Private Mergers and Acquisitions in Switzerland: Overview

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Country Q&A | Law stated as at 01-Dec-2021 | Switzerland

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

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

Market Overview

1. What are the current major trends in the private M&A market?

In the first half of 2020, M&A activity in Switzerland slowed down due to the Covid-19 pandemic. However, in the second half, the number and also the value of deals increased, leading to a total of 363 deals (2019: 402), with a total value of USD63.1 billion (2019: USD127 billion) for 2020 (the bigger decline in deal volume is attributed to the lack of mega-deals in 2020).

The recovery continued in H1 2021 and gained even more momentum. 256 transactions were announced in H1 2021 (H1 2020: 150). This is due to previously suspended deals being resumed and the favourable financing environment.

In 2020:

- 74 deals had a Swiss target company and a Swiss buyer (2019: 63).
- In 84 deals, Swiss target companies were acquired by foreign buyers (2019: 106).

Foreign buyers mainly came from Western Europe (61% out of the number of deals with foreign buyers), North America (24%), and Asia (10%). UK-based buyers were the biggest source of buyers of Swiss target companies, spending USD7.5 billion, followed by buyers based in The Netherlands (USD2.7 billion) and Germany (USD1.5 billion).

In H1 2021, deals with foreign buyers acquiring Swiss target companies increased to 74 deals, a remarkable increase compared to the previous year. Domestic transactions declined compared to the previous year to 42 deals in H1 2021.

The most active sectors in 2020 were:

- Technology, media and telecommunications (TMT) (80 deals, total value USD22.1 billion).
- Industrial markets (63 deals, total value of USD5.9 billion).
- Consumer markets (46 deals, total value of USD7 billion).

Compared to 2019, mainly TMT gained speed (+48% in number of deals, +89% deal value). Pharmaceuticals and life sciences fell (42 deals, -35% compared to 2019, total deal value USD6.2 billion, -91% compared to 2019).

In H1 2021, TMT activity remains strong, with about one-fifth of the overall deal number and deal volume (53 deals, USD13.1 billion). Lively deal activity is also recorded in the industrial and pharmaceutical sectors.

Private equity related acquisitions experienced a slightly higher number of 133 deals in 2020 (+6% compared to 2019) but a lower deal volume of USD29.7 billion (-15% compared to 2019).

(*Sources: KPMG, Clarity on Mergers & Acquisitions 2021/KPMG; Media Release, Swiss M&A market picks up pace significantly, 2021.*)

During the Covid-19 pandemic, the authors observed slight shifts on some deal points towards the buyers' interests (for example, a slight extension in the limitation period for representations and warranties). However, the Swiss M&A market generally remains seller-friendly.

The main deal drivers continue to be entry into new markets, followed by acquisitions of competitors, and know-how acquisition. Generally, the reasons for entering into M&A deals are diverse.

Structuring an Acquisition

Current Structures

2. What are the current trends in structuring private M&A transactions?

In Switzerland, privately held businesses are more often acquired through a share deal than an asset deal (*see also Questions 6, 7, and 31 to 34*).

Commonly, cash consideration is paid. Cash consideration is sometimes combined with other forms of consideration such as vendor loans or shares in the buyer or its parent (*see also Question 26*).

Because the Swiss M&A market is currently a seller-market (*see also Question 1*), sellers are frequently successful in avoiding any deferred compensation. However, especially in mid-sized deals with private sellers, buyers try to opt for some type of security for representation and warranty claims. Recently, if at all, common forms of security are bank guarantees and price retentions/holdbacks, as well as the currently less often seen escrow accounts (*see also Question 28*).

The authors continue to see earn-outs as a usual means to bridge valuation gaps between the parties in smaller and mid-sized transactions (*see also Question 27*). During the Covid-19 pandemic, some expected buyers to use earn outs more frequently to mitigate risks of uncertainties. However, the authors have not seen such an increase in earn outs recently.

Determination of the purchase price for a business usually starts with calculating the enterprise value by using common valuation methods, including discounted cash flows and sometimes also multiples, and comparables (*see also Question 27*). Then, the effective purchase price is negotiated between the relevant parties.

Locked box mechanisms but also purchase price adjustments (PPA) are very common in Switzerland. PPA is used more often in mid-sized and bigger deals than in smaller transactions. The locked-box mechanism is used more frequently in smaller transactions (*see also Question 27*).

Terms and Documentation

3. What are the current trends in the terms and documentation of private M&A transactions?

In the authors' experience, the Covid-19 pandemic's uncertainties often caused difficult negotiations, especially for deals signed but not closed before March 2020. Some of these deals closed later than initially expected. However, the authors did not see many deals signed but not closed due to the Covid-19 pandemic.

In H1 2020, certain deal terms were expected to change significantly due to the Covid-19 pandemic. The authors believe that this is not true for the following terms in particular:

- Material adverse consequence (MAC) clauses, entitling the buyer to terminate the transaction before closing in case of a defined MAC, are used rather rarely, including during the Covid-19 pandemic, irrespective of the deal size.
- *De minimis* clauses, excluding any representation and warranty claim under a certain amount, remain very popular.
- Basket clauses, excluding any representation and warranty claims if they do not exceed a certain amount, are often used, also in combination with *de minimis* clauses.
- Insurances for representations and warranties and indemnities (W&I insurance) continue to be regularly included in mid-sized transactions, and even more so for bigger transactions. Most often, the policy is bought buy-side, and the buyer pays the premium accordingly (*see also Question 15*).

In contrast, caps and limitation periods on representations and warranties claims may have increased slightly in recent months (*see also Question 17*). Both favour buyers, and could be a way for buyers to deal with current uncertainties.

Conduct of Transactions

4. What are the current trends in how private M&A transactions are conducted?

Because most Swiss M&A activity is cross-border, global trends hugely influence how a deal is conducted. Because the market is seller-friendly, auctions are very common. A lot of negotiated sales are also conducted (*see Question 8*).

The organisation of due diligence varies on a case-by-case basis. However, parties have an increased appetite to use the benefits of artificial intelligence tools during legal due diligence, even though it has not (yet?) become standard in the market (*see Question 11*).

Corporate Entities

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

In Switzerland, acquisition vehicles are primarily organised as a:

- Corporation (*Aktiengesellschaft/société anonyme/società anonima*) (AG/SA).

- Limited liability company (*Gesellschaft mit beschränkter Haftung/société à responsabilité limitée/società a garanzia limitata*) (GmbH/S.à.r.l./S.a.g.l.).

An AG can issue registered shares. If its equity securities are listed on a stock exchange or shares are issued as intermediated securities, the AG can issue bearer shares. An AG must have a share capital of at least CHF100,000, of which at least 20% of the nominal value of each share (at least CHF50,000 in total) must be paid in (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 must be fully paid in.

Ways to Acquire a Private Company

6. What are the main ways to acquire a private company? Which methods are most commonly used and in what circumstances?

Share deals are the most common way to acquire privately held companies and are more common than asset deals or mergers.

In Switzerland, asset deals can be conducted either:

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

Whether a transaction should be structured as a share or asset deal needs to be assessed on a case-by-case basis. Important factors for such assessment are often (*see also Question 7*):

- If the business to be transferred is already in a stand-alone legal entity (or group of entities) or the buyer prefers to "cherry-pick" the objects of transfer.
- Tax considerations (benefits of a step-up for the buyer in an asset deal, or benefits of tax-free capital gains for the seller as an individual in a share deal).
- Whether objections from certain shareholders are expected.

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

Share Purchases and Asset Purchases

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

Transfer of Assets/Liabilities

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

Exceptions to this principle may apply in certain areas, for example change of control clauses in contracts, licences, regulatory items, and a transfer of residential real estate to foreign buyers. The parties may agree a carve out or carve in of certain assets, liabilities, and contracts before closing the share deal.

In an asset deal (asset purchase) performed through a transfer of assets and liabilities (*Vermögensübertragung/transfert de patrimoine/trasferimento di patrimonio*) under the Swiss Merger Act, all assets and liabilities listed in an inventory attached to the transfer agreement are transferred by operation of law to the buyer. Therefore, the parties can in principle cherry-pick the object of transfer. However, there are certain exceptions, for example employment relationships (*see Questions 37 and 38*) and liabilities such as environmental liabilities (*see Question 41*). It is disputed and therefore unclear whether this principle also applies to contracts to be transferred. The Swiss Merger Act further provides that the seller and the buyer are jointly and severally liable for debts incurred before the transfer of assets and liabilities (*Vermögensübertragung/transfert de patrimoine/trasferimento di patrimonio*), principally for up to three years from the date of the publication of the transfer in the Swiss Official Gazette (*Schweizerisches Handelsamtsblatt/Feuille officielle suisse du commerce/Foglio ufficiale svizzero di commercio*).

In an asset deal performed the traditional way, there is no automatic transfer of assets and liabilities. Again, there are exceptions, for example employment relationships (*see Questions 37 and 38*) and certain liabilities. Therefore, cherry-picking is generally possible, although certain transfer formalities must be complied with.

Complexity of the Transaction

In a share deal, the principle is that the entire business is transferred, subject to certain exemptions (contracts with a respective change of control provision, regulatory permits, and so on).

The documentation required for a share deal primarily consists of the share purchase agreement and the various documents required to close the transaction (*see Question 19*).

Because the buyer is generally not able to cherry-pick in a share deal, buyers seek protection for certain general risks and risks identified during due diligence, through among other things representations and warranties and specific indemnities.

In principle, the same is true for an asset deal. However, an asset deal often leads to more complex closing actions, such as updating various registers, and obtaining consents of third-party contractors or authorities. If an asset deal is performed:

- In the traditional way, all the assets and liabilities to be transferred must be identified and individually transferred/assumed, and third-party consents and approvals are usually required.
- Through a transfer of assets and liabilities (*Vermögensübertragung/transfert de patrimoine/ trasferimento di patrimonio*), all relevant assets and liabilities are transferred by operation of law. However, there are disadvantages to this type of transfer (such as disclosure obligations that make the transaction transparent) and uncertainties (it is unclear whether contracts transfer by operation of law, that is, without third party consents).

An asset deal with a sale of all or substantially all assets constitutes a factual liquidation. This may first require formally putting the selling company into liquidation or changing its purpose (*see Question 12*).

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

Tax Considerations

Typical tax considerations for whether to conduct a share or asset deal include the following.

Share deal. If a corporate shareholder holds the shares, the participation relief applies, if the requirements are met. If the seller is an individual, the seller may, in certain circumstances, benefit from tax-exempt capital gains (*see Question 34*). Amortisation of the shares in the target held by the buyer is limited to the case of a decrease in value.

In a share deal, in principle the target company carries over the base cost of capital assets.

After the acquisition, carried forward tax losses of the target company can be used by the buyer during the residual tax loss carry-forward period.

There are in general no tax consequences for the target company in a share deal.

In a share deal, the buyer takes over deferred historical tax risks.

The sale of shares may be subject to securities transfer tax if a Swiss securities dealer is involved in the transaction (*see Question 31*).

In a share deal, the buyer may not be able to offset financing costs against future profits of the target company (no debt push down) (*see Question 36*).

Asset deal. In an asset deal, the base cost of capital assets can be stepped up which may benefit the buyer (allowing greater relief from corporation tax on capital gains on later sales because of higher future amortisation in case of a step up).

Other Factors

In an asset deal, the buyer can grant security to lenders over the assets acquired. In a share deal, any security taken over the target company's assets may constitute prohibited financial assistance (although a private company can give financial assistance if it is not an unlawful reduction of capital) (*see Question 30*).

Auctions

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

In a sellers' market, auction sales are very common. Accordingly, the seller should clarify at the very beginning of the auction process that it is not obliged to accept any bid 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.

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

Foreign Ownership Restrictions

9. Are there any restrictions on acquisitions by foreign buyers?

There is currently no general Swiss foreign direct investment control regime. In March 2020, the Swiss Parliament tasked the Swiss Government to propose a bill to introduce a new Swiss foreign direct investment control regime. In August 2021, the Swiss Government identified key industries and categories of investors which may be subjected to such a control regime. A first draft bill is expected in March 2022. However, as such a draft is also subject to the legislation procedure, the final bill and date of entry into force cannot yet be predicted (*see Question 42*).

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

- Residential real estate.
- National defence.
- Banking.

- Insurance.
- Electricity.
- Other areas of national importance.

Preliminary Agreements

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

Letters of Intent

Letters of intent (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.
- Envisaged structure of the acquisition (for example, share deal, asset deal, and pre-closing carve outs or carve ins).
- Price or price formula.
- Other major terms sometimes listed in short form in a term sheet annexed to the letter of intent.
- Timing, in particular concerning due diligence, signing, and closing.
- Tax and 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 the approval of a corporate body). A breach of such obligation amounts to a fault in the conclusion of a contract (*culpa in contrahendo*) and might involve the payment of damages.

Sometimes letters of intent also contain binding provisions, such as provisions on confidentiality, exclusivity (if any), break fees (if any), governing law, jurisdiction, and arbitration. Confidentiality clauses (also called non-disclosure clauses) are common in letters of intent if the non-disclosure issues are not dealt with in a separate agreement (*see*

below, Non-Disclosure Agreement). Exclusivity and break fee clauses (with the seller as beneficiary or the buyer as the beneficiary in a reverse break fee clause) are rarer.

Prudent parties state explicitly in the 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. In this case, a brief list (term sheet) with certain already agreed deal terms may increase efficiency in the drafting process.

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 negotiate with another prospective buyer for a certain period of time.

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

Specific performance is, in theory, possible, but in practice is rarely granted. Since quantifying the damage is usually difficult in case of a breach of contract, 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 possible to agree on confidentiality (non-disclosure agreements, NDA) in a separate, stand-alone agreement.

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

Negotiations of NDA often focus on:

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

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

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

Due Diligence

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

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

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

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

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

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

Consents and Approvals

12. Briefly outline the main consents and approvals typically required for an acquisition.

Corporate Approvals

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

A share deal with a Swiss AG as the target company may require approval of the target's board of directors, depending on the types of shares it has. The transferability of bearer shares (if they can be issued (*see Question 5*)) is not restricted by corporate law and cannot be restricted by the articles of incorporation.

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

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

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

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

There are certain incidental restrictions on the transferability of registered shares, in that the buyer must make certain notifications to the company under anti-money laundering and similar rules to benefit from all rights relating to the acquired shares.

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

Shareholder Approval

AG. If the buyer issues new shares as consideration for the acquisition, the buyer's shareholders' meeting must approve with a qualified quorum the necessary capital increase and the cancellation of the existing shareholders' subscription rights. The cancellation requires a valid reason (often given in an acquisition context) and equal treatment of the shareholders. The capital increase also must be approved by the board of directors.

If the buyer has an authorised share capital, its board of directors can increase the share capital, issue new shares, and cancel the existing shareholders' subscription rights if the above criteria are met (*see also Question 29*).

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

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

There are certain incidental restrictions on the transferability of quotas due to the anti-money laundering and similar rules.

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

Contractual Consents

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

In an asset deal performed through a transfer of assets and liabilities (*Vermögensübertragung/transfert de patrimoine/ trasferimento di patrimonio*) under the Swiss Merger Act, all assets and liabilities listed in an inventory attached to the transfer agreement are transferred by operation of law to the buyer. Accordingly, notification or consents are not required. However, it is unclear whether this principle applies to contracts to be transferred (*see Question 7*).

In an asset deal performed in the traditional way, except for employment relationships and certain other relationships (*see Questions 7 and 38*), there is no automatic transfer of assets and liabilities. Accordingly, creditors whose claims are to be transferred must be notified, and they must agree to the transfer. Other counterparties to contracts also have to be notified and their consent obtained to the transfer of any related contracts.

Regulatory Approval

See *Questions 9 and 40*.

Main Documents

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

The main acquisition documents are:

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

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

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

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

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

Acquisition Agreements

14. 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).
- Sale 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 specific indemnifications, non-compete/non-solicitation, no leakage/actions between signing and closing, confidentiality and public announcement).
- Miscellaneous provisions (including tax, costs, amendments, notices, governing law, and jurisdiction/arbitration).

The key substantive clauses in an asset purchase agreement are:

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

Warranties and Indemnities

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

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

Representations and warranties and indemnities are generally either:

- Representations and warranties under Article 192 et seq. and 197 et seq. of the Swiss Code of Obligations (the statutory purchase law provisions).
- Guarantees under Article 111 of the Swiss Code of Obligations (more applicable for specific indemnities).

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

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

In mid-sized and bigger transactions, it has become common for a W&I insurance to be taken by the buyer in a seller-friendly market (*see also Question 3*).

16. What are the main limitations on warranties?

Limitations on Representations and Warranties

Common limitations on representations and warranties are:

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

Qualifying Representations and Warranties by Disclosure

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

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

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

Remedies

The prevailing sole remedy for breaches of representations and warranties provided by the parties in acquisition agreements is damages (normally irrespective of any fault of the seller), sometimes preceded by the seller's right to cure the defect in question.

Less common is the right of the buyer to reduce the purchase price.

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

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

Time Limits for Claims Under Representations and Warranties

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

For certain (sometimes called "fundamental") representations and warranties, the time limit is usually between five and ten years, such as relating to title to shares (for example, as part of the capitalisation of the company and subsidiaries), tax, and environmental issues.

Signing and Closing

Conditions Precedent

18.What common conditions precedent are typically included in a private acquisition 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.

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

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

Main Steps at Signing and Closing

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

Signing

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

- The share purchase agreement or asset purchase agreement. Compared with the share purchase agreement, the asset purchase agreement extensively identifies the object of transfer (assets, liabilities, contracts, employees, and so on) and the required closing actions (*see also Question 7*). In addition, if an asset purchase agreement transfers real estate located in Switzerland, the agreement requires notarisation by a local notary.
- The disclosure letter, if any (in which the seller makes disclosures against representations and warranties in the share purchase agreement or asset purchase agreement).
- A power of attorney (if an attorney needs to be appointed to execute documents in the absence of one of the parties).

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

- Pre-closing covenants (to operate the business in the ordinary course, best-efforts to achieve closing, and so on).
- Conditions to closing (*see Question 18*).
- Purchase price adjustments (*see Questions 2 and 27*).
- Specific indemnities.

Closing

The following documents are commonly produced and executed at closing meetings of share deals (share sale):

- 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).
- An updated share register of the target company providing for the buyer as a new shareholder (if applicable).
- The resignation letters for the resigning members of the board of directors of the target company (if any).
- A banker's confirmation that the purchase price has been wire 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).
- Notification of the board of directors of the target company by the buyer disclosing the new beneficial owner.
- An updated register of the beneficial owner of the target company, providing for the new beneficial owner of the target company.
- Bring-down disclosure to get the policy of a W&I insurance (if applicable).
- Closing minutes.

The following documents are commonly produced and executed at closing meetings of asset deals (asset sale):

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

Execution of Documents

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

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

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

In principle, in Switzerland, a share purchase agreement for the sale of shares in an AG can be concluded without observing a certain form (for the instrument of transfer, *see Question 22*).

The assignment of a quota (share) in a GmbH, as well as an obligation to assign, subject to any contrary statutory provision, must be made in writing.

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

Notarisation is required for asset deals transferring real estate properties located in Switzerland. Transactions including certain corporate actions require notarisation by a Swiss notary (for example, a shareholders' meeting resolving on a merger, a shareholders' meeting changing the articles of association, and board minutes for closing an increase of the share capital). Further, the signatures of the persons signing the power of attorney for the incorporation of a Swiss AG or GmbH and for real estate acquisition contracts must be legalised.

Swiss law does not impose special formalities for the execution of documents by foreign companies other than those imposed on a Swiss company.

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

Yes, but the use of digital signatures requires caution because either a statute or the contract can provide for the "written form" (principally wet ink).

Digital signatures satisfying the "written form" require an authentication which is still limited to relatively few certified providers.

The Swiss Code of Obligations requires digital signatures to be in the form of an authenticated electronic signature based on an authenticated certificate issued by a provider of certification services, within the meaning of the Swiss Federal Act of 19 December 2003 on Electronic Signatures. Only such authenticated electronic signatures are deemed equivalent to a handwritten signature (written form, wet ink), subject to any statutory or contractual provision (if possible) to the contrary.

Transferring Title to Shares

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

AG

Registered shares in an AG without restricted transferability are transferred by handing over possession of the duly endorsed share certificates representing the shares or, if no such share certificates are issued, by a written declaration of assignment.

Additionally, a resolution of the board of directors of the target company regarding entering the buyer into the share register as a new shareholder of the target company and the respective entry are also required.

However, both have no constitutive effect, which means that legally, solely the endorsement of the share certificates or the written declaration is required to transfer title.

Registered shares in an AG with restricted transferability are transferred by handing over possession of the duly endorsed share certificates representing the shares or, if no 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 buyer's entry into the share register of the target company as a new shareholder are also required. Finally, the buyer must be entered into the share register of the target company, which, however, has no constitutive effect.

To the extent still permissible (*see Question 5*), bearer shares in an AG are transferred by handing over possession of the share certificates representing the shares or, if no such share certificates are issued, by a written declaration of assignment.

GmbH

To transfer quotas (shares) in a GmbH, the Swiss Code of Obligations provides that:

- The assignment of a quota (share), as well as an obligation to assign, must be in writing.

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

Reporting Obligations

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

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

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

Seller's Title and Liability

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

- Not qualified by buyer's knowledge.
- Independent of any fault of the seller.

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

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

Seller

If the parties signed a letter of intent, they must act in good faith during the negotiations. Therefore, each party is obligated to inform the other party about matters it should be aware of in light of the principle of good faith (*see Question 10, Letters of Intent*).

Also, the parties are obligated not to make misrepresentations and misleading statements to the other party. This pre-contractual relationship exists even if there is no letter of intent and the parties are simply negotiating.

A breach of the obligation to act in good faith gives rise to a *culpa in contrahendo*-liability and may involve payment of damages (*see Question 10, Letters of Intent*). Whether such claims still exist after the acquisition agreement has been concluded is controversial, at least if the acquisition agreement does not regulate this matter.

Advisers

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

Governing Law and Arbitration

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

Choice of Law

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

However, a share purchase agreement can provide for a foreign governing law (for example the law of the country where the seller's or buyer's registered seat is located). In this case, provisions of national law would 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).

Arbitration

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

Switzerland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which ensures the enforcement of foreign arbitration awards worldwide.

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

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

Consideration and Acquisition Financing

Forms of Consideration

26. 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 buyer's own resources or funded by debt.

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

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

Factors in Choice of Consideration

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

If a buyer has insufficient cash 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, or to provide for an earn out. The buyer may also see value in issuing shares as consideration, to ensure that the seller (particularly if the seller is a key individual manager) has a continuing commitment to the combined business.

Price Adjustments and Deferred Consideration

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

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

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

If the payments on closing are not adjusted, this is one element of a locked box-mechanism. Another element of a locked box-mechanism is "leakage-language", that is, clauses to prevent the leakage of substance from the target company between signing and closing (*see also Question 14*). Locked box mechanisms but also PPA are very common in Switzerland.

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

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

Buyers typically pay the price in full on closing. In the current market, sellers are frequently successful in avoiding any deferred consideration. The parties rarely agree a form of security for representation and warranty claims. If the parties agree on security, they have tended to use bank guarantees or price retentions/holdbacks more recently. On the other hand, escrow accounts are no longer regularly used as security due to compliance issues (know your customer (KYC) issues) with banks and negative interest rates.

29. If a buyer listed in your jurisdiction issues shares to raise cash to acquire a private company, how is the issue typically structured? What consents and regulatory approvals are required?

Typical Structures

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 (or a capital band under the future law to enter into force, at the latest by the end of 2023, *see Question 42*), which authorises the board of directors to increase the share capital within a certain period of time, the buyer's board of directors 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 shareholders' meeting 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, for example, a restriction or cancellation of subscription rights. This qualified majority requires both at least two-thirds of the voting rights represented and an absolute majority of the nominal value of shares.

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

To be listed, an issuer must publish a listing prospectus that 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 to list securities that, calculated over a 12-month period, account for less than 10% of the securities of the same class that have already been listed.

Financial Assistance

30. 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 may provide or secure financing of a transaction up to its freely disposable equity if both:

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

Exemptions

No general exemptions exist.

Tax

Transfer Tax

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

Share Deal (Share Sale)

Securities transfer tax. A sale of shares is subject to securities transfer tax if at least one of the parties or intermediaries involved qualifies as a Swiss securities dealer. However, certain transactions and parties are exempt (*see Question 32*).

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

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

Securities transfer tax rate is charged on the sale price at 0.15% for Swiss securities and 0.3% for foreign securities.

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

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

Asset Deal (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 Deal*).

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

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

Share Deal (Share Sale)

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

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

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

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

Asset Deal (Asset Sale)

See above, *Share Deal*.

Corporate Taxes

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

Share Deal (Share Sale)

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

A capital gain derived from a sale of shares is basically subject to corporate income tax. However, the participation relief applies, if the requirements are met (*see Question 34*). Capital losses are tax-deductible.

The tax rates vary depending on the canton and the community. The effective tax rate, given the deduction of the corporate tax itself, ranges between 11.3% and 21.6%.

During the implementation of the Corporate Tax Reform (STAF) as of 1 January 2020, existing tax privileges (such as finance branches, mixed, domiciliary, principal, and holding company regimes) were abolished and replaced by other OECD-compliant measures (for example, IP box, R&D super deduction, and notional interest deduction), leading to a reduced corporate income tax liability.

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

Asset Deal (Asset Sale)

Income tax. Capital gains derived from a sale of assets are subject to corporate income tax. The effective tax rates vary depending on the canton (state) and the community, and range between 11.3% and 21.6% (*see above, Share Deal*). However, no participation relief applies if the sold assets are not qualifying participations (*see Question 34*).

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

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

Share Deal (Share Sale)

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

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

If the seller is an individual, the seller can benefit from tax-exempt capital gains on the sale of privately held participations unless, among other things, the sale is considered as an indirect partial liquidation (re-qualification of the tax-exempt capital gain into taxable income) or if the sale price is partially re-qualified as income from employment. These income tax consequences can be avoided if the transaction is properly structured or mitigated and if the share purchase agreement contains respective covenants.

Asset Deal (Asset Sale)

See above, *Share Deal*.

Other Taxes

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

VAT

The sale of shares is exempt from VAT. However, the sale of assets is basically subject to VAT at 7.7%.

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

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

Swiss Withholding Tax

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

Tax Group Consolidation

36. Is tax consolidation of corporate groups possible in your jurisdiction? Are companies in the same group able to surrender losses to each other for tax purposes?

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 usually 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

Information and Consultation

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

Asset Deal (Asset Sale)

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

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

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

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

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

Share Deal (Share Sale)

Unless there are specific information/consultation requirements under collective bargaining agreements or similar agreements, the common view is that the provisions of Article 333a of the Swiss Code of Obligations do not apply to share deals. However, court judgments in the EU state that the EU rules corresponding to Article 333a of the Swiss Code of Obligations (transfer of undertakings (protection of employment) (TUPE) rules) may apply to share deals. The common view on the non-applicability of Article 333a of the Swiss Code of Obligations should therefore be approached with some caution.

Transfer in a Business Sale and Other Protections

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

Asset Deal/Business Sale

If 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 the notice period provided by law). This applies both to an asset deal performed through a transfer of assets and liabilities (*Vermögensübertragung/transfert de patrimoine/trasferimento di patrimonio*) and the traditional way.

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

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

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

Other Protections

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

Employees have, in certain circumstances, the right to be consulted before a decision on measures affecting the employees is made (*see Question 37*).

Pensions

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

Private Pension Schemes

Private pension schemes are mandatory. Therefore, an employer must conclude an accession agreement with a separate legal entity.

This legal entity, normally a foundation, is set up by the employer or, more commonly, by an insurance company or other third party.

The legal entity is the owner of the private pension scheme, which is mainly financed by the employer and normally the employees.

Pensions on a Business Transfer

A share or asset deal does not, as such, affect the separate legal entity that owns the private pension scheme, but they might affect it indirectly.

For example, in some instances, the legal entity must be fully or partly liquidated, and assets resulting from the liquidation are passed on to the legal entity/ies newly in charge of the employees concerned. Such full or partial liquidation is heavily regulated and supervised by the cantonal (state) authorities that supervise the legal entities.

Competition/Anti-trust Issues

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

Triggering Events/Thresholds

Concentrations of undertakings are according to the Swiss 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.

Concentrations meeting the following thresholds are subject to pre-merger control as set out in the Swiss 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 total joint worldwide turnover of at least CHF2 billion or a total joint turnover in Switzerland of at least CHF500 million.
- At least two of the involved undertakings generated a turnover in Switzerland of at least CHF100 million each.

Irrespective of any turnover thresholds, a concentration must be notified to the Swiss Competition Commission if one of the involved undertakings has been held in a final decision to be dominant in a market in Switzerland, and the concentration concerns this market, an adjacent, or an upstream or downstream market (*Article 9, Swiss 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 special market dominance test. A concentration can be prohibited or authorised subject to conditions and obligations if it both:

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

(*Article 10, Swiss Cartels Act*.)

Environment

41. 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 Swiss Environmental Protection Act, the contaminator is responsible for the clean-up of the 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, or potentially the lessee, of the contaminated land.

The general rule is that clean-up costs are allocated between the person who caused the contamination (as a rule of thumb, between 70% and 90% of the costs) and the person who controls the contaminated land.

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

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

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

Risks associated with contamination are usually dealt with in the transaction agreements by representations and warranties, or specific indemnities. Depending on the specifics of the case, contamination may require clean-up measures before closing, a change of the deal structure (asset deal, rather than a share deal), or the prior carve out of certain assets or business.

Recent Developments and Reform Proposals

42. Have there been any significant recent or proposed legal developments affecting the market that could impact on transactions?

Recent Developments

Global Forum Act. On 1 November 2019, the Swiss Federal Act on the Implementation of Recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) entered into force.

This Act provides, among other things, that bearer shares are only permitted if the company has equity securities listed on a stock exchange or if they are issued as intermediated securities.

The affected corporations had time to convert these impermissible bearer shares into registered shares by 1 May 2021. On this date, all impermissible bearer shares were automatically converted, that is, by operation of law, into registered shares.

Therefore, in the context of a due diligence process, a potential buyer should, among other things, examine whether:

- The corporations that converted their bearer shares into registered shares complied with all requirements.
- The holders of bearer shares that were automatically converted into registered shares have complied with the reporting obligations before the conversion.

DLT legislation. On 1 February 2021, amendments to the Swiss Code of Obligations entered into force enabling the issuance of uncertificated securities on a blockchain.

On 1 August 2021, the Federal Act on the Adaption of Federal Law to Developments in Distributed Electronic Register Technology fully entered into force, as well as the associated blanket Federal Ordinance, adapting ten Federal Ordinances accordingly. This legislation allows for innovative distributed ledger technology trading facilities and increased legal certainty in the case of bankruptcy. The legal implementation of this technology allows a new type of transaction on the Swiss M&A market.

Revision of Company Law and Covid-19 Legislation. The Swiss Parliament approved a general corporate law reform on 19 June 2020.

In general, the reform aims to modernise corporate governance and holding of shareholders' meetings, facilitate company formation, and revise the rules on corporate restructuring.

Further, the rules on share capital are designed to be more flexible (for example, introducing bandwidth capital increases and decreases, so-called "capital band").

The revision is expected to enter into force in 2023. After then, companies will be given two years to make the necessary amendments.

Due to the Covid-19 pandemic, the rules for holding the shareholders' meeting have been liberalised temporarily, and virtual shareholders' meetings have been permitted until the entry into force of the revised Company Law.

Further, "Covid-19 loans" may impact M&A deals. Between 26 March 2020 and 31 July 2020, companies affected by the Covid-19 pandemic were eligible to apply for bridging credits guaranteed by the Swiss Federal Government. In general, these loans do not prevent share deals or mergers. However, the respective Swiss Federal Act imposes numerous restrictions on borrowers. Therefore, in the context of due diligence, a buyer should examine whether the target company took out a Covid-19 loan and, if so, whether it complied with all regulations.

Reform Proposals

Foreign Direct Investment Control. On 3 March 2020, the Swiss Parliament tasked the Swiss Government with proposing a draft bill to introduce foreign direct investment controls, including setting-up a respective licensing authority.

In an announcement on 25 August 2021, the Swiss Federal Council published the key features of a foreign direct investment control regime. The Swiss Government follows a rather investor-friendly approach. The proposed regime concentrates on notification and approval requirements for state-related foreign investors and foreign investors acquiring target companies in sensitive sectors. A two-tier procedure is proposed:

- A preliminary review to determine whether an in-depth approval procedure is to be conducted. An in-depth review will only be conducted if a threat to public security or a potential distortion of competition can be detected. The State Secretariat for Economic Affairs (SECO) is to be responsible for these reviews and co-ordination between the departments and offices involved.
- If the transaction is not approved after an in-depth review or there is disagreement between the departments and offices involved, the Federal Council will decide on the approval.

The consultation draft of the bill is expected for publishing by the end of March 2022 (*see Question 9*).

New due diligence and transparency obligations. The Swiss Parliament has decided new due diligence regulations, in the context of a rejected popular initiative, "for responsible companies - to protect people and the environment," requiring Swiss-based companies to also respect internationally recognised human rights and environmental standards abroad.

To specify these, the Federal Council must issue implementation provisions. Therefore, the Federal Council has published a preliminary draft of an Ordinance on due diligence and transparency regarding minerals and metals from conflict areas and child labour.

The new regulations would require large Swiss companies to report on the risks of their business activities in the areas of the environment, social concerns, employee concerns, human rights, and the fight against corruption, and on the measures taken against these risks. Also, companies with risks in the sensitive areas of child labour and "conflict minerals" must comply with special and far-reaching due diligence obligations.

The new regulations will enter into force on 1 January 2022, applying for the first time to the financial year 2023. Therefore, these new obligations would need to be taken into account in any due diligence examination in the context of future M&A deals.

Transactions involving shell companies. Currently, there are efforts to revise the Swiss bankruptcy law to avoid abusive bankruptcies. The Swiss Federal Supreme Court's disputed case law, according to which the sale of shares in shell companies is void, is planned to be partly codified. Therefore, a potential buyer would have to examine even more thoroughly whether the target company or any of its subsidiaries qualifies as a shell company. However, the revision project is currently pending in parliament, and it is not clear when it will enter into force.

Merger control. The Swiss Federal Council has contemplated modernising the merger control regulations of the Swiss Cartels Act. On 12 February 2021, the Federal Department of Economic Affairs, Education, and Research was tasked to propose a consultation draft.

The aim is to introduce the Effective Competition-Test (SIEC-Test). The revised Swiss Cartels Act would allow authorities to prohibit mergers or subject them to appropriate conditions if they lead to a significant impediment to

competition. Under the current standard of review, this is only possible if a merger eliminates effective competition. The consultation procedure started in 2021 and will end in spring 2022.

43. What will be the main factors affecting the market next year, and how do you expect the market to develop?

The general outlook for the next year is rather positive, mainly because of the stabilisation trends in the European and US economy, politics, and the health situation. These trends have already started to show, as the Swiss M&A market is clearly recovering from the Covid-19 pandemic lows (*see Question 1*).

If these trends continue, an increase in (high value) transactions is expected, as well as a general acceleration expanding from the technology and industrial sectors to broader segments.

However, some Covid-19 impacts remain, and sectors facing uncertainty and a potential wave of bankruptcies, such as the tourism sector, will need more time to return to pre-pandemic levels.

Additionally, in 2022 the Covid-19 loans (*see Question 42*) will be due for repayment if they are not extended. If companies struggle to pay them back, their businesses could be subject to distressed deals, which may therefore increase in the Swiss M&A market.

Contributor Profiles

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Recent transactions

- Advising JENOPTIK AG (Xetra: JEN) on the acquisition of SwissOptic AG, a specialist in developing and manufacturing optical components and assemblies, primarily for the medical technology, semiconductor, and metrology industries.

- Advising Montana Aerospace (SIX: AERO) on the acquisition of Asco Industries.
- Advising TX Group on the creation of a corporate joint venture with Ringier, La Mobilière and General Atlantic resulting in a leading digital marketplace group.
- Advising ED&F Man Capital Markets on the sale of its Structured Commodities Division.
- Advising Viseca Holding on the reorganisation of its card business activities and dividing the enterprise into an issuing company and a service company.
- Advising the private sellers on the sale of NVT AG to Blue Sail Medical Co., Ltd., a leading Chinese medical device company, listed at Shenzhen Stock Exchange.
- Advising Aduno Holding on the sale of cashgate to Cembra Money Bank (SIX: CMBN).

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Recent transactions

- Advising Montana Aerospace (SIX: AERO) on the acquisition of Asco Industries.
- Advising TX Group on the creation of a corporate joint venture with Ringier, La Mobilière and General Atlantic resulting in a leading digital marketplace group.
- Advising the British private equity investor Bridgepoint on the acquisition of Infinigate group, a leading value-added cyber security solutions distributor.
- Advising Dovista A/S, part of the Danish VKR Group, on the purchase of Arbonia's Windows Division.
- Advising Avaloq on the acquisition of Derivative Partners AG, the number one independent information and data provider for Structured Products and Derivatives in Switzerland.

- Advising the private sellers on the sale of NVT AG to Blue Sail Medical Co., Ltd., a leading Chinese medical device company, listed at Shenzhen Stock Exchange.
- Advising Arthur J. Gallagher & Co. (NYSRE: AJG) on its acquisition of all shares in VERBAG Versicherungsberater-AG.

Languages. German, English, French

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Recent transactions

- Advising JENOPTIK AG (Xetra: JEN) on the acquisition of SwissOptic AG, a specialist in developing and manufacturing optical components and assemblies, primarily for the medical technology, semiconductor, and metrology industries.
- Advising the owner family of Lista Office Group, a planner and organiser of offices, on the sale of this group to a subsidiary of the furniture manufacturer Zhejiang Henglin Chair Industry Co., Ltd. (SSE: 603661).
- Advising Evoco AG, STS Management AG, and Renaissance PME fondation suisse de placement on the sale of and reinvestment in ASIC Robotics AG, a developer and manufacturer of custom-built machines for production, assembly, and testing processes.
- Advising TX Group AG (SIX: TXGN) on the acquisition of Basler Zeitung AG and the newspaper "Basler Zeitung".

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Recent transactions

- Advising Revalize, Inc. on the acquisition of SpecPage AG, a leader in operations software for manufacturers.
- Advising Nautilus (NYSE: NLS) on the acquisition of VAY AG, a leader in motion detection and analysis in Switzerland.
- Advising Rigips AG, a subsidiary of Compagnie de Saint-Gobain (EPA: SGO), on the sale of a gypsum quarry and a gypsum factory to Ciments Vigier SA.
- Advising Hochdorf Holding AG (SWX: HOCN) on the sale of its previous majority interest in the Pharmalys Group to Mr. Amir Mechria.

Languages. German, English, French

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