors), unless they are acquired by inheritance, division of estate, matrimonial property law or compulsory execution.
- The articles of incorporation can further stipulate that non-listed registered shares can only be transferred with the consent of the company (that is, in principle the board of directors). However, such consent can only be refused if there is a valid reason stated in the articles of incorporation, or if the company offers to acquire the shares from the party divesting them for the company's own account, for the account of other shareholders or for the account of third parties at their real value, at the time the request was made.
- Further, the company (that is, in principle the board of directors) can refuse entry in the share register, if the buyer fails to declare expressly that he has acquired the shares in his own name and for his own account.

In a GmbH:

- An assignment of company contributions (shares) and an undertaking to assign company contributions must be in writing. The assignment of company contributions requires in principle the approval of the general meeting of partners.
- Under corporate law, there are extensive options to limit the assignability of company contributions. In fact, assignability can be (and in practice is) restricted to a far greater extent than permitted in an AG.

Foreign ownership restrictions

There is no legislation of general application in Switzerland requiring notification to or clearance of a governmental agency when a foreign owned (or foreign controlled) company makes an acquisition in Switzerland. However, depending on the business area, restrictions may apply (for example, residential real estate, national defence, banking, insurance, electricity or other areas of national importance).

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

Share purchases are the most common way to acquire privately held companies, and are more common than asset purchases.

In Switzerland, asset purchases can be conducted either:

- The traditional way, that is, with individual transfers of all assets and liabilities to be transferred.
- Through an instrument of transfer of assets and liabilities (*Vermögensübertragung*), under the Merger Act.

Share purchases: advantages/asset purchases: disadvantages

The main advantages of a share purchase and accordingly disadvantages of an asset purchase are:

- Simplicity, that is, the entire business is transferred, subject to agreements or permits with change of control provisions. On an asset purchase, if performed the traditional way, all the assets and liabilities to be transferred have to be identified and individually transferred/assumed, and third party consents and approvals are usually required. If an asset purchase is performed through a transfer of assets and liabilities (*Vermögensübertragung*), all relevant assets and liabilities are transferred by operation of law. However, there are other disadvantages (like disclosure obligations which make the transaction transparent) and uncertainties (it is unclear whether agreements transfer by operation of law, that is, without third party consents).
- Contracts are generally unaffected unless they contain change of control provisions.
- The seller can benefit from tax-exempt capital gains on the sale of privately held participations, unless the sale is considered as an indirect partial liquidation (re-qualification of the tax-exempt capital gain into taxable income). However, such income tax consequences can be avoided if the transaction is properly structured. If the shares are held by a corporate shareholder the

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participation relief applies, provided the respective requirements are met (*see Question 28*).

- The buyer can use any tax loss carry forwards of the target company, during the residual tax loss carry forward period.
- There are no tax consequences for the target company.
- Unless there are specific information/consultation requirements under collective bargaining agreements or similar agreements, the common view is that it is not necessary to inform or consult employees or employees' representatives regarding a share purchase.
- An asset purchase with a transfer of employees makes it necessary to inform and/or consult with the transferring employees or employees' representatives.
- 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, which in turn is less confidential than a share deal.

Share purchases: disadvantages/asset purchases: advantages

The main disadvantages of a share purchase and accordingly the advantages of an asset purchase are:

- The buyer can pick and choose assets that it wishes to acquire and generally leave liabilities with the seller. This also protects the buyer to a certain extent from any hidden liabilities.
- The base cost of capital assets can be stepped up for tax purposes (allowing greater relief from corporation tax on capital gains on later sales).
- The buyer can grant security to lenders over the assets acquired, while on a share purchase, any security taken over the target company's assets may constitute prohibited financial assistance (although financial assistance can be given by a private company provided it is not an unlawful reduction of capital).
- An asset purchase avoids the problem of trying to locate missing minority shareholders.
- The buyer may not be able to offset financing costs against future profits of the target company.
- The amortisation of the acquired shares is limited (only in case of a decrease in value).
- The buyer takes over the 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.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

In a sellers' market auction sales are very common. The seller should make it clear at the very beginning of the auction process that it is not obliged to accept any bid, nor to consider any offer tendered, and should 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 in this respect of the final sale agreement.

There are no regulations which apply.

PRELIMINARY AGREEMENTS

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

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

Letters of intent typically contain the following key points:

- Parties.
- Structure of the acquisition (for example, share purchase, asset purchase and pre-closing divestitures).
- Price or price formula.
- Other major terms.
- Timing, in particular in relation to due diligence, signing and expected closing.
- Costs.
- Choice of law, jurisdiction or arbitration clause.

Letters of intent are normally not agreements, that is, normally not binding. However, letters of intent create 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 in light of the principle of good faith (for example, if the negotiations are subject to approval of a corporate body). A breach of such obligation amounts to a fault in conclusion of a contract (*culpa in contrahendo*) and might involve the payment of damages.

Sometimes letters of intent also contain binding provisions, like provisions on confidentiality or exclusivity or on break fees. Confidentiality clauses (also called non-disclosure clauses) are common in letters of intent. Exclusivity and break fee clauses (with the seller as beneficiary, or the buyer as beneficiary in a reverse break fee clause) are rarer.

Prudent parties state explicitly in the letter of intent which provisions are binding and which provisions are not binding.

Letters of intent 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.

Exclusivity agreements

For exclusivity clauses in letters of intent, 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 enter into negotiation with another prospective buyer for a certain period of time.

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

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

Non-disclosure agreements

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

Confidentiality (non-disclosure) agreements are agreements in which the parties agree not to disclose information received from the other party to third parties. They are therefore normally mutual, but can also be drafted in a way that only one party, normally the seller, is the beneficiary.

Confidentiality (non-disclosure) agreements are normally concluded at the very beginning of an acquisition, and often replaced by the confidentiality clause in a letter of intent or in the acquisition agreement.

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

Further issues are often included in a confidentiality (non-disclosure) agreement, like clauses relating to the non-solicitation of employees or protection of IP rights.

ASSET SALES

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

If an asset purchase is performed through a transfer of assets and liabilities (*Vermögensübertragung*) as provided for by 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. It is still disputed and therefore unclear whether this principle also applies to contracts to be transferred. The Merger Act further provides that both the seller and the buyer are jointly and severally liable for debts incurred before the transfer of assets and liabilities (*Vermögensübertragung*) for three years.

If an asset purchase is performed the traditional way, there is no automatic transfer of assets and liabilities that cannot be excluded, except for employment relationships.

Whether an asset purchase is performed through a transfer of assets and liabilities (*Vermögensübertragung*) or the traditional way, where the seller transfers in an asset deal the company or a part of it to a buyer, 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 notice period provided by law.

Where the transferred relationship is governed by a collective employment contract, the buyer must comply with it for one year, unless it expires or is terminated sooner. If the employee refuses the transfer, the employment relationship ends on 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 claims of an employee which fall due before the transfer, or which fall due between the transfer and the date on which the employment relationship could normally be terminated or is terminated following refusal of the transfer.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

If an asset purchase is performed through a transfer of assets and liabilities (*Vermögensübertragung*), 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 consent is not required.

If an asset purchase is performed the traditional way, except for employment relationships and certain other relationships (*see Question 6*), 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.

SHARE SALES

8. What common conditions precedent are typically included in a share sale agreement?

Conditions precedent can 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.
- Reorganisation of the target company.

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 on the consequences if this date is not met, that is, by providing for withdrawal rights of the parties.

SELLER'S TITLE AND LIABILITY

9. 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 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 or a cap (or a higher cap than for other representations).
- Given for a longer period than the other representations.

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

Seller

If there is a letter of intent, the parties need to act in good faith, which includes the obligation to inform the other party about matters it should be aware of in light of the principle of good faith (*see Question 5, Letters of intent*). This also includes not to make misrepresentations and misleading statements to the other party. This pre-contractual relationship exists, even if there is no letter of intent.

A breach of the obligation to act in good faith amounts to a *culpa in contrahendo* and may involve payment of damages (*see Question 5, Letters of intent*).

Advisers

In theory advisers may become liable based on tort or similar legal constructions. However, corresponding actions are rare. As the behaviour of the advisers to a party is deemed to be behaviour of the party itself, it is more common that the respective party is sued.

MAIN DOCUMENTS

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

The main acquisition documents are:

- Share purchase agreement or the asset purchase agreement (generally prepared by the buyer).
- Disclosure letter, if any, qualifying warranties (generally prepared by the seller).

In an auction sale, it is common for the seller to prepare the first draft of all these documents.

In an asset sale, there will also be lists defining the assets (in a broader sense) to be transferred (generally prepared by the buyer).

ACQUISITION AGREEMENTS

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

The key substantive clauses in a share purchase agreement are:

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

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, non-compete, no leakage/actions between signing and closing, confidentiality and public announcement).
- Miscellaneous provisions (including taxes, costs, amendments, notices, governing law and jurisdiction/arbitration).

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

A share purchase agreement can provide for a foreign governing law.

Generally, provisions of national law would then not apply. However, mandatory Swiss laws relating, for example, to tax, employee protection, competition and the mechanics of transferring the shares would still apply (where relevant).

WARRANTIES AND INDEMNITIES

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

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

Warranties and indemnities are generally either:

- Representations under Article 192 et seq and 197 et seq of the Code of Obligations, that is, purchase law warranties.
- Guarantees under Article 111 of the Code of Obligations.

Whether they qualify as one or the other, or something else (for example, an obligation to do something), has to be assessed in each instance.

Warranties and indemnities can relate to the following, among others (basically, according to the American Bar Association (ABA) Model Stock Purchase Agreement):

- Organisation and good standing.
- Enforceability and authority, and no conflict.
- Capitalisation of the company and subsidiaries.
- Financial statements.
- Books and records.
- Real and personal property.
- Condition and sufficiency of assets.
- Accounts receivables.
- Inventories.
- No undisclosed liabilities.
- Taxes.
- 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.
- Intellectual property rights.
- Relationships with related persons.
- Customers and suppliers.
- Product liability and warranties.
- Brokers and finders.
- Disclosure.

15. What are the main limitations on warranties?

Limitations on warranties

Common limitations are:

- Disclosure against warranties.
- Knowledge qualifications in warranties.
- Requirement of a notice of breach of warranties.
- Time limits for bringing warranty claims.

- De minimis rules (exclusion of smaller warranty claims).
- Statute of limitations.
- Cap on the liability of the seller for warranty claims.
- Rules regarding conduct, in case of third party claims which amount to a breach of warranties.

Qualifying warranties by disclosure

In deviating from Article 200 of the Code of Obligations, the parties often agree on limiting the seller's liability under the warranties, by way of either:

- General disclosure, that is, disclosure of the whole data room against all warranties, which is more common.
- Specific disclosure against specific representations.

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

Remedies

The prevailing sole remedy in case of breaches of warranties provided by the parties in acquisition agreements is damages, sometimes preceded by the right of the seller to remedy 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 the ones in case of a material error or in case of fraud, can be contractually excluded or modified.

Time limits for claims under warranties

For most warranties the time limit is usually between 12 and 36 months, most often 18 months.

For certain warranties the time limit is usually between five and ten years, such as relating to ownership (for example, as part of the capitalisation of the company and subsidiaries), tax and environmental issues.

CONSIDERATION AND ACQUISITION FINANCING

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

Forms of consideration

The most common form of consideration is cash, either funded out of the buyers' 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.

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 business, or to retain an interest in the combined business.

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

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

An issue is likely to be structured as a rights offering, normally underwritten by institutions.

Consents and approvals

If a buyer has an authorised share capital, which authorises the board of directors to increase the share capital within a certain period of time, the board of directors of the buyer can, within the limits of the authorised share capital, allot new shares out of the authorised share capital. No further shareholders' resolution is required.

If a buyer does not have such an authorised share capital, a resolution of the general meeting of shareholders is required to increase the share capital, which must be carried out by the board of directors within three months of the resolution:

- Normally, the resolution is approved by an absolute majority of the voting rights represented.
- A qualified majority is required in certain cases, of at least two-thirds of the voting rights represented and an absolute majority of the nominal value of shares (for example, restriction or cancellation of pre-emptive subscription rights).

Requirements for a prospectus

Where new shares are publicly offered for subscription (including through underwritings), the issuer has to publish an issue prospectus containing certain information on the issuer.

To be listed, an issuer must publish a listing prospectus which provides sufficient information for competent investors to reach an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer, as well as of the rights attached to the securities (*Swiss Exchange (SIX) Listing Rules*). However, there are exemptions from the requirement to draw up a listing prospectus, in particular for the listing of securities that, calculated over a 12-month period, account for less than 10% of securities of the same class that have already been listed.

19. 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 provided, that:

- 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 of incorporation (which includes the purpose of group support and financial assistance) and is in the interests of the Swiss target company.

Exemptions

There are no exemptions.

SIGNING AND CLOSING

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

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

- Share purchase agreement and asset purchase agreement, respectively.
- Disclosure letter, if any (in which the seller makes disclosures against warranties in the share purchase agreement and asset purchase agreement, respectively).
- Power of attorney (if an attorney needs to be appointed to execute documents in the absence of one of the parties).

Closing

The following documents are commonly produced and executed at closing meetings of share purchase transactions:

- Endorsement of share certificates or written declaration of assignment (the instrument required to transfer title to the shares).
- A resolution of the board of directors of the target company approving the share transfer (if applicable).
- A new share ledger of the target company providing for the buyer as new shareholder (if applicable).
- Resignation letters for the resigning board members of the target company (if any).
- Banker's confirmation that the purchase price has been electronically transferred.
- Share certificates for consideration shares (if applicable).
- Vendor loan agreement (if applicable).
- Release of any security and/or guarantees if applicable).
- Escrow agreement (if applicable).
- Closing minutes.

The following documents are commonly produced and executed at closing meetings of asset purchase transactions:

- The instruments required to transfer title to the transferred assets (for example, granting of possession, declaration of assignments and tripartite agreements).
- Banker's confirmation that the purchase price has been electronically transferred.
- Employee and employee benefit matters.
- Vendor loan agreement (if applicable).
- Transitional services agreements (if applicable).
- Escrow agreement (if applicable).
- Closing minutes.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

According to Swiss law, the validity of a contract is not subject to compliance with any particular form, unless a particular form is prescribed by law. Where the law requires that a contract is done in writing, an amendment generally has to be also in writing. All persons on whom the contract imposes obligations must then sign the contract. Where the law requires that a contract must be done in a certain form, the proxy must comply with that form as well.

In principle, in Switzerland a share purchase agreement regarding the sale of shares in an AG could be concluded without observing a certain form. The assignment of a capital contribution in a GmbH as well as an obligation to assign, subject to any contrary statutory provision, must be done in writing.

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

22. What are the formalities for the execution of documents by foreign companies?

Swiss law does not impose special formalities for the execution of documents by foreign companies, other than those imposed on a Swiss company (*see Question 21*).

23. Are digital signatures binding and enforceable as evidence of execution?

Yes. Under the Code of Obligations, an authenticated electronic signature based on an authenticated certificate issued by a provider of certification services, within the meaning of the Federal Act of 19 December 2003 on Electronic Signatures, is deemed equivalent to a handwritten signature, subject to any statutory or contractual provision to the contrary.

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

Bearer shares in an AG are transferred by either handing over possession of the share certificates representing the shares or, if no such share certificates are issued, by a written declaration of assignment.

Registered shares in an AG (without transfer restrictions) are transferred by either 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. A resolution of the board of directors of the target company, regarding the entering of the buyer into the share ledger as a new shareholder of the target company and the respective entry, are also required. However, both have no constitutive effect, that is that legally, solely the endorsement of the share certificates or the written declaration is required in order to transfer title.

Registered shares in an AG with restricted transferability are transferred by either 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. In any event, a resolution of the board of directors of the target company approving the share transfer and the entry of the buyer into the share ledger of the target company as new shareholder are also required. Finally, the buyer must be entered into the share ledger of the target company which, however, has no constitutive effect.

With regard to the transfer of capital contributions in a GmbH, the Code of Obligations provides that:

- The assignment of a capital contribution as well as an obligation to assign must be in writing.
- An assignment of a capital contribution requires the consent of the members' general meeting of the target company (however, the articles of incorporation may deviate from this).

- The buyer must be entered into the register of capital contributions of the target company (which does not have constitutive effect).
- The name, address and place of origin of company members, together with the number and the nominal value of their capital contributions, must be entered in the commercial register (which does not have constitutive effect).

TAX

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

Share sale

Securities transfer tax. The 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. Certain transactions and parties are exempt (*see Question 26*).

Swiss securities dealers include banks and bank-like financial institutions as defined by the Swiss banking law, as well as 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.

Further, Swiss companies which are not in the securities trading business qualify as a securities dealer if they hold taxable securities with a book value exceeding CHF10 million.

The securities transfer tax is 0.15% for Swiss securities, and 0.3% for foreign securities (0.075% for Swiss and 0.15% for foreign securities for each party that is not itself exempt or eligible for a specific exemption).

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

Asset sale

Securities transfer tax. This 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, real estate transfer tax is levied on the sale of Swiss real estate property. Notary and land registry fees may apply, and depending on the location of the property, such 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 tax liability?

Share sale

Securities transfer tax. Certain parties (for example, foreign public authorities, foreign central banks, Swiss and foreign funds, foreign social security entities, foreign banks and brokers) qualify as exempt investors. This means that no securities transfer tax will be due from this 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. This can be avoided if the sale of the shares qualifies as tax neutral group internal restructuring.

Asset sale

See above, *Share sale*.

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

Share sale (corporate shareholders)

Income taxes. Income taxes are generally levied at federal, cantonal and communal level. In a few cantons income taxes are also levied by the districts.

A capital gain derived from the sale of shares is basically subject to corporate income tax. However, the participation relief applies, provided that the requirements are met (*see Question 28*). Capital losses are tax deductible.

The tax rates vary depending on the canton and community. The effective tax rate, given the deduction of the corporate tax itself, ranges between 11.6% and 24.2%. If the company benefits from a tax privilege, the effective tax rate may be even lower (for example, 7.83% for holding companies, as holding companies are exempt from income tax at cantonal/communal level).

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 cantonal/communal level.

Asset sale

Income tax. Capital gains derived from the sale of assets are subject to corporate income tax. The effective tax rates vary depending on the canton and community, and range between 11.6% and 24.2% (*see above, Share sale (corporate shareholders)*).

Real estate capital gain tax. Depending on the canton, capital gains from the sale of real estate may be subject to real estate capital gain tax (and exempt from the local income tax) (*see above, Share sale (corporate shareholders)*).

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 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, provided that the holding period of one year is met. The corporate income tax liability will be reduced by the ratio between the net participation income (taking into account administrative and financing costs) and total net profit.

Income tax: tax privileges. Holding companies are exempt from cantonal/communal income taxes in general and capital gains realised on the sale of shares are only taxable at federal level, where the participation relief may apply.

Asset sale

See above, *Share sale*.

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

VAT

The sale of shares is exempt from VAT. The sale of assets is basically subject to VAT at 8%.

The notification procedure may apply in a transfer of all or part of the business assets under the Merger Act, and provided that both the seller and the buyer are taxable persons for 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 and 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 may benefit from a more advantageous tax treaty rate, the "old reserve practice" may apply. This means that for later dividend distributions, the tax treaty rate before the transaction would apply to the amount of available accumulated existing free distributable reserves at the time of the transaction.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Except for VAT purposes, Switzerland does not recognise the concept of group taxation. Each Swiss company is treated as a separate taxpayer.

Expenses incurred in a bid vehicle basically cannot be shifted to the target company in a tax effective way (acquisition financing debt push down and depreciation of acquisition goodwill is denied for income tax purposes).

EMPLOYEES

31. 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) has to inform the employees' representatives or, if there is 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 (like a change of usual place of work) the employees' representatives or, if there are none, the employees directly, have to be consulted in due time before the decision on these measures.

Share sale

The common view is that the provisions of Article 333a of the Code of Obligations do not apply to share sales. There are, however, court judgments in the EU which state that the EU rules corresponding to Article 333a of the Code of Obligations (so called 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.

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

Asset sale

Where the seller transfers in an asset deal the company or a part of it to a buyer, an employment relationship and all related rights and obligations automatically 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 notice period provided by law. In insolvency proceedings the seller and the buyer may opt out of the respective provisions regarding the automatic transfer of the employment relationships.

Employees have, in certain circumstances, the right to be consulted before the decision regarding measures affecting the employees is made, which is certainly before signing (*see Question 31*). If such measures are not planned, they have at least the right to be informed before closing.

If such consultation and information rights are breached the asset sale does not automatically become null and void. The employees' representation or each employee concerned can, however, block the acquisition by injunctive relief. It is disputed whether they can have the acquisition prohibited until the rights have been complied with. They can at least sue for damages. If the asset sale occurs in the form of a restructuring according to the Merger Act, the employee's representatives or each employee have even more possible measures, like blocking the registration of the acquisition in the relevant registry of commerce.

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

Share sale

The common view is that the provisions on consultation and information rights of employees of the Code of Obligations are not applicable to share sales.

PENSIONS

33. 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 in that the employer has to conclude an accession agreement with a separate legal entity. This legal entity, normally a foundation, is either set up by the employer itself or, more commonly, by an insurance company or another 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 on a business transfer

A share or asset purchase does not as such affect the separate legal entity which owns the private pension scheme. It might be, however, that either transaction affects the legal entity indirectly. In some instances, for example, the legal entity needs to be fully or partly liquidated, and assets resulting from the liquidation passed on to the legal entity/ies newly in charge of the employees concerned. Such full or partial liquidation is heavily regulated and supervised by the states authorities entrusted with the supervision of the legal entities.

COMPETITION/ANTI-TRUST ISSUES

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

Concentrations of undertakings are according to the Cartels Act:

- A merger (absorption or combination) of two or more previously independent undertakings.
- Any transaction, in particular the acquisition of an equity interest or the entering into an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings, or parts of them.

Planned concentrations are subject to pre-merger control as set out in the Cartels Act. They must be formally notified (by written submission) to the Swiss Competition Commission before any closing/implementation steps if, in the financial year preceding the concentration, both:

- The undertakings involved in the concentration generated a joint total worldwide turnover of at least CHF2 billion, or a joint total turnover in Switzerland of at least CHF500 million.
- At least one of the involved undertakings generated a turnover in Switzerland of at least CHF100 milllion.

Irrespective of any turnover thresholds, a concentration must be notified to the 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, Cartels Act*).

Notification and regulatory authorities

Notifiable concentrations are notified to the Swiss Competition Commission (*see above, Triggering events/thresholds*).

Failure to comply with the notification duty triggers fines of up to CHF1 million, and the underlying agreements are null and void.

Substantive test

The Competition Commission performs a market dominance test. A concentration can be prohibited or authorised subject to conditions and obligations if it both (*Article 10, Cartels Act*):

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

The market dominance test is currently under review. The Swiss parliament is discussing replacing it by the substantial impediment of effective competition (SIEC) test.

ENVIRONMENT

35. 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 Environmental Protection Act, the contaminator is responsible for the clean-up of contaminated land. The contaminator is primarily the one who actually caused the contamination, but also the person who controls the contaminated land, such as the owner of the contaminated land.

If certain conditions are met on the side of the person(s) who controls the contaminated land (which have been laid down in a recent Federal Supreme Court Decision (*Federal Supreme Court Decision 1C_231/2012 of 29 November 2012*) the clean-up costs can be allocated between the person(s) who caused the contamination and the person(s) who controls the contaminated land, unless the person(s) who controls the contaminated land proves that they have no knowledge of the contamination.

It is disputed to what extent the liability of the person(s) who caused the contamination and the person(s) who controls the contaminated land is passed on in an asset sale. The prevailing view is that the liability is passed on (at least the liability of the person who controls the contaminated land), if control of the contaminated land is passed on from the seller to the buyer.

If the target company is either the person which caused the contamination or the person which controls the contaminated land, the target company remains such a person, even if its shares are sold in a share sale. It may be that not only the target company but also the seller is considered to be the person who controls the contaminated land. If this is the case, the liability of the seller may be passed on to the buyer.

ONLINE RESOURCES

Swiss Government website

W www.admin.ch/ch/e/rs/rs.html

Description. Official website of the Swiss Government with legislation in four national languages, that is, German, French, Italian and Romansh, and partly in English.

Federal Supreme Court website

W www.bger.ch/

Description. Official website of the Federal Supreme Court, with decisions in German, French or Italian, depending on the language of the original case.

For cantonal legislation and cantonal court decisions, the respective websites of the cantons need to be consulted.

Practical Law Contributor profiles



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Recent transactions

- Advising SIX-listed Tamedia on the public takeover offer regarding all shares in SIX-listed PubliGroupe and the subsequent relevant joint venture with SIX-listed Swisscom.
- Advising NASDAQ-listed Minerva Neurosciences Inc. on its pre-IPO acquisition of all shares in Mind-NRG S.A., a Swiss pre-clinical stage pharmaceutical company.
- Advising FSE-listed ADVA Optical Networking on the acquisition of all shares in Oscilloquartz SA, a leading solutions provider for precise network from SIX-listed Swatch Group.
- Advising SeneCura Kliniken- und Heimbetriebsgesllchaft m.b.H on the sale of Senevita AG, a leading operator of elderly care residences in Switzerland, to French based Orpéa S.A.
- Advising NYSE-listed Baxter on the sale of its legacy Continuous Renal Replacement Therapy (CRRT) business to Nikkiso America, Inc.

Languages. German, English, French

Professional associations/memberships. Registered with the Swiss and the Zurich Bar Registry and admitted to practice in all Switzerland. Member of the IBA and the ABA, as well as the board of examiners for the Swiss certified tax expert exams.

Publications. Lectures and publishes regularly on his areas of practice.



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Areas of practice. M&A; private equity and venture capital transactions; business reorganisations; corporate and commercial, including employment and real estate law.

Recent transactions

- Advising SIX-listed Tamedia on the public takeover offer regarding all shares in SIX-listed PubliGroupe and the subsequent relevant joint venture with SIX-listed Swisscom.
- Advising Mövenpick, one of the leading hotel, resorts, restaurant, food and wine company in the world, on the sale of its highway restaurants to Coop.
- Advising SIX-listed Tamedia on the acquisitions of jobs.ch jointly with Ringier, one of the leading Swiss media houses, and the subsequent joint venture with Ringier.
- Advising Uniqua, a leading insurance group in Austria, in the purchase of the subsidiaries of SIX-listed Baloise in Serbia and Croatia.
- Advising Husky, a leading global supplier of injection molding equipment and services to the plastics industry, in the acquisition of the Schoettli group.

Languages. German, English, French

Professional associations/memberships. Registered with the Swiss and Zurich Bar Registry and admitted to practice in all Switzerland. Member of the IBA, the ASA and the Swiss Arbitration Association.

Publications. Lectures and publishes regularly on his areas of practice.