

# Due Diligence for Private Acquisitions (Switzerland)

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This Practice Note considers the purpose, scope, and practical aspects of a legal due diligence investigation for the purchase of a private company or business in Switzerland.

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## Types of Due Diligence

- Legal Due Diligence
- Commercial (or Business) Due Diligence
- Financial Due Diligence
- Tax Due Diligence
- Due Diligence for Industry Risk

## Scope of Due Diligence Review

- Environmental Due Diligence
- IT Due Diligence
- Data Protection Due Diligence
- Insurance Due Diligence

## Organising the Due Diligence Process

- Discuss Scope of Due Diligence with Buyer
- The Due Diligence Team
- Due Diligence Checklist and Questionnaire
- Data Room
- Vendor Due Diligence Reports
- Other Sources of Information
- Contact with Target's Management

## Confidentiality

- Disclosure of Sensitive Information

## Reviewing Information: What to Look for

- Corporate Information
- Material Agreements
- Licences and Authorisations
- Employment Matters
- Litigation and Outstanding Claims

## Communicating Results of Due Diligence

During the Due Diligence Investigation

Due Diligence Summaries

Due Diligence Report

Third-Party Reliance on the Due Diligence Reports

## Seller Due Diligence

### Due Diligence Considerations for Private Equity Buyers

Due diligence is the investigation of a person or business. In the context of business acquisitions, the parties use the due diligence process to gather information about each other and about the target business or assets that are for sale. Although the seller occasionally conducts due diligence on the buyer (see *Box, Seller Due Diligence*), the due diligence process is usually more significant for the buyer.

This Practice Note considers, from the buyer's perspective, the purpose, scope, and practical aspects of a due diligence investigation for a private share or asset purchase in Switzerland. It outlines the process for legal due diligence, including:

- How to organise the due diligence process.
- The various sources of information in a typical due diligence investigation.
- How the information gathered should be reviewed and presented.

It also considers issues of confidentiality and data protection in Switzerland.

The primary purpose of a due diligence review is to obtain enough information about the target's business to enable the buyer (or other parties with an interest in the transaction, for example, lenders financing the transaction) to decide whether the proposed acquisition represents a sound commercial investment. Due diligence is effectively an audit of the target's legal, business, and financial affairs. It is therefore a crucial bargaining and risk control tool for the buyer.

## Types of Due Diligence

### Legal Due Diligence

In any significant acquisition, a legal due diligence investigation should establish the following key information about the target business:

- Does the seller have good title to the shares in the target company, and does the target have good title to its assets?
- Are there any unstated or understated liabilities or risks or hidden reserves associated with the target company or assets?
- Are there any restrictions on the business or transfer of ownership?
- Is the declared condition of the property and assets as stated?

- Are there any jurisdiction specific legal, regulatory, or other circumstances limiting the envisaged transaction or the operation of the target post-acquisition?

Detailed information on the target business is required, so that the buyer is in a better position to:

- Confirm the value of the target business or assets.
- Determine the preferred structure of the transaction.
- Determine any consents or approvals that may be required for the transaction, or any contractual prohibitions on the transfer of key contracts or assets. For example, the consent or cooperation of industry regulators, trade unions, tax authorities, competition authorities, shareholders, or important customers or suppliers of the target.
- Plan the integration of the target business.
- Determine whether any ancillary documents are needed (for example, a transitional services agreement).
- Determine how to deal with risks identified in the due diligence process.
- Bargain with the seller.

The buyer will inevitably seek contractual protection from the seller in the form of warranties and indemnities but, in practice, the protection offered may be limited by disclosures and other contractual provisions. While due diligence is not a substitute for contractual protection, it is an aid for the buyer to determine what contractual protection it requires from the seller and what risks it is not prepared to assume.

Furthermore, depending on the nature of the targets, and occasionally the buyer's business, a buyer may decide to focus due diligence on particular areas. In case of regulated sectors such as financial services, due diligence would typically include regulatory compliance as a focus area, with due diligence in some cases extending to the buyer's business, for example due to group oversight or fit and proper requirements on the buyer and its management.

## **Commercial (or Business) Due Diligence**

In addition to the legal due diligence review, specialist advisers may be required to contribute commercial (or business) due diligence. Commercial due diligence looks at issues such as the market in which the business operates, competitors, the business's strengths and weaknesses, production, human resources, sales and marketing, and research and development. Some of the results of this part of the due diligence review will be relevant to the legal due diligence.

The commercial due diligence aims to test the assumptions already made in the buyer's acquisition plan and to identify the management action required by the buyer to take effective control of, and reduce risk in, the business once the deal has closed.

## **Financial Due Diligence**

As part of the due diligence process, the buyer may instruct accountants or financial advisers to prepare a report on the financial aspects of the target business, including a review of the target's financial statements. Financial due diligence is not the equivalent of a financial audit. Financial due diligence focuses on the areas of the target's financial affairs that are material to the buyer's decision to proceed with the transaction. The buyer can then assess the financial risks and opportunities of the deal and whether, given these risks and opportunities, the target business will fit well into the buyer's strategy. Financial due diligence may also help quantify:

- Potential synergies.
- The best acquisition and financing structure.
- The impact of the acquisition on the buyer's performance metrics. When the buyer's accounting policies are more conservative than those followed in the target business, it may be necessary to make appropriate adjustments to measure the true impact.

## Tax Due Diligence

Tax due diligence is usually carried out by the buyer's tax advisers or tax lawyers. This is a key exercise to ensure the target company is properly accounting for tax and that there are no potential tax liabilities which could be triggered by the sale.

In particular, the tax due diligence may include a review of:

- Copies of all returns related to income tax, VAT, stamp duty and withholding tax returns.
- All correspondence with any federal, cantonal, or municipal tax authorities concerning adjustments or questioning compliance.
- All tax rulings (binding information issued by the competent tax authorities on the request of the relevant taxpayer in respect of the tax treatment of a planned, tax-relevant situation) obtained by the target.
- The list of returns and the years thereof that have been audited by federal, cantonal, or municipal tax authorities.
- The list of the relevant taxes applicable to the target (and any subsidiaries).
- Copies of documents concerning any tax litigation proceedings.
- Copies of all legal and accounting tax opinions received by the target.

Tax due diligence (typically with a limited scope) is also carried out on intragroup transactions that, for example, could trigger a clawback of stamp duty or capital gains tax reliefs on the exit of the target.

## Due Diligence for Industry Risk

The buyer also needs to identify the main areas of risk and liability inherent in the industry in which the target operates. This sets the emphasis of the legal due diligence exercise and enables the buyer to seek appropriate contractual protections from the seller. The buyer should consider the following issues:

- What are the "normal" risks in this industry?
- What is the known reputation of the target company and how has it been run?
- What is the assessment of those who are selling the business and, if different, those who have been running it?
- Does the buyer have the personnel to run the business if the management team it acquires are not up to task?

If a buyer operates in the same industry as the seller and is purchasing the target business or assets for growth or consolidation purposes, the buyer may not engage in much operational due diligence or require a thorough legal review of certain standard contracts.

If personnel are important, enquiries should focus on employment conditions and motivation. If the industry sector is heavily regulated, such as financial services or pharmaceuticals, questions about compliance with applicable regulations need to be satisfactorily answered in advance. If the post-acquisition performance depends on a few critical contracts, it will be very important to ascertain, to the extent not prevented by antitrust requirements, the attitude of the other parties to those contracts to the acquisition before it takes place.

## Scope of Due Diligence Review

Many factors influence the scope of the due diligence investigation. It is important to determine the scope at the outset because it dictates how many people are needed, how much time is required, whether outside experts are engaged and depth of review. Common factors that influence the scope of a due diligence review include:

- **Deal Structure.** For example, if the transaction is a share purchase or merger, the buyer will likely need information on the entire business. In an asset purchase, the buyer may only focus on the specific assets and liabilities it is acquiring. Typically, in an asset purchase, the due diligence process would not seek to address establishing the chain of title in the shares of the target nor review the target's corporate governance to the extent not relevant for the purchased assets.
- **Industry.** The industry of the target business may influence areas of due diligence on which the buyer will concentrate (see *Due Diligence for Industry Risk*).
- **Global presence.** If the target business has global operations, it is important to assess compliance with applicable trade controls and bribery and corruption laws, in particular articles 322ter seq. of the Swiss *Criminal Code* SR 311.0.
- **Competition.** If the buyer and seller compete, they may want (or be required by competition or antitrust laws) to keep certain information (such as pricing, customers and suppliers) confidential until after the transaction is completed (see *Disclosure of Sensitive Information*). Furthermore, transactions meeting certain criteria may be subject to notification and approval by the Swiss Competition Commission (merger control).
- **Purpose.** For example, if two companies are looking for a trade advantage or element of synergy through a merger, the investigation will focus on matters such as economies of scale, marketing advantages, and competition issues.
- **Risk tolerance.** The buyer may be willing to purchase a target business or assets without engaging in much due diligence if the price is right. The buyer's legal advisers should engage in a thorough discussion with the buyer about its risk tolerance level and advise their client about potential risks involved in the transaction.

The extent of the investigation is also likely to be governed by practical realities, such as:

- **Access to seller and target business.** The seller often restricts access to itself or the managers of the target business to comply with statutory requirements, limit interference and protect its proprietary information.
- **Expense.** The buyer may limit the scope of the due diligence investigation to reduce its expenses. Sometimes, a buyer conducts its investigation in stages and only increases spending when the likelihood of the deal closing increases.
- **Time constraints.** The parties may wish to complete the transaction by a certain date (such as fiscal year end) or the seller may have enough bargaining power to limit the time allowed for due diligence (for example, in an auction).

Even if the investigation is well-focused, there needs to be a limit on the information to be supplied. For example, a due diligence request to review all current contracts of the target business could turn up many small contracts entered in the ordinary course of business that will have little bearing on the price or risks of the transaction. One solution would be to ask only for details of

all contracts entered outside the ordinary course of business, review only the templates for standardised contracts, and to put a monetary floor on the value of contracts entered in the ordinary course of business which are to be disclosed.

Although contractual protection is no substitute for a thorough due diligence exercise, it may offer some comfort where, for example, time is short and due diligence is limited. In these circumstances, the buyer should at least seek to investigate key issues and take other steps to protect itself. For example:

- Ensure that warranties and indemnities are sufficiently wide and specific.
- Consider negotiating a retention of the purchase price to cover potential warranty claims.
- Propose a price adjustment.
- Purchase warranty and indemnity insurance protection.

Depending on the nature of the target's business, the buyer may also want to instruct experts such as environmental experts, surveyors, IT consultants, or other relevant specialists.

## Environmental Due Diligence

The acquisition of a company that is a manufacturing or processing company, or whose assets include land used or previously used for industrial processes, will raise the need for environmental due diligence. The issues to investigate include the value of the target and its assets, title to land, potential responsibility for any clean-up, and liability generally in relation to environmental damage.

If these concerns are relevant, a buyer must decide on the level of investigation it wishes to undertake. This may range from a brief site visit and a desktop review of information including registers of polluted sites, historical maps, geological or hydrological surveys and process information, to a more detailed survey involving detailed sampling of soil and ground water.

The aim will be to determine and allocate responsibility for clean-up and to obtain protection where appropriate from the seller.

## IT Due Diligence

If the target company is heavily dependent on IT, or its business is the provision of IT services or products, then IT due diligence may be important to both buyer and seller (for general guidance not specific to Switzerland, see [Practice Note, Transferring IT Systems \(UK\)](#)).

The following factors are key to due diligence in an IT context:

- **The relationship between target and seller, which may not cease on completion.** Following a sale, the target may continue to provide IT services to the seller (or vice versa). This continuing relationship raises the importance of due diligence, as the buyer may be reluctant to look to warranties and indemnities. Parties may have to enter into transitional service agreements where services are continued after the transaction closes.
- **IT assets will include intangible intellectual property (IP) rights.** Therefore, due diligence will be focused on these rights to ensure that the sale of the target will not affect licences or other rights, to establish what consents may be necessary and to determine ownership of copyright.

- **Skilled personnel are key assets for an IT company dependent on know-how.** Investigating this asset requires diplomacy and speed to prevent disgruntled personnel from leaving the target business.
- **Integration of the target's IT systems in the buyer's IT environment may be a key factor to consider.** Depending on the nature of the transaction, post-acquisition integration might be desired and any integration should be reviewed in terms of feasibility, timeline, and costs, in particular when complex or fragmented IT environments are at hand.

Additionally, cyber security risks and data privacy breaches can result in potentially significant regulatory sanctions (including fines) and, more generally, the risk of litigation. These risks and liabilities are all relevant to the determination of the target company's value.

## Data Protection Due Diligence

Depending on the nature of the target's business, data protection rules may play a prominent role in the mergers and acquisitions (M&A) process. Data protection considerations during the due diligence process mainly focus on two aspects:

- Review of the target's data protection policies, procedures, and processes.
- Ensuring that the transaction in general, and the due diligence in particular, are executed in compliance with applicable data protection regimes. Aside from potential limitations on data shared on a transaction, considerations also include the choice and setup of the virtual data room, the security of personal data throughout the due diligence process, and its return or destruction in the event that the transaction does not proceed.

Due to the increased commercial sensitivity around data protection, as well as increased enforcement efforts by the competent authorities, the involvement of data protection lawyers in M&A transactions has increased significantly in the past decade.

## Insurance Due Diligence

Insurance due diligence is becoming more common in Swiss M&A transactions, in particular, when the target exceeds a certain size. Insurance due diligence, typically performed by specialist advisors or insurance brokers in cooperation with the buyer's M&A lawyers, focuses on the following key areas:

- Review of the target's insurance programme and policies in order to establish potential gaps, potential post-acquisition synergies and costs.
- Review of the target's claim history with the goal of enabling the detection of operational deficiencies, allocation of the economic benefit of pending claims, and determination of meaningful representations and indemnities in the acquisition agreement.

## Organising the Due Diligence Process

### Discuss Scope of Due Diligence with Buyer

It may be helpful for the legal adviser to meet with the buyer at an early stage to agree the parameters of the investigation. At this meeting, the adviser should find out how much their client already knows about the target business and ask the buyer to highlight any areas of concern.

Before beginning the due diligence review, the buyer's lawyers should establish with their client:

- A due diligence budget.
- The scope of review (see *Scope of Due Diligence Review*).
- What type of oral or written report is required (see *Due Diligence Report*).
- The deadline for completing the due diligence review and delivering the report.
- Whether any outside consultants should be engaged.
- If certain areas should be a primary focus.
- If there are any threshold issues that could make or break the deal (known as deal breakers) or if there are materiality thresholds to be applied.
- The process for communicating with the seller and the management of the target business.

The extent of the due diligence investigation should be in keeping with the value and importance of the acquisition to the buyer and the potential risk. It is important to agree the scope of the legal due diligence investigation at the outset and for the buyer to understand the limits of such scope.

## The Due Diligence Team

It is essential that the acquisition team is made up of appropriate people under clear leadership and with good reporting structures. The team carrying out the due diligence must involve the buyer's own personnel as well as its legal and financial advisers and accountants. In some cases, it may also be necessary to retain outside consultants in other areas such as regulatory compliance, environmental compliance, or insurance. As the due diligence team may be large and comprise multiple organisations, it is important to have a point person to organise and coordinate the process. The point person may be the buyer, but often the buyer delegates this responsibility to its lawyers.

Generally, the legal team consists of corporate lawyers and other specialists (such as environmental, employee benefits, real estate, data protection, antitrust and intellectual property lawyers). Lawyers doing the due diligence investigation must be fully briefed about the purpose of the acquisition, the depth of investigation required, and the key areas of importance for the client. If this information is not given, the onus is on the lawyers carrying out due diligence to ask the relevant questions rather than proceed with an unfocused investigation.

## Due Diligence Checklist and Questionnaire

One of the most important preliminary activities in the context of a due diligence exercise is to prepare the due diligence checklist, which is a list of the documents and information to be requested from the seller and the target company that should be uploaded in the data room. To prepare the due diligence checklist, the buyer's advisers should read the main publicly available information on the target company (see *Other Sources of Information*).

In drafting the due diligence checklist, the adviser should consider the scope of the due diligence exercise that has been agreed with the client (see *Scope of Due Diligence Review*).

The cornerstone of any due diligence exercise is the questionnaire or information request that sets out the areas of investigation and a list of questions and enquiries to be put to the seller. The due diligence questionnaire should be well organised and easy to

update. Ideally, the questionnaire should not be too technical and each section should be stand-alone so that it can be considered by the appropriate adviser. For general (non-Switzerland specific) guidance, see *Standard Documents, Legal Due Diligence Information Request: Asset Purchases (long form) (UK)* and *Legal Due Diligence Information Request: Long Form: Share Purchases (UK)*.

These questions will usually be supplemented by further requests as the negotiations proceed and as the buyer learns more about the target. Care should always be taken to tailor standard due diligence questions so that they are relevant to the target company and the relevant transaction.

## Data Room

The bulk of due diligence review involves reading documents of the target business, including contracts, financial reports, and corporate records. A seller usually sets up a data room, in which relevant information on the target will be made available. Rarely, and generally limited to smaller transactions, the seller may either send the buyer electronic or hard copies of documents.

Nowadays the data room is, with rare exceptions, a virtual rather than a physical data room at the seller's offices or the office of the seller's attorney. If the materials are stored on an online data site, the seller determines who is invited to the data site and gives password-protected access. It is important to determine which due diligence team members need access to the data site so that the buyer's lawyers can submit a comprehensive request for access to the seller.

For general (non-Switzerland specific) guidance on due diligence data rooms, see *Practice Note, Setting up a Data Room (UK)*.

## Vendor Due Diligence Reports

It is common in auction sales for the seller to conduct a formal seller due diligence process culminating in the preparation of one or more vendor due diligence reports (also referred to as VDD reports or VDDRs) by the seller's advisers to be provided to prospective buyers.

The types of VDD report commissioned by a seller vary from transaction to transaction. Financial VDD reports are common. Other VDD reports may cover legal, tax, commercial, and property matters.

VDD reports are initially given to prospective buyers on a non-reliance basis, but on the understanding that the reports will be addressed to the successful bidder who can then often rely on them in the same way that they rely on the bidder's own due diligence reports, subject to the report provider's terms of business.

The main purpose of providing VDD reports is to accelerate the bidders' due diligence on the target company. While they require considerable management input before the sale process begins, once it is underway, management tends to spend less time answering due diligence questions from bidders. The provision of a VDD report does generally not lead to buyers foregoing their own due diligence process, but may allow the buyer to focus its efforts on key areas thus accelerating the process.

## Other Sources of Information

Information about a target company can be derived from a variety of sources, including the website of the seller or the target business.

### Sources of Corporate and Financial Information

Key corporate information can be obtained from:

- **The relevant cantonal Commercial Register: *Handelsregisteramt* (German), (*Office du registre du commerce* (French), and *Ufficio del registro di commercio* (Italian)).** This includes incorporation documents, articles of association, capital increases, and information on changes of the target's management and board. The Commercial Registers are obliged to provide a copy of the recent articles free of charge, with the provision of further documents underlying the Commercial Register entry being subject to charges in certain cantons and being freely available online in others. It is typical that the target provides such information in the VDDR rather than the buyer obtaining it from the Commercial Register. See [Company Searches](#).
- **Statutory books.** Companies must maintain a share register and register of beneficial owners.
- **Financial information.** This includes (audited) annual (consolidated) financial statements and management reports, if available. This information should be requested from the seller. There is no requirement to file the company accounts on the Commercial Register.
- **Online insolvency searches.** To ensure that the target, its subsidiaries, or the seller have not been declared bankrupt or are not subject to a moratorium of payments, online searches can be carried out in the Commercial Register and the Swiss Official Gazette of Commerce, it being noted that bankruptcy proceedings are not disclosed in their early stages. Furthermore, a debt enforcement register excerpt may be obtained at the debt enforcement office at the seat of the target. As the debt enforcement office only makes these available if a buyer can prove its legitimate interest in such an excerpt, it is standard in Swiss due diligence processes that the target is requested to provide such excerpt in the VDDR.
- **Applicable regulators.** For example, the Swiss Financial Market Supervisory Authority (FINMA), is Switzerland's independent financial markets regulator (see [FINMA: Swiss Financial Market Supervisory Authority FINMA](#)). Its mandate is to supervise banks, insurance companies, financial institutions, collective investment schemes, and their asset managers and fund management companies. FINMA publishes information about companies under its supervision such as authorisations and issued fines.

Non-public corporate information may also be obtained through specialist commercial providers and news service providers, such as [finews.com](#) and [The Financial Times](#). However, the buyer will not usually be able to rely on the accuracy of this information as part of the due diligence process.

### Sources of Information about Real Property

Information about real property can be obtained from the relevant land registry (*Grundbuch* (German), *registre foncier* (French), and *registro fondiario* (Italian)) partially on payment of a fee. However, certain information such as mortgages are only disclosed on excerpts delivered to the owner of the real property, which is why it is standard that the target is requested to provide such an excerpt in the VDDR. There is no centralised database of real property, instead, land registers are organised at a cantonal level and, depending on the canton, maintained at a cantonal, district, municipal or land registry circuit level. To find the relevant land registry, see [Cadastr.ch: Cadastralinfo – easy access to real estate data](#).

### Sources of Information about Intellectual Property (IP)

Information about IP rights can be obtained through the following searches:

- **Patents.** Searches for Swiss and European patents that are effective in Switzerland and Liechtenstein can be conducted through the Swissreg database (see [Swiss Federal Institute of Intellectual Property: IP rights database](#)). Pending Swiss (but not European) patent applications can also be viewed on the platform.
- **Trade marks.** Searches for Swiss trade marks can be conducted through the Swissreg database. If carrying out IP due diligence, it is also important to search the World Intellectual Property Organization (WIPO) database for international

trade marks, which do not feature on Swissreg, even if they are effective in Switzerland (see *WIPO IP Portal: Madrid Monitor*).

- **Design rights.** Searches for registered design rights can also be conducted through the Swissreg database. Searches for international design rights that are effective in Switzerland can be conducted through the relevant WIPO database (see *WIPO IP Portal: Hague Express*).
- **Copyright.** There is no copyright register in Switzerland.

In due diligence processes, it is inadvisable to rely on the results of these searches alone. Comprehensive searches should also be conducted by a patent attorney, trade mark search specialist, or design specialist (as applicable).

## Contact with Target's Management

Establishing contact with the target's management and discussing the business with them can be an important aspect of due diligence. The buyer will often ask to visit the target business site and talk with members of the target's management. The buyer's lawyers may also have follow-up questions after reading due diligence materials which can be answered more completely during a phone call.

However, due to confidentiality concerns, the target business or seller may not want its employees to be aware of the transaction, so it may only grant access to a few members of senior management. Accessing management of the target business or seller (in an asset sale) during the due diligence process can be a hotly negotiated matter.

## Confidentiality

Although a seller typically requires prospective buyers to enter into a confidentiality agreement, these are difficult to enforce in practice. If the buyer is a competitor or potential competitor, a seller may be particularly reluctant to disclose sensitive information about the target business until it can be sure that the sale will go through. Furthermore, antitrust law limits the amount of information which may be shared before completion of a transaction.

The knowledge that a business is for sale can also be unsettling for employees, customers, and suppliers. It can lead to a loss of customers or key staff during the sale process. In some cases, the seller wants to keep its intention to sell the target confidential from all but the most senior management. This limits the scope of the information available for a full due diligence investigation.

The seller will want to ensure that no approaches are made to its customers, suppliers, management, or employees either with a view to poaching them or obtaining more information. In an auction sale, it is more difficult to maintain confidentiality because of the number of parties involved. Bridging the gap in expectations between the seller, who wants to restrict the release of information, and the buyer, who wants to gather as much information as possible, is a crucial element of the initial stages of any transaction.

## Disclosure of Sensitive Information

There are legal restrictions on the disclosure of sensitive information which the seller must be very careful to respect when providing information to the buyer in the context of a due diligence investigation.

Information classified as a governmental secret (art.267 Penal Code (German: *Schweizerisches Strafgesetzbuch*; French: *Code pénal suisse*; Italian: *Codice penale svizzero*), a military secret (art. 86 Military Penal Code (German: *Militärstrafgesetz*; French: *Code pénal militaire*; Italian: *Codice penale militare*)), certain information relating to a criminal investigation, or certain

information disclosed to a professional in their professional capacity (such as a legal adviser) cannot be disclosed, regardless of the existence of a confidentiality agreement.

Information that is commercially or competitively sensitive (in particular, if a buyer is a potential competitor of the target or the seller) should only be shared where an agreement has been put in place to strictly limit the exchange of the information to a "clean-team" of certain advisers of the buyer, or certain employees of the buyer, who do not have past, current, or anticipated operational responsibilities within the buyer (for example, they are not involved in customer facing or decision making roles on competitively sensitive issues regarding the buyer's business for competing products).

## Reviewing Information: What to Look for

Following the due diligence investigation, the first step in the review is to consider the completeness of the responses to the enquiries and whether all documents requested have been supplied and all questions satisfactorily answered (see *Due Diligence Checklist and Questionnaire*).

A review of the target's contracts may raise various issues for consideration. There may be contractual covenants that could be triggered by the transaction, such as a change of control clause. Any provision in the target's organisational documents imposing limitations on anyone obtaining more than a specified percentage of the voting rights might also act as an obstacle to assuming control of a business. Antitrust or other regulatory issues may require the buyer to dispose of various brands owned by itself or the target before the acquisition can proceed.

The sections below are a guide to assessing corporate information, material agreements, licenses, and litigation disclosed as part of the due diligence investigation. It does not provide an exhaustive list, as each transaction may bring its own particularities.

## Corporate Information

### Company Searches

The commercial registers are maintained at a cantonal level (Commercial Registers) (for a list of Commercial Registers, see *Central Business Name Index (Zefix): Registries of Commerce of Switzerland*).

A company search at the relevant Commercial Register can reveal a wealth of information about a target company, such as:

- Details of directors, management, and authorised signatories, including signing authority.
- Articles of association.
- Equity capital, including past increases, decreases, and share splits.
- Mergers and de-mergers as well as asset transfers under the Swiss Merger Act.
- Branch offices.
- Liquidation or winding-up resolutions.

Which companies to conduct a search upon depends on the nature of the transaction. On most share purchases, the buyer or its advisers should search against the target and its subsidiaries, any companies in which it has a significant shareholding, the corporate seller and corporate guarantor (if applicable). On an asset purchase, where there is no separate target company to search, a search against a corporate seller may be helpful.

The information available at the Commercial Register is not necessarily completely up to date.

It is therefore advisable to run a search against all relevant companies at the outset of the due diligence investigation and then repeat the exercise immediately before exchange to check that there have been no changes since the first search (if so required). The buyer typically also requires a seller to warrant under the purchase agreement that all the information included in the Commercial Register is complete, correct, and up to date.

### Corporate Information Provided by the Seller

In addition to information obtained through a Commercial Register search, the buyer normally requests copies of the following documents from the seller in its due diligence questionnaire:

- **Articles of association.** The articles of association of the company may contain provisions that would be of interest to the buyer, such as provisions relating to shareholder approvals, minority shareholder protections, rights of appointment of directors or unusual limits on the authority of the board of directors, enhanced quorums, and veto rights on certain matters.
- **Organisational regulations and policies.** The board commonly issues organisational regulations (by-laws), governing the organisations and powers of the board as well as the delegation to the company's management. Depending on the nature and the size of the business, a company may have issued policies governing a broad variety of topics such as authority to represent the company, compliance matters, operational procedures, and employee matters.
- **Share register.** The share register may reveal the existence of a minority holding that could limit the buyer's freedom of action after the acquisition. The share register might also show any discrepancies between the shareholding as described by the seller and the shareholding as recorded by the company. It might also show that shares are pledged.
- **Pledges.** In addition, it is important to check that the corporate seller has not pledged its shares in the target company and that the target has not pledged any of its assets. On an asset sale, it is important to check whether there are any pledges on the assets being sold.
- **Board and general shareholders' meeting minutes.** All material actions of the company should be reflected in the minutes. Both board minutes and general shareholders' minutes can be a rich source of information, containing references to, for example, acquisitions and disposals, financing, litigation, poor or unusual operating results and issues of guarantees and security interests in the company's assets.
- **Minutes of board committees.** A review of board minutes alone may not be enough if the board has formed committees (for example, an audit committee) that focus on certain significant aspects of the business.
- **Minutes of management meetings.** Larger or regulated companies typically keep minutes of the meeting of their executive management, which should be requested and reviewed in due diligence exercises.
- **Reports of statutory auditors.** In addition to the short reports provided to the shareholders' meetings, auditors may provide in-depth reports to the management and board of the company, which contain detailed findings, suggestions on possible improvements, and other valuable information.
- **Financial statements.** It is important to review the financial statements of the last three to five years of the company to understand its financial situation. The legal due diligence team should focus on the assets (that is participations and accounts receivables (in particular from shareholder(s))) and liabilities (including accruals and accounts payables (in particular from shareholder(s))), and interact with the financial adviser to coordinate their findings and better understand the accounting data of the target.

- **Management accounts.** Note that the seller may be reluctant (or unable) to provide management accounts if the listed company has recently published its annual accounts.

## Material Agreements

Every business has agreements that are material to the success of its operation. These may include:

- Supply agreements for crucial raw materials or services.
- Sales agreements (for example, distribution, output or requirements contracts).
- Intellectual property licences (for example, patent or trade mark licences).
- Employment agreement (templates) and respective regulations.
- Service or management contracts (for key staff).
- Collective bargaining or trade union agreements.
- Leases for important equipment (for example, computers).
- Real property leases for facilities.
- Joint venture agreements.
- Shareholders' agreements.
- Loan and other debt agreements to provide capital to run the business.

Other agreements, such as agreements to dispose of assets, businesses, or shares may subject the company to continuing liability with respect to a business sold previously.

In addition, when buying a company out of a group, intra-group transactions involving the target company should be investigated to ensure they do not give rise to any contingent tax liabilities.

The due diligence enquiries need to identify those agreements that are material to the target's business. That is, those that will affect the price the buyer is willing to pay for the target or which pose material business or liability risks. The due diligence questionnaire typically indicates the criteria by which a contract is considered material, for example, by value.

Having identified the material agreements of the business, the reviewer should check that the contracts are effective, that they have been executed properly, and that they do not contravene any competition law or regulatory requirements.

The principal commercial terms of these agreements should be noted. The following questions are relevant to almost all enquiries:

- **Parties.** Are the parties to the agreement the persons to whom the agreement relates? For example, in a licence of intellectual property, is the company using the intellectual property the company named in the agreement or is the named party the parent or associated company of the user? Is the grantor of the licence the legal and beneficial owner of the intellectual property?

- **Execution of the agreement.** Has the agreement been properly executed? Did the person signing the agreement have the proper authority?
- **Effectiveness of agreement.** Is the agreement too vague to be enforceable?
- **Assignment clause.** Is the consent of a third party needed for the transfer of the benefit of the contract?
- **Change of control clause.** Does the agreement stipulate that the consent of the other contracting party must be given on a sale of shares in the business or a change of control of the business? Does the change of control affect any employees, for example, will it require a payment or result in an extended notice period?
- **Confidentiality.** Is the target already in breach of this clause in an agreement, possibly giving a right to damages against the target should it be acquired?
- **Warranties, guarantees, and indemnities.** Warranties in most commercial contracts either relate to compliance with applicable laws and regulations or compliance with the quality standards and the specifications of the contract. Additionally, there are certain standard indemnities relating to breach of third-party rights, breach of contract, and liability for damages. The extent of these warranties and indemnities should be noted.
- **Term and termination.** What is the date of commencement of the agreement? Is the agreement subject to conditions precedent, for example, a regulatory approval? When does the agreement terminate? Will a major supply contract (for example) terminate soon? Will any compensation be payable on termination of an agreement? What notice must be given to terminate the agreement? What actions entitle the other party (or the target) to terminate for breach?
- **Liability and exclusion clauses.** Is the liability of the other party or the target limited in respect of breach of the agreement? Is there an exclusion of liability in respect of the target's or the other party's obligations? If so, is it likely to be enforceable?
- **Intra-group transfers.** Are all intra-group transfers to which the target is party made at arms' length? Do any such transfers give rise to any contingent tax liabilities?
- **Restraint of trade.** Are any restrictions imposed on any party's ability to conduct its business?

The significance of issues raised by a review of the target's legal documents often depends on whether the proposed transaction is a share sale or an asset sale. For example, a change of control clause may be of no significance on an asset sale whereas it might be crucial on a share sale. On an asset sale, the assignment clause is critical.

Inevitably, material agreements raise their own specific issues in addition to the above. The buyer's intentions also have a bearing on the review of material agreements. For example, if a loan to the target is to be repaid on completion, the provisions of the loan agreement relating to prepayment and redemption are critical. If it is to be left outstanding, the buyer will want to be sure that the terms are appropriate when applied to it as the new borrower.

## Licences and Authorisations

Depending on the business performed by the target company, it may be obliged to hold certain licences and permits issued by the public authorities.

The due diligence review should identify that all necessary licences are in place, are duly held by the target company and are still in force. The necessary licences and authorisations depend on the nature of the business. For example, a company in the hospitality sector must hold a licence issued by the municipality where each of the businesses are located, while an insurance company will require a license to operate by FINMA.

A share sale transaction would normally not impact the status of the licences and authorisations since the entity holding the given licence or authorisation (that is, the target company) does not change. However, in an asset sale transaction, the transfer of the licence or authorisation may imply either a notice to the given public entity or even the need to request prior authorisation, depending on the licence or authorisation. Furthermore, in heavily regulated sectors, such as banking and insurance, share sales trigger filing and approval requirements.

## Employment Matters

Swiss employment relationships are, in addition to the terms of the individual employment contract, governed under:

- Collective bargaining agreements, in particular if such collective bargaining agreements have been declared generally applicable by the Swiss Federal Council.
- Title Ten of the *Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations SR 220* (Swiss Code of Obligations).
- The *Federal Act on Labour in Industry, Trade and Commerce SR 822.11* (Labour Act) and associated ordinances.
- The *Federal Act on Information and Participation of Employees SR 822.14* (Participation Act).

## Litigation and Outstanding Claims

Most businesses experience litigation or other claims from time to time. Common due diligence issues include:

- **Pending claims.** How many claims are currently pending or threatened? What is the estimate of damages? What is the status of each claim? What is the likelihood of success on the merits? Is there insurance coverage for such claims?
- **Litigation history.** Were there any large claims paid out in the past? Any class actions? What kind of claims is the target business a party to?
- **Litigation trends.** What are the common types of litigation? What is the average amount of damages? Are most claims settled or litigated?

## Communicating Results of Due Diligence

### During the Due Diligence Investigation

Part of the key to a successful due diligence investigation is communicating the results to those responsible for assessing the proposed transaction and making the decisions.

The due diligence review is usually carried out in parallel to the negotiation of the acquisition and the drafting of the acquisition agreement. Any significant information that might affect negotiations or the drafting should be communicated immediately to a senior lawyer or the client even though the due diligence exercise is not complete. All members of the team must be alerted to potential deal-breakers so that they understand what information is important and must be shared as soon as it is discovered.

Important information that comes to light during due diligence must be communicated to the buyer and to the directors of the buyer. Any problematic issues which come to light should then be raised at a full board meeting so that they can be properly considered by those responsible for approving the deal.

## Due Diligence Summaries

It is important when reviewing due diligence to keep careful notes of the findings. Often the buyer's lawyers create a written record summarising the key terms and conditions of each document. For sample templates of due diligence summaries, see *Standard Documents, Due Diligence Summary Template: Agreements* and *Due Diligence Summary Template: Organizational Documents*.

## Due Diligence Report

Once the investigation is complete, the information is consolidated in a due diligence report, which should cover the business, financial, legal, and other specialist areas of the investigation. For certain transactions, this may be an informal report focusing only on matters material to the transaction (a so-called "Red Flag Report"). For others, it comprises a complete audit of the target's business including an in-depth summary of the target's material contracts (known as a "Fully Fledged Report").

While the report is often addressed to executive management, it should be in a form that can be circulated to the board in advance of the meeting at which definitive approval of the acquisition will be considered or an executive summary should be provided along with the report. For general guidance, see *Standard Document, Legal Due Diligence Report: Acquisitions (UK)*.

Time must be allowed to review the report, follow up on further questions and evaluate fully the implications of what is revealed.

## Third-Party Reliance on the Due Diligence Reports

Sometimes (such as when the buyer finances the acquisition or seeks warranty and indemnity (W&I) insurance) the buyer is asked to share the due diligence report with a third party (such as the financing bank or members of the buying syndicate). Some firms permit the client to share the report, provided that the third party executes a non-reliance letter. Although most non-reliance letters state that sharing the report does not serve as a waiver of attorney-client privilege, it is unsettled whether this statement preserves privilege. Lawyers should find out from their client whether it plans to share the report with any third parties and whether any third parties expect to rely on the reports. They should then consult with the deal team to determine the appropriate course of action. If the client shares the report, lawyers should remind their client that the third party may review the report with a different objective and that the information in the report may reveal sensitivities about the target company that the buyer may want to keep confidential.

### Seller Due Diligence

Although this Practice Note is focused on the buyer, a prospective seller may wish to conduct its own due diligence of the target business or assets before and during the transaction to help it identify risks, deficiencies, and liabilities, enabling it to mitigate them before conducting the transaction.

A seller should also conduct a limited due diligence on the buyer. This will help the seller assess if the buyer can afford the target business or assets and obtain information about the buyer that the seller may leverage when negotiating the purchase agreement.

Furthermore, if the buyer is issuing stock to the seller as consideration or if the transaction is a merger of equals, the seller needs to conduct a thorough due diligence investigation of the buyer.

If the buyer is issuing stock, the seller should:

- Confirm that the buyer has authority to issue the stock.
- Confirm the value of the buyer's stock.
- Identify any impediments to the issuance.

In a merger of equals, each party needs to:

- Confirm the value of the transaction.
- Identify steps necessary to integrate the companies.
- Learn more about the other's businesses.
- Identify any impediments to the transaction.

### **Due Diligence Considerations for Private Equity Buyers**

A private equity buyer may have a different view on certain due diligence issues. Private equity buyers can be more risk-averse when they are trying to make a relatively quick profit on a highly leveraged acquisition. Generally, a buyer who is currently operating in the industry (known as a strategic buyer) is better equipped to understand the business of the target and to absorb an operational loss or messy litigation. As a result, private equity buyers often conduct more extensive due diligence reviews than other types of buyers and may seek greater contractual protections.

As opposed to a strategic buyer, a private equity buyer may not have certain operational capabilities. For example, if a private equity buyer buys a target business that does not have its own payroll department or IT systems, the private equity buyer will have to procure those services. A strategic buyer would likely have those services already in place for its existing business. As a result, a private equity buyer may need to focus on operational due diligence. In turn, the possibility to benefit from synergies may be key for a strategic buyer and may require in-depth due diligence in order to assess the potential of, and costs for, the exploitation of such synergies.

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