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1 Types of transaction

How may businesses combine?

In private transactions, businesses are usually acquired by the purchase of either shares or (all or part of) the assets and liabilities. Businesses can also be combined by a joint-venture agreement pursuant to which certain assets are transferred to a new corporation in exchange for shares. A public offer is the most common way to obtain control of a public company. Public offers may be structured as tender offers for cash or as exchange offers for securities or a combination of both (including mix and match).

Another way of obtaining control of a company, either public or private, is by a statutory merger. A statutory merger is effected by absorption (one company is dissolved and merged into another) or by combination (two companies are dissolved and merged into a newly formed company). In both cases, the assets and liabilities of the dissolved companies are transferred by operation of law to the surviving or new company. Shares and cash may be used as consideration. If shareholders are forced to accept compensation other than shares of the surviving company (squeeze-out), 90 per cent of all voting securities outstanding need to approve (see question 14).

As alternatives to a statutory merger, share-for-share transactions ('quasi-merger') or the formation of a new company, which takes over the assets and liabilities of the two combined companies in exchange for its own shares, can be pursued.

In transactions in which a company divests parts of its assets or liabilities to one or more acquiring entities, the parties may choose to effect the resulting business combination by way of a statutory demerger. In such case, the respective assets and liabilities of the divesting legal entity are transferred by operation of law to the acquiring company, and the shareholders of the divesting legal entity receive shares in the acquiring company as consideration.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are, in general, governed by the Swiss Code of Obligations (CO) and by the Federal Act on Merger, Demerger, Transformation and Transfer of Assets (Merger Act). Public offers for listed shares are, in addition, subject to the Federal Act on Stock Exchanges and Securities Trading (SESTA). SESTA applies to cash or share exchange offers addressed publicly to the holders of equity securities of Swiss companies listed on a Swiss exchange. It should be noted that SESTA provides for a mandatory bid rule: a person acquiring, directly or indirectly, more than 33.33 per cent of the voting rights of a Swiss company listed in Switzerland (regardless of whether such voting rights can be exercised) is required to submit an offer for all listed securities of the target. A potential target company's articles of incorporation can provide for an 'opting-out' (no mandatory offer obligation) or an 'opting-up' (increase of the triggering threshold up to 49 per cent of the voting rights. In case of a mandatory offer (including offers that would result in the triggering threshold being exceeded), the offer price may not be set below (minimum price):

- the weighted average stock price on the relevant Swiss exchange of the 60 trading days prior to the formal pre-announcement or the publication of the offer (if the stock is deemed not liquid, the minimum price corresponds to the value of the shares as valued by a qualifying expert); and
- 75 per cent of the highest price paid by the bidder for shares in the company (including privately negotiated block trades) in the preceding 12 months.

Non-mandatory public offers need to comply with the best price rule only (the highest price paid to a shareholder after the formal pre-announcement or launch of the offer or within a period of six months following the additional acceptance period has to be offered to all shareholders). In case of a cash purchase outside an exchange offer, a cash alternative needs to be offered to all shareholders. In case of a mandatory offer, the offeror must in any case offer a cash alternative (if otherwise structured as an exchange offer).

If the business combination results in the listing of new shares on a stock exchange, the listing rules of the respective stock exchange need to be complied with (eg, Listing Rules of the SIX Swiss Exchange (SIX)). In contrast, there is no general requirement to register securities or their owners.

The Swiss Federal Act on Cartels and other Restraints of Competition (ACart), in combination with the Ordinance on Merger Control, regulates merger control.

In public transactions, business combinations may be subject to insider trading, market manipulation and publicity rules. An impending acquisition or merger is deemed to be price-sensitive inside information. Insider trading and market manipulation are considered a felony under the Swiss Criminal Code.

There are no general currency transfer limitations or restrictions on foreign investments.

3 Governing law

What law typically governs the transaction agreements?

The transaction agreement is typically governed by Swiss law. It is common in Switzerland to draft such acquisition agreements in an Anglo-American style, since the statutory remedies provide only for limited protection in the event of a misrepresentation or breach of warranty or non-performance.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The parties to business combinations are obliged to notify the Swiss Competition Commission (ComCo) if:

- the aggregate turnover of the enterprises concerned exceeds 2 billion Swiss francs worldwide or 500 million Swiss francs in Switzerland; and
- the individual turnover in Switzerland of at least two of the enterprises involved exceeds 100 million Swiss francs.

Special rules apply for banks, savings institutions and insurance companies. A combination is deemed approved unless the ComCo decides within one month of notification to initiate an in-depth investigation. If this is the case, the final decision must be rendered within another four months. The merger may be: cleared, cleared subject to conditions or prohibited.

In public offers, the bidder must file the offer prospectus with the Swiss Takeover Board. Stock exchange filings are required if the business combination results in a listing of securities on a stock exchange. In such case, for instance with respect to the SIX, a listing application with listing particulars must be submitted to the Admission Board. In addition, filings with the stock exchange and publication of reports may be required based on ad hoc publicity rules or if a shareholder's participation reaches or passes certain thresholds as a result of the transaction (see question 6).

In certain regulated industries, such as the financial industry, notifications or approvals are required in connection with merger and acquisition transactions (see question 17). Under Lex Koller (the law on foreign ownership of Swiss property), the acquisition by a foreigner or foreign-controlled company of rights in rem over properties or shares, and the acquisition of unlisted shares of a company owning such rights is subject to governmental approval if (rules of thumb):

- one-third or more of the target company's assets or consolidated assets (ie, including the assets of its subsidiaries), at market value, consists of real estate other than commercially used real estate;
- the legal entity's actual purpose is to acquire or trade in real estate, or both of the above; or
- the legal entity possesses considerable land reserves suitable for residential buildings or industrial land reserves which will not be used within two to three years, or both.

For taxes and other fees, see question 18.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Public offers and listings require the publication of a prospectus. In a public offer, the target company's board of directors, and in a statutory merger, as a rule, the board of directors of all involved companies, must issue a special report to the shareholders stating its position on the offer in order to enable the shareholders to make an informed decision.

Pursuant to the Listing Rules of the SIX, a public company must inform the market of any price-sensitive facts (ad hoc publicity), which have arisen in its sphere of activity and which are not of public knowledge (eg, merger, business combination, etc).

The issuer must publish information without delay as soon as it has knowledge of the main points of the price-sensitive facts in question, unless:

- the new facts are based on a plan or decision of the issuer; and
- its dissemination is bound to prejudice the legitimate interests of the issuer. In this case, the issuer can postpone publication of price-sensitive facts as long as confidentiality of such facts is preserved.

A transaction effected under the rules of the Merger Act must be registered in the commercial register. As the commercial register is open to the public, a significant part of the documentation prepared in connection with such a transaction (eg, the merger agreement, financial statements, the merger report and the special audit report obtained in connection therewith) will be available for inspection upon registration. See question 6 with regard to the disclosure of significant shareholdings.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the SESTA, whoever directly, indirectly (including as a result of a business combination) or acting in concert with third parties, acquires or sells, for his own account, securities in a Swiss company listed in Switzerland, and who thereby reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the voting rights must report these participations to the company and to the stock exchange on which the shares are listed. The disclosure obligations are also triggered by put and call options and conversion rights (see 'Update and trends'). Both the intentional and the negligent violation of disclosure obligations are subject to fines.

Article 663c CO requires listed corporations to disclose, in their annual business report, the identity of shareholders or organised groups of shareholders with a title or beneficial interest of more than 5 per cent (subject to a lower percentage pursuant to the articles of incorporation) in the corporation's shares to the extent such interest is known to the corporation.

In the context of a public offer, the bidder and all shareholders holding more than 3 per cent of the voting rights of the target company must report all acquisitions and sales of equity securities in the target company and, if applicable, in the company whose securities are offered in exchange for the equity securities of the target company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under Swiss law, directors and senior officers of a corporation are bound to perform their duties with due care, to safeguard the interests of the corporation in good faith and to extend equal treatment to shareholders under the same circumstances. If they fail to fulfil these duties, they may become personally liable to the company and its stockholders and, in case of bankruptcy, to its creditors for the damage caused.

In the case of a public offer, directors and officers are bound to act in the best interests of the company and to abide by the requirement to treat all shareholders and all bidders equally (including due diligence access). In the context of a friendly takeover, the board of directors may, in normal circumstances, recommend acceptance without violating its fiduciary duties and without obligation to initiate an auction (for hostile transactions, see question 9).

As a rule, the corporations involved in a merger must consult the employees before the merger becomes effective. The employees may have the recording of the merger in the Commercial Register enjoined by the judge if such duty was violated.

Controlling shareholders owe no fiduciary duties to the company or its minority shareholders (unless acting as shadow directors of the company).

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights

The shareholders' rights over a business combination vary depending on how the parties have structured the business combination.

In a statutory merger, whether effected by absorption or by combination, the Merger Act requires a resolution of the shareholders' meeting approving the merger with a supermajority vote (ie, at least two-thirds of the votes represented and the absolute majority of the par value of the shares represented). No shareholder resolution is required with respect to intra-group mergers ('parent-subsidiary merger' and 'sister companies merger', respectively). In the case of a parent-subsidiary merger, the absorbing company must hold all of the voting securities in the transferring corporation (in some cases 90 per cent suffices), and in the case of a sister companies merger, a company, an individual or a group related by law or contract must hold all voting securities in the companies involved in the merger. Under such circumstances, a resolution passed at the shareholders' meeting is only necessary if the merger involves a capital increase, a name change or an amendment of the purpose of the company as defined in the articles of incorporation.

Statutory demergers effected under the Merger Act need to be approved by the respective shareholders, again with a super-majority vote.

If the transaction is structured as a purchase of either shares or all or part of the assets and liabilities of the target company, Swiss law does not require the shareholders of either company to approve the transaction. A shareholders' resolution of the acquiring company may, however, be required if the transaction involves an increase of the share capital of the acquiring company in order to provide for the share consideration. The shareholders of either company may have to adopt a resolution if the consummation of the transaction effectively means a change to the company's purpose as defined in the articles of incorporation. Such resolutions need to be passed with a supermajority vote.

Appraisal rights

Following a statutory merger or demerger, pursuant to the Merger Act, shareholders can file an appraisal action against the surviving company. If the consideration is deemed 'inadequate', the court determines an adequate compensation payment.

Procedural rights

In case of a public tender offer for shares of a listed company, shareholders owning 2 per cent or more of the shares at the time of the launch may participate as parties in the procedures of the takeover board, FINMA and the courts. Typically, such procedures are being used to claim a higher purchase price based on the minimum price or the best price rules.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

A bidder intending to launch a tender offer may directly disclose his intention to the public or launch the offer without having approached the target company's board of directors. If a bidder discloses its intention to potentially launch a takeover, the Swiss Takeover Board may request it to proceed with an offer or to refrain from launching an offer for six months ('put up or shut up' rule).

Once a takeover offer has been publicly launched (or formally pre-announced) and until the publication of its final result, the board of directors of the target company must abstain from any action that may impede the offer, irrespective of the offer being friendly or unfriendly and report intended defensive measures to the takeover board. Before the pre-announcement the board may under certain circumstances undertake defensive measures, even if an offer is imminent. After the takeover offer has been formally pre-announced, only the shareholders' meeting of the target company may resolve any major defensive measures.

Defensive measures include shares with increased voting power. A company may issue registered shares with different nominal values or split existing shares and stipulate in its articles of incorporation that each share entitles its holder to one vote irrespective of its nominal value. However, the nominal value of common shares may not exceed 10 times the nominal value of shares with increased voting power. As minority shareholders (2 per cent or more) have a right to join proceedings in the context of a takeover, they may play an important role in trying to raise the price, fending off or supporting a bidder (hostile or not). All proposals or resolutions of the board of directors of the target company for defensive measures must be in line with the company's interest and the fiduciary duties of the board and, as a rule, respect the principle of equal treatment of shareholders.

Transfer restrictions

The articles of incorporation of a listed company with registered shares may provide for a percentage limit (usually 2 per cent to 5 per cent) above which registration in the share register with voting rights may be refused by the board of directors. Accordingly, in such situation, an offer can be made subject to the condition that the bidder will be registered or that such restrictions in the articles of incorporation are removed.

Restrictions on voting rights

The articles of incorporation can provide that no shareholder, directly, indirectly or acting in concert with third parties, may cast more than a certain percentage of votes (eg, 5 per cent). This restriction may apply to registered shares and bearer shares. A bidder may therefore make the offer subject to the prior removal of such restrictions.

Capital decrease and extraordinary dividends or capital increase

In some situations bidders can be deterred by extraction or infusion of cash by way of capital adjustments or dividends.

Requirements on changes of articles of incorporation

The above provisions on share transfers and voting restrictions can be further entrenched by imposing special majority voting requirements for their removal from the articles of incorporation of the company. However, the shareholders' vote on the removal of a voting restriction is itself also subject to the corresponding voting restriction.

Redemption of own shares

A corporation may purchase up to 10 per cent of its own shares (treasury shares). Selective share repurchases (and resales) by the corporation, however, are limited by the principle of equal treatment of shareholders in like circumstances, which might also prevent 'greenmailing'.

Poison pills, share placements with white knights or friendly investors

A poison pill mainly consists of options or subscription rights granted to all or some shareholders or third parties, but for the unfriendly bidder, entitling them to acquire new shares or other securities of the target at a substantial discount in case of an unfriendly takeover attempt. Poison pills are hardly used in Switzerland and would only be lawful under limited circumstances. However, Swiss takeover law permits the use of authorised capital under exclusion of subscription rights of the existing shareholders in the context of a takeover if the articles of incorporation provide for such use.

Poison puts

By means of a poison put, in the terms of its financial instruments, a company makes immediately repayable a larger or smaller part of its private or public debt in the event of a takeover.

Disposal or acquisition of substantial assets

Without shareholder approval, the board of directors of the target company is not entitled to sell or acquire assets valued at more than 10 per cent of the target's assets or contribute more than 10 per cent of the revenues, either voluntarily ('scorched earth' tactics) or on the basis of a lock-up agreement, or to sell or encumber such part of the target's assets that has been designated by the bidder as being among its principal target assets ('crown jewels').

Golden parachutes

Generally, special payments to the management of the target company in case of an unfriendly takeover are not prohibited. However, if such payments are excessive, they may be deemed unlawful defensive measures.

White knights

The search for a white knight is neither prohibited nor required. The board of directors or the management of the target company may also take over the company themselves by way of a management buyout.

Staggered board

While staggered terms of board members do not prevent removal of board members by the shareholders prior to the expiration of their term, they nevertheless pose a hurdle for the election of bidder-friendly board members.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no statutory or judicially determined limits as to whether break-up fees or reverse break-up fees are permissible in principle and, if so, what break-up fee amount would be acceptable. Therefore, break-up fees are mainly restricted in light of fiduciary duties and shareholder rights. In transactions requiring shareholder approval (eg, a statutory merger or demerger), the board of directors may not agree to a break-up fee in an amount that would prejudice the outcome of the respective shareholder resolution. Break-up fees that correlate to the costs incurred by the other party in connection with the intended merger or demerger should be possible. Reverse break-up fees are rare, as they imply the right or at least the possibility that the buyer may withdraw.

Under the SESTA, the availability of defensive measures against unfriendly takeovers has been substantially curtailed. From the formal (pre) announcement of a public offer until the publication of its final result, a target's board may not (without shareholder approval) engage in any transaction that would significantly alter the assets or liabilities of the target, including the sale of those assets that are the main target of the bidder and which have been described as such in the offer (prohibition of lock-up agreements). Break-up fees are permissible if they do not deter potential competing bidders or coerce shareholders into tendering, and if they roughly correspond to possible costs or damages. See question 9.

Financial assistance

Swiss law does not contain specific financial assistance rules. However, financial assistance may be restricted, depending on the circumstances, by general principles of corporate and tax law such as the principle that equity cannot be (re)distributed to the shareholders, except through the procedures for dividends or capital decreases. Also, contributions to shareholders may trigger withholding and other taxes. Therefore, debt pushdown and similar transactions require careful structuring and, usually, an advance tax ruling.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Under Swiss law, there are no such general legal instruments as would allow governmental agencies to influence or restrict the completion of business combinations. In certain regulated industries, such as banking, supervisory authorities can take regulatory action that may include the withdrawal of licences or mandatory liquidation of the target if the purchaser does not meet the legal requirements. While the government does have certain powers in order to safeguard national security, it is unlikely that a business combination would be openly restricted for such reason.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Public offers may be made subject to conditions precedent only if such conditions are beyond the bidder's control (eg, entry in the share register of the target company or regulatory approvals, shareholder approval to issue shares in an exchange offer, but not financing of the transaction). Where the nature of the conditions precedent is such that the bidder's cooperation is required to satisfy them, the bidder must take all reasonable steps to ensure that the conditions are satisfied. At the close of the offer period, it must be clearly stated whether the conditions have been satisfied. The terms of the offer may reserve the bidder's right to waive certain conditions. With the approval of the Takeover Board, the offer may also be made subject to conditions subsequent. The Takeover Board will allow such conditions if the advantages of the conditions for the bidder outweigh the disadvantages for the target's shareholders (eg, obtaining regulatory approval).

Mandatory bids may only be subject to conditions in justified cases (ie, if the condition is needed for completion, for example, government approval, to obtain control or abolishment of voting restrictions). Typical conditions include the following:

- minimum percentage reached;
- grant of regulatory approvals (such as approvals under the Act on Cartels regarding Merger Control, Lex Koller and Banking Acts);
- recognition of the bidder as a shareholder with voting rights; and
- no material adverse change to the economic substance of the target company.

In transactions that are not regulated by SESTA, conditions are only restricted by general principles of the law, such as the principle of good faith.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In private transactions, financing conditions and representations as to financing may be included in the transaction document. In public takeovers, however, the bidder and the independent review body must confirm that full financing is already in place. Furthermore, corporate and tax laws limit the use of funds of the target for its financing. Finally, Swiss financial assistance rules limit the up and cross-stream financing and provision of security.

As a general rule, the seller does not have any obligations to assist in the buyer's financing in excess of the general obligation to act in good faith.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Following a successful public offer, a bidder may request a squeeze-out of the remaining shareholders, if, after the public offer, it holds more than 98 per cent of the voting rights in the target company. To that end, the bidder must file a request with the relevant court for cancellation of the remaining equity securities within three months of expiration of the public offer. The court orders the cancellation of the remaining equity securities (including derivatives issued by the target) and the target company must allot them to the bidder against payment of the offer price or fulfilment of the exchange offer in favour of the holders of the cancelled equity securities (no appraisal rights).

The Merger Act provides for the possibility of a squeeze-out merger irrespective of the type of company and without a prior purchase offer being required: if a merger resolution is passed with a majority of at least 90 per cent of all outstanding voting rights, the minority may be squeezed out for consideration other than shares of the surviving company. The minority shareholders are protected by appraisal rights.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The Swiss Private International Law Act (PILA) contains provisions on the cross-border (into or out of Switzerland) transfer of a company's domicile. Cross-border mergers and demergers are possible if the non-Swiss jurisdiction involved recognises such cross-border transactions. In addition, the rules of Lex Koller must be complied with if the surviving company is a foreign or foreign-controlled entity (see question 4).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Public offer procedures are subject to certain time periods. After a cooling period of 10 trading days, the offer must be open for acceptance for a minimum of 20 trading days and a maximum of 40 trading days. Once the offer period has lapsed, the offer must be extended by another 10 trading days.

In a statutory merger a 30-day document review period applies between the issuance of the merger documentation (agreement, board report, etc) and the resolution by the general meeting of shareholders on the merger.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The acquisition of a significant interest in a Swiss bank or a Swiss securities dealer (generally any interest in excess of 10 per cent of the capital or votes) must be reported to the Federal Banking Commission (FBC). The reporting requirement extends to Swiss and foreign shareholders alike. In addition, certain laws specifically address the purchase of companies by non-Swiss (controlled) acquirers in certain sectors (eg, banking, insurance, radio and television, telecoms and transport).

The purchase of an ongoing business which requires a licence or a concession (eg, insurance, transport, telecoms, health sector) may be subject to approval by the relevant authorities.

18 Tax issues

What are the basic tax issues involved in business combinations?

Sale of shares

If the seller is an individual, capital gains on his private portfolio are usually tax-exempt. In specific cases, however, the tax authorities tend to perceive capital gains as:

- de facto dividends (in so-called 'transformations', if the individual sells his shares to a company which he controls);
- income (if the seller qualifies as a professional securities dealer, which is also the case, according to jurisprudence, if an individual seller regularly and systematically deals with securities), which makes the seller subject to income taxation and social security contributions; or
- liquidation proceeds (in 'indirect partial liquidations', if the sale is refinanced by the assets of the acquired company). This practice of the 'indirect partial liquidation' has been amended under the revised tax laws that entered into force on 1 January 2007. Under the new rules, an indirect partial liquidation will be assumed if shares representing at least 20 per cent of the share capital of a company are sold from the private assets of an individual investor (or a group of individual investors) to the business assets of a corporate or individual buyer and the target distributes current assets not needed for business operations out of distributable profit or reserves within a period of five years after the sale of the shares with the co-operation of the seller.

If the seller is a company incorporated in Switzerland, subject to exemptions below, capital gains are subject to federal and cantonal income taxation of 20 to 25 per cent (effective tax rate from profits before taxes), depending on the canton of residence and, in certain cantons and communes, the amount of profit. However, if the seller qualifies as a company with cantonal holding or domicile privilege, only the federal income tax of 8.5 per cent (effective tax rate 7.8 per cent) applies. In addition, capital gains from the sale of a qualifying investment (ie, at least a 10 per cent participation), if held for at least one year, qualify for 'participation relief', usually leading to an almost full capital gains tax exemption at both the federal and the cantonal level. Qualifying investments may be transferred tax-neutrally to a Swiss or foreign group company.

Sale of assets

Capital gains on business assets sales are fully taxable by all Swiss sellers (individuals and companies). The seller of a business may avoid these tax consequences if his company first spins off the assets and liabilities to be sold into a new company in a tax-neutral reorganisation and the seller then sells the shares in the new company, provided that the spun-off activities and the activities left behind both constitute businesses to be continued by the old and the new company, respectively. Furthermore, the sale of assets is subject to 8 per cent VAT which is recoverable by the purchaser if it qualifies as a Swiss VAT subject and uses the assets for Swiss VAT underlying activities. In the transfer of an entire group of assets (and liabilities) or a closed group of assets (and liabilities), the VAT liability can be discharged with a notification to the federal tax administration rather than payment of the tax.

Tax aspects for the purchaser

Purchase of shares

The tax base for the shares in the purchaser's books is equal to the purchase price. Except in particular cases (eg, if the acquired company encounters serious financial difficulties), it is not possible to write off the goodwill component for tax purposes. In contrast, in an asset purchase, the goodwill may be recorded separately and written off against taxable income.

Swiss tax law does not acknowledge the concept of tax grouping or tax consolidation, which makes it difficult to set off the acquisition debt or losses carried forward against operational income of an acquired company. Therefore, before the acquisition of a Swiss operating company or a group holding company, foreign investors very often form a Swiss leveraged acquisition vehicle (NewCo), which subsequently purchases the shares of the Swiss target company. If the NewCo and the target company are merged thereafter, the NewCo's debts will be taken up into the operating company. Tax authorities will likely qualify this as misuse of form and treat it as tax evasion with the result that the interests paid on debt is not tax-deductible (in certain cantons denial of deduction may be limited to the subsequent five years). If the NewCo is not merged with the target company, dividends paid out by the target company may serve to finance the acquisition debt. However, there is a risk that tax authorities could qualify such dividend payments in the case where the shares have been purchased from a private individual seller as an indirect partial liquidation, triggering unfavourable tax effects on the seller (see above). Even if the acquisition vehicle is not merged with the target company, it may be advantageous to incorporate such an acquisition vehicle. An alternative to push down debt is to leverage NewCo by having it repay its capital to the extent legally permissible against assumption of debt. Furthermore, additional leverage may be created by having NewCo first sell qualified participations to subsidiaries outside Switzerland where the debt is deductible and distribute the sales receivables to the foreign investor. Dividends, which are taxable income for a Swiss resident individual or company, may be sheltered if the shares are held by a Swiss holding company or by an operational company taking advantage of the participation relief. If dividends are not sheltered, the company's income is taxed twice, as profit of the acquired company and as dividend income of the private individual shareholder. The new federal and cantonal law entered into force on 1 January 2011 ('second corporate tax reform') introduced, by way of a reduction of the tax rate or the taxable amount, reduced taxation of dividends for private individuals holding qualified participations of 10 per cent in the stated capital of the company making the distribution. In any event, the distribution of dividends (but not repayment of stated capital) is subject to a 35 per cent withholding tax which may be fully recovered by a Swiss taxpayer or fully or partially recovered in the event of a foreign recipient under an applicable double taxation treaty. In cross-border transactions the tax authorities may refuse to refund all or part of the withholding tax if the purchaser, under an applicable double taxation treaty, is entitled to a refund which is higher than that which the seller would have obtained. The new federal law mentioned above allows a Swiss company repaying capital contributed by the shareholders after 31 December 1996 to be free of the 35 per cent withholding tax. This exemption leads to significant tax shortfalls and is for this reason currently disputed in public and in parliament. If the target company provides upstream or cross-stream security in the acquisition financing and has not received or will not receive the equivalent value in exchange for such security, then the entering into or the performance of any obligation under such a security by the target company, may be classified as a conveyance of an economic benefit by the target company to NewCo or an affiliated company, for which the target company may, at the time of the entering into or the performance of any obligation under the security, as the case may be, be liable to a 35 per cent withholding tax on any actual or constructive dividend distribution resulting from such conveyance of an economic benefit.

Purchase of assets

In a purchase of assets, the tax base in the purchaser's book is equal to the purchase price of the assets purchased. The goodwill may, to some extent, be recorded separately and written off against taxable income. In a purchase of assets, the operating income of the purchase may be used for the payment of interests on the acquisition debt.

Transactional taxes

The sale of shares, whether by Swiss residents or non-Swiss residents, may be subject to a Swiss securities transfer stamp duty of up to 0.15 per cent (for shares of a Swiss company) or up to 0.3 per cent (for shares of a foreign company) calculated on the sale proceeds if it occurs through or with a Swiss bank or other securities dealer as defined in the Swiss Federal Stamp Tax Act. In addition to this stamp duty, the sale of shares by or through a member of SIX may be subject to stock exchange levy. The transfer of assets is subject to VAT (see above). The transfer of real estate is usually subject to real estate gains tax and real estate transfer tax.

Taxes on mergers

Shares issued in a statutory merger are exempt from the 1 per cent stamp tax on issuance of securities. Capital gains of individual shareholders of the acquired company resident in Switzerland are normally tax free. Should the nominal value of the new shares exceed the nominal value of the shares of the merged company, however, the difference may be subject to income tax. Corporate shareholders are not taxed if they retain the same tax base for the new shares. Squeeze-out payments and payments for fractional shares made by the merging companies are subject to income tax. Corporate shareholders may claim participation relief for such payments if they hold a participation representing either a value of at least 1 million Swiss francs or at least 10 per cent of the stated capital of the other company. If in a reorganisation, assets and liabilities are transferred at book value, no income tax is usually incurred. Real estate transfer tax is levied by a few cantons and municipalities if the merged or absorbed company owns real estate in Switzerland.

A share-for-share transaction ('quasi-merger') where: the acquisition of shares of one corporation in exchange for newly issued shares of the acquiring company leads to the acquisition of at least 50 per cent of the voting rights of the acquired company; and not more than 50 per cent of the consideration for the shares in the acquired company is paid in cash (ie, at least 50 per cent of the consideration consists of newly issued shares of the acquiring company), is exempt from both the 1 per cent stamp duty on issuance of securities and securities transfer stamp tax. Treasury shares of the acquiring company used as acquisition currency are considered cash consideration.

The acquiring company using treasury shares as acquisition currency will be treated as having sold the treasury shares and depending on the tax base and the market value of the treasury shares, realises a taxable gain or a tax-deductible loss on the treasury shares used for the acquisition. Except if deemed an indirect partial liquidation, a share-for-share transaction is tax-neutral for individual shareholders resident in Switzerland: cash consideration paid by the acquiring company constitutes a tax-free capital gain and an increase in nominal value of the shares in the acquiring company over the shares in the acquired company as a result of the exchange ratios is tax-neutral. Cash consideration paid to individuals that are deemed securities dealers or hold the shares in the acquired company otherwise within a business and corporate shareholders are not taxable for shares exchanged if they retain the same tax base for the new shares. Cash consideration paid to them is taxable. It may, however, be offset against a charge to expenses if an impairment is required. If the aforementioned conditions for a tax-free quasi-merger are not met, both the 1 per cent stamp duty on issuance of securities and the securities transfer stamp tax of 0.15 per cent (for shares in a Swiss company) and 0.3 per cent (for shares in a foreign company) apply. If after a tax-neutral share-for-share transaction the acquired company is merged within five years with the acquiring company, the transaction will retroactively be taxed like a statutory merger (see above).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

A business combination usually either involves the transfer of individual entitlements of Swiss employees under their Swiss pension plan or, if part of a business or a larger group of employees are affected by the combination, a partial liquidation of the pension plan. In the latter case, a proportion of the reserves or the underfunding, respectively, are being transferred as well. Swiss pension plans need to include the details of the requirements and procedures to be followed if the employees leave the plan in their regulations (to be approved by the supervisory authorities).

Also, as an ultima ratio, an employer can be forced to cover any underfunding as evidenced by actuarial calculations. Therefore, due diligence and indemnities in order to identify and address a potential underfunding are critical.

It should also be noted that in case of an asset purchase regarding a business or part of a business, the employees working in such business are automatically transferred to the acquirer, unless the relevant employees would reject such transfer (with the consequence of termination upon expiration of the statutory notice period). The same rule applies in a statutory merger. In case of such transfer, the acquirer and the former employer are jointly and severally liable for claims (including severance, etc) of the employees relating to the period prior to the transfer. In addition, in asset deals and mergers, certain information and consultation obligations are to be observed. If a combination involves a mass dismissal, special regulations apply.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Upon the commencement of insolvency proceedings, either in the form of a creditor moratorium and liquidation or bankruptcy, the acquirer may no longer effect a business combination by entering into a private transaction with that company. A company in insolvency can no longer freely dispose of or divest its assets. In the case of bankruptcy, the administrator may sell specific assets or the entire business by auction or in a private transaction upon approval at the creditors' meeting. In a creditor moratorium, assets may be transferred and assigned in part or in their entirety to a third party pursuant to a reorganisation agreement negotiated by the administrator on behalf of the company in reorganisation with the creditors of the company. Such an agreement is deemed accepted upon the consent of:

- the majority of the creditors representing at least two-thirds of the claims determined to be admissible; or
- one-quarter of the creditors representing at least three-quarters of the claims determined to be admissible; and
- subsequent court ratification.

If necessary in order to maintain and safeguard the value of a business which may be able to survive under new ownership, the administrator is entitled to dispose of, or divest part of, the assets even before the company is formally liquidated or a reorganisation agreement has been reached with the creditors of the company. Such transaction will, however, need to be approved by the appropriate court.

The usual way to purchase a business from a reorganisation or bankruptcy estate would be by asset deal with the exclusion of liabilities and undesired contracts. Nevertheless, the employees active in the business may be automatically transferred to the purchaser. However, pursuant to recent court precedents, in an asset purchase from a bankruptcy estate, in contrast to the general rule, the acquirer is not liable for transferring employees' claims that relate to the period before the purchase.

Update and trends

Currently, there is a proposal under discussion to amend the ACart in order to, inter alia, modernise Swiss merger control by simplifying the filing obligations in cases that concern at least Europe-wide geographic markets and that are reviewed by the European Commission. At the same time, the requirements for a prohibition decision shall be lowered and thus be harmonised with EU standards.

21 Anti-corruption and sanctions

What are the anti-corruption and economic sanctions considerations in connection with business combinations?

Switzerland's anti-corruption laws have been heavily influenced by, and adhere to, the respective international conventions such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe Criminal Law Convention on Corruption and the United Nations Convention against Corruption. Under Swiss law, it is a crime for any person to offer, promise or grant an official a bribe, or for an official to solicit or accept a bribe. This applies both to Swiss and foreign officials.

In addition, granting, respectively accepting, an advantage is also a crime under Swiss law. Unlike in the case of bribery, the advantage granted is not linked to any specific act or omission of the official, but is simply granted to the official for carrying out the official duties. The offence of granting, respectively accepting, an advantage only targets Swiss officials.

Bribery in the private sector may also constitute a crime pursuant to the Unfair Competition Act. The offence consists of offering, promising or granting an employee, a member of a company, a representative or another auxiliary of a third party in the private sector

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an advantage for an activity which is contrary to his or her duty or that is in his or her discretion. As in the case of bribery of officials, the recipient of the advantage is equally punishable. The offence is only prosecuted upon explicit demand of the victim.

Under Swiss law, businesses may themselves also become criminally liable if bribery is committed in the course of doing business if the company has not established all reasonable and necessary procedures to prevent bribery. Hence, adequate compliance programmes and training are not only a matter of best practice from a corporate governance point of view, but also required to eliminate legal risks.

While Switzerland does not usually enact its own economic sanctions, it does regularly implement international economic sanctions imposed on a supranational level, such as sanctions imposed by the United Nations against certain states. Embargoes in particular are implemented in Switzerland by means of criminal sanctions in case of their breach.

In the context of business combinations, due diligence is critical for identifying corruption and economic sanctions-related risks. Such risks should be examined particularly carefully if one of the involved businesses is active in industries or geographical regions susceptible to unlawful practices. Prior to completing a combination, identified risks should be eliminated, in particular by establishing adequate compliance procedures and, if necessary, investigating suspicious business practices discovered in the due diligence.

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