Acquisition Structures: Comparing Asset and Share Purchases (Switzerland)

by Practical Law Corporate Switzerland and *Janine Corti*, *Urs Gnos*, *Christian Hagen*, *Boris Räber*, and *Markus Vischer*, *Walder Wyss*

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A Practice Note providing an overview of the key differences between a share purchase and an asset purchase transaction in Switzerland. It also outlines alternative methods for structuring a private acquisition.

There are two principal methods of structuring a private acquisition in Switzerland:

- **Share purchase.** This involves the buyer acquiring all or a majority of the shares in the company which carries on, or controls, the target business. It is the most common private acquisition method in Switzerland.
- **Asset purchase.** This involves the buyer acquiring a collection of assets and rights that constitute a business and sometimes assuming responsibility for certain liabilities of the target business. Asset purchases can be achieved in one of two ways:
  - through a statutory asset transfer (*Vermögensübertragung*), where the relevant assets transfer by operation of law in accordance with Articles 69 to 77 of the *Merger Act 2003 SR 221.301* (Merger Act); or
  - by individually transferring the relevant assets, rights, and liabilities identified by the parties.

This Note covers share and asset purchases involving companies whose shares are not listed on a public stock exchange.

While both structures can achieve broadly the same commercial objective, there are fundamental differences in their legal effect. This Note provides an overview of the two transaction types, including their advantages and disadvantages, and highlights some of the key differences between them. It considers the main legal and commercial issues that influence the parties' structuring choices. It also addresses the differing tax implications of share and asset purchases at a high level.

Additionally, under the Merger Act, it is possible to merge two or more existing companies into one company (by absorption or combination) or to separate a company's businesses by way of a de-merger (by transferring the whole business into separate entities or by spinning off only part of the business). However, these are less common in the context of private company acquisitions.

What is a Share Purchase?

In a share purchase transaction, the buyer acquires ownership of the company that is controlling or carrying on the target business (the target company). This is achieved by purchasing all, or a majority of, the shares or equity interests of the target company from its shareholders. Accordingly, the only assets that are transferred in a typical share purchase transaction are the shares in the target company.

The seller(s) in a share purchase are the shareholder(s) of the target company, who may be one or more natural or legal persons (for example, a holding company). Therefore, a share purchase is only a viable option if the target business and its underlying assets are owned by a trading vehicle with a separate legal personality and share capital that can be sold.

Ownership of the underlying assets and rights and responsibility for the liabilities of the target business does not usually change as a result of the transaction. This means that, generally, the buyer acquires the target company with the benefit of all of its assets and rights, and subject to all of its liabilities and obligations (whether past, present, or future). However, liability may be, and often is, reallocated between the parties in accordance with the warranties and indemnities in the share purchase agreement (SPA). Moreover, contracts that contain change of control provisions are at risk of termination unless either third party consent has been obtained, or the counterparty chooses not to exercise its termination rights under the change of control provision.

There is no legal requirement that an agreement for the sale and purchase of shares in an *Aktiengesellschaft* (AG) (UK: public limited company; US: corporation) must be in writing. However, in the vast majority of cases, the parties will choose to document their transaction in an SPA. Furthermore, various clauses that normally feature in an SPA (for example, assignments and jurisdiction clauses) require the written form.

By contrast, the assignment of a capital contribution in a *Gesellschaft mit beschränkter Haftung* (GmbH) (UK: private limited company; US: limited liability company) must be made in writing (*Article 785, paragraph 1, Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations SR 220* (Code of Obligations)).

What is an Asset Purchase?

In an asset purchase transaction, the buyer takes over the target business by purchasing a collection of specified assets and rights, and sometimes assuming responsibility for certain liabilities, which together comprise the target business. In this Note, an asset purchase refers to the sale of a whole business or business unit, as opposed to individual assets of a business.

For information on the differences between a Merger Act asset transfer (a type of statutory transfer) and a contractual asset purchase, see *Merger Act Asset Transfers Versus Contractual Asset Purchases*.

The question of precisely what assets, rights, and liabilities of the target business are transferred to, or assumed by, the buyer as part of an asset purchase deal is a matter for the parties to negotiate. The purpose is to ensure that the collection of assets, rights and liabilities can either be integrated into the buyer's business in a meaningful manner or function as an autonomous unit with the ability to continue running the business once the transaction has completed. As no assets transfer to the buyer automatically in an asset purchase, what the buyer acquires ultimately depends on the relevant asset purchase agreement (APA). Subject to certain limited exceptions, any unwanted assets, rights, and liabilities remain with the seller on completion of the transaction.

While the final division of assets between buyer and seller varies between deals, items that are commonly acquired as part of an asset purchase transaction include:

- Business information and records.
- Goodwill.
- Information technology and IT systems.

- Intellectual property rights and know-how.
- Licences, permits, and, in rare cases, regulatory authorisations (depending on the nature of the business).
- Plant and machinery.
- Real estate.
- Stock.
- The benefit of business contracts.
- Employees and service providers.
- Contractual relationships.

By contrast, items that are often (but not always) excluded from an asset purchase include cash, debts and insurance claims.

As an asset purchase involves buying the underlying assets and rights of the target business, rather than the legal entity which owns them, this transaction structure can be used to acquire an unincorporated business (such as a business carried out by an individual) or part of the business of an incorporated entity.

It also follows that the seller in an asset purchase transaction is the person or entity which is carrying on the target business. For example, if the target business is being carried on by a company, the seller in the transaction is the company itself rather than the individual shareholders in the company.

Choosing a Transaction Structure

General Considerations

In certain situations, the parties may have no choice over which transaction structure they adopt (see *Circumstances Requiring an Asset Purchase*). However, where the target business is carried out by a solvent company, it is usually possible to effect the transaction either as a share or asset purchase and the parties need to decide which route to take.

Share purchases continue to be the predominant method for private acquisitions in Switzerland because Swiss tax resident individual sellers may generally benefit from tax-exempt capital gains on the sale of privately held shares.

There may be a single overriding factor which dictates using one structure over another. In practice, the route that secures the most advantageous tax treatment for the parties (or the party in the strongest bargaining position) often prevails. However, in some instances, choosing the right structure requires balancing a range of competing legal, commercial, and tax factors, and it is common for the seller to favour one structure, while the buyer favours the other.

While the relative advantages and disadvantages of the available structures always need to be assessed paying attention to the circumstances of the particular transaction, there are several factors which could make one structure more attractive to one party than the other.

For the main advantages and disadvantages of each transaction structure, see:

- *Key Advantages of a Share Purchase*.
- *Key Disadvantages of a Share Purchase*.
- *Key Advantages of an Asset Purchase*.
- *Key Disadvantages of an Asset Purchase*.

Circumstances Requiring an Asset Purchase

In some situations, an asset purchase may be the only viable option for acquiring a target business. For example, this may be the case where:

- The target business is operated by an unincorporated sole trader or a type of trading vehicle that does not have a separate legal personality, and there are reasons preventing the prior conversion of the business into an incorporated entity.
- The target business is a division or business unit of a larger enterprise not operated by a separate subsidiary, and there are reasons preventing the prior carve-out of the target business into a new, separate legal entity.
- There are dissenting minority shareholders who are not prepared to sell their shares and a squeeze-out merger is not an option the parties are in a position, or wish, to pursue.
- The target business is the subject of a regulatory investigation or carries other risks the buyer is not prepared to assume.
- The target company is undergoing insolvency proceedings. A transaction involving a financially distressed target company is often structured as a sale of its business and assets so the buyer can avoid, to the extent possible, taking responsibility for its creditors and other liabilities.

Pre-Sale Reorganisation

Depending on the circumstances, it may be possible to achieve a share sale structure in the scenarios outlined in *Circumstances Requiring an Asset Purchase* by carrying out a pre-sale hive-down, which involves transferring the target business to a newly formed company (the hive-down company), and then selling the shares in the hive-down company to the buyer.

Key Advantages of a Share Purchase

Share purchases generally have the following advantages for sellers or buyers in comparison to asset purchases:

- Structural simplicity and business continuity (see *Structural Simplicity*).
- Clean break for the seller (see *Clean Break for the Seller*).
- Direct receipt of sale proceeds by the shareholders (see *Direct Receipt of Sale Proceeds*).
- There is generally no need to inform or consult employees or their representative(s) (see *No Statutory Duty to Inform and Consult Employees*).

- Swiss tax resident individual shareholders benefit from a tax exempt capital gain when they sell privately held shares (see *Tax Considerations*).
- There are no tax consequences for the target company.
- There is no forfeiture of any tax losses carried forward at the target company's level as a result of the change of control.

Structural Simplicity

A key advantage of a share purchase for a buyer and seller is its structural simplicity:

- The only assets that need to be transferred from the seller to the buyer are the shares in the target company.
- Unless the parties agree otherwise (for example, the seller may assume responsibility for certain liabilities through indemnity provisions in the SPA or retain some assets), there is no change in the underlying ownership of the various assets and rights, or responsibility for the liabilities, that collectively comprise the target business.

This continuity regarding the target business removes many of the transaction complexities that otherwise arise on an asset purchase, often with resulting savings in the transaction timetable and costs. In particular:

- It is not necessary to identify each asset, right, or liability of the target business that is included in, or excluded from, the transaction. Consequently, there is a much lower risk that the buyer may omit to acquire a key asset or right which is required to continue operating the target business. (On the flipside, see *The Buyer May Acquire Unwanted or Hidden Liabilities*).
- There is no need to deal with a multiplicity of transfer formalities for different categories of assets and rights. Even though a Merger Act asset transfer (as opposed to a contractual asset purchase) entails a collection of assets being transferred in one act by operation of law, the disclosure requirements and uncertainty over the automatic transfer of contracts limits this benefit (see *Merger Act Asset Transfers Versus Contractual Asset Purchases*).
- Since Swiss law-governed contracts are frequently not subject to change of control provisions, the target company's contracts, licences, and similar arrangements are largely unaffected by the transaction. The buyer acquires the target company with the benefit (and subject to the burden) of all the contracts, licences, and similar arrangements to which it is a party on completion. This means that there is generally no need to obtain any third-party consents.

Conversely, an asset purchase can often be comparatively complex to document and implement (see *Structural Complexity*).

Clean Break for the Seller

A key attraction of a share purchase for the seller is that it delivers a clean break from the target business and its associated liabilities. On completion of the transaction, all of the continuing obligations, responsibilities, and liabilities of the target business stay with the target company, and the seller's post-transaction liability is generally limited to the extent of any representations, warranties, indemnities, and covenants it agrees to give the buyer in the SPA.

By contrast, in an asset purchase, a seller may retain problem assets or liabilities that the buyer is not prepared to take on and which will not transfer by default (see *The Seller may be Left with Problem Assets or Liabilities*). Additionally, in a Merger Act asset transfer, the seller continues to have joint and several liability with the buyer for creditors' claims in respect of the transferred assets for a period of three years after the publication of the transfer or the date that the claim falls due, whichever the later (*Article 75, paragraph 2, Merger Act*) (see *Merger Act Asset Transfers Versus Contractual Asset Purchases*).

While a clean break may be a commercially attractive outcome for the seller, it can be a major drawback for the buyer, particularly if the target company's liabilities are extensive, or there is a risk that it is exposed to significant contingent or unknown liabilities (see *The Buyer May Acquire Unwanted or Hidden Liabilities*).

Direct Receipt of Sale Proceeds

In a share purchase, the consideration is paid directly to the target company's shareholder(s), generally avoiding the potential tax implications and legal constraints that could arise when seeking to extract the proceeds of sale from a corporate seller following an asset purchase (see *Complexities Around Extracting Sale Proceeds*).

No Statutory Duty to Inform and Consult Employees

Unlike an asset purchase of a target business comprising employees, a share purchase does not give rise to a statutory duty to inform and consult with employees or their representative(s) (see *Duty to Inform and Consult Trade Union or Employees*).

Nevertheless, an information or a consultation process may exceptionally be required in accordance with the terms of a collective bargaining agreement (or similar agreement) that has been entered into.

Key Disadvantages of a Share Purchase

Share purchases generally have the following disadvantages for sellers or buyers in comparison to asset purchases:

- The buyer may acquire unwanted or hidden liabilities (see *The Buyer May Acquire Unwanted or Hidden Liabilities*).
- The sale must gain shareholder approval (see *Shareholder Approval Required*).
- Financial assistance rules apply (see *Prohibition on Financial Assistance*).
- Swiss securities transfer taxes may apply (see *Securities Transfer and Other Transfer Taxes*).
- Hardly any no debt pushdown options are available (see *Debt Pushdown*).

The Buyer May Acquire Unwanted or Hidden Liabilities

The liabilities and obligations of the target company (including its tax liabilities) are generally unaffected by a share purchase, and they continue to reside with the target company after the shares are transferred to the buyer (see *Clean Break for the Seller*). Liabilities associated with the target company may include, for example, environmental liabilities, liabilities arising from current or pending litigation, or tax liabilities.

While a clean break from liabilities associated with the target company may be a commercially attractive outcome for the seller, it can be a major drawback for the buyer, particularly if the target company's liabilities are extensive, or there is a risk that it is exposed to significant undisclosed or unknown liabilities.

The buyer can mitigate some of its exposure by negotiating a price reduction or requiring the seller to provide extensive representations, warranties, and indemnities in the SPA. However, contractual protections of this type have their limitations. Any agreement would only be binding on the contracting parties; it would not be enforceable against the target company's creditors. Breach of warranty claims can be costly and time-consuming to enforce and, ultimately, they are of no value if the seller does not have the requisite financial substance or insurance to meet the buyer's claim.

As a result, if the target company has significant exposure to liabilities that cannot be addressed to the buyer's satisfaction through a price reduction or warranty and indemnity cover, or if there is a risk that it will be exposed to significant contingent undisclosed or unknown liabilities, the buyer may seek to structure the transaction as an asset purchase to enable it to cherry-pick what it is buying (see *Control Over What Transfers*).

Shareholder Approval Required

To acquire 100% of the issued share capital of the target company or, at least, a controlling stake, the buyer needs all (or a significant number) of the shareholders of the target company to agree to sell their shares. If any of the shareholders are either untraceable or unwilling to participate in the transaction, the deal is unlikely to be effected as a share purchase unless both:

- A requisite majority of the shareholders supports the transaction.
- The shareholders' agreement includes a contractual mechanism (such as a drag-along right) that can be invoked to force the missing or recalcitrant minority to sell their shares to the buyer.

Prohibition on Financial Assistance

In deciding how to fund an acquisition of shares, the buyer must take into account any applicable financial assistance rules.

According to the predominant, but disputed, view, which is based on statutory rules protecting share capital and reserves, a target company may provide or secure financing of a transaction up to its freely disposable equity (being the same amount that could be distributed as dividends), provided that:

- Both the board of directors and the shareholders' meeting of the target company resolves on and approves the granting of the loan or of the security interest.
- The upstream financial assistance is allowed by the target company's articles of association and is in the interests of the target company.

The financing documents typically contain limitation language which addresses the freely disposable equity limitation.

Payments under any upstream or cross-stream credit support may further have certain tax implications. For example, they may under certain circumstances trigger Swiss withholding tax at a current rate of 35% if they do not meet the arm's-length test for tax purposes.

Key Advantages of an Asset Purchase

Asset purchases generally have the following advantages for sellers or buyers in comparison to share purchases:

- More control over what is being transferred (see *Control Over What Transfers*).
- Limited shareholder involvement (see *Limited Shareholder Involvement*).
- No financial assistance constraints (see *No Financial Assistance Issues*).
- Step-up in the basis of assets acquired (see *Step-Up in Basis Of Acquired Assets*).
- The buyer may be able to offset the relevant financing costs against future profits of the target (see *Debt Pushdown*).

Control Over What Transfers

The principal commercial advantage of an asset purchase is that, generally, it gives the parties control over which of the target company's assets and liabilities the buyer acquires. The collection of assets, rights, and liabilities (if any) acquired should enable the buyer to continue running the business in the same manner as the seller once the transaction has completed.

Generally, no assets transfer automatically on an asset purchase, and exactly what the buyer acquires depends on the terms of the APA. The buyer therefore has some scope to choose the assets that it is particularly interested in, and to leave any unwanted assets with the seller. The inherent flexibility over what transfers to the buyer may also be an attractive feature to a seller who is looking to divest a business division or unit of a larger enterprise.

Subject to certain limited exceptions, the liabilities of the target business remain with the seller on completion of the transaction, unless otherwise expressly agreed between the parties in the APA. The ability to leave liabilities behind can be a major advantage for the buyer, particularly where the target business has extensive known liabilities, or its operations involve an unacceptable exposure to unquantified or unknown liabilities (such as product liability claims). It can also help to simplify negotiation of the APA, as the buyer may be prepared to accept less extensive warranty cover from the seller if it does not assume the risk of historic, undisclosed liabilities.

Moreover, as the buyer does not acquire the seller's tax history on an asset purchase, there is no need for it to seek protection against pre-completion tax liabilities through a tax indemnity from the seller. However, depending on the approach chosen for Swiss VAT purposes (that is, the notification procedure or levying Swiss VAT), the seller and the buyer will need to collaborate.

Limited Shareholder Involvement

Where the target business is carried on by a company, it may be possible for an asset sale to be approved and implemented by the seller's board of directors, without involving the company's shareholders in the transaction process.

However, in the case of Merger Act asset transfers, transfers of 5% or more of the company's assets trigger the provision of prescribed retrospective information to the shareholders in the financial statements or the next shareholders' meeting (*Article 74, Merger Act*). For more information, see *Merger Act Asset Transfers Versus Contractual Asset Purchases*.

Furthermore, shareholder approval for an asset sale may be required if all or substantially all of the target company's assets are sold without reinvesting the consideration, as this would constitute a factual liquidation of the target company. Generally, the board of directors of a Swiss company is not competent to approve a sale amounting to a factual liquidation. Additionally, it is only in rare circumstances deemed to be in the interest of the company.

If a sale qualifies as a factual liquidation and shareholders' approval is not obtained, the transaction will be void and may lead to the assumption of liability on the part of the directors. To address this issue, the target company may be put into voluntary liquidation before the closing of the transaction. If there is uncertainty that the envisaged transaction would qualify as a factual liquidation and the initiation of voluntary liquidation proceedings is not feasible, it is standard market practice to have the shareholders' meeting approve the envisaged transaction (that is, a shareholders' resolution in the form of a public deed). This reduces the directors' exposure to personal liability claims.

No Financial Assistance Issues

Unlike a share purchase (see *Prohibition on Financial Assistance*), an asset purchase is not subject to the statutory rules on financial assistance under Article 680, paragraph 2, *Code of Obligations*.

Key Disadvantages of an Asset Purchase

Asset purchases generally have the following disadvantages for sellers or buyers in comparison to share purchases:

- Structural complexity (see *Structural Complexity*).
- There is no clean break for the seller (see *The Seller may be Left with Problem Assets or Liabilities*).
- Complexities around extracting sale proceeds (see *Complexities Around Extracting Sale Proceeds*).
- An asset purchase with a transfer of employees makes it necessary to inform and, to the extent applicable, consult with the organisation representing employees (for example, the trade union) or the employees themselves (see *Duty to Inform and Consult Trade Union or Employees*).
- There is no tax exempt capital gain for Swiss tax resident individual shareholders (see *Swiss Tax Resident Individual Shareholders*).

Structural Complexity

The principal legal and commercial drawback of an asset purchase is the complexity involved in documenting and implementing the transaction. At the very least, the need to address the matters below is likely to add to the overall transaction costs and timetable. At worst, it could make the acquisition structure unviable in practice. This may be the case when the parties are unable to obtain a third-party consent to the novation of a key business contract or approval from an applicable regulator for the transfer or re-grant of an essential licence or permit.

In particular, the parties must do all of the following:

- **Identify what is being sold.** The parties must identify the individual assets, rights, contracts, and liabilities comprised in the target business, and ascertain which of them will transfer to, or be assumed by, the buyer, and which will remain with the seller.

  Once the parties have agreed to a commercially acceptable split of the relevant assets and liabilities, it is essential to ensure that the agreed position is accurately documented in the APA. Generally, no assets transfer automatically in an asset purchase.

  However, if an asset purchase is performed through an asset transfer under the Merger Act, all assets and liabilities listed in an inventory attached to the transfer agreement are transferred to the buyer by operation of law on registration of the transfer agreement on the commercial register (see *Merger Act Asset Transfers Versus Contractual Asset Purchases*).

  Therefore, buyers need to be mindful of the risk of failing to identify and include a key asset in the transaction. At the same time, the parties must ensure that they do not inadvertently agree to assume or retain (as the case may be) an undesired liability. Particular care is required in defining which assets are included and which are excluded, and (where relevant) the liabilities for which one of the parties has agreed to accept responsibility and perhaps indemnify the other.

- **Deal with transfer formalities.**In the event of contractual asset purchases, the parties must comply with the individual legal formalities required to transfer title to the purchased assets (or responsibility for any assumed liabilities) to the buyer. The applicable transfer formalities vary depending on the type of asset, right, or liability concerned and, in practice, it is likely that the parties will have to produce a variety of different transfer documents. Further, specific regulations may govern the transfer of certain assets. For example:

  - The transfer of possession of movable assets must generally be perfected by delivery of the asset, providing a means of access to it or instructing the current possessor to hold it in the name of the buyer (*Article 714 seq, Swiss Civil Code SR 210* (SCC)).

  - Intellectual property may require formal transfers or assignments and registration with the relevant public registries.

  - Receivables must be assigned by written assignment. Usually, the consent of the debtor is not required, but it is advisable for the transferee to inform the debtor as soon as possible about the assignment. This is because, in the absence of any notice of assignment, the debtor may still pay the transferor and be released from its debt (*Article 164 seq, Code of Obligations*).

  - Contracts must be assigned by way of a written assignment. This is normally done in the form of tripartite agreements, since it is often necessary, due to contractual provisions or from a risk management perspective, to obtain the consent of the counterparty.

  - Employment relationships must be transferred in accordance with Article 333 seq of the Code of Obligations if the transfer qualifies as a partial business transfer from an employment law perspective, in which case the entire employment relationship, including the accrued rights and obligations, are transferred by operation of law, subject to a right of rejection by the employee concerned. If an employee objects to a transfer, the employment relationship is terminated on the expiry of the statutory notice periods even if longer or shorter contractual notice periods apply.

    - The transfer of real estate assets must be incorporated into a public deed and registered with the corresponding land registry (*Article 657, SCC*).

  In the event of an asset purchase carried out under the Merger Act, the assets transfer collectively by operation of law without the requirement of individual transfer formalities. However, there is uncertainty as to whether this fact also applies to contracts transferred as part of the deal (see *Merger Act Asset Transfers Versus Contractual Asset Purchases*). Additionally, if any real estate is transferred, the requirement for a public deed similarly applies, although a single public deed is sufficient, even if real property is located in different cantons (*Article 70, paragraph 2, Merger Act*).

- **Obtain third-party consents, permits and approvals.** As an asset purchase involves transferring a collection of individual assets and rights to the buyer, there are likely to be several third parties (including suppliers, customers, and lessors) who will be affected by the transfer, and whose prior consent may be required. For example:

    - If the benefit of any business contracts that are to be transferred to the buyer contain restrictions on assignment (which, in practice, is often the case), the prior consent of the counterparty may be required.
    - If leased equipment is particularly important to the target business, the buyer may need to arrange for the leases to be assigned or novated to it on completion, which is likely to necessitate agreeing on the terms with the lessors beforehand.
    - If the target business is involved in a business activity that cannot be carried on without a licence, permit or any other regulatory approval, the buyer may need to obtain approval from the relevant regulator for the post-completion continuation of that licence, permit or approval, or the grant of a new licence, permit or approval in the buyer's own name.
    - If the buyer is going to assume any financial liabilities relating to the business, it will need to obtain approval from the financing entity and expressly assume the position of the seller under those financing obligations, including the granting of any security. If the financing liabilities remain with the seller, the seller must ensure that its post-transaction status does not breach any covenants under the financing arrangements that would trigger early repayment obligations, penalties, or any other consequences.

The Seller may be Left with Problem Assets or Liabilities

In an asset purchase, generally the only assets and liabilities that transfer are those included in the APA. This is subject to limited exceptions for certain assets and contracts.

If the buyer does not agree to take on certain problem assets or liabilities, the seller may have to retain a shell entity with residual liabilities even after the key assets of the company have transferred to the buyer.

Complexities Around Extracting Sale Proceeds

In an asset purchase, the selling company receives, and is taxed on, the consideration paid by the buyer. For the seller's shareholders to subsequently extract the proceeds of sale from the company, it is usually necessary for the selling company to declare and pay a dividend to its shareholders. The distribution of a dividend requires that:

- After the sale, the target company has freely disposable equity.
- The shareholders' meeting approves the distribution based on the company's (interim) financial statements.

By contrast, on a share purchase, the proceeds of sale are paid directly to the target company's shareholders (see *Direct Receipt of Sale Proceeds*).

Duty to Inform and Consult Trade Union or Employees

If an employer transfers a business (or a part of a business) to a third party, it must inform the organisation representing the employees (or, where there is none, the employees themselves) in good time before the transfer takes place of:

- The reason for the transfer.
- Its legal, economic, and social consequences for the employees.

(*Article 333a, paragraph 1, Code of Obligations*.)

If measures affecting the employees are envisaged as a result of the transfer, the employees' representatives (or, where there are none, the employees themselves) must be consulted in good time before the relevant decisions are taken (*Article 333a, paragraph 2, Code of Obligations*). For more information on how these provisions apply to Merger Act and contractual asset purchases, see *Merger Act Asset Transfers Versus Contractual Asset Purchases*.

Tax Considerations

The diverging tax consequences of share and asset purchases are usually a fundamental driver in determining which route should be taken.

Share Purchases

Swiss Tax Resident Individual Shareholders

Capital gains on the sale of shares are generally tax-free for Swiss tax resident individual shareholders. However, there are certain exceptions to this rule:

- **Indirect partial liquidation.** The sale of privately held shares (of at least 20%) by an individual may be requalified into taxable income (that is, as a dividend) if the target company makes a distribution of assets that is not necessary to run the business within five years following the closing date that was (i) already available and (ii) legally distributable as dividends at the time of the transaction.

  To avoid the risk of a requalification into taxable income, the sellers typically ask for a specific indemnity in the SPA and require the buyer to comply with certain restrictions. Alternatively, the buyer may file a tax ruling request with the competent tax authorities, asking them to confirm that the planned distributions or reorganisations involving the target within five years following the closing will not trigger any tax consequences.

- **Earn-out.** If a portion of the purchase price is contingent, and at least partially depends, on the ongoing employment relationship between the target and the respective seller, this portion may be requalified into salary, which will make it subject to income tax and social security contributions. However, if an earn-out is properly structured (that is, it is not linked to the ongoing employment and there is no good or bad leaver concept and so forth), the risk of reclassification in this way is relatively low.
- **Non-compete or non-solicitation clauses in the SPA.** Excessive non-compete or non-solicitation clauses in the SPA that relate to sellers who are also employees may lead to a reclassification of a portion of the purchase price as compensation for entering into the non-compete or non-solicitation undertakings. The relevant portion is treated as employment-related compensation, which is fully subject to income taxation and social security contributions.
- **Employee shares.** Shares acquired after the establishment of the target as a result of an employment relationship with the target qualify as employee shares. If the purchase price at the time of the acquisition of the shares is below the fair market value (for example, it is based on a formula value), only a part of the sales proceeds is treated as a tax-free capital gain. Any increase in value attributable to a changed valuation formula is treated as salary subject to income tax and social security contributions, if the sale of the shares is made within five years of their acquisition.

Swiss Tax Resident Corporate Shareholders

Capital gains from the sale of equity investments of at least 10% held for at least one year are virtually tax-free for Swiss tax resident corporate shareholders under the application of participation exemption rules.

Target Company

The share purchase does not have any tax consequences for the target company. Tax loss carry-forwards are not forfeited as a consequence of a change of ownership. Therefore, the buyer may offset them against any taxable income within the seven-year offset period.

Securities Transfer and Other Transfer Taxes

If any of the parties or any intermediary involved in the transaction qualifies as a Swiss securities dealer under the *Swiss Federal Stamp Duty Act SR 641.10*, the sale of the target shares is subject to Swiss securities transfer tax at a rate of 0.15% for Swiss securities and 0.3% for non-Swiss 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 may be triggered on the sale of the majority of the shares in a real estate company depending on the domicile of the real estate property.

Capital Gains Tax

There is no capital gains tax in Switzerland for non-Swiss shareholders of a Swiss target.

Real estate capital gains tax may be triggered on the sale of the majority of the shares in a real estate company depending on the domicile of the real estate property.

Swiss Withholding Tax

If the buyer acquires a Swiss company and may benefit from a more advantageous tax treaty rate than the rate applicable to distributions to the sellers, an anti-avoidance mechanism known as the "old reserves practice" may apply. This means that for post-closing dividend distributions, the prior (higher) tax treaty rate still applies to the freely distributable reserves that already existed at the time of the transaction.

Depending on the buyer and the acquisition structure chosen, the tightened practice of the Swiss Federal Tax Administration regarding the (extended) international transposition may need to be considered as well. The refund of (35%) Swiss withholding tax may be fully, or partially, denied on future dividend distributions of the target (in the worst case, up to the purchase price).

Debt Pushdown

In Switzerland, traditional debt pushdowns (such as a merger between the acquisition company and the target) are not accepted by the Swiss tax authorities. Further, there is no (group) consolidation for tax purposes.

Asset Purchases

Swiss Tax Resident Individual Shareholders

Swiss tax resident individual shareholders may not benefit from tax-free capital gains. The distribution of sales proceeds is subject to income tax, whereby the reduced dividend taxation applies if the requirements are met (equity investment of at least 10%).

Swiss Tax Resident Corporate Shareholders

The distribution of sales proceeds is virtually tax-free due to the application of the participation exemption, provided that the dividend was received from an equity investment or an entitlement of reserves of the distributing company of at least 10% or worth at least CHF1 million.

Seller

Any difference between the sales price and the book value of the respective asset is subject to corporate income tax (tax rates vary between 12% and 21% depending on the residence of the company) if that income cannot be offset against any existing tax loss carry-forwards. Additionally, the sale of real estate may be subject to real estate capital gains tax depending on the location of the real estate.

VAT

The notification procedure may apply in a transfer of all or part of a business, if both the seller and the buyer are taxable persons for Swiss VAT purposes. If the requirements are met, the corresponding tax liability is fulfilled by reporting the transaction to the Swiss Federal Tax Administration rather than paying VAT (which presupposes that the seller and the buyer liaise with each other).

Securities Transfer and Other Transfer Taxes

The sale of real estate may be subject to real estate transfer tax, depending on the location of the real estate.

Step-up in Basis of Acquired Assets

It may be possible for the buyer to benefit from a step-up in basis of the assets acquired for tax purposes. If assets receive a step-up in basis, this reduces the buyer's capital gains on future disposals. A buyer may also be able to amortise assets if it can demonstrate that it will receive no more benefit from them at a certain date.

Debt Pushdown
The buyer may be able to offset financing costs against future profits from the target assets.

Merger Act Asset Transfers Versus Contractual Asset Purchases

Asset purchases conducted using the statutory procedure in Articles 69 to 77 of the Merger Act (Merger Act asset transfers) offer the advantage of a partial "universal succession" (*Universalsukzession*). This means that instead of having to comply with individual transfer procedures for each business item transferred (for example, certain transfer formalities, third party consents and approvals), the business transfer is effected in one go by operation of law as soon as it is entered in the commercial register (*Article 73, paragraph 2, Merger Act*).

However, while the prevailing view is that the partial universal succession includes the transfer of contracts, the lack of corresponding clear confirmation in case law has resulted in uncertainty as to whether contracts can be transferred as part of this process without first obtaining counterparty consent. Therefore, in practice, the partial universal succession advantage can be of limited benefit. Accordingly, parties are typically advised to seek relevant third party consents for commercially material contracts to cover this eventuality.

Additionally, a Merger Act asset transfer has the following drawbacks in comparison to a contractual asset purchase:

- **The agreement is available for inspection by the public.** The transfer instrument must be entered on the commercial register (*Article 73, Merger Act*). It is therefore available for inspection by third parties at the Commercial Registry (*Article 936, Code of Obligations*).
- **Prescribed retrospective information must be provided to the shareholders for transfers of 5% or more of the company's assets.** The seller's board of directors must inform the company's shareholders about the transfer of assets in the appendix to the annual financial statements. If no annual financial statements are to be prepared, information on the transfer of assets must be provided at the next general meeting (*Article 74, Merger Act*). Paragraph 2 of Article 74 sets out a list of information that must be provided.
- **Seller's ongoing liability for third party claims.** The seller continues to have joint and several liability with the buyer for creditors' claims in respect of the transferred assets for a period of three years after the publication of the transfer or the date that the claim falls due, whichever is the later (*Article 75, paragraph 2, Merger Act*).
- **General obligation to provide security if requested by creditors.** The parties must secure third-party debt in relation to the transferred assets if the relevant creditors credibly demonstrate that joint and several liability does not provide sufficient protection (*Article 75, paragraph 3, Merger Act*). Instead of providing security, the parties may satisfy the debt, provided the other creditors are not harmed (*Article 75, paragraph 4, Merger Act*).
- **Wider employment information and consultation scope.** The employee information and consultation provisions in Article 333a of the Code of Obligations (see *Duty to Inform and Consult Trade Union or Employees*) apply in respect of the acquiring company (that is, the buyer), as well as the transferring company (that is, the seller) (*Article 77, paragraph 1, Merger Act*).

Mergers and Demergers

Most acquisitions in Switzerland are structured as share or asset purchases. This is because mergers and demergers add to the complexity of a transaction and therefore impact the timeline of transactions. Moreover, transactions under the Merger Act require registration in the commercial register, which results in the documents filed becoming available for inspection to the public. However, it is possible to acquire a business by way of a statutory merger or demerger. Furthermore, the buyer group may carry out a pre- or post-acquisition restructuring involving a merger or demerger, procedures for which are established under the Merger Act. Mergers and restructurings are often, to the extent possible, structured so as to ensure tax neutrality.

Merger

Mergers in Switzerland are governed under Articles 3 to 28 of the Merger Act. A merger may occur:

- By the combination of two or more companies into a newly incorporated company. This involves the dissolution of the combined companies following the transfer of all their assets and liabilities, under universal succession of title, to the new company.
- By the absorption of one company (the acquiring company), under universal succession of title, of all of the assets and liabilities of the other company or companies, which cease to exist when the merger becomes effective.

(*Article 3, Merger Act*.)

The *Federal Act on Private International Law 1987 SR 291* establishes additional requirements for cross-border mergers involving a Swiss company and a non-Swiss company, applying the Merger Act by analogy. In practice, cross-border mergers are relatively rare due to their complexity and are only possible with entities based in a limited number of jurisdictions. For the avoidance of doubt, the *Cross-Border Mergers Directive (2005/56/EC)* is not applicable in Switzerland, which is not a member of the *European Economic Area* (EEA).

Demerger

The Merger Act also sets out the requirements for demergers (*Articles 29-52, Merger Act*). Like mergers, demergers can be structured in one of two ways:

- **Division and transfer of whole business.** The company may divide all its assets and transfer them to one or more companies. Its shareholders receive share or membership rights in the acquiring companies. The transferring company is dissolved and removed from the commercial register.
- **Spin-off of part of the business.** The company may transfer one or more business segments to one or more new or existing companies (that is, retaining the rest of the company's business). In return, the transferring company's shareholders receive share or membership rights in the acquiring companies.

(*Articles 29 and 34, Merger Act*.)

If a company transfers all or some of its assets to another company and the shareholders of the transferring company receive share or membership rights in the acquiring company, the provisions in Chapter 3 of the Merger Act, which relate to demergers, apply to the transaction (*Article 69, paragraph 1, Merger Act*).

Auctions

In a sellers' market, auction sales are very common. No specific regulations apply to this type of transaction.

If the seller decides to sell by auction, it should make it clear at the very beginning of the 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.

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