Signing and Closing: Private Acquisitions (Switzerland)

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This Practice Note sets out the mechanics of signing and closing Swiss share or asset acquisitions, the documents required and the execution and transfer formalities.

This Practice Note sets out the mechanics of signing and closing share and asset purchases in Switzerland. It covers:

- The people that should attend, documents that are required and the location and timing of signing and closing meetings.
- Execution and transfer formalities, including the role of notaries.
- The use of opinion letters.
- Events that should happen after closing.

Documents at Signing and Closing Meetings

Signing Meetings: Share or Asset Deals

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

- Share purchase agreement (SPA) or asset purchase agreement (APA), as applicable. Warranties and the indemnities are typically included in the SPA or APA, sometimes in an annex.
- Disclosure letter, qualifying the warranties in the SPA or APA, as relevant. See *Practice Note, Key Documents for Acquiring a Private Company (Switzerland)*.
- Evidence for the signing authority of the parties' representatives:
    - In case of natural persons, a power of attorney (if the respective party is not attending in person or otherwise not signing themselves).
    - In case of legal entities: evidence for the approval of and authority to enter into the transaction, typically a resolution by the competent corporate body and evidence for the signing authority of the party's representative, e.g. excerpt from the Register of Commerce (similar to Companies' House in the UK), supplemented by a simple power of attorney, if required.

Share Purchase: Closing Meetings

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

- Relevant transfer instrument. That is, a written declaration of assignment, or:
    - in the case of physically issued bearer shares in an *Aktiengesellschaft* (AG) (UK: public limited company; US: corporation), the bearer certificates; or
    - in the case of physically issued registered shares in an AG, duly endorsed (signed) by the seller on the reverse side (see *Share Transfer Formalities*).

  Bearer shares, while in principle possible, are only permitted to be issued by an AG if it is listed on a stock exchange or issued as intermediated securities (*Bucheffekten*, according to the Federal Intermediated Securities Act) and deposited with a custodian in Switzerland.
- Resolution of the competent corporate body of the target company approving the share (in an AG) or quota (in a *Gesellschaft mit beschränkter Haftung* (GmbH) (UK: private limited company; US: limited liability company)) transfer (if applicable). In the case of an AG this will typically be the board of directors and, in a GmbH, this is typically a members' meeting.
- Updated share or quota ledger of the target company, naming the buyer as new shareholder or member (if applicable).
- Resignation letters for the resigning board members of the target company (if any).
- Banker's confirmation that the purchase price has been electronically transferred.
- Share certificates of subsidiaries or other evidence of ownership (if applicable).
- Seller loan agreement (if applicable).
- Transitional services agreements (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. If a buyer prefers not to disclose such information to the seller(s) (which is typically the case) it is possible to notify the board of directors, or board of managing directors, immediately after closing.
- Updated register of the beneficial owner of the target company (providing for the new beneficial owner of the target company) if the notification is made as part of the closing process.
- Bring-down disclosure letter (if warranty and indemnity (W&I) insurance has been purchased). The letter discloses any facts occurring between signing and closing that would be a breach of a closing warranty.
- Closing minutes (including evidence for the signing authority of the parties' representatives, if not covered by the respective evidence provided at signing).

Asset Purchase: Closing Meetings

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

- Instruments required to transfer title to the transferred assets (for example, grants of possession, declarations of assignment and tripartite agreements). Reference to such instruments may be included in the closing minutes.
- Banker's confirmation that the purchase price has been electronically transferred.
- Seller loan agreement (if applicable).
- Transitional services agreements (if applicable).
- Release of any security and/or guarantees on transferred assets (if applicable).
- Escrow agreement (if applicable).
- Closing minutes (including evidence for the signing authority of the parties' representatives, if not covered by the respective evidence provided at signing).

Which Jurisdiction for Signing and Closing?

There are no specific requirements under Swiss law as to the jurisdiction in which the signing and closing should take place, nor are there any specific advantages from a Swiss law perspective to doing so, other than potential (international) tax considerations.

Warranties and Indemnities: Gap Between Signing and Closing

In Swiss transactions, it is market standard practice to provide warranties and indemnities as of signing and closing, unless there is a specific (typically practical) reason not to do so. In respect of the management of the business between signing and closing, the buyer's interests are typically covered by interim covenants of the seller to continue normal operation of the business of the target, not to enter into any significant new agreements or terminate any significant existing agreement or acquire, or sell substantial assets of the target without consulting the buyer.

Who Should Attend Signing and Closing Meetings?

Individuals and representatives of companies will usually attend although they can appoint third parties (for example, their lawyers in Switzerland) to execute on their behalf (see *Powers of Attorney*). Depending on the provisions of the relevant company's articles of association and internal regulations (in particular, organisational regulations), prior approval of the board and shareholders/members may be required. There is no requirement for powers of attorney granted by Swiss companies or their officers to be notarised.

Proof of Identity and Authority

It is standard practice to request proof of authority to sign in case of a party being a legal entity, see *Execution by Companies*. For a Swiss legal entity, such proof is provided by an excerpt from the competent Swiss Register of Commerce (similar to Companies' House in the UK). For foreign legal entities, it depends on the respective jurisdiction and the evidence available.

Proof of identity of the individual signatory (for example, a notarised passport copy) is, in general, not requested.

Execution Formalities

Under Swiss law, the validity of a contract is not subject to compliance with any particular form, unless a particular form is prescribed by law (*Article 12, Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations SR 220 (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, Fünfter Teil: Obligationenrecht) (Code of Obligations)*).

Where formalities do apply, Swiss law distinguishes between simple contracts in writing, which are signed by the parties without any precise requirement as to the method of execution or presence of witnesses, and contracts drawn up by and executed before a notary (public deed (*öffentliche Urkunde*) or certified deed (*beglaubigte Urkunde*)). For more information on when a public deed is required, see *Notaries and Notarisation*.

In principle, an SPA regarding the sale of shares in an AG could be concluded without observing a certain form. The assignment of a share in an AG or a quota in a GmbH must be done in writing (subject to any contrary statutory provision).

The legal formalities for an APA depend on the particular assets (tangible and intangible) involved in the sale. In practice, it is either in writing (that is, a simple contract) or, rarely, in a public deed, signed by the company's legal representative, such as a director or a proxy.

Execution by Companies

Swiss companies must be represented by one or more authorised individuals. Authorisation can be granted by:

- **Law.** Generally, companies are represented by members of their elected corporate bodies, by default by the board of directors (in an AG) or the board of managing directors (in a GmbH). The authorisation of members of the elected corporate bodies (e.g. board of directors, managing directors, members of management) or of further specific individuals to sign on behalf of the company is to be entered in the Register of Commerce. Upon entry, *bona fide* third parties may rely on the entry. The Register of Commerce only allows entering of the following main distinctions:
    - **Signature right**. Authority to represent and bind the principal in transactions relating to the purpose of the principal's business (as provided by the company's articles of association).
    - **A commercial power of attorney (*Prokura*)**. An agent vested with a commercial power of attorney can bind the principal in transactions relating to the purpose of the principal's business; except for the sale and pledge of real estate, which require an express authorisation.
- **A simple (general or special) power of attorney.** Persons who do not have the general authority to represent a company can conclude contracts or act on behalf of the company if they have been authorised to do so by an authorised person under a simple power of attorney. Such authority can grant authority for a certain area (for example employment matters for a Head of HR) or specific matters (e.g. signing of a specific contract).
- **Apparent authority.** Companies can also be represented by individuals with apparent authority; typically, however, parties do not rely on such authority except for minor matters or day-by-day business.

The intention to represent the company must be explicitly or implicitly expressed. This is typically done by making a reference in the relevant document to the company represented and the function of such representative. However, there are no requirements to affix a company seal or stamp or for signature by specific public officers.

Swiss law does not impose special formalities for the execution of documents by foreign companies, other than those imposed on a Swiss company. With regard to any documents that require notarisation in case of a Swiss company, the same documents

from a foreign company would require, in addition, an apostille (according to the Hague Convention) or super-legalization by a Swiss Embassy or Consulate in the respective country.

Execution by Individuals

Individuals who have the capacity to act can conclude contracts by themselves or through a third party authorised under a power of attorney. An individual has the capacity to act if they are 18 years of age and are capable of judgement. Individuals who do not have the capacity to act must be represented by a legal representative, who can conclude contracts directly with third parties, or subsequently approve the contracts concluded by the individual represented.

In the case of an individual married under the marital status of Community of Property (*Gütergemeinschaft (German)* / *Communauté de biens (French)* / *Comunione dei beni (Italian)* according to article 221 et seq. of the *Swiss Civil Code*), (which is very seldom the case in Switzerland and requires a marital contract between the spouses) a power of attorney of the spouse is also required.

In principle, the agent can only bind the principal to the extent that it is authorised to do so. However, this is subject to two exceptions:

- If the principal has disclosed the agency relation to a third party, and the third party can rely on this communication in good faith.
- If the agent acted on the principal's behalf without authority in the past, the principal did not intervene, and the third party relies on this apparent authority in good faith.

Digital Signatures

In principle, the validity of a contract is not subject to compliance with any particular form, unless prescribed by law (*Article 12 CO*). If no particular form is prescribed, the parties may freely decide on the form. Typically, however, the parties agree on the written form.

If a simple contract in writing (i.e. written form) is prescribed or agreed upon between the parties, such requirement can be fulfilled by handwritten signature (written form, wet ink) or an authenticated electronic signature with qualified timestamp in accordance with the Federal Act on Electronic Signatures (*Federal Act on certification services in the field of electronic signature and other applications digital certificates* (*Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur und anderer Anwendungen digitaler Zertifikate)* (ESA)). Such authenticated electronic signature must be issued by a qualified and accredited service provider and meet the strict requirements provided by the ESA. The use of such authenticated electronic signature is still limited to relatively few certified providers and rarely used in practice. Only such authenticated electronic signatures are deemed equivalent to a handwritten signature, subject to any statutory or contractual provision (if possible) to the contrary.

Admissibility of Faxed or Emailed Documents as Evidence of Due Execution

Fax copies of original documents are accepted as equivalent to the physical exchange of the original document or transmission by mail. Accordingly, a fax copy in principle fulfils the requirements for the admissibility in court as evidence of due execution.

Scan copies are still subject to a certain degree of legal uncertainty. In practice, parties typically accept the exchange of scan copies for the signing of an agreement, with the understanding that original signatures will be exchanged thereafter. For

certainty, before exchanging the scan copies, parties may request that each party's attorney(s) confirm(s) to hold the original signature page in escrow, to be exchanged upon release without further instruction.

Execution in Counterpart

Swiss law generally permits execution of documents in counterparts, as long as it is clear that all parties are signing the same agreed version of the document (typically the parties' legal advisers will manage the signing and closing process to ensure this is the case). Examples of execution in counterpart include where each party signs their own copy that can be assembled to form one complete single agreement or each party signs multiple copies (equating to the number of parties) so that each party has a copy signed by every party). There is no specific need for a respective statement in the document (for example an express counterpart statement) or other agreement between the parties.

In case of a contract required to be notarised, the parties must be present or represented by persons authorized by a notarised (and if notarised outside of Switzerland, also apostilled/super-legalised) power of attorney.

Powers of Attorney

Applicable Swiss law (in particular Article 32 et seq., Code of Obligations) does not prescribe any general formalities to grant a private law power of attorney (as opposed to, in particular, public law powers of attorney, for which special rules may apply). However, according to the prevailing Swiss legal doctrine, the granting of a power of attorney for a principal act or transaction which itself requires a certain form (e.g. a contract for the purchase of real property requires public notarisation in order to be valid) must be made in the same form prescribed for the principal act or transaction.

Swiss law provides for certain default limitations, however these are not mandatory and parties may deviate from them by mutual agreement. The most important are the following:

Self-Dealing and double representation are in principle not included in a power of attorney unless explicitly stated or implied.

A power of attorney granted in connection with a principal act or transactions is limited to the duration of such principal act or transaction, for example a power of attorney granted to an employee is limited to the duration of the employment relationship.

Pursuant to Article 35, Code of Obligations, a power of attorney terminates automatically upon death, declaration of disappearance, incapacity to act or bankruptcy of the principal.

Share Transfer Formalities

The transfer of shares (in an AG) or quota (in a GmbH) requires the following:

- A valid underlying obligation.
- Transfer of ownership.
- Corporate approvals (if required).
- Entry of the acquirer in the share (in an AG) or quota (in a GmbH) ledger.
- Filings.
- Reporting obligations.

Valid Underlying Obligation

Any valid transfer of shares (in an AG) or quota (in a GmbH) requires a valid underlying obligation for such transfer. This is usually a purchase agreement, but can be any obligation, be it from private law (e.g. donation or contribution) or any other area of law. In case of quotas, Swiss law prescribes the written form for such agreement (see Articles 785 to 788 of the Code of Obligations).

Transfer of Ownership

Based on the underlying obligation, the shares or quota require formal transfer, such transfer formalities varying depending on the legal form of the shares or quotas and the type of participation rights involved. The most common forms are:

- Shares in an AG with physical share certificates issued: Hand-over of the physical share certificate is sufficient for a transfer of ownership of bearer shares; whereas, in case of registered shares, an additional endorsement of the assignor on the reverse side of the share certificate is required.
- Shares in an AG with no physical share certificates issued: Written declaration of assignment is required.
- Quotas in a GmbH: Written assignment agreement between the assignor and the assignee, which must include a statement concerning:
    - potential obligations for additional financial contribution obligations or further ancillary performance obligations,
    - non-compete obligations for company members, and
    - right of first option, right of pre-emption and purchase rights of company members or the company, or any penalties set out in the articles of association (for violation of obligations either, provided for by law or in the articles of association; for example, a non-complete obligation).

Corporate Approvals (if required)

The transfer of shares (in an AG) or quotas (in a GmbH) may require the approval of certain corporate bodies.

In case of an AG, the articles of association may provide that the board of directors (typically) or the shareholders' meeting (exception) must approve the transfer of shares.

In case of a GmbH, the approval by the members' meeting is required for any quota transfer, unless the articles of association expressly deviate from this principle.

Entry of the acquirer in the share (in an AG) or quota (in a GmbH) ledger

The share or quota ledger is of a purely private nature and therefore only has an effect on the internal relationship between the company and the shareholder or member. The company may only consider those persons entered in the share or quota ledger as its shareholders or members. For example, dividend payments or the allocation of subscription rights are therefore, subject to certain exceptions, only permitted to persons entered in the ledger.However, the share or quota ledger merely has the significance of a disprovable presumption in the relation between company and shareholder or member, and if the company knows or should know that an entry is incorrect, it may not rely on it.

Filings

No filing requirements apply in case of an AG. In case of a GmbH, the owners of quotas (i.e. company members) must be registered with the Register of Commerce. The legal effect of such registration is however limited to the same extent as the entry in the quota ledger. It is to be noted that any documents filed with the Register of Commerce are publicly accessible.

Reporting Obligations

Acquirers of shares or quotas in a company, acting solely on their own account 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 (see Articles 697j to 697m [for an AG] and Article 790a [for a GmbH] of the Code of Obligations). Non-compliance with these 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.

  (*Articles 697j and 697m of the Code of Obligations*.)

Notaries and Notarisation

Role of the Notary

As a practical matter, the involvement of a notary can have an impact on the timetable of the transaction.

Federal law requires a notarised public deed for certain types of transaction and such public deeds require notarisation. However, it is uncommon to have an acquisition executed as a public deed, unless the transaction involves the transfer of real estate or certain forms of guarantees pursuant to Article 492 et seq, Code of Obligations. Furthermore, the articles of association of a GmbH can require that the undertaking to transfer quotas in a GmbH must be notarized. This mostly applies to articles of association which pre-date 1 January 2008, when the until then mandatory statutory notarization requirement for transfers of quotas in GmbHs was abolished in the course of a revision of the Code of Obligations.

In contrast to many other countries, the transaction value is irrelevant to determine whether formal requirements apply.

The act of notarisation is mainly governed by cantonal public law. Each canton has its own notaries and there are essentially three notarial models: Private notary's office (whereby any attorney with the required degree may act as public notary), official public notary's office (such notaries being employed by the respective authorities), and mixed forms. Real estate transactions must be notarised in the canton where the property is located. For other transactions, there is no limitation on where notarisation can take place, unless cantonal law imposes special restrictions.

A notary only records acts performed in its presence and does not have the power to change the terms of a specific deal.

Notaries' Fees

Notaries' fees are subject to cantonal public law. In most cantons, in particular such cantons with official public notary offices and mixed forms, cantonal public law determines the fees, typically in relation to the transaction value, often combined with caps. There are, however, exceptions in cantons with mixed forms (for respective private notaries) and with private notary's offices, where fees are negotiable.

Closing in Escrow /Conditional Closings

Swiss law does not provide for a specific mechanism for closing to take place subject to fulfilment of an outstanding formality. If required, the parties agree on such process in the relevant acquisition agreement.

Other Considerations

Lawyer's Undertaking

The concept of an *undertaking* as defined under the UK Solicitors Professional Conduct Rules (that is, a commitment given by a solicitor to their client to do something) does not exist under Swiss law.

Opinion Letters

Legal opinions are not market practice in Swiss transactions and only agreed upon in rare cases in cross-border transactions with UK or US involvement.

Post-Closing Formalities

In Swiss transactions with non-listed companies, there are no mandatory post-closing formalities.

However, there are market standards usually adhered to in case of share purchases:

- The respective agreement typically provides for an obligation of the acquirer to grant discharge from liability to the members of the board of directors and the management up to, and including, the closing. Such discharge is to be granted immediately after closing in an extraordinary shareholders' or members' meeting, and at the occasion of the next ordinary annual shareholders' or members' meeting.
- Changes to the acquired company/companies' corporate bodies are usually to be completed and filed with the respective authorities (in Switzerland: the competent Register of Commerce).

END OF DOCUMENT

