

# M&A and Corporate Transactions in Switzerland

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## Table of Abbreviations

AOA	Federal Act on the Licensing and Oversight of Auditors of 16 December 2005 ( <i>"Auditor Oversight Act"</i> , <i>Revisionsaufsichtsgesetz, RAG</i> )
ARR/FER	Accounting and Reporting Recommendations ( <i>Fachempfehlungen zur Rechnungslegung</i> )
BGE	Decision of the Swiss Federal Supreme Court ( <i>Bundesgerichtsentscheid</i> )
Cartel Act	Federal Act on Cartels and other Restraints on Competition of 6 October 1995 ( <i>Kartellgesetz</i> )
CC	Swiss Civil Code of 10 December 1907 ( <i>Schweizerisches Zivilgerichtsbuch, ZGB</i> )
CHF	Swiss Francs
CISA	Swiss Federal Act on Collective Investment Schemes of 23 June 2006 ( <i>Kollektivanlagengesetz</i> )
CO	Federal Code of Obligations of 30 March 1911 ( <i>Schweizerisches Obligationenrecht, OR</i> )
CPC	Swiss Civil Procedure Code of 19 December 2008 ( <i>"Civil Procedure Code"</i> , <i>Zivilprozessordnung, ZPO</i> )
DFTA	Federal Act on Direct Federal Taxes of 14 December 1990 ( <i>Bundesgesetz über die direkte Bundessteuer, DBG, StHG</i> )
DFTHA	Federal Act on the Harmonization of Direct Cantonal and Municipal Taxes of 14 December 1990 ( <i>Steuerharmonisierungsgesetz, StHG</i> )
FBC	Federal Banking Commission
FINMA	Swiss Financial Market Supervisory Authority
FINMASA	Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 ( <i>"Financial Market Supervision Act"</i> , <i>Finanzmarktaufsichtsgesetz, FINMAG</i> )
FISA	Federal Act on Securities held with an Intermediary of 3 October 2008 ( <i>"Intermediated Securities Act"</i> , <i>Bucheffektengesetz, BEG</i> )
IFRS	International Financial Reporting Standards
Lex Koller	Federal Act on the Acquisition of Real Property by Foreigners of 16 December 1983
LLC	Limited liability corporation ( <i>Gesellschaft mit beschränkter Haftung, GmbH</i> )

MA or Merger Act	Federal Act on Mergers, Demergers, Conversions and Asset Transfers of 1 July 2004 ( <i>Fusionsgesetz, FusG</i> )
SESTA	Federal Act on Stock Exchanges and Securities Trading of 24 March 1995 ("Stock Exchange Act", <i>Börsengesetz, BEHG</i> )
SESTO	Ordinance on Stock Exchanges and Securities Trading of 2 December 1996 ( <i>Börsenverordnung, BEHV</i> )
SESTO-FINMA	Ordinance of the FINMA on Stock Exchanges and Securities Trading of 25 October 2008 ( <i>Börsenverordnung-FINMA, BEHV-FINMA</i> )
SME	Small or medium sized enterprise
SPC	Swiss Penal Code of 21 December 1937 ( <i>Schweizerisches Strafgesetzbuch, StGB</i> )
TOO	Ordinance of the Takeover Board on Public Takeover Offers of 21 August 2008 ( <i>Übernahmeverordnung, UEV</i> )
UK	United Kingdom
US	United States of America
US GAAP	United States Generally Accepted Accounting Principles

## I Corporate Transactions

### 1 Corporate Acquisitions

Synergies are a key driver for corporate transactions, in particular when it comes to mergers and acquisitions. Combining two companies can improve shareholder value: It typically allows for cost savings, often accelerates earnings growth, and sometimes improves the strategic position. Yet there are both rewards and risks when it comes to mergers and acquisitions. Corporate cultures may clash, synergy opportunities may be misconceived, or redundancies may cause the loss of operational capabilities. In addition, the law governing mergers and acquisitions is becoming ever more complex. The problems are compounded when transactions cross national borders. Given these complications, the aim of this booklet is limited to providing an introduction to the legal workings and the documentation of an M&A deal, bearing in mind that each successful combination is based on the observation of the legal foundations. Therefore, whoever is seeking an overview of the relevant fields of Swiss law may want to browse through this publication. The authors hope that the material is neither too broadbrush nor too narrow to achieve this purpose.

As a general rule, a Swiss company or its business may be acquired by way of a public offer or in a private acquisition. Based on a private agreement, control may be obtained through (a) the purchase of a controlling block of shares, (b) the acquisition of a business (assets and liabilities) or by a transfer of assets according to chapter 5 of the Merger Act, (c) the participation in a major share capital increase, or (d) a merger. The purchase of a controlling block of shares is the technique most commonly used. Many of Switzerland's corporations are either privately held or, even those listed on the SIX Swiss Exchange, controlled by a group of shareholders. Of all listed companies only about 30 percent are truly public in the sense that the majority of the share capital is held by investors without coordinated interests. Therefore, other than by share purchases, acquisitions in Switzerland of listed companies tend to be effected by friendly takeovers or mergers.

The major Swiss banks and a number of specialized consultancy firms provide a whole range of M&A services – including searches for possible targets, value analyses of potential opportunities, provision of competitive intelligence, corporate finance advisory services or the delivery of fairness opinions. Specialized law firms normally draft the acquisition documents. Since tax considerations greatly influence the transaction structure, tax and legal counsel need to cooperate closely. Accounting matters are usually dealt with by one of the big four accounting firms.

The Anglo-American drafting style has continually influenced Swiss M&A agreements. This applies to both private arrangements and takeovers, where expressions such as raider, white knight, poison pill or golden parachute have become part of Swiss legalese. Nonetheless, Swiss transaction documents continue to be more concise than their Anglo-American counterparts, not only because Swiss lawyers dislike verbosity (or lack elegance) but also because Swiss M&A transactions heavily rest on statutory law and general principles of equity.

## 2 Corporate Restructuring

Besides mergers and acquisitions, other transactions may create shareholder value, in particular corporate restructurings such as breaking up a group or divesting parts of it. Restructurings ideally results in increased transparency for investors and greater accountability of managers, which may lead to improved operating performance attracting additional investors and finance opportunities. In some cases there may also be a lack of synergies between two businesses with the effect that the combined entity is undervalued.

Forms of corporate restructurings include demergers (spin-off of a business into a separate legal entity with shares being either transferred to existing shareholders or sold on the market), equity carve-outs (IPO of a non-controlling stake in a subsidiary), or sell-offs (divestiture of a subsidiary). Tracking stocks which are issued by a parent company to track the earnings of a division have not caught on in Switzerland.

The Merger Act specifically deals with corporate restructurings. It allows for flexibility of businesses in merging, changing their legal form and transferring assets and liabilities. Tax laws generally enable reorganizations without negative tax implications.

The Merger Act is concerned with the following types of corporate restructuring:

- statutory mergers, i.e. the amalgamation of two entities;
- demergers, in which a company is split in two or in which (part of) the business of a company is transferred to another company and the shareholders of the divesting entity become shareholders of the receiving company (or companies);
- conversions, which result in a new legal form for the same legal entity;
- asset transfers, in which assets and liabilities are transferred by operation of law.

Contrary to initial expectations, the instruments provided by the Merger Act for transferring assets and liabilities by operation of law have not been extensively used mainly because of the publicity of the transfer (entry into the – public – commercial register), the temporary joint and several liabilities of the transferring and receiving entities and the lack of legal certainty in certain important areas such as the transferability of contracts.

## 3 Swiss Business Environment

### 3.1 Independence and Political Stability

The Swiss Confederation comprises 26 cantons (states), each with its own constitution, parliament, government and courts. Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution. To a great extent, legislation in the field of civil procedure and substantive laws, including

corporate and securities laws, is a Federal matter. Since the enactment of the Civil Procedure Code on 1 January 2011, the rules of procedure before civil and criminal courts have been harmonized on a Federal level, while the cantons retain legislative authority with respect to the organization of the judiciary and civil justice.

Due to the fact that Switzerland's major political parties have shared power in the Federal Council – the executive body – for more than fifty years, the political situation is very stable despite the different cultural backgrounds of the almost eight million Swiss residents and Switzerland's four official languages (German, French, Italian and Romansh).

Traditionally, Switzerland's international relations have been determined by a policy of armed neutrality. This policy did not change when Switzerland joined the United Nations in 2002. Switzerland is a member of the Council of Europe, the European Free Trade Association ("EFTA"), the Organization for Economic Cooperation and Development ("OECD") and has been a signatory of the General Agreement on Tariffs and Trade ("GATT"). Switzerland joined the World Trade Organization ("WTO") in summer 1995 and the International Monetary Fund and the Bretton Woods Institutions in 1992. In the same year, Swiss voters decided against joining the European Economic Area ("EEA"), which was created to pave the way for a common market between the European Union ("EU") and the EFTA countries. Since then, despite a somewhat ambiguous relationship with the EU, Switzerland has sought to make Swiss laws and regulations compatible with EU directives on a voluntary basis, especially in the field of commercial law. In June 1999, Switzerland and the EU signed seven bilateral agreements covering civil aviation, overland transport, free movement of persons, research, public procurement, agriculture and elimination of technical trade barriers ("Bilaterals I"). Some matters not addressed by the Bilaterals I (i.e. security and asylum; Schengen membership; cooperation in fraud pursuits) were the subject of a second round of negotiations resulting in a new set of agreements ("Bilaterals II"), which were signed on 26 October 2004. In addition to these bilateral treaties, more than 100 technical agreements govern relations between Switzerland and the EU.

Whereas bilateral treaties seem to be the only policy option acceptable to the Swiss public, the EU has blocked discussions on new agreements until the institutional question is resolved. While the EU wants Switzerland to accept future changes of the 'community acquis', the body of EU law, Switzerland is skeptical about any automatic adjustments to signed accords. Notwithstanding the fact that Swiss legislation is often adjusted *ad hoc* to the European rules, Switzerland wants to be able to take part in the decision-making process which should allow for arrangements that give Swiss sovereignty its due, notably the right to hold referendums. A particularly hotly debated topic involves Switzerland's tax policy: Until now a distinction between tax fraud and tax evasion has shielded Swiss bank transactions from foreign scrutiny. But the Swiss government has now agreed to drop this distinction in a series of double taxation agreements that were agreed recently with influential EU member states.

The currency of Switzerland is the Swiss Franc which had always floated independently until its currency appreciation became unsustainable during the

Eurozone debt crisis. To safeguard Swiss exports to the EU, Switzerland's largest trading partner, the Swiss National Bank ("SNB") introduced a euro peg at a minimum exchange rate on 6 September 2011. The SNB has committed to maintaining the exchange rate to ensure stability as long as deemed necessary.

### 3.2 Positive Business Climate

Switzerland's gross domestic product based on purchasing power parity per capita ("GDP") for 2013 is estimated by the International Monetary Fund to be US\$ 46,475. This notwithstanding, in the league of the richest nations, Switzerland has been overtaken by Luxembourg, Norway, the US, Singapore, Brunei, Qatar, Hong Kong and the UAE. The current unemployment rate at around 3.0 percent (May 2013) is low by international standards. In 2011, an estimated 73.7 percent of the working population were employed in the service sector. As approximately one Swiss franc in two is earned abroad, Switzerland continues to rely on its ability to export goods and services, particularly to Germany, other members of the EU, the US and ever more to Asia. In general, the Swiss are well aware that in order to stay world-class they must take pains in catering for the needs of international investors. Against this backdrop, thanks to a rebounding economy and Switzerland's open and positive business environment, M&A activity has nearly stayed stable. In 2012, 606 transactions with an approximate deal volume of CHF 110.9b were recorded, which was 16 percent below in terms of number of deals but 116 percent above the levels of 2011 in terms of deal volume, mainly due to Glencore/Xstrata's announced mega deal. A further increase in transactions is projected for the foreseeable future; yet – and as a caveat – any negative developments in the Eurozone and the global markets may negatively affect the Swiss market as well.

## II Regulatory Framework

### 1 Statutes and Supervisory Authority

In 1881, the Swiss legislature enacted the Federal Code of Obligations ("CO"). Major revisions occurred in 1911, 1936, 1992, 2004 and 2008 (regarding Swiss company law). In 1907, the Swiss Civil Code ("CC") was enacted which entered into force in 1912. Together, these codes – supplemented by the Merger Act and the Stock Exchange Act – contain the bulk of the law concerning family and inheritance matters, property, contracts, torts, restitution, partnerships, as well as corporate matters and securities. Securities are also governed by the Intermediated Securities Act and the Federal Act on Collective Investment Schemes. The recently enacted Auditor Oversight Act regulates the licensing and oversight of persons who provide audit services.

In 2009, the Swiss Financial Market Supervisory Authority ("FINMA") was established (itself the product of a merger) as a new oversight authority over banks, insurance companies, exchanges, securities dealers, collective investment schemes, distributors and insurance intermediaries. The FINMA is also responsible for combating money laundering and, where necessary, conducts restructuring and bankruptcy proceedings, as well as issues operating licenses for companies in the supervised sectors.

### 2 Business Organizations

#### 2.1 The Company Limited by Shares (Corporation)

Most businesses (year end 2012: 198,433) in Switzerland are organized as corporations (*Aktiengesellschaften – AG or SA*). The minimum share capital is CHF 100,000. Prior to July 1992, it was CHF 50,000, and therefore companies incorporated before 1985 are permitted to maintain it at that level.

A major revision of the Swiss corporation law has been pending in the Swiss Parliament since 2007. The draft bill is intended, in particular, to improve corporate governance by strengthening shareholder rights, to make capital structures more flexible, to modernize shareholder meetings and to introduce up to date accounting and reporting rules.

The accounting provisions (applying to stand-alone accounts only) became effective on 1 January 2013. As the new rules provide for a transition period of two years (respectively three years for consolidated audits), the new body of law will not be applied before 2015 for stand-alone accounts and 2016 for consolidated statements.

The implementation of the other proposals of the draft bill has been delayed, mainly due to a popular initiative "against fat-cat salaries", also referred to as "rip-off" or "Minder" initiative. This initiative, which calls for binding shareholders' approval of board and executive compensation of listed companies as well as for a ban on sign-on bonuses and severance payments, led to a flurry of legis-

lative activities attempting to counteract its effects. The Swiss voters approved the referendum in favor of the initiative in March 2013, and thus amended the Swiss Constitution by a provision with the aforementioned content that applies to Swiss domiciled companies listed on a Swiss or foreign stock exchange. The constitutional text is not directly applicable and requires implementing legislation, first by an ordinance to be issued by the Federal Council (expected to come into force on 1 January 2014 with a staggered implementation of the various duties imposed by the new rules) and then by parliament which will most likely include some of the changes proposed in the 2007 revision.

In general, shareholders' obligations do not extend beyond the contribution of the shares issue price. The share capital may be increased by a majority vote of the shares represented (*de lege ferenda*: majority of the votes cast) in an ordinary share capital increase, or, alternatively, out of authorized or conditional capital. When creating authorized share capital, the shareholders authorize the board of directors to issue shares up to a pre-determined amount within a period of two years. The authorized share capital is expected to be replaced by a capital band as outlined below. Conditional share capital is used in connection with convertible bonds or option rights; it empowers the holders of conversion or option rights to automatically increase the equity by exercising their rights. The shareholders' resolution necessary to create authorized or conditional capital requires a majority of two thirds of the votes represented (*de lege ferenda*: of the votes cast) at the meeting and the majority of the represented nominal value of the shares (the latter being only relevant for companies with a dual share structure). Authorized and conditional share capital may not exceed 50 percent of the ordinary capital (except in the context of mergers). The 2007 draft bill proposes a more variable form of authorized share capital (capital band) that furnishes the board with more flexibility. The shareholders agree on a floor and a cap of the share capital. Within the resulting spread, the board may increase or decrease the share capital in its own discretion. The capital band will, if enacted in the future, replace the provisions on authorized share capital.

A reduction of share capital requires, *inter alia*, a notice to creditors and normally involves a procedure taking at least two months. According to the draft bill, the procedure will be reduced to approximately one month (except for a simplified reduction within the capital band).

The articles of incorporation define organizational requirements. More specifically, the corporation must have a board of directors, auditors (opting out of this requirement is permitted under certain scenarios, see below), and a shareholders' meeting, which must be convened at least annually. The board may manage the company itself, but most companies have chosen a two-tier system where the management runs the day-to-day business and the board of directors performs supervisory functions. The adoption of a two-tier structure entails the issuance of organizational rules by the board of directors, which define the competencies of the board and the management. At least one member of the board of directors must be authorized to represent the company. Further, a Swiss corporation must allocate signatory powers in such a way that it may be represented by one Swiss resident with sole signatory power (or two residents with joint signatory power).

The appointment of an auditor is mandatory. However, the shareholders may reduce the auditors' duties under certain circumstances. A company may opt for a limited audit if its shares are not listed and if it has no bonds outstanding. In addition, the company must not exceed two out of three thresholds (CHF 20 million total assets, CHF 40 million revenues, 250 full-time employees on annual average). Furthermore, an ordinary audit must be carried out if the company is required to prepare consolidated accounts or if shareholders who represent at least 10 percent of the share capital so request. If the company is entitled to perform a limited audit and has less than 10 full-time employees on an annual average, it may even waive the appointment of an auditor (opting out). This resolution, however, requires a unanimous decision of all shareholders; therefore, the company has to perform a limited audit if at least one shareholder so requests.

A corporation may issue bearer shares or registered shares. As per July 2012, about 74 percent of the companies listed at the SIX Swiss Exchange had one class of registered shares, 18 percent one class of bearer shares, and nine percent a mixture of bearer shares, registered shares and/or other membership rights. In the case of physically issued bearer shares, possession of the certificate evidences title to the shares, and a transfer is achieved by delivery of the certificate. Whereas certificated registered shares are conveyed by transfer of possession and endorsement of the certificates, non-physically issued shares require a written declaration of assignment. In addition, the transferee must be entered in the corporation's share register. Since 1992 the following additional rules apply to registered shares:

- A corporation may refuse a transfer of the rights attached to unlisted registered shares (article 685c III CO) within three months of the request by asserting a valid ground for refusal which must be defined in the articles of incorporation. It may also refuse to approve the transfer if it is prepared to repurchase the shares at their true value (article 685b I CO) either for its own account or for the account of a shareholder or of a third party. Finally, the company may object against the transfer if the acquirer fails to confirm that he is purchasing the shares for his own account. Special rules apply where the shares are transferred by operation of law (succession, bankruptcy, etc.; see articles 685b IV, 685c II CO).
- If the registered shares are listed on a stock exchange, the company may refuse to approve the transfer but only in relation to the voting rights and based on a provision in the articles of incorporation stating that the interest of any single shareholder may not exceed a certain percentage. A substantial number of listed companies have adopted a three percent limit, which also applies to shareholders acting in concert. Another possible ground for refusal by companies owning real estate is foreign nationality owing to restrictions on foreign ownership of interests in such entities (see article 4 of the transitory provisions to the CO, and 8 below III 2 on Lex Koller). For the purpose of registration, the acquirer must declare that he is holding the shares for his own account; again, special rules apply to transfers effected by operation of law (article 685d III CO). Although the acquirer becomes a shareholder upon purchase of the shares, his voting rights are suspended until he is approved as a shareholder and entered into the share register (article 685f III CO).

Notice of refusal must be given by the company to the transferee within 20 days, failing which the company is deemed to have agreed to the transfer (article 685g CO). A shareholder who is rejected under these rules must still be registered, albeit as a non-voting shareholder. A special feature of Swiss company law are dispo shares. Dispo shares are registered shares in relation to which no application is made by the purchaser to be registered in the issuer's share register. While holders of dispo shares technically do not qualify as shareholders, in practice they receive dividend payments through the depositary banks.

Furthermore, the transferability of bearer and registered shares may be affected indirectly by provisions in the articles of incorporation limiting the number of votes a shareholder may cast. Nevertheless, the general trend is to abolish or relax limitations of voting rights.

The company may issue bearer and registered shares, or registered shares with different nominal values. As the articles of incorporation may provide that every share carries one vote irrespective of its nominal value, super voting shares may be created by issuing registered shares with a nominal value of say CHF 10 and bearer shares with a nominal value of CHF 50 (or any multiple of the nominal value of registered shares up to the tenfold, see article 693 CO) to the effect that holders of registered shares will hold more voting rights relative to their investment. Super voting shares, however, are ineffective in connection with resolutions on certain important matters (see article 693 III and 703 CO) due to the requirement that approval by the majority of the capital represented (*de lege ferenda*: of the cast votes) is required.

Most listed corporations have stopped issuing share certificates. Consequently, the legal ownership of shares is evidenced by the securities account statement of an investor rather than by an actual physical share certificate. Against this background, the Intermediated Securities Act has introduced a new legal framework for mediated custody: Intermediated securities are created by depositing share certificates or registered uncertificated shares with the SIX SIS or another intermediary and by simultaneously crediting such intermediated securities to a securities account. Any sale or other disposal of intermediated securities must comply with the provisions set forth in the Intermediated Securities Act.

## 2.2 Other Types of Corporations

An increasingly popular type of business is the limited liability corporation (*Gesellschaft mit beschränkter Haftung – GmbH or Sàrl*), whose minimum capital is CHF 20,000. There were 140,885 limited liability corporations at the end of 2012. In 2008, a revision of the law relating to limited liability corporations aligned this legal form to a large extent with the law governing corporations. Namely, the requirement to appoint qualified auditors (applicable for public companies and companies exceeding specific thresholds in their balance sheet and their revenue) as well as the option to waive the appointment under certain circumstances (opting out, applicable if the company has less than 10 full-time employees) was introduced. Unlike shareholders of a corporation, however, quotaholders of

a limited liability corporation are recorded in the commercial register, which is open for inspection by the public. Also, the law embodies a legal fiduciary duty of quotaholders towards the company, whereas the articles of incorporation of a corporation may not impose such an obligation on shareholders.

The cooperative (*Genossenschaft*) is of lesser practical importance. Its members join together for the purpose of promoting or safeguarding their specific economic interests by way of collective self-help. At the end of 2012, approximately 10,000 cooperatives were listed in the commercial register, amongst them the two largest retailers of Switzerland and a few insurance companies and banks.

## 2.3 Partnerships and Limited Partnerships

Comparatively few business entities in Switzerland are organized as partnerships. At the end of 2012, 12,413 general partnerships (*Kollektivgesellschaften*) and 2,081 limited partnerships (*Kommanditgesellschaften*) were recorded in the commercial register.

# 3 Taxation and Company Accounts

## 3.1 Taxation and Social Security in Switzerland

### 3.1.1 Taxes on Income

Swiss resident individuals and companies are subject to taxation by the Federal government, the cantons, and the municipalities. Cantonal taxes vary to some extent with respect to the computation of taxable earnings and considerably in the overall tax burden, as each canton and municipality sets its own tax rates.

A Swiss resident individual is taxable on his worldwide income, exclusive of capital gains deriving from the sale of privately owned movable assets including shares. For resident and non-resident individuals, capital gains arising out of the alienation of Swiss real property are taxed with a cantonal real estate transfer and gains tax. Swiss domiciled corporations are subject to corporate income tax for each accounting period on the net profit as per stand-alone accounts. Partnerships are transparent for tax purposes. The double taxation of corporations (on profits made) and its shareholders (on dividends received) is mitigated by the participation relief both on the Federal and the cantonal level or when it comes to holding companies where the participation exemption applies at the Federal level and, in addition, a holding privilege at the cantonal and municipal level.

Tax relief through a participation exemption is available for revenues deriving from (a) dividend payments on shares representing 10 percent of the company's capital or if those shares have a fair market value of at least CHF one million, and (b) capital gains on disposals of shares representing not less than 10 percent of the share capital, held for a minimum of one year. A cantonal

and municipal holding privilege is usually granted if (a) the company's object reflects a holding purpose and (b) either two thirds of the company's total assets consist of, or two thirds of its earnings are derived from, participations.

As pointed out, capital gains on the sale of privately owned shares are tax free for individual shareholders. Another special feature of Swiss tax law is that corporate taxes are generally deductible.

Non-resident companies will be subject to Swiss corporate income taxation if they have a permanent Swiss business establishment, invest in Swiss real property (or benefit from Swiss real estate as collateral), or join a Swiss partnership.

### 3.1.2 Withholding Tax

Withholding tax is payable by the debtor (i.e. the issuer) on income from movable property (interest and dividends) at a tax rate of currently 35 percent. If the creditor is a Swiss resident, a total refund will be available. Foreign creditors may benefit from a (partial) relief in the form of a refund or a tax credit in accordance with the applicable double tax treaty (if any) between Switzerland and the creditor's country of residence. According to article 15 of the agreement with the European Union on the taxation of savings income (2003/48/EC), a zero percent tax rate applies to all members of the European Union, if the parent company (a) holds a participation in a Swiss subsidiary of at least 25 percent and (b) for a holding period of two years. If the participation is 25 percent at the time the dividend is paid, the delivered withholding tax may be reclaimed at a later stage once the two-year holding period has ended. Switzerland has developed a solid network of such double taxation treaties, often providing for even more attractive conditions, with many jurisdictions around the globe. Double taxation treaties in place or to come into force providing for a zero percent tax rate for participations of 10 percent or more include the treaties with Luxembourg, Hong-Kong, Denmark, and Germany. The double taxation treaty with the US provides for a five percent tax for companies holding a participation of 10 percent, in all other cases 15 percent including a corresponding tax credit in the US.

Since 1 January 2011, capital contributions from shareholders (e.g. share premium) reported on Form 170 may be distributed or repaid without incurring any withholding tax. Withholding taxes on dividends of a Swiss subsidiary to its Swiss parent company may be dealt with by way of reporting, provided that the parent company owns at least 20 percent of its subsidiary's capital. This also applies to dividends from a Swiss subsidiary to its parent company domiciled in the European Union if the parent company holds a participation of 25 percent and has its tax domicile within the European Union and is subject to regular corporate taxation. A similar procedure applies to all states with whom Switzerland has concluded a double taxation treaty if the significant participation requirement is met (e.g. at least 10 percent respectively 20 percent shareholding).

Anti-avoidance provisions may apply relating to withholding tax relief. The competent tax authorities often treat transactions avoiding withholding tax

on undistributed reserves as tax avoidance. A tax ruling is recommended if foreign residents are involved, as there is some uncertainty under which circumstances the authorities will consider a tax structuring to be illegitimate and therefore void.

### 3.1.3 Value Added Tax

The value added tax is payable on each phase of production, distribution and import of goods, domestic services and the procurement of services from abroad. The method of pre-tax deduction avoids tax accumulations such that the tax burden will only be borne by the end consumer. Turnovers generated by export deliveries and (transport) services for the benefit of persons abroad are generally exempted. The standard tax rate currently is eight percent. The system is similar to the relevant European Union Directive.

### 3.1.4 Stamp Duties

For a Swiss company, stamp duties arise on the issuance of shares (since 1 March 2012, bonds and money market papers are no longer subject to the issuance stamp tax); for a Swiss fiscal securities broker or a remote member of the SIX Swiss Exchange the stamp duties arise on the transfer of securities (transfer tax). Euro bonds denominated in non-Swiss currencies are exempted from transfer tax. A Swiss regulated bank, securities dealer or a Swiss company holding title to securities corresponding to an amount of at least CHF 10 million are deemed to be fiscal securities brokers for stamp duty purposes. The tax rate is one percent with respect to issue tax for capital exceeding CHF 1 million, 0.15 percent with respect to the transfer of Swiss securities and 0.3 percent with respect to the transfer of foreign securities.

The Federal Council has abolished the issuance stamp tax on publicly issued bonds as of 1 March 2012. The political agenda foresees the abolishment of the issuance stamp tax in various steps in order for Switzerland to remain competitive compared with the majority of the European jurisdictions that have already abolished this tax.

### 3.1.5 Other Taxes

In addition to income and corporate income tax, individuals and corporations are taxed by the cantons and municipalities on their net wealth. Further, cantonal taxes include real property taxes on the transfer and capital gains arising from the sale of real property (or the sale of shares in real estate companies).

### 3.1.6 International Tax Treaties

Switzerland has entered into international tax treaties to avoid double taxation in relation to individual and corporate income (and withholding) taxes with

more than 90 countries, including all OECD member states. The tax treaties are normally modeled on the OECD model convention.

### 3.1.7 Social Security Contributions

Social security contributions are levied on partnership income and income of employees. While those who are self-employed must contribute between 5.2 and 9.7 percent of their annual income (depending on total earnings), the payroll deduction for employees is 11.3 to 12.5 percent (8.4 percent old age and survivor's insurance ("AHV") plus 1.4 percent invalid insurance ("IV") and 0.5 percent income compensation ("EO") plus 1 to 2.2 percent for unemployment insurance. The payroll deductions are paid equally by the employer and the employee.

### 3.1.8 Corporate Reorganizations

Various tax laws were revised in line with the goal of the Merger Act to increase the flexibility of Swiss companies reorganizing themselves. The main emphasis of the tax revision was placed on the principle that taxation of hidden reserves (i.e. the difference between book and market value) should not be triggered by a reorganization but be deferred until profits are actually realized on condition that (a) the assets and liabilities are transferred at their existing book value and (b) the parties concerned continue to be subject to taxation in Switzerland. Depending on the type of transaction further conditions apply.

## 3.2 General Principles of Accounting

### 3.2.1 Sources of Reporting and Accounting Rules

Switzerland has recently adopted new reporting and accounting principles. Due to transition periods, the new provisions (in effect since 1 January 2013) will not affect financial statements before 2015 (stand-alone accounts), respectively 2016 (consolidated accounts); early adoption is possible. As the new law provides for a transition period of two years to allow the adaption to the new regulations, the new principles will not be applied before 2016. The provisions on group financial statements even provide for a transition period of three years. The new accounting law will be applicable to all individual undertakings, partnerships and legal entities with an annual turnover above CHF 500,000 irrespective of their legal form. For exempted businesses, a 'back of the envelope' financial statement will be sufficient, whereby the principles of proper bookkeeping apply by analogy.

Under the present accounting principles (see articles 957 et seq. and 662 et seq. CO), the board of directors of a Swiss corporation must prepare an annual report for each business year, including statutory (stand-alone) accounts, a business report of the directors and audited consolidated accounts if required. As a general rule, financial statements must be prepared in accordance with

accepted accounting principles such as completeness, clarity and materiality, prudence (conservatism), going-concern, and consistency. In addition, the current law prohibits set-offs between assets and liabilities and between revenues and expenses. While Swiss company law contains rules governing statutory accounts in relation to format, valuation principles, reserves, and dividends, all it provides regarding consolidated accounts is that they must be prepared in accordance with generally accepted accounting principles and that the methods applied must be disclosed in the footnotes.

Since current Swiss company law does not clearly define what "accepted accounting principles" are, the core of the accounting rules rests on recognized practices of the accounting and auditing profession. The Swiss Institute of Certified Accountants and Tax Experts (*Schweizerische Treuhand-Kammer*) has published accounting and auditing standards and interpretations in the Swiss Auditing Handbook (*Schweizer Handbuch der Wirtschaftsprüfung*). Though not strictly legally binding, the Swiss Auditing Handbook reflects the accepted practices of the accounting and auditing profession in Switzerland. Moreover, The Swiss Foundation for Accounting and Reporting Recommendations (*Schweizerische Stiftung für Fachempfehlungen zur Rechnungslegung*) has issued recommendations on valuation and presentation relating to both individual and group accounts (the emphasis being on the group accounts). This set of rules (which consists of different modules that companies choose according to their size and their business), the Swiss GAAP ARR (Accounting and Reporting Regulations) reflects in a scaled down version internationally accepted accounting standards and is applied mostly by small to medium sized companies, whether listed (in the "Domestic Standard") or not.

Companies listed on the SIX Swiss Exchange outside of the Domestic Standard, may not use Swiss accounting standards, but have to apply either IFRS (International Financial Reporting Standards) or US GAAP (US Generally Accepted Accounting Principles).

### 3.2.2 Tax Relevance of Statutory Accounts

As a general rule, the tax authorities may only tax profits as evidenced in the statutory (stand-alone) accounts (*Massgeblichkeitsprinzip*). However, in order to be accepted by the tax authorities, expenditures must be justified business expenditures and certain write-downs and valuations may not be accepted. Commission and other payments to related parties must respect the arm's length principle; otherwise the statutory accounts will be adjusted for the assessment of the taxable profit. Amortizations and depreciations need to be in line with the effective lowering of the value of the respective assets. The rule that the value in the statutory accounts may at no time exceed market value of an asset is imperative for the assessment of the taxable profit. Therefore, if the taxable entity proves a real diminution in value, this is to be accepted for the determination of the taxable income. For sake of simplicity, tax authorities publish lists with generally accepted depreciations and amortizations in regard to different assets, thus creating an incentive for the taxpayer to depreciate and amortize its assets to the admissible extent.

With the revision of the CO the concept of true and fair valuation will be introduced also for statutory accounts (article 958 nCO). Assets, as a general rule, may not be valued higher than at purchase or production value. However, assets with an observable market value, may be valued at this market value. In this case, there is no limitation of the asset's valuation compared to the purchase or production value. Therefore, and also under the revised CO, not adjusting an asset to market value (or keeping it at the purchase or production value if there is no market value) will lead to hidden reserves in the long run. Such hidden reserves may be dissolved by revaluation in case of an over-indebtedness and are dissolved in the case of a sale of the respective asset, which leads to a corresponding increase of the taxable profit.

### 3.2.3 Principal Users of Accounts

The pre-eminent users of financial statements are shareholders and creditors. Under Swiss law, there is no general requirement to publish accounts or file them for public inspection with a governmental body. Exceptions apply to listed companies and companies with outstanding bonds (see article 697h CO respectively article 958e nCO) which must either publish the audited financial statements subsequent to the approval by the shareholders' meeting in the Swiss Commercial Gazette or provide a copy free of charge on request within a year of the shareholders' resolution. Banks and insurance companies are required to publish accounts annually, six-monthly or quarterly, depending on the company's size, in the Swiss Commercial Gazette and further newspapers, as specified in the articles of incorporation.

Shareholders are entitled to receive or inspect the annual report, including the financial statements, the directors' business report, the audit report and the board's proposal for profit appropriation at the company's head offices and branches at least 20 days before the ordinary general meeting takes place, which must be held within six months of the balance sheet closing date. In practice, these documents are sent to the shareholders or made available on the Internet. Any shareholder may request a copy of the business report and of the audit report during one year following the general meeting.

Creditors may inspect the audited financial statements of Swiss corporations if they can demonstrate a valid reason. However, the company may deny a request for inspection due to overriding company interests or by settling the relevant debt. In practice, though, the banks as the most important providers of (debt) finance in Switzerland are in a position to require detailed financial information, irrespective of their limited legal rights, and in very rare cases they will even insist on being directly represented on the board of directors.

### 3.2.4 Audit

Historically, prior to becoming independent through management buy-outs, most of the major audit firms were owned by Swiss banks; nowadays, the profession is dominated by the big four (Deloitte, Ernst & Young, KPMG, and

PricewaterhouseCoopers). In 2008, the Auditor Oversight Act entered into effect. To ensure proper performance and the quality of audit services, this Act has established an Oversight Authority that operates a licensing office and maintains a public register with the names of individuals and legal entities providing auditing services. In addition, the Oversight Authority supervises auditing companies which provide auditing services for public companies and inspects them at least every three years.

Under Swiss law, audit requirements differ depending on the category into which a company falls:

- As a rule, Swiss corporations must have statutory auditors. The auditor's report for the statutory (stand-alone) financial statements need not comment on whether these show 'a true and fair view'. However, a recommendation must be made to shareholders as to whether they should approve or reject the financial statements, which may be with or without qualification. The auditor's report also has to confirm that the dividend proposal is in line with the law and the articles of association. The standard form of an audit report on the consolidated financial statements confirms that the accounts give a true and fair view of the company's financial position, the result of operations and the cash flow in accordance with the applied standard and that the statements comply with Swiss law.
- The involvement of specially qualified auditors is required for audit work relating to companies with total assets of more than CHF 20 million and/or revenues of more than CHF 40 million and/or an average annual number of employees of more than 250 and those with bonds outstanding or with listed securities. In practice, Swiss certified public accountants are eligible for the position of 'specially qualified auditors', although some other qualifications are also sufficient, including qualifications obtained in foreign jurisdictions (e.g. UK chartered accountants) provided that experience in and knowledge of Swiss law and accounting can be proven.
- Only specially authorized auditing firms may be appointed to undertake an audit required for a bank and other supervised institutions in the financial sector. Audit reports relating to banks are reported to the board of the institution and in parallel to the FINMA (article 27 FINMAG) and are not available for public inspection.

### 3.2.5 Role of Accountants in Acquisitions

Accountants often play an important role in the provision of detailed accounting and financial information on the target. The information is provided primarily to the management of the acquirer, but it is also frequently requested by sponsors and providers of finance. Normally, the main purpose of the investigation is to assure that the financial statements are correct; sometimes, however, the auditing firms also produce valuations or work on a whole range of accounting and business issues, including the provision of cash projections or an analysis of the effects of an acquisition on the consolidated accounts of the acquirer.

### 3.2.6 International Comparability

Switzerland has traditionally based its statutory accounting practices on minimal legal requirements and a largely tax driven presentation. Accordingly, there has been little compliance with international standards in the area of these accounts. However, in certain areas the ARR/FER standards, which have been established by the Swiss accounting profession and which are widely accepted, go beyond what the 4<sup>th</sup> and the 7<sup>th</sup> EU Directives require. Moreover, a large number of Swiss companies apply IFRS, and some of the multinational Swiss groups have introduced US GAAP. As pointed out above, companies listed in the main segment of the SIX Swiss Exchange must apply IFRS or US GAAP.

## 3.3 Statutory (Stand-Alone) Financial Statements

### 3.3.1 Contents and Format of Accounts

Statutory financial statements are prepared for an individual company on a stand-alone basis. They comprise a balance sheet, an income statement and the notes. A cash-flow statement will, according to the new regulations (article 961b nCO) be required for companies that must have their annual accounts reviewed in an ordinary audit. Also, such companies will have to present a status report, which outlines, *inter alia*, the situation of orders received, research and development activities and unusual events. Since 1992, the disclosure in the statutory financial statements of all companies, other than those covered by special legislation, have been standardized with a minimum classification of 26 items in the balance sheet and 15 in the profit and loss account. The new accounting law will provide for a more detailed categorization and disclosure provisions which go substantially beyond the current standard.

### 3.3.2 Valuation Basis

As a general rule, companies are required to value their assets not in excess of the lower of cost and market value. In addition, the board of directors may value assets at amounts lower than the maximum value laid down by statutory law and thus create "hidden reserves". Under the new law it will remain possible to undertake additional depreciations and valuation adjustments to create hidden reserves and the new rules will not call for a dissolution of provisions that are no longer justified (article 960a IV nCO).

Tangible fixed assets are valued at historic cost. The revaluation of fixed assets above cost is prohibited with a few exceptions. Depreciation is strongly influenced by tax regulations. The tax authorities specify maximum depreciation rates for tax purposes which are often in excess of the true economic rate. As a result, significant hidden reserves often exist against assets. The new law will now introduce some parameters to limit this discretion (article 960 II nCO).

Intangible assets, such as trademarks and goodwill, may be shown at cost, less appropriate amortization. Purchased goodwill must be written off over

a reasonable period, usually five to 10 years. Where the goodwill relates to trademarks or long-term licenses, a longer period may be used. Formation costs, such as legal fees and pre-incorporation costs, together with stamp duty, may be capitalized but must be amortized over a period of five years or less.

A provision for bad debts is usually five to 10 percent of the gross balance.

Details of contingent liabilities, guarantees and charges, for which no provision has been made, must be disclosed in a footnote to the balance sheet, although no details need be given.

As a consequence of the historical cost basis approach, statutory accounts usually show less equity than is actually existing. In addition, the equity and revenues situation may be distorted by the increase and decrease of hidden reserves and the realization principle according to which unrealized gains may be deferred and treated as corporate income only when they are realized.

### 3.3.3 Reserve Accounting

Swiss law provides that five percent of the annual profit must be allocated to the general reserve until the latter has reached 20 percent (*de lege ferenda*: 50 percent, except for holding companies, see article 672 nCO) of the paid-in share capital. For as long as the current article 671 CO remains in force, the following amounts must still be allocated to the general reserve after having reached the 20 percent limit:

- any share premium (also referred to as "agio"), i.e. any surplus over the nominal value received by the company when issuing new shares after deduction of the issue cost to the extent such surplus is not used for depreciation or welfare purposes;
- the excess of the amount which was paid in on cancelled shares over any reduction on the issue price of replacement shares; and
- 10 percent of the amounts which are distributed as a share of profits on top of a dividend of five percent (calculated on the nominal value).

The portion of the general reserve exceeding an amount corresponding to half of the share capital may only be used to cover losses, support the company in times of financial distress and counteract or alleviate the consequences of unemployment; legal practice allows to convert the excess into distributable reserves based on a shareholders' resolution.

Exceptionally, holding companies are exempt from the obligation to build up reserves (as set out in the last bullet point above) once they have reached the 20 percent threshold and are not restricted in the use of the general reserve. The remaining net profits are at the disposal of the shareholders' meeting.

### 3.4 Consolidated Financial Statements

#### 3.4.1 Obligation to Prepare Consolidated Accounts

If a company controls other companies by a majority of votes or by other means, it must prepare consolidated accounts if during two consecutive years the group has had a balance sheet total exceeding CHF 10 million, net sales exceeding CHF 20 million, or more than 250 employees per annum on average. In addition, consolidated accounts have to be prepared at the request of shareholders holding at least ten percent of the share capital, where it is necessary to produce such accounts to provide reliable information on the company's financial position and result of operations and, before the enactment of the new accounting rules, if a company has outstanding bonds or listed shares (see article 663e III OR and article 963a nCO).

Any company included in the consolidated accounts of a parent company which is established and audited according to Swiss law or equivalent foreign standards is dispensed from preparing separate consolidated accounts if the parent's accounts are available to its shareholders and creditors. Such a company is, however, required to establish separate consolidated accounts if it must publish its individual statutory accounts because of outstanding bonds and shares listed on stock exchanges or if consolidated accounts are requested by shareholders who hold at least 10 percent of the share capital.

Swiss company law requires the consolidated accounts to be prepared in accordance with generally accepted accounting principles and the consolidation and valuation principles to be disclosed in the footnotes. Today, the vast majority of the major Swiss companies present their accounts based on IFRS or US GAAP. Smaller companies use Swiss ARR/FER. Notwithstanding, based on current Swiss law, unlisted Swiss companies are still allowed to present a view which is not true and fair, given that hidden reserves are generally permitted.

#### 3.4.2 Accounting Treatment of Mergers and Acquisitions

Swiss company law remains silent on the accounting treatment of mergers and acquisitions. In practice, 'purchase accounting' is the method most commonly used, as opposed to 'pooling of interests', which had been applied in the past in a few large Swiss combinations but has now largely disappeared. From an accounting perspective, which may be different from the legal or tax viewpoint, the purchaser has to be identified, i.e. the individual or entity taking control of a target; in specific cases, e.g. share for share deals (including reverse mergers), the acquirer (for accounting purposes) may be the target (for legal or tax purposes).

If the purchaser pays more than the fair value of the net assets acquired, the difference between the purchase price and the value of the purchased net assets is reflected in the financial statements of the purchaser as goodwill. Historically, there were two ways to treat goodwill: either it could be written off immediately against equity, which is still permissible under ARR/FER, or

goodwill could be capitalized and amortized over its useful life, i.e. over five to 20 years, as an expense through the income statement. The results of the acquired company could be brought into the group accounts from the beginning of the year in which the acquisition was made. Nowadays, under IFRS and US GAAP, the target's assets and liabilities must be measured at fair value as of the acquisition date and if the purchase price is above the value of the revalued net assets, goodwill is created. Goodwill is not written off, but measured on an on-going basis and assessed for impairment. Any impairment is to be recognized immediately as a profit or loss for the period.

## 4 Corporate and Commercial Law

### 4.1 Corporate Law Matters

In the event of an acquisition or restructuring, approval by the shareholders of the transferee corporation (acquirer) will be required if:

- the business of the target company is outside the statutory purpose of the acquirer, the shareholders must then approve an amendment to the articles of incorporation of the acquirer, which requires a resolution to be passed with a majority of at least two-thirds of the shares represented (*de lege ferenda*: of the votes cast) and an absolute majority of the share capital represented if there are super voting shares (see article 704 I.1 CO);
- the consideration for the acquisition takes the form of shares (or equity linked bonds), the shareholders must then approve an increase in the share capital with a two-thirds majority in order to issue the shares, unless sufficient authorized capital is available or – *de lege ferenda* – unless the capital band allows such increase;
- a merger, demerger, or spin-off under the new Merger Act is contemplated, the shareholders must then approve the transaction agreement, again with a two-thirds majority.

The shareholders of the target will have to approve the transaction:

- indirectly by selling their shares; or
- in the case of a merger, conversion or spin-off to an existing company, or a sale of all assets followed by a liquidation of the company, by a resolution in the shareholders' meeting.

Special disclosure requirements apply if the transaction is financed by an increase in the share capital of the acquirer, irrespective of whether the subscribers pay cash or in kind (articles 650 II.4, 628, 634, 652e, 652f CO). The board will have to issue a report detailing how the valuation of the target company was made, and the auditors of the acquirer will have to confirm that the valuation meets accepted standards (article 652f CO). Moreover, a prospectus will be required if the shares are offered to the public (article 652a CO).

A shareholder, or a group of shareholders, holding 10 percent or more of the share capital of a corporation (*de lege ferenda*: holding 2.5 percent of the

share capital of a listed company) may at any time request that the board of directors call a shareholders' meeting with a specific agenda (article 699 III CO) – for instance, the election of new directors in case the current board is fighting a transaction.

The acquirer is neither entitled to request information about the target from the target directly nor has the acquirer, even after the purchase of a majority of the target's shares, a right to inspect the shareholders' register to be able to identify and contact other shareholders (but he may change the Board, bring in his own representatives and then get access indirectly to the information). Rather, the acquirer will have to inform the shareholders about his offer through the press or other media (potentially subjecting the offer to the takeover rules). If the target has issued bearer shares, not even the target will be able, at least theoretically, to contact its shareholders and will have to respond by public announcement as well.

Basic information on a Swiss company may be obtained from the commercial register, including:

- the contents of the articles of incorporation;
- the share capital;
- the number and types of shares; and
- the names of directors, managers and officers.

Except for listed companies and companies with listed bonds, there is no requirement to publish financial statements. However, shareholders and creditors are entitled to receive a balance sheet and a profit and loss statement (article 696 and article 697h CO respectively article 958e nCO). Under the Merger Act, the shareholders of a Swiss company involved in a merger, demerger, spin-off, or conversion are entitled to inspect the financial statements of all the companies involved covering the last three business years.

As mentioned above, statutory balance sheets of Swiss companies often do not reflect the true and fair value of a company, for the board has an incentive to form hidden reserves by undervaluing assets and making generous provisions. The main reason for creating hidden reserves is that Swiss corporate taxes are based on these financial statements.

Corporations with listed shares must disclose their major shareholders in a note to the financial statements (see article 663c CO). Since 1998, Shareholders holding more than five percent of the shares in a Swiss listed company (since 2007 the level is three percent) have to disclose their holdings to the company concerned and to the stock exchange on which the shares are listed. Further, companies whose shares are listed must disclose all remuneration paid directly or indirectly to current members of the board of directors and to the top management (see article 663b<sup>bis</sup> CO).

If securities are publicly issued, the CO requires the production of an 'issue prospectus' which is, however, very limited in scope by international standards

(see article 652a CO) and also if compared with a 'listing prospectus' as per the Listing Rules of the SIX Swiss Exchange. The preparation of such listing prospectus is required for listed companies which issue in excess of 10 percent of the existing capital (measured over a calendar year).

## 4.2 Commercial Law Matters

The acquisition of a corporation's stock is governed by articles 184 to 215 CO relating to the sale of movable goods. Many of the rules contained in these articles may be (and often are) derogated by oral or written consent. In particular, articles 190 and 214 (default by either party), article 185 (passing of risks and benefits with regard to the purchased shares or assets), and article 192 et seq. (breaches of representations and warranties) form the cornerstones to be considered when drafting a share purchase agreement.

In the event of a sale of a controlling block of shares, the Swiss Supreme Court has held that statutory law does not imply terms into the agreement as to the state and condition of the underlying business and that the buyer will have to seek express representations and warranties to be legally protected. However, on various occasions the Court has allowed an acquirer to rescind the contract even in the absence of warranty clauses if the net value of the business turned out to be considerably lower than expected on the ground of 'material error'.

Article 201 CO requires the buyer to examine the purchased goods without delay and to object immediately if defects are uncovered. This also applies to the purchase of shares with respect to liabilities in the underlying business. In the past, the Federal Supreme Court imposed an impractical short time period on the acquirer to investigate the company after closing. Article 210 CO provides that all claims for defects of the purchased goods (or breaches of warranty) are time-barred unless the acquirer instigates court proceedings within two years of completion of the sale. Neither article 201 nor 210 CO is mandatory, and legal counsel of the acquirer will often insist on adapting these rules to the special circumstances of an acquisition.

Based on article 205 CO, the acquirer may rescind the contract if representations and warranties prove to be untrue. However, in many cases the seller will request from the acquirer to waive this right (at least for the period subsequent to completion of the agreement) and confine himself to damages or indemnities for breach of contract by the seller. Finally, article 200 CO stipulates that the seller shall not be liable for a breach of warranty if the acquirer knew or should have known the defects of the purchased good (or the underlying business), unless specific warranties as to the absence of such defects were given. Especially where an extensive due diligence has been carried out prior to signing the agreement, the acquirer will want the applicability of this clause to be excluded.

## 5 Insolvency, Bankruptcy, Composition with Creditors

### 5.1 Insolvency and Bankruptcy

If debts are not paid when they become due, a normal debt collection procedure is commenced by filing an enforcement request to the debt enforcement and bankruptcy office. The debt enforcement office issues and serves a summons to pay upon the debtor, containing the order either to pay the sum specified by the creditor within 20 days or to file an objection within 10 days. The filing of an objection has the effect of bringing the proceedings to a halt. In case an objection is raised, the creditor must set it aside by proving that his claim is justified in an ordinary or a summary court procedure.

After the end of the introductory stage, the process is continued – if the creditor is a company – through the filing of a request for continuation of proceedings. Then, a bankruptcy warning is issued and served to the creditor. In the event that the creditor is not paid within 20 days upon service of the bankruptcy warning, he may file a request for declaration of bankruptcy with the competent bankruptcy court. The declaration of bankruptcy is issued by the court within a short delay after a bankruptcy hearing. The declaration of bankruptcy results in the acceleration of all debts; further, the bankruptcy court appoints a liquidator.

A request for declaration of bankruptcy may or must be filed without previous enforcement proceedings:

- in the event of over-indebtedness of the company, i.e. when its assets do not cover its liabilities;
- If the debtor's whereabouts are unknown, or if the debtor has escaped in order to avoid his obligations, or has acted fraudulently, or is attempting to act fraudulently to the detriment of his creditors, or has concealed assets in enforcement proceedings;
- if a debtor who is subject to enforcement proceedings by bankruptcy has ceased payments;
- in case of rejection of a composition agreement or revocation of a moratorium (see below);
- if a debtor himself requests the opening of bankruptcy proceedings by declaring to the court that he is insolvent (declaration of insolvency).

In the event of bankruptcy, all sizable assets owned by the debtor constitute the bankruptcy estate. The opening of the bankruptcy proceedings entails that all claims against the bankruptcy estate become due with the exception of those which are secured by mortgages on real estate. The creditor may claim the amount of debt, interest up until the date of the opening of the bankruptcy proceedings as well as the costs of enforcement. Unmatured non-interest bearing claims are discounted at a rate of five percent. There is a fixed order of distribution to the creditors. Creditors of the same class are equal among themselves. Yet, creditors of a class only receive proceeds once the creditors of the preceding class or classes have been satisfied.

A creditor has to submit its claim to the bankruptcy administrator who examines the claim, makes the necessary inquiries for verification and decides whether or not to admit it. A creditor whose claim has been entirely or partially rejected may bring an action against the bankruptcy estate.

The proceeds of the bankruptcy estate are applied to cover:

- the costs of the proceedings;
- the debts of the bankruptcy estate (i.e. debts arising after the opening of the bankruptcy proceedings);
- the secured claims (being satisfied directly out of the proceeds from the realization of the collateral);
- the unsecured claims and the uncovered part of secured claims; these are satisfied in the following order:
  - First class: *inter alia* claims of employees derived from the employment relationship; claims derived from the Federal Statute on Accident Insurance, claims from pension schemes and pension funds;
  - Second class: in particular claims by social security authorities, health and unemployment insurance institutions for employer contributions as well as claims by the federal tax administration concerning value added tax;
  - Third class: all other claims.

### 5.2 Composition with Creditors

Swiss bankruptcy law provides a legal procedure which enables a financially unsound debtor to reach a composition agreement with his creditors without having to file for bankruptcy. A composition agreement may have advantages over bankruptcy proceedings in certain cases. *Inter alia*, it may facilitate a reorganization of the debtor (as opposed to a liquidation in the case of bankruptcy), achieve a higher liquidation return for the creditors, grant more flexibility in the liquidation or sale of the debtor's assets or permit the current management (as opposed to a receiver in the case of bankruptcy) to continue, within certain limitations, to run the business.

In essence, the competent court, to the extent it holds the view that prospects for the recovery of unsatisfied claims exist, will grant a debt moratorium for a period of up to 24 months, during which time the debtor must agree on a composition agreement with his creditors (except for certain privileged creditors as defined under Swiss bankruptcy law). The composition agreement also requires court approval. The debt moratorium has the effect that no debt enforcement action against the debtor may be initiated or pursued; furthermore, although the debtor remains 'in charge', i.e. continues to manage his affairs, he is subject to supervision as regards the conduct of his day-to-day business through a court-appointed composition commissioner and may only dispose of assets with the approval of the competent court.

If debt restructuring proceedings lead to the conclusion of a composition agreement, the debtor is generally freed of a certain percentage of his debts and he may continue his business activities. Failing the execution of a composition agreement, or if a debt moratorium is revoked by the competent court, creditors may demand the opening of bankruptcy proceedings. Alternatively, the debtor may also file for bankruptcy if he meets the requirements. Debt restructuring proceedings can also lead to the conclusion of a debt restructuring agreement with assignment of assets, which – as in bankruptcy proceedings – leads to the dissolution and liquidation of the debtor company. The debtor assigns his assets to all creditors for realization which provides more flexibility compared to ordinary bankruptcy proceedings.

### 5.3 Avoidance Actions

Swiss law gives creditors in composition and bankruptcy proceedings the legal tools to challenge transactions entered into by a debtor prior to the confirmation of a composition agreement by assigning assets or the opening of bankruptcy proceedings if these transactions impair the realization of assets in favor of the creditors. The critical interval is one or five years prior to the composition or bankruptcy depending on the type of avoidance action. The legal tools to invalidate transactions because of their preferential character reach not only payments of money, gifts and sales, but also the providing of security. Courts have recently been easily prepared to admit such claims if they harmed creditors and if the debtor's counter-party acted in bad faith or gained an unjustified enrichment; in certain cases courts even requested the repayment of fees for services or the restitution of repaid loans, arguing that there was no counter value received by the debtor and the bankruptcy was foreseeable to the counterparty.

## 6 Listed Companies

### 6.1 Regulatory Regime

The Federal Act on Stock Exchanges and Securities Trading of 24 March 1995 ("Stock Exchange Act", "SESTA") regulates stock exchanges, securities dealers, and insofar as listed companies are concerned, mandatory disclosures of shareholdings and public offers. Since the SESTA came into force, listed companies and their shareholders must comply with a comprehensive regime regarding disclosure of shareholdings and public offers.

The SESTA makes disclosure of shareholdings mandatory if shares of a company which is incorporated in Switzerland and whose equity securities are listed are purchased or sold and if, as a result of a purchase or sale, certain thresholds are exceeded, irrespective of whether or not voting rights are exercisable. The relevant percentages are 3, 5, 10, 20, 25, 33 1/3, 50 and 66 2/3 percent of the voting rights. The notification must be made both to the stock exchange and the company concerned within four trading days after the disclosure obligation arises. Non-observance of these reporting duties is an offence which can result in a (heavy) fine.

Furthermore, in the context of a public offer, each person who holds at least five percent of the voting rights in the target company or in the company whose shares are offered as consideration must notify both the Takeover Board and the stock exchange of each transaction in these shares by midday on the trading day following the transaction.

### 6.2 SIX Swiss Exchange

The SESTA, besides regulating securities dealers, notifications of significant shareholdings, and tender offers, sets forth the general requirements to be met by stock exchanges seeking authorization from the FINMA. The system is basically one of self regulation, leaving the enactment of rules for listing and trading to the exchanges. The most important stock exchange authorized under the SESTA is the SIX Swiss Exchange, which is one of the leading stock exchanges in Europe.

The SIX Swiss Exchange became the world's first fully integrated electronic trading, clearing and settlement operation in 1996. Measured on the basis of trading turnover, the SIX operates Europe's largest market segment for listed and exchange-traded warrants. The shares traded on the SIX are mainly held in the Swiss-based deposit accounts of domestic and international investors and more and more through Swiss banks acting as custodians.

Over the past years, a number of large listed corporations have opted for a single share structure consisting of registered shares with deferred or no printing of certificates. Where a company still has more than one class of shares, bearer shares sometimes trade at a premium over registered shares owing to their free transferability and because registered shares trade on a smaller market (as they are often owned by Swiss investors). Participation certificates, in general, trade at a discount due to their lack of voting power.

The SIX Swiss Exchange offers a range of listing standards, including the Main Standard, the Domestic Standard, the Standard for Investment Companies, the Standard for Real Estate Companies, the Standard for Collective Investment Schemes, the Standard for Depository Receipts, the Standard for Bonds, the Standard for Derivatives and the Standard for Exchange Traded Products, each of which is governed by special rules. A company applying for listing on the Main Standard of the SIX Swiss Exchange must:

- have presented financial statements for at least three complete financial years, unless an exemption is granted;
- have a consolidated equity of at least CHF 25 million;
- show that if equity securities are listed for the first time, the capitalisation is at least CHF 25 million, or, if debt securities are listed, the total nominal amount is at least CHF 20 million, or, if derivatives are quoted, the relevant capitalization requirements are satisfied, which vary depending upon the kind of the underlying securities; and
- show that a sufficient number of shares, corresponding to 25 percent of the share capital, has been distributed to the public by the time of admission of

the securities for which listing is sought or that proper market trading can be expected if a lower percentage is publicly held.

The listing application must include, among other things, a prospectus containing the information set forth by the Listing Rules of the SIX Swiss Exchange. In addition, under the Listing Rules, quoted companies have certain continuing disclosure obligations.

Trading in domestic securities on the SIX Swiss Exchange is settled within three business days. Exchange members enter purchase and sale orders directly into the electronic books of the SIX, where they are automatically matched. Historically, off-the-floor trading has been a special feature of the Swiss securities market. There is still a large number of registered broker/dealers in Switzerland who are not members of the SIX Swiss Exchange and are therefore under no obligation to process orders through the electronic SIX matcher. Banks which are licensed to act as broker/dealers often offset their customers' purchase and sale orders at market rates. However, securities dealers who are subject to the SESTA must report all on- and off-exchange transactions in Swiss and foreign securities listed on a Swiss exchange, with a few exceptions. Thanks to the national clearing and depository system, SIS SegalInterSettle AG, physical delivery of the shares can be avoided provided the purchaser and the seller are both customers of a member bank.

### 6.3 Insider Dealing, Market Manipulation and Market Abuse

Since insider trading has become a criminal offence in 1988, convictions for insider dealing have been rare. It has proven very difficult in practice for the prosecution to establish beyond a reasonable doubt that a confidential fact was brought to a tippee's attention by an insider acting intentionally. Swiss Parliament ratified tighter regulations on insider trading in 2012 that aim at sanctioning illegitimate transactions more effectively. Additionally, the provisions on market manipulation and on the obligation to disclose shareholdings have been tightened as well. The new law is expected to become effective on 1 April 2013.

According to the new article 40 SESTA (which will replace article 161 SPC), a person who receives information as an insider with respect to a listed company is liable to a fine and/or imprisonment for a period of up to three years if he is dealing despite knowing a confidential fact whose dissemination would likely have a significant effect on the share price, or is making such confidential fact known to a third party. In case the pecuniary advantage exceeds one million CHF, the criminal sanction involves imprisonment of up to five years. Furthermore, a tippee who learns a confidential fact from an insider commits an offence if he abuses the information as specified above. Tippees can be fined or imprisoned for up to one year. Profits deriving from insider transactions are seized by the authorities. Sellers who have suffered a loss may also bring a claim in tort and rescind the purchase if they were induced to sell their shares to the insider.

Article 40 SESTA defines an insider as a person who is aware of a confidential fact or information. It extends the former scope of the definition beyond directors, managers, auditors and agents of a company. A fact is 'confidential' if its disclosure would have a substantial and foreseeable influence on the price of the listed shares.

The new article 40a SESTA (which replaces article 161<sup>bis</sup> SPC) prohibits price manipulation. It forbids any attempt to significantly influence the price of securities traded on a Swiss stock exchange by spreading misleading information or by entering into fictitious purchases and sales. Furthermore, article 33f SESTA draws a distinction between legitimate market stabilization activities and impermissible market manipulations. The Federal Council will enact an ordinance prohibiting actions commonly referred to as "ramping", "camping", "pegging", "squeezing", "cornering" and "spoofing". The former limitation to supervised entities will be partly abolished: According to the new law, every market participant will be subject to the criminal sanction set out above while on the level of administrative sanctions imposed by the FINMA, differences between regulated entities on the one side and individuals and other entities on the other side will remain.

A shareholder or a group of shareholders acting in concert who fail to disclose the crossing of a threshold when acquiring or disposing of shares in a Swiss listed company accordance to article 20 SESTA may be fined up to CHF 10 million.

### 6.4 Anti-Bribery and Corruption

Switzerland has a solid body of criminal legislation on anti-bribery and corruption. According to article 322ter SPC et seq. bribery of Swiss and foreign public officials is a criminal offences that may result in imprisonment for a period of up to five years or a fine of up to CHF 1,080,000 (respectively CHF 5,000,000 for companies). Article 4a of the Unfair Competition Act prohibits private bribery; investigations are instigated at the request of a complainant. However, bribery in connection with non-profit organizations (such as FIFA and the IOC) and sport events in particular are not covered because no competitive relationship in the sense of the Unfair Competition Act is involved. The Swiss Parliament is currently debating whether more stringent anti-bribery laws should be enacted to extend the current rules to non-profit organizations as well.

## 7 Merger Control

The "Cartel Act" introduced preventive merger control in Switzerland when it entered into effect on 1 July 1996.

Article 9 of the Cartel Act provides that the Competition Commission must be notified of concentrations which have an effect in Switzerland if in the business year preceding the concentration, (a) the undertakings concerned have reached a combined world-wide turnover of at least CHF 2 billion, or combined sales

in Switzerland amounting to at least CHF 500 million, and (b) the turnover of at least two of the undertakings concerned in Switzerland was CHF 100 million or more. It is generally the latter requirement that determines in reality whether or not a notification must be made. Besides, a notification is required if one of the undertakings concerned has been held in previous proceedings to benefit from a dominant position in a relevant market and the concentration affects the same market.

The 'undertakings concerned' include the merging companies as well as their affiliates. The term 'concentration' is broadly defined to include not only statutory mergers but also an acquisition of control and the establishment of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Merger control procedures commence by a notification to the Competition Commission, which must occur prior to completion of the agreement leading to the concentration. The Competition Commission decides within one month ("Phase I") whether to instigate an in-depth investigation ("Phase II") or whether to clear the transaction in Phase I. If an in-depth investigation is opened, the examination must be finalized within 4 months, resulting either in the approval of the concentration (which may involve conditions and obligations) or its prohibition. The decision of the Competition Commission may be appealed at the Federal Administrative Court and then at the Federal Supreme Court.

The Competition Commission may prohibit a concentration if its examination reveals that (a) the concentration creates or strengthens a dominant position as a result of which effective competition could be eliminated in a given market, and (b) conditions in another market are not concurrently improved so as to outweigh the disadvantages of the dominant position. This threshold for prohibition is higher than the one of other jurisdictions notably the SIEC-test used in the EU (Significant Impediment of Effective Competition). For this reason, the Federal Council has proposed that Parliament adopt the SIEC-test also in the Swiss merger control procedures. This change is currently discussed in Parliament.

The turnover thresholds of the Swiss merger control are high. As a consequence, only a fraction of the transactions involving Swiss companies have to be notified to the Swiss Competition Commission. Many of them, however, have to be notified to foreign competition authorities, notably in Germany and Austria, since the merger control laws of these jurisdictions have much lower triggering turnover thresholds.

## 8 Lex Koller (Acquisition of Real Estate)

The Federal Law on the Acquisition of Real Property by Foreigners of 16 December 1983, as amended on 1 October 1997 and 1 April 2005 (referred to as Lex Koller), provides that the acquisition of real property and the acquisition of shares in companies or businesses owning real property requires authorization from the cantonal authorities, unless the property is used as a permanent busi-

ness establishment. In particular, Lex Koller applies to a purchase of shares in a company owning real property which is not used for business purposes if:

- the acquirer is a foreigner, a foreign corporation or a Swiss corporation controlled by a foreigner; the test being, *inter alia*, whether foreign ownership is in excess of one-third of the share capital; and
- the market value of the real property (exclusive of real estate used as a permanent business establishment) is more than a certain percentage of the market value of the total assets of the company. As the law is silent on what that percentage is, different authorities apply different thresholds, usually around 20 percent to 33 1/3 percent.

If the value of the real property not used as a permanent business establishment is not clearly below the relevant threshold, the acquirer must seek confirmation by the competent authorities that Lex Koller will not apply. Where the value of such property exceeds the relevant threshold, the foreign purchaser must seek the approval of the competent authorities which will be given on certain grounds only. In a transaction context, the problem may be addressed by carving the residential real property out of the target company.

It is of particular importance to ensure compliance with the obligations imposed by Lex Koller because a purchase of shares in a company holding non-business related Swiss real estate without the necessary authorization will be deemed to be null and void. However, the obligations set out by Lex Koller do not apply to a company whose shares are listed on a stock exchange.

## 9 Data Protection

The processing of personal data is governed by the Swiss Federal Act on Data Protection (referred to as Data Protection Act). Personal data may only be disclosed abroad if the country in which the recipient of the data resides guarantees adequate protection. The Swiss Federal Data Protection and Information Commissioner has issued a list of countries that – from a Swiss data protection law perspective – are considered to have an adequate data protection legislation. If a country to which the personal data is transferred does not provide adequate protection, other safeguards must be implemented to ensure adequate protection. The most common safeguards are contractual clauses entered into between the data importer and the data exporter which oblige the data importer to adequately protect the personal data disclosed to him.

In M&A transactions, data protection plays an important role. Especially during the due diligence phase a lot of personal data (such as employee data, client data, supplier data, etc.) is disclosed to potential buyers. The principle of proportionality requires that only the most relevant personal data is disclosed during the (initial) due diligence phase or even that in a first round the personal data is anonymized. For example, it is not permissible to disclose the name, address and further details of all employees during the (initial) due diligence phase. The further the transaction progresses, the more personal data may be

made accessible. However, personal data of employees which are absolutely irrelevant for the transaction may not be disclosed.

If potential buyers have their domicile abroad, it must be verified whether they are domiciled in a country that provides for adequate data protection before the due diligence information may be disclosed to these buyers. If their country of residence (and/or the country of residence of their advisers) does not provide this protection, then the seller and potential buyer (and/or their advisers) must enter into a cross-border data flow agreement which ensures adequate protection of the disclosed personal data.

## 10 Employment of Foreign Nationals

Non-Swiss citizens who wish to work in Switzerland need a Swiss work and residence permit. Citizens of the EU/EFTA are privileged compared to non-EU/non-EFTA citizens because the former benefit from the Bilateral Treaty on Free Movement of Persons. The freedom of movement includes the right of entry, the right of residence and the right of access to an economic activity. This right is, in principle, sufficient to enter into an employment agreement with a Swiss employer to be eligible for a Swiss work and residence permit. Short term employments of up to 90 days may even be registered online, without submitting any formal application and documents. Accordingly, the number of residence and work permits for EU/EFTA citizens are in principle not subject to any quota. However, after certain thresholds had been surpassed regarding the number of immigrants from EU/EFTA countries in 2012, Switzerland has recently invoked the safeguard clause (*Ventilklausel*) provided for in the Bilateral Treaty on Free Movement of Persons, and applied it to all EU member states: this allows Switzerland to unilaterally re-introduce quotas for citizens from the EU-countries until mid 2014. Furthermore, a transitional period during which additional restrictions on work permit quotas may be maintained to nationals from Bulgaria and Romania, is applicable until 2014 (and might be extended until 2016). Croatia – as the most recent EU-member state – is currently still treated as a non-EU country with regard to the free movement of persons.

Swiss work and resident permits for non-EU/non-EFTA citizens are limited in number (annual quota). The authorities have broad discretion when approving an application and an applicant has to fulfill strict requirements regarding education, job qualification and financial means. Further, work permits for non-EU/non-EFTA citizens are only available if no other suitable candidate could be found within Switzerland and the EU, unless the respective candidate had previously been employed with the assigning company abroad for at least one year. Thus, if a Swiss company is acquired, a non-Swiss purchaser cannot expect to be able to staff the newly acquired company largely with personnel from outside the Swiss labor market. However, working permits for top executives, skilled technicians and specialists who are essential for the operation of a business will usually be granted – provided that they have previously been employed with the purchaser's company abroad and subject to the availability of permits under the respective quota.

## 11 Foreign Investment

There are currently no restrictions on capital transactions between Switzerland and other developed countries. However, the Swiss National Bank may regulate the country's money supply and implement credit and currency policies.

Under certain circumstances the Swiss government may prohibit the sale of securities of Swiss companies as it did in 1978 in order to control the exchange rate of the Swiss franc. Currently, no such rules are in force.

Foreigners may acquire all types of domestic assets or shares in domestic companies without requiring authorization, with the exception of (a) companies engaged in certain regulated businesses, such as banks, insurances or casinos and (b) real property or companies holding real property.

The sale of an ongoing business that requires a license or concession for its operation (e.g. the transport business, certain activities in the health sector and the importation of certain agricultural products) may be subject to approval by the competent authorities. However, licenses will usually not have to be renewed if shares of a licensed company are sold.

Generally, investment incentives are available only to new enterprises or new investments of existing businesses. Therefore, the purchase of an existing business will normally not entitle the acquirer to investment incentives, except if the business becomes engaged in new projects. Even then, it often proves helpful to incorporate a new entity in order to take full advantage of incentives offered to newly established companies.

Incentives vary considerably from one canton to another, at times even from one municipality to another. As a general rule, they fall into one of the following categories:

- tax incentives: reduction of income and capital taxes for up to 10 years (in some areas even at the Federal level) or extraordinary depreciation allowances at the cantonal and communal level;
- financial incentives: subsidies for interest payments or guarantees for loans; and
- administrative incentives: help in locating adequate premises (possibly also sale of land below market value) and ease in obtaining work permits.

Areas such as Zurich, Basel or Geneva have abolished these tax incentives. Other regions with ailing industrial sectors still offer reduced tax rates for a period of up to 10 years. Federal incentives are generally limited to less developed areas and may not exceed the incentives granted at the cantonal and communal level.

### III Purchase and Sale of Private Businesses

#### 1 Share or Business Purchase?

When purchasing a business, an acquirer may choose between an asset purchase or a share purchase. The decision will depend on whether or not:

- the target is organized as a corporation;
- the acquirer wants to purchase the entire business;
- there is a risk of hidden liabilities;
- the assets are easily transferable;
- tax and accounting considerations favor one approach over the other;
- assets must be pledged in order to finance the transaction.

In the past, Swiss parties usually opted for selling shares rather than assets and liabilities, for the transfer of shares was much easier in practice than the transfer of a business where titles for every asset, contract and governmental authorization had to be individually transferred. In addition, business transfers often required the consent of third parties or governmental agencies. Where real property was involved, a registration of the new owner was required, which could trigger special taxes. While nowadays the new Merger Act simplifies the acquisition of business assets by providing for a transfer by operation of law, the procedure to sell a business is still more burdensome than a sale of shares, entailing the production of a detailed inventory, a registration in the commercial register, information of the shareholders, joint and several liability with the seller for a certain interval and other measures to protect the interests of creditors and employees.

In addition, a share deal will be preferable for an individual vendor who generally realizes a tax free capital gain on the disposal of shares. For the acquirer, the purchase of assets offers two advantages from a tax point of view: (i) he may set off financing costs directly against income of the purchased business (since the interest expense and the income will arise in the same legal entity), and (ii) the acquirer may furthermore depreciate assets of the purchased business in the future and therefore benefit from tax savings, given that book values in the statutory and tax accounts may be written up on completion of the acquisition to reflect the purchase price. These advantages, however, usually do not measure up to the benefits a seller derives from a share transaction. Therefore, more often than not, the parties will agree to a share deal, at times only if the seller lowers the purchase price in order to compensate the purchaser for agreeing to the seller's preferred structure.

Where there is a purchase of shares, certain other advantages may arise. For instance, the target company will become a subsidiary of the acquirer. This not only leads to limited liability of the parent but also facilitates a future re-sale. If the business of the target should be combined with that of the acquirer, the two entities may merge after the acquisition. The necessity to pledge assets in connection with the transaction (e.g. as a security for financing by a third party)

will also favor a purchase of shares over the purchase of a business because under Swiss law, a pledge is valid only if collateral is actually transferred to the pledgee, which effectively rules out pledges of business assets; a pledge of shares is, however, easy to implement.

The acquisition is structured as an asset deal if a share purchase is not feasible due to the legal organization of the enterprise concerned or if there is a danger of a considerable amount of hidden liabilities that cannot be dealt with by warranties of the selling shareholder(s). In these cases, the acquirer will purchase all, or part, of the assets of the target and assume all, or part, of the (known) liabilities. If only part of the business is sold, the seller may – instead of an asset deal – set up a subsidiary and furnish this subsidiary with the business to be sold by way of a contribution in kind and thereafter sell the shares in the subsidiary.

## 2 Acquisition Process

### 2.1 Structured Auction / Privately Negotiated Sale

To put it broadly, a private M&A transaction can either be structured as an auction (in which various prospective acquirers strive towards acceptance of their bids) or as a privately negotiated sale with a specific acquirer. In the latter case, acquisition agreements are generally negotiated by the senior management of both the seller and the acquirer, assisted by lawyers who normally become involved when one party, usually the acquirer, wishes to draft certain preparatory documents, e.g. a letter of intent. The seller will often insist that the letter of intent contain confidentiality undertakings, which, together with provisions regarding exclusivity (if any), are meant to be legally binding, whereas there is normally no right to enforce the execution of a definitive agreement. The parties should generally not fix the purchase price in a letter of intent without appropriate reservations because many aspects of the transaction, in particular taxes, unknown liabilities, or the scope of warranties the seller is ready to give, that will have a bearing on the price, are rarely considered during the initial stages.

In a controlled auction, the seller solicits bids from various bidders through a structured sale process. After having executed a confidentiality agreement, the bidders receive access to an information memorandum, which describes the target company's business. Based on this information, the bidders deliver an indicative offer. The seller will then grant – to selected bidders only – access to a due diligence investigation. Eventually, after having received and analyzed binding offers of the bidders (which often have to include a mark-up to an agreement drafted by the seller), the seller enters into a purchase agreement with the preferred bidder.

Structured auctions are an efficient method for the seller to maximize competitive tension for the target. From the bidder's perspective, the limited access to information is perceived as disadvantage. As the upper hand in M&A negotiations tends to have shifted from seller to acquirer since the financial crises, structured auctions have been adapted to meet the requirements of

investors calling for a greater amount of information prior to committing their own resources. To provide bidders with adequate information at an early stage, a 'vendor due diligence' is increasingly performed.

If a party does not negotiate in good faith and eventually refuses to sign the contract, the other party may have a claim based on *culpa in contrahendo* to be compensated for the costs incurred in connection with the negotiations (e.g. legal fees, travel expenses) or as a result of arrangements made in view of the execution of the contract (e.g. hiring of a manager for the new subsidiary). The seller may have a claim for damages against an acquirer acting in bad faith if the seller turned down other prospective purchasers who no longer wish to purchase the business when the acquirer aborts negotiations. However, *culpa in contrahendo* does, as a general rule, not give rise to a claim for lost profits.

In negotiated deals, once the basic structure for the transaction has been agreed, a first draft of the purchase agreement is often provided by the legal counsel of the acquirer. Although this draft normally favors the position of the party drafting it, it should not be extremely one-sided so as to be acceptable as a basis for further negotiations and to avoid a completely rewritten counter-proposal by the seller's counsel or a request for a more balanced new draft.

After the signing of the letter of intent, the parties at times agree to a timetable, which quite often proves to be optimistic in hindsight. Nevertheless, it is a useful tool for addressing the issues the parties will have to consider before and after the execution of the agreement.

### 2.2 Public Announcement

Under Swiss corporate law, an acquirer is under no general duty to disclose his shareholdings in the target or to publicly announce his intentions to purchase a business. Other rules apply to listed companies, where '*ad hoc publicity*' rules force a listed company to disclose negotiations if there are rumors in the market. Once a contract is signed, the transaction is generally publicly announced, but quite often without specification of the purchase price.

### 2.3 Investigating the Target Company (Due Diligence)

As an interested acquirer is generally in need of information to value the target and to assess the risks and benefits of the contemplated transaction before entering into the purchase agreement, it has become common practice to allow the acquirer to examine the target and its business in a due diligence investigation. In such a due diligence, the documents and information made available by the seller and the target are reviewed by the acquirer who will typically rely on external advisors such as auditors, attorneys and tax or environmental experts to assess the information received. However, a prospective acquirer is invariably faced with the problem that the seller is reluctant to disclose very confidential details about the target for as long as it is uncertain whether the

acquirer is willing to purchase the business at an acceptable price. Therefore, on the one hand, the seller will want to sign the agreement before giving the acquirer full access to very sensitive data regarding the business. On the other hand, the acquirer will not want to be bound until he knows that the proposed acquisition represents a sound commercial investment. A variety of techniques have been developed in order to mitigate this problem:

- In the context of structured auctions, an inspection can be carried out by a third party on behalf of the seller (vendor due diligence), generally by an accounting and/or a law firm. A vendor due diligence will not only cover the financial and legal aspects of the target business, but also business matters, such as the markets in which the business operates, its competitors, production, sales, research and development, etc. The assigned experts prepare a written report with their findings that will be handed over to the bidders for their review, generally provided that they have agreed in a non-reliance letter that the authors of the report are not liable for any mistakes or omissions the report may contain. At times, the authors deliver a reliance letter to the ultimate acquirer that permits the acquirer to rely on the final report.
- In another method, the acquirer is given full access to the business of the target even prior to the signing of the agreement against the potential acquirer's undertaking to treat all information confidentially, particularly if the transaction is not completed. This procedure is most often used when private equity houses purchase companies in Switzerland, but might be less suitable if the acquirer is a competitor of the target (or the seller).
- A nowadays less frequently used alternative is to give the acquirer limited access to the business until the signing of the agreement and instead be offered contractual protection in the form of detailed warranties. The acquirer may then freely inspect the target's business after signing, knowing that he will have the right to rescind the agreement prior to completion if the warranties prove to be materially incorrect. After completion, indemnity payments will be due if the acquirer discovers a breach of warranty or he will have the right to lower the purchase price. The procedural advantage of this technique is that information is provided by the party which can most easily do so as it is – for example – much more efficient if the seller represents and warrants that it has full title to the real property and that the buildings are in compliance with the applicable laws rather than if the buyer's attorneys look into all these issues. Verification of the information is still possible after completion for as long as the warranties and indemnities survive. This technique, however, is not suitable when damages or indemnity payments would be an insufficient remedy for the acquirer – for example, where title to certain assets or certain earnings data is of such importance to the acquirer that the possibility of a rescission or an indemnity payment will not afford adequate protection.

## 2.4 Signing and Completion (Closing)

Normal practice is for the purchase agreement to provide for an interval between signing and completion. The interim period will be used to obtain third party consents or governmental authorizations. It will also allow the acquirer

to arrange for the financing of the transaction and possibly to further inspect the business of the target.

On completion, the parties exchange the shares (or transfer the business) against payment of the purchase price. As the warranties will usually be given either as per the date of the most recent balance sheet, or as per signing of the agreement, the period pending completion must be regulated by contract. Normally, the seller will promise that the target company will not enter into contracts outside the ordinary course of business without the prior written consent of the acquirer; often, certain (or all) representations and warranties are confirmed to be correct as per completion.

Simultaneous signing and completion is possible where no interim period is necessary.

## 3 Share Purchase

The nature and length of a sale and purchase agreement depends on the business of the target, the method by which information is exchanged and the bargaining power of the parties. These elements have a bearing on the amount of warranties to be given by the seller. The agreement usually contains the clauses set forth below.

### 3.1 Recitals

The agreement generally contains recitals which summarize the understanding between the parties of the basic structure and describe the transaction in summary. The parties sometimes expressly state that the recitals have no binding effect and represent declarative statements only.

### 3.2 Sale of Shares

The agreement usually provides that a certain number of shares is to be sold free from all liens and encumbrances. It may be worth noting here that if share certificates have been issued, the transfer by virtue of statutory law excludes a transfer of liens or encumbrances provided the acquirer acts in good faith (see article 935 CC for bearer shares, and article 968 and 1006 CO for registered shares).

The wording of the clause often refers to the number, type and nominal value of the shares issued. If not all of the shares are purchased, the serial numbers of the certificates will be enumerated.

The agreement further provides for the duty of the seller to deliver the shares on completion and specify, according to the type of shares, whether they must be simply handed over (bearer shares) or also need to be endorsed (registered shares) and/or whether the board of directors of the target company must

approve the transfer (registered shares with transfer restrictions). In the latter case, minutes of the respective board decision must be delivered at completion.

If no share certificates have been issued, title is transferred by written assignment.

Finally, the agreement often provides for the acquirer's duty to accept delivery of the shares on completion. This makes clear that acceptance of the shares is a contractual duty of the acquirer, allowing the seller to withdraw from the contract (in accordance with article 102 et seq. CO) if the acquirer defaults (see also article 211 I CO).

### 3.3 Purchase Price

Of course, the agreement also provides for the acquirer's obligation to pay the purchase price on completion either to the seller or (at least in part) into an escrow account. The consideration may take the form of cash or shares or a combination of cash, debt or equity securities of the buyer and possibly a contingent component based on future performance. If the parties have agreed on cash, a money transfer or the delivery of a banker's draft will be foreseen in the agreement. The delivery of shares against payment of the purchase price takes place at the completion meeting, where each party may verify whether the other party performs its main obligations under the agreement.

Acquisitions in Switzerland tend to be settled in cash. In general, if an acquirer offers shares, the seller will accept consideration in this form only if the shares are readily marketable (possibly after a lock-up period). Often, this rules out share-for-share deals involving private companies as buyers.

In a situation where the buyer and the seller disagree on the method of payment, in that the buyer wishes to offer shares whereas the seller wishes to receive cash, a vendor placing could be envisaged. Though rare in practice, this type of placing involves the buyer transferring its shares to the seller and organizing a placing of these shares with institutional investors through its financial advisers, while promising the seller a certain amount of proceeds from such placing. Alternatively, the acquirer may place shares with investors and use the proceeds to settle the purchase price in cash – but then the price risk of the shares is entirely with the acquirer. This method is used quite often.

In spite of the fact that before 2005, Swiss law treated an increase of the share capital made in view of an acquisition similar to a contribution in kind (article 652c and 628 CO), entailing special disclosure obligations, but under the current rules, this only applies if the seller is a related party. A shareholder of a Swiss corporation has a statutory right to subscribe newly issued shares in proportion to his holding (pre-emption right). A Swiss acquirer, when raising cash to finance the purchase, will therefore either have to issue shares to its shareholders, or seek shareholders' approval to waive the pre-emption rights, a decision requiring not only a majority of two-thirds of the shares represented (article 704) but also what is called 'valid grounds'. These are normally deemed

to exist if the shares are either issued to the seller or to the public in order to finance an acquisition. The intended implementation of a capital band would facilitate the issuance of equity.

The amount a buyer is willing to pay for the target company will depend on the valuation of the business, which is more of an art than a science. Over the last decades, the discounted cash flow (DCF) method has gained widespread acceptance. The DCF method operates by discounting forecasted free cash flows (operating profit + depreciation + amortization of goodwill – capital expenditures – cash taxes – changes in working capital) to a present value using the target company's weighted average costs of capital as the discount factor. Another (short-hand) valuation technique involves the use of comparative ratios, such as the P/E ratio. Here, the purchase price is calculated as a multiple of the (historical, but sometimes also estimated future) earnings that a target company is producing based on the P/E for the stocks within the target group's industry. Other multiples (such as of sales or of the EBIT) are also used and allow the calculation of the enterprise value from which the (financial) debt is deducted to arrive at the equity value. Finally, if earnings are less relevant or negative, the net assets method may be applied where the book values are adjusted to reflect the market value of the net assets. The parties usually agree that a certain amount will have to be paid in excess of the value of the net assets of the company in order to compensate the seller for goodwill. This excess amount generally depends on:

- synergy effects the acquirer intends to realize;
- the earning power of the target;
- hidden reserves in the balance sheet;
- the target's goodwill (in the strict sense of the word);
- tax consequences of the transaction; and
- the bargaining power of the acquirer and the seller.

An alternative to setting the price based on historic figures, market multiples, or projected free cash flows, is to determine the consideration by reference to the results of the target for a certain period after completion. Earn-out formulas are used especially where the seller continues to manage the target company after selling his shares. Such formulae are quite common in the professional services sector (involving public relations, accounting or consultancy firms) where the parties intend to retain the services of the founders and key employees of the company. A seller might – if such formula is used – be willing to accept a low salary for his future services for tax reasons, because he may realize a tax free capital gain from a higher purchase price, whereas his income as an employed manager will be taxed at ordinary rates and, furthermore, will be subject to social security payments. From the point of view of the acquirer, an earn-out formula may also be advantageous as it ties the consideration to the performance of the business.

The employment contract to be agreed with the seller will have to include, *inter alia*:

- provisions regarding the management of the target company;
- a list of transactions for which the seller will need the approval of the acquirer;
- a provision that the seller may not renounce his salary (which he might be tempted to do in order to reach profit targets); and
- a non-competition clause for a certain period of time after termination of the employment relationship.

In addition, the purchase agreement will contain rules for the computation of profits, defining, for example:

- interest rates on inter-company loans;
- rates of depreciation and amortization of goodwill;
- research and development expenditures;
- creation of reserves (e.g. for taxes, warranty claims); and
- treatment of work in progress, etc.

Often, and irrespective of the way the purchase price is determined, the question of deferred taxation is addressed by the purchaser at some point in time. To a large extent, Swiss companies are allowed to depreciate assets for accounting and tax purposes below their fair market value. Consequently, Swiss companies may incur considerable tax liabilities when their operations are sold or liquidated. Therefore, the acquirer will argue that part of that tax burden must be borne indirectly by the seller and that the purchase price must be lowered accordingly. The seller will take the position, however, that in an on-going business deferred taxes are of minor importance and would become due only if the acquirer liquidated the business – something the seller would not expect the acquirer to do.

Even if the parties agree on a fixed price and not a formula, the contract should specify how the price was calculated. This will facilitate the computation of reduction payments if warranties prove to be untrue.

If the seller has granted loans to the target company, it should be specified whether the loans will be assigned to the acquirer, and if such transfer is contemplated, whether payment of the purchase price includes consideration for this assignment. If the seller owes money to the target, the parties will usually agree that the acquirer assumes the debt of the seller against an appropriate deduction of the purchase price.

In many cases, it is agreed that the acquirer pays part of the consideration into an escrow account; for example, until the inspection of the business can be completed or until a settlement is reached in a major dispute in which the target company is involved. The agreement will then provide that the escrow amount must be returned to the acquirer if representations and warranties are breached.

## 3.4 Warranties and Indemnities

### 3.4.1 General

The parties usually devote much time during negotiations to the 'reps and warranties' section of the agreement. In contrast to other jurisdictions, Swiss warranties are rather included in the main document than listed in a separate schedule.

The Swiss Federal Supreme Court has held in a number of cases (see e.g. BGE 79 (1953) II 155; 97 (1971) II 43; 107 (1981) II 419; 108 (1982) II 102) that the statutory remedies for defects in purchased goods (article 197 et seq. CO – see II. 1 above) apply only to the share certificates and not to the business as such. Consequently, the purchaser will want to ensure that contractual warranties are given by the seller with respect to the business. The relevant court decisions have been heavily criticized by legal writers, yet to no avail.

Warranties given by the acquirer are usually of minor importance. The acquirer typically warrants that it has the full corporate power and authority as well as the necessary governmental approvals (if any) to consummate its obligations under the share purchase agreement. Increasingly popular are warranties that the source of the funds used for the transaction is legal. Also, the parties often annex an extract of the commercial register evidencing that the acquirer's representatives have authority to sign the agreement.

Where Swiss courts had to adjudicate claims on the grounds of material defects of acquired businesses, they, on various occasions, allowed the aggrieved party to have recourse to article 24 I.4 CO, which provides that a contract may be rescinded based on a material error at the time when the agreement was made. The courts have expanded this rule to also allow price reductions within certain limits. Since a rescission of the contract often does not prove to be an adequate solution, it is common for the parties to waive the right to rescind the agreement due to a breach of representations and warranties or a material error. One reason for the scarcity of published court decisions in this area is that many private acquisition agreements contain an arbitration clause.

A number of customary warranties given by the seller are enumerated hereinafter.

### 3.4.2 Who Should Give Warranties

Normally, only controlling shareholders will be able and prepared to give warranties on the condition of the business. Minority shareholders, however, will at times also be required to additionally assume liability in proportion to their share of the sale proceeds.

Under Swiss law it is unusual for the target company itself to give warranties as is sometimes the case in other jurisdictions. This is because a payment under such a warranty:

- would in fact economically be made by the acquirer; and
- could be considered as a constructive dividend to the selling shareholder, subject to withholding tax.

From the acquirer's viewpoint, it makes sense, though, to obtain warranties from the target relating to the period prior to completion if a breach of warranties discovered during a pre-completion due diligence allows the acquirer to rescind the contract.

### 3.4.3 Remedies for Breach

The legal remedies for a breach of warranties are derived from general principles of contract law and the law relating to the sale of movable goods. These principles do not always provide an adequate solution in the context of an acquisition. Therefore, the parties usually seek to vary the operation of statutory law by defining specific terms with respect to remedies.

The agreement will often provide that the purchaser is not required to complete the transaction if a material breach of a warranty is discovered before completion. However, the parties usually exclude any right to rescind the agreement after completion, thus in effect waiving actions for rescission on the grounds of article 205 CO relating to grave defects and article 24 I.4 CO relating to material errors. Furthermore, article 207 III CO restricts the right to rescind the agreement where the acquirer has modified the purchased goods.

If a breach of warranty is discovered after completion (or prior to it, but the acquirer decides to complete the deal anyway), the acquirer may seek a reduction of the purchase price. Generally, Swiss courts apply the relative method to determine the appropriate reduction. According to the relative method, the purchase price, say CHF 72, is reduced in proportion to the ratio of the 'true value' of the goods without the defects, say CHF 60, to the 'true value' of the goods with the defects, say CHF 40. In this example the relevant proportion would be 3:2, meaning that the reduced purchase price would amount to 48. In practical terms, it will hardly be possible to establish 'true values' in M&A transactions. Therefore (and without a respective provision in the agreement) a judge is likely to seek an answer to the following question: "What would the parties have agreed on in good faith had they both known of the existence of the breach of warranties when entering into the contract?" The liability will amount to the difference between the purchase price and the value so found by the judge.

As a general rule, the purchaser will prefer indemnities over reps and warranties, stating in the agreement that the seller will keep the buyer harmless from a specific loss in relation to certain matters, for example in relation to pending litigation. Where there are indemnities, it is unnecessary to ask what the value of the shares is or would be. The seller will simply have to discharge his payment obligation and may not argue that the acquirer would have purchased the shares for the same consideration even if he had known of the

breach when signing the agreement. Technically, such a clause qualifies as a guarantee as per article 111 CO. Indemnities are usually given in favor of the target company itself, although agreements typically provide that the acquirer may elect to directly receive the compensation. Reduction payments are always paid to the acquirer.

Swiss law provides for additional damages for breaches of the seller's representations or covenants under certain circumstances, for example if the acquirer suffers a damage that is not covered by either an indemnity or a reduction of the purchase price or if the parties agree that the appropriate remedy should be damages rather than a reduction of the purchase price.

### 3.4.4 Limitations on Liability

Often the seller will seek to limit his responsibility for warranties by asking for a maximum liability to be stated in the agreement (possibly amounting to the purchase price or a certain percentage of the purchase price, often between 10 and 30 percent). In addition, the parties may agree minimum limits to be reached before a claim may be brought forward; it is often agreed that no claims may be made unless the aggregate of all claims exceeds a certain threshold (for example one percent of the purchase price). Further, a *de minimis* limit may be stipulated on individual claims, which means that a claim may not be counted towards the threshold unless it is worth a certain minimum amount, say CHF 5,000. If the minimum limit is exceeded, the buyer will want to ensure that the full amount to the first Swiss franc may be recovered, in which case the minimum limit is often referred to as a threshold, whereas the seller's desire is to become liable only to the extent the limit is exceeded, in which case it is called a deductible. In this context, it should be noted that under Swiss law, a maximum limit is ineffective insofar as the seller has caused a damage by gross negligence (article 100 I CO).

Typically, the parties agree that to the extent the damage is covered by an insurance, the acquirer may not seek damages; similarly, a payment duty is often excluded if the acquirer or the target failed to take appropriate measures to mitigate the damage. Finally, the seller normally attempts to exclude any liability for consequential damages (including loss of profits).

### 3.4.5 Notification of Breach

Article 201 CO provides that the buyer must examine the 'purchased goods' (i.e. in the present context the business) as soon as practicable in the ordinary course of business and that the seller must be notified immediately of any defects for which he is to be held liable under a warranty. Should the purchaser fail to comply with this notification duty, the sale and the sold products are deemed to have been approved, except where there are defects which could not have been discovered in the course of a normal examination. Where such hidden defects are later uncovered, immediate notice must be given, failing which the hidden defects are deemed to have been accepted as well.

The duty to immediately examine the business and notify the seller of any breach is usually relaxed in a share purchase agreement by allowing the acquirer to notify the seller of any breach discovered at any time during a stated period.

### 3.4.6 Limitation of Actions

Article 210 CO provides for a time limit of two years from the date of delivery for bringing forward a claim for breach of warranties (this was changed from one to two years in 2013). The parties sometimes extend this survival period to two or three years, and often agree longer intervals for claims involving tax and environmental matters.

### 3.4.7 Joint and Several Liability

Pursuant to article 143 CO, there is no joint liability of debtors (i.e. the selling shareholders) unless it is so stated in the contract.

### 3.4.8 Qualification of Warranties as to Knowledge

Warranties are often qualified as being given to the best knowledge and belief of the seller. It is then uncertain whose knowledge will be deemed to be the one of the seller. In particular, the question arises whether the knowledge of the target is attributed to the seller. It is, thus, recommendable to define in the share purchase agreement, whether the knowledge of directors, managers and officers of the target will be imputed to the seller. The knowledge clause is often the subject of considerable debate, as the acquirer will not want to accept a limitation on its claims based on how the seller is organized or how diligent he is.

Warranties are sometimes also qualified in terms of materiality. The seller may be requested to state for example that there are no 'material' court cases pending, or threatened, against the target. While it would be advisable to expressly define what 'materiality' means, this is often difficult in practice; the easiest way to address this point is by not tying the litigation to a materiality standard, but by defining an adequate *de minimis* threshold which excludes certain claims from an indemnity/purchase price reduction.

### 3.4.9 Structure of Warranty Clauses

The following areas are generally covered by warranty clauses:

- the target as a legal entity (incorporation, shares, ownership, assets);
- the target's financial statements;
- the target's business and contracts; and
- dealings of the target since the date of the most recent balance sheet up to the signing of the agreement or even until completion.

Statements relating to the conduct of business until completion are strictly speaking undertakings by the seller to conduct the business in a certain manner, rather than warranties confirming a given state of affairs as per a certain date.

### 3.4.10 Disclosures

Warranties are usually given subject to matters disclosed either in the agreement itself or in a separate disclosure letter, which is annexed to the agreement. Sometimes, the parties agree that all information contained in the data room and/or in a vendor due diligence report shall be deemed disclosed to the acquirer, provided that such disclosure allowed the acquirer to reasonably identify and assess the impact of the disclosed information on the target.

### 3.4.11 Typical Warranties

Typical warranties may cover the following areas:

- Warranties related to the target
  - The seller typically warrants that he is the legal and beneficial owner of the shares being sold and these shares, when transferred at completion, are free and clear from any encumbrances.
  - The acquirer will usually require warranties giving him comfort that the target is duly incorporated and exists in accordance with Swiss law, as evidenced by an extract from the commercial register. The extract informs the acquirer about the number, type and nominal value of the outstanding shares as well as the dates of amendments in the articles of incorporation, and lists all persons entitled to sign on behalf of the target.
  - The parties sometimes also agree to refer to the articles of incorporation and important resolutions by the board of directors – especially the resolution regarding the entering of the acquirer in the shareholders' register. The seller will warrant that these are valid documents and resolutions.
  - A further warranty in this context will assure the acquirer that all other corporate documents are in good order, including the minutes of the shareholders' meetings and the meetings of the board of directors and often all records on which the accounts are based.
- Warranties related to the accounts presented to the acquirer
  - The buyer will want to seek confirmation that the balance sheet, the profit and loss statement as well as the cash flow statement (if existing) have been drawn up in accordance with generally accepted accounting principles. Also, the warranty may state that the assets are neither individually nor collectively overvalued and that the liabilities are not undervalued or unaccounted for. This general warranty is often specified by detailed warranties for certain assets (e.g. real property or patents) or liabilities (e.g. taxes or social security contributions). That is especially important where the accounts do not give a true and fair view, which in the past

has been the case in Switzerland in relation to statutory accounts (and this will remain so, despite of the 2013 revision of the law). Furthermore, the seller will be asked to warrant that there are no contingent liabilities (to be accounted for in the notes to the balance sheet) and no other threatened or possible liabilities for which reserves should have been provided.

- Since leased or rented property does not appear in a Swiss balance sheet, the acquirer will often want the seller to warrant that such property is at the disposal of the target and that it is in good working condition.
  - Sometimes, the buyer will furthermore wish to include a warranty dealing with the inventory and its salability within a certain period of time.
  - The purchaser may also seek to obtain a warranty stating that the target has conducted its business in the ordinary course since the date of the most recent balance sheet and has not, and will not enter into any transaction outside the ordinary course of business pending completion. This clause may also be inserted as a 'covenant' or 'undertaking' of the seller covering the time between signing and closing.
- Warranties as to compliance with contracts and law
- It is common for a seller to warrant that the target and its business are in compliance with all applicable laws and regulations. Compliance with building and construction laws, environmental regulations and statutes relating to safety standards of plants or certain equipment is of particular importance in this context. With regard to regulated businesses, this clause will assure the acquirer that the business is operated in accordance with applicable regulations. Sometimes, the seller will also have to give assurance that the change of control will not have a negative impact on permits.
  - Furthermore, the purchaser will usually want the seller to warrant that there are (i) no defaults under any material contract, (ii) no claims against the target in relation to existing contracts, unless provided for, and (iii) no notices, threats or indications as to the termination of material contracts because of the transaction (for instance due to a change of control clause).
  - The seller will also have to warrant that there is no litigation or administrative proceeding, pending or threatened, against the target unless disclosed.
  - Sometimes, the buyer seeks a warranty that the assets are adequately insured.
  - In addition, the seller will normally have to warrant that the target has not entered into (material) agreements and contracts other than those disclosed in an annex. The relevant contracts may be defined with respect to the contractual commitment (e.g. contracts creating an expenditure in excess of a certain amount, or contracts binding the target for a certain number of years), or may contain a list of generically important agreements (e.g. licensing agreements, lease agreements, credit or loan agreements, consulting and joint venture agreements).

- Further clauses typically deal with (i) taxes, (ii) obligations towards employees (including pension funds), (iii) absence of contractual rights for managers to terminate the employment on short notice or to obtain any severance payment, (iv) intellectual property rights, or (v) relations between the target and its related persons.
- The seller generally seeks a clause stating that no representations and warranties are made by the seller other than those contained in the share purchase agreement. Depending on the bargaining power of the parties, the acquirer, by contrast, might insist on a full disclosure concept whereupon the seller warrants that no facts, which have not been disclosed, are relevant for the acquirer's assessment of the value of the target.

### 3.4.12 Conduct Pending Completion

As to the target's conduct pending completion, technically, two interim periods should be distinguished: (a) the period between the date of the most recent financial statements and the signing of the agreement, and (b) the period between signing and completion. During the latter, the seller will still control the business but will do so on behalf of the acquirer, at least in those cases where the purchase price is not fixed as at closing only. Therefore, the seller usually will undertake to cause the target to transact business only in the ordinary course and to seek written approval from the acquirer for certain important transactions. Often this clause, *inter alia*, refers to the warranty clause enumerating important contracts.

## 3.5 Covenants and Undertakings

This clause may contain, *inter alia*:

- A non-competition clause which prevents the seller not only from directly competing with the target but also from participating in competing enterprises, sometimes supported by a penalty payment obligation (article 160 CO). The non-competition clause should be reasonably limited as to the restricted activities, the geographical area of the restraint and its duration because courts may apply the relatively strict standards for non-competition clauses of employees by analogy (article 340 et seq. CO). Furthermore, competition law considerations also necessitate a limitation of restrictive covenants.
- An undertaking from the seller to enter into certain agreements with the target, particularly where the target was a subsidiary of the seller prior to the sale and where it will continue to provide certain services to its former parent in future (or procure services from the former parent). Similarly, it may become necessary upon the sale to formalize oral agreements with former group companies.

A seller in a service business will often undertake to enter into an employment or consulting agreement with the target. Frequently, tax considerations will have a bearing on whether the seller prefers low compensation for his services as employee or consultant in view of a higher purchase price for the

shares, as the latter might lead to a tax free capital gain. This undertaking is often given additional weight by a clause specifying that signing of the employment contract is a condition precedent to completion of the purchase agreement.

- An undertaking by the acquirer that the target will not terminate any of its employment contracts and the acquirer will not liquidate the company for a certain period of time. The latter is sometimes also important for tax reasons, at least if the seller is a Swiss resident individual because a liquidation (and other corporate action) might lead to a requalification of the capital gain if the target holds non-operating cash which it could have distributed prior to the deal.
- An undertaking by the parties to treat the purchase agreement and its contents confidential during a certain interval. In certain circumstances, however, the parties must be able to disclose this information due to legal requirements for either the acquirer or the seller to report an acquisition. If the acquirer is a listed company and if officers of the acquirer (or seller) intend to trade in the shares of the acquirer, an announcement will often be inevitable, as such trading may amount to insider dealing in the absence of adequate information given to the public (see article 40a SESTA); further, disclosure of the purchase price might be necessary in the financial statements of the acquirer.
- Occasionally, the seller undertakes to grant access to the directors, officers and selected key personnel of the target as well as to its material books and records before closing.
- Sometimes, the conditions for conducting the business of the target pending completion will also be spelled out in this section.

### 3.6 Conditions

The agreement may contain a number of conditions that must be fulfilled prior to completion, including:

- Approval from third parties, such as key employees, customers, suppliers, landlords and banks. An approval condition is necessary when contracts with third parties contain a change of control clause, or when contracts may be terminated at short notice – for example credit agreements with banks, employment contracts and possibly lease agreements.

Instead of insisting on certain undertakings, the parties may prefer to make the signing of certain agreements a condition precedent to completion. It is useful to specify the exact form of the consent or agreement required in order to avoid uncertainty at the completion meeting.

- Governmental authorizations, for example clearance from competition or tax authorities.
- Shareholders' approval, where necessary.
- Occasionally, a clause that no material adverse change has occurred before closing. Such a clause favors in effect the acquirer, who does not have to

consummate the transaction if the terms have rendered it unfavorable provided that the acquirer finds an 'excuse' to exit the deal in the wording of this clause.

In general, the parties should be aware of article 156 CO, which provides that a condition is deemed 'fulfilled' where one of the parties has in bad faith attempted to prevent it from being satisfied.

### 3.7 Completion (Closing)

This clause specifies when and where completion will take place. In case payment will not be made by wire transfer (which is the usual form) but by delivery of a cheque, the seller will often seek assurance that the cheque received is credited to his account for value on the day when the shares are transferred, i.e. on completion.

Furthermore, the agreement will enumerate the documents to be exchanged on completion, such as:

- The original share certificates of the target (duly endorsed in favor of the acquirer in case of registered shares) as well as the original share certificates and share registers evidencing the shareholding of the target in the subsidiaries (if any).
- Letters of resignation from the members of the board of the target.
- Consents and authorizations by third parties and a board resolution agreeing to the transfer of registered shares to the acquirer and the entering of the acquirer in the shareholders' register.
- Assignment of a shareholders' loan and signed copies of the target's agreements with the seller.

### 3.8 Other Provisions

Other provisions in a typical share purchase agreement may cover the following topics:

- Employees and pensions: Swiss employers may either set up their own pension fund or ensure employees with an existing fund or with a life insurance company, as set out in the Federal Act on Compulsory Pension Plans of 25 June 1982. Pension funds are legal entities distinct from the employer. An acquirer will therefore not enter into a direct legal relationship with the target's pension fund upon the acquisition.

A surplus in the fund does not accrue directly to the target, but may sometimes be used for a contribution holiday. Technically, the target is not liable for underfunding provided it has always made the required contributions, although the target will often have a 'moral obligation' to fill existing gaps. Specific terms in the purchase contract are necessary in case new pension arrangements must be made; for example, where employees used to be members

of a pension fund of the seller's group, there must be provisions for a split of the fund (see also article 23 of the Federal Act on Vested Benefits of 17 December 1993). If the pension fund must be terminated, amended and/or partially distributed, governmental authorities must approve the arrangement. In other cases, the employees will remain beneficiaries of the target's existing pension fund.

- Insurance coverage: Insurance arrangements must sometimes be re-considered, especially where the target is a group company insured under an umbrella policy.
- Entire agreement: This clause specifies that the signed agreement, together with its annexes, contains the entire agreement of the parties and supersedes any previous understanding or contract.
- Modifications: They will usually have to be made in writing.
- Costs: It is usual to provide that each party bears its own costs (i.e. lawyers' and accountants' fees); if a security turnover tax is levied on the transaction, the parties should specify who will have to bear it.
- Severability: If a provision of the share purchase agreement is invalid, the remaining provisions shall continue to be binding and be applicable instead of the invalid provision; it is also often stated that in this case a rule shall apply that achieves the initial intention of the parties as closely as possible.
- No Assignment: The parties may agree that no party is allowed to assign any rights or obligations under the share purchase agreement to any third party without the prior written consent of the other party.
- Notices: This clause specifies the manner in which any notices are required to be given, e.g. whether communications by fax or e-mail constitute valid notices under the agreement.
- Applicable substantive law: Swiss law is generally agreed to be the governing law if the target is a Swiss company. Foreign law might be chosen if, for example, both the seller and the acquirer are nationals of the same non-Swiss jurisdiction.
- Jurisdiction: Parties often agree that disputes will be submitted to an arbitral tribunal or a specific Swiss court, or as a compromise possibly to the courts at the domicile of the target. The latter choice is only possible if at least one of the parties is a foreign resident and if Swiss law is applicable to the contract (article 5 III. b of the Federal Act on Private International Law) since *forum non conveniens* rules may apply to domestic cases (i.e. where both the seller and the acquirer are Swiss companies and/or Swiss nationals).

### 3.9 Signatures

No notarization or filing of the acquisition agreement is necessary in order to make the document binding. A Swiss party's authorized signatories (as evidenced by an extract of the commercial register) may sign the agreement; no corporate seal need be affixed or stamped onto the document. It is com-

mon for the parties to initial all pages of the agreement, although this is not a legal pre-requisite.

## 4 Asset Purchase

### 4.1 In General

The main difference between an asset and a share purchase agreement lies in the fact that the former must specifically enumerate the assets sold and the liabilities transferred. With respect to the liabilities, sellers not registered in the commercial register may agree on a public notice of the transfer in order to avoid the necessity of the creditors' approval. Otherwise, the business purchase agreement will look similar to the share purchase agreement, with the exceptions referred to below.

Swiss law generally requires consent by the creditors to the assumption of debts by a new debtor (article 176 CO). However, where an entire business is transferred by a seller not registered in the commercial register and where the transfer is publicly announced, article 181 CO dispenses with such consent. Instead, in order to protect the creditors, the seller remains jointly liable with the acquirer for two years after the transfer; for unmatured claims the two-year period commences on the day the claim becomes due. Where a seller is registered in the commercial register, the parties may agree that the assets and liabilities will be transferred *uno actu* – in one step – by operation of law based on an asset transfer (*Vermögensübertragung*) as provided for in article 69 of the Merger Act.

### 4.2 Breach of Warranties

It is common to contractually specify the consequences of a breach of warranties since Swiss statutory remedies may be (a) generally inadequate for a particular acquisition, and (b) specifically unclear on whether a reduction in the purchase price is to be made based on the effect a breach has with respect to the business as a whole or with respect to the value of the respective asset.

### 4.3 Employees

Employees may terminate their employment where there is a business transfer if they do not agree to be taken over (article 333 CO). In addition, article 333a CO provides for an information duty of the employer. However, employees must respect the legal notice period of one to three months depending on the duration of their employment (article 336a and 336b CO). Therefore, article 333 CO is of practical relevance only where important employees of the target have long-term contracts or contracts with notice periods exceeding three months.

## 4.4 Consent of Third Parties

Often, consents from third parties or governmental authorizations will be required for a business transfer. Non-assignment clauses in agreements with third parties will have to be waived by the third parties concerned.

## 4.5 Completion

The clause regulating completion activities usually contains a detailed list of the documents to be produced in order to evidence the transfers.

## 5 Tax Considerations

### 5.1 Taxation of the Seller

Capital gains arising from the sale of privately owned shares by individuals are tax free, making share transactions very attractive for individual sellers. Majority shareholders who are employed by the company therefore often prefer to pay themselves low salaries (thus increasing corporate taxes), accumulate profits and then sell the company, so that they can realize a non-taxable capital gain, *de facto* also on these never distributed profits.

However, the sale of privately held shares may, under specific circumstances, qualify as taxable income (so called "indirect partial liquidation" as well as "transposition").

According to article 20a para. 1 lit. a of the Federal Direct Tax Act and article 7 a para. 1 lit. a of the Tax Harmonization Act, realized gains from the alienation of privately held participations qualify under the following cumulative conditions as taxable income, if:

- a privately held participation of at least 20 percent in the capital of a company or a cooperative is sold to an individual or a legal entity that holds the participation as a business asset. However, the 20 percent criteria also applies if different shareholders together sell at least 20 percent of the shares in a company; and
- within five years from the transaction, dividends are paid out of the company's substance, which at the time of the transfer were not considered as operationally necessary, and thus, have not been distributable under the CO at the time of the transfer.

Furthermore, under article 20a para. 1 lit. b of the Federal Direct Tax Act and article 7 a para. 1 lit. b of the Tax Harmonization Act, realized gains from the alienation of privately held participations also qualify as taxable income, if:

- at least five percent in the privately held capital of a company or a cooperative is sold by a shareholder, or in combination with other shareholders, to a buyer who holds the participation subsequently as a business assets; and

- after the sale of the participation rights, the seller still holds a 50 percent participation in the capital of that entity and the sale proceeds exceed the nominal value of the transferred participation.

A partner selling his share in a partnership is liable for income tax (and social security contributions) on the difference between the sales price and the base cost of his quota (usually equivalent to his contribution to the partnership plus retained earnings not yet taxed).

Subject to certain exemptions, the sale of shares or a business by a Swiss resident corporation will be taxed as corporate income on the amount of the difference between the purchase price and the book value of the shares (respectively the assets minus liabilities in the case of a sale of a business). Holding companies are exempt from corporation tax and, therefore, not taxed on corporate income derived from a sale of their participation. But income tax at a flat rate of 7.8 percent will be levied on such sales at the Federal level. In case of a participation of 10 percent or more that has been held for a time period of one year, a participation relief is granted at the Federal level.

### 5.2 Taxation of the Acquirer

The acquirer will account for the purchased shares in the target company as a participation on its balance sheet (there being no consolidation for tax purposes). Tax authorities generally do not allow the purchaser to write off the value in the new shares, unless the subsidiary concerned encounters serious financial difficulties. Also, the acquirer will not be able to use losses carried forward by the new subsidiary unless it merges with it. In the absence of a group taxation in Switzerland, Swiss members of a group are not allowed to set off losses with profits in related companies.

In the event of a business purchase, the acquirer may step up the book value of the assets of the target company in order to reflect their market value and the purchase price. It may also account for the purchased goodwill. In future years, assets may be written off and goodwill amortized. Losses carried forward by the acquirer may be offset by future gains arising out of the sale of the target, although certain restrictions apply.

The acquirer will be liable to pay security transfer tax if he is a fiscal securities dealer. If the acquirer issues shares in order to finance the acquisition, the issuance suffers a stamp duty of one percent of the issue price (provided the share capital exceeds CHF one million). No stamp tax is due if shares are given as consideration to the seller and the transaction qualifies as a merger or a reorganization for tax purposes.

Between related companies of which a parent company holds at least 50 percent each, transfers of assets and liabilities, or the transfer of participations of at least 20 percent in a third company are treated on a no gain/no loss basis and therefore such transfer has no impact on income tax. After the transfer,

the assets need to be held for a period of five years. If not, the transferred hidden reserves will be taxed subsequently.

## IV Asset Transfers

### 1 Statutory Framework

When the Merger Act came into force, the provisions on the asset transfer (*Vermögensübertragung*) introduced a new transactional tool, allowing registered companies and registered sole proprietorships to transfer assets and liabilities without having to observe the requirements for the conveyance of different types of assets and liabilities. In practical terms, an integral and simultaneous transfer of a number of assets and liabilities can be achieved on the basis of (a) a contract and (b) the entry of the asset transfer into the commercial register. In principle, there is no need for a shareholders' resolution, and the assets and liabilities to be transferred may be lumped together arbitrarily. Even a single item of an asset may be transferred by way of an asset transfer. In addition, the parties are generally free to agree any consideration for the transfer or make it free of charge. If no consideration is paid, the corporate law limitations on capital distributions and liquidations apply.

Technically speaking the asset transfer is different from

- a merger and a split-up in that none of the parties involved in an asset transfer will be dissolved by operation of law;
- a spin-off because the consideration (if any) will be paid to the transferring company as opposed to the company's shareholders (if the shareholders of the transferring entity receive membership rights in the transferee company, the transaction is deemed to be a demerger); and
- a conversion, given that an asset transfer necessarily involves at least two parties.

The range of application for an asset transfer is extremely broad. It may be used to effect a corporate restructuring (economically similar to a merger, demerger or conversion), a liquidation, a sale of assets, a business, or shares, a contribution in kind in the context of a hive-down or a share capital increase, a distribution in kind (dividend or a capital reduction), etc.

The disadvantages associated with an asset transfer are the need to draw up a detailed inventory and the possible disclosure of confidential business information due to the registration of the asset transfer with the commercial register, where the transfer agreement is available to the public. In addition, the transferor remains jointly and severally liable in relation to transferred debts for a period of three years and creditors may have their claims secured. Whether or not counterparties to any transferred contracts need to consent to the transfer remains unclear. As a result of these disadvantages, asset transfers – though used in practice – turned out to be less popular than anticipated by the legislator.

## 2 Asset Transfer Steps

### 2.1 Asset Transfer Agreement

In accordance with article 71 MA, the top executive bodies must enter into an asset transfer agreement containing

- the name, domicile and legal form of the entities involved;
- an inventory including a list of the assets and liabilities to be transferred where real property, securities and intangible assets must be listed piece by piece;
- the total value of the assets and liabilities to be transferred;
- the consideration (if any); and
- a list of the employment relationships to be transferred.

An asset transfer is only permissible if the inventory shows a surplus of assets. Assets and liabilities that cannot be allocated based on the inventory, will remain with the transferring company (article 72 MA).

### 2.2 Registration in the Commercial Register

The asset transfer needs to be entered into the commercial register. At the time of registration, the assets and liabilities listed in the inventory are transferred to the receiving company by operation of law (article 73 MA). The traditional forms of transfer, which vary depending on the type of assets or liabilities involved (transfer of possession for chattel, assignments for claims, endorsements for share certificates, registration in the land registry for real property, consent of creditors for transfer of debts, etc.) are redundant when it comes to the effectiveness of the asset transfer.

However, when debating the bill on the Merger Act, the legislator concluded that there should be one exception to that rule. It was thought that contractual arrangements should not be able to be transferred by operation of law without the contract partner's consent. That orthodoxy has been challenged of late. Commentators are now almost unanimous in advocating that the asset transfer should be able to comprise contractual arrangements, at least where the contractual arrangement does not exclude a transfer and where an entire business is transferred, given that individual claims and individual debts may be transferred without the need for the creditors' or debtors' consents, as the case may be.

### 2.3 Information of Members

The top executive body of the transferring company must inform its members of the asset transfer in the notes to the financial statements, except if the assets involved represent less than five percent of the balance sheet total of

the transferring company (article 74 MA). In the absence of a duty to prepare annual accounts, the asset transfer must be communicated to the transferor's next general meeting.

The following points must be explained and justified from a legal and an economic point of view:

- the purpose and consequences of the asset transfer;
- the transfer agreement;
- the consideration for the transfer; and
- the consequences for the employees and the contents of a social plan (if any).

### 2.4 Protection of Creditors and Employees

If the transferring company transfers liabilities, it will remain severally liable with the transferee for liabilities incurred before the asset transfer was entered into the commercial register during a period of three years (article 75 MA). In addition, there is a duty for the companies concerned to secure claims of creditors if the joint and several liability either ceases to exist during the three-year period (e.g. because one of the companies is liquidated) or if there is *prima facie* evidence that it will be insufficient to afford adequate protection to the creditors. Instead of providing security, the companies may satisfy individual claims, provided that other creditors will not suffer a damage as a result of this.

Transfers of employees are subject to the requirements set out in articles 333 and 333a CO.

### 2.5 Cross-Border Asset Transfers

The situation is basically similar to that of a cross-border demerger.

## 3 Tax Considerations

### 3.1 Restructuring versus Realizations

Swiss tax law does not expressly deal with the asset transfer as a transactional mechanism. So far as it is used to achieve the economic effects of a merger, demerger or conversion, it will be tax neutral assuming it complies with the requirements for a tax-neutral merger, demerger or conversion, as the case may be. If, however, an asset transfer is employed within the ambit of a sales transaction, income will normally be realized and tax liabilities will arise. In consequence, whether or not a transaction involving an asset transfer is tax-neutral, hinges on its qualification either as a reorganization (tax neutral) or a realization of income (tax relevant).

### 3.2 Intra Group Transfer (Restructuring)

Concurrently with the enactment of the Merger Act, Swiss tax law was revised to broaden the definition of transactions qualifying as tax neutral reorganizations. Further to the traditional corporate restructurings (merger, demerger and conversion), the definition now includes the transfer of shares (assuming at least 20 percent of the share capital is involved, which must be owned directly or indirectly), a business, part of a business or other operating fixed assets (such as real property, production facilities, machines, means of transportation, patents, licenses and concessions) within a group of companies, provided that

- the transfers occurs between Swiss companies; and
- the companies concerned are under the common management of a company with stated capital or a cooperative (articles 61 para. 3 DFTA and 24 para. 3 DFTHA).

These types of intra-group transfers are tax neutral if, as a general rule (to which there are exceptions),

- the receiving company continues to be subject to taxation in Switzerland;
- the assets and liabilities are transferred at book value; and
- the five-year holding period requirement is complied with.

The permissibility of tax neutral transfers of shares, businesses, business parts or operating fixed assets at book value is a first step towards group taxation. It concerns for example upstream and side stream asset transfers within a group. The difficulty in practice is to bring upstream and side stream transactions in line with the corporate law prohibitions to make hidden profit distributions or repay equity capital. As an alternative to an asset transfer to a sister company, a business or part of a business could also be transferred with the same economic effect by means of a spin-off (where the holding period requirement does not apply).

### 3.3 Hive-Downs (Restructuring)

A business, part of a business and operating fixed assets may be hived down to a Swiss subsidiary on a tax-neutral basis (see articles 61 para. 1 DFTA and 24 para. 3 DFTHA) if:

- Swiss taxation continues;
- the assets and liabilities are transferred at book value; and
- the five-year holding period condition is met.

## V Buyouts and Private Equity Transactions

### 1 Management Buyout

A management buyout is a transaction by which the target's managers and additional equity and debt investors, such as banks or private equity funds, jointly acquire the shares of the target company. The buyers normally seek to finance the acquisition through the company's assets and to service the company's loans from future earnings. This is usually achieved by the formation of an acquisition company, which purchases the shares and is merged into the target after a certain period of time, subject to tax rulings (if relevant). While debt investors expect a regular interest payment and a (partial) repayment of the loans and sometimes an option to purchase shares (in the event of mezzanine facilities), equity investors hope to achieve an appropriate return in view of the company's expected development and the prospects of an exit in the form of a share sale.

As a rule, arrangements between a closely held corporation and its managers or directors do in contrast with other jurisdictions not have to be disclosed. However, a breach of the general duty of care and loyalty of managers and directors may result in the transactions being declared void if they are not in the best interests of the corporation. If in the light of third-party interests these transactions are not declared null and void, it may at least expose the incumbent managers and directors to personal liability vis-à-vis the shareholders, the company or the creditors who have suffered a damage, provided that negligence or even intent can be proven by claimants.

There is no body of precedents clearly defining the duties of the management if it purchases the business it is active in. Again, the general duty of care and loyalty seems to indicate that managers should seek an independent valuation of the business in order to protect themselves against personal liability. No such valuation is necessary where all the shareholders approve the transaction provided that they have been able to take an informed decision.

An additional layer of complexity arises sometimes if the seller is a private individual. Though private individuals are normally capable of realizing a tax free capital gain by disposing of shares held in their private portfolio, a management buyout may boil down to an indirect partial liquidation of the company. If this is the case, capital gains are requalified as taxable income (on the difference between sale price and nominal value, which can exceed the capital gain) if the target holds non-operating cash. Since the criteria applied by the tax authorities vary, tax rulings should be sought to clarify the situation in each case.

Due to the lack of leverage possibilities, the buyout market came to a near standstill during the financial crisis in 2009 but has slowly recovered since then.

### 2 Leveraged Buyout

Leveraged buyouts basically operate like management buyouts. The main difference is that the initiative for the buyout is taken by debt and equity inves-

tors rather than by the management of the company. The formal purchaser is usually a newly formed acquisition company that is merged into the target after the share acquisition to ensure an efficient structure for tax purposes allowing for setting off interest payments with earnings while still preserving an acceptable debt-equity ratio (for the limits of such structure see above). The investors normally take an active part in the management of the company after the acquisition so as to make it ready for an exit in two to five years.

Where a bank finances an acquisition, it will want to take the shares of the target as a security. Business assets, with the exception of real estate, are usually unsuitable as collateral since under Swiss law a pledge of movables involves a transfer of possession. This is a further explanation as to why there usually is a preference to acquire shares rather than the on-going business of a corporation: shares may be pledged without affecting the day-to-day business.

Should the seller be prepared to provide debt finance to the acquirer, it is important to note that under articles 717 and 884 CC the transfer of ownership in shares retained by the seller as security for his loan to the acquirer could be held invalid by a Swiss court. Furthermore, corporate law and tax considerations may exclude the possibility of the target granting a loan to the acquirer. In addition, the target's securing of the debt incurred by the acquirer to finance the acquisition might be considered *ultra vires*. Therefore, special measures will have to be taken to avoid legal problems arising from upstream or cross stream security transactions (financial assistance).

### 3 Private Equity

The structure most commonly used for private equity in Switzerland is that of an offshore (regularly a Jersey or Guernsey) limited partnership with its investment advisor, and possibly also its key limited partners located in Switzerland. New company forms for collective investment schemes were introduced in Switzerland by the Collective Investment Schemes Act of 2006 (CISA), in particular the limited partnership for collective investment intended to be the Swiss equivalent of the common law limited partnership. However, these legal vehicles have had very limited success as of today mainly due to the lack of the FINMA's respective approval practice and uncertainties with regard to the taxation of the carried interest.

At present, offshore domiciled collective investment schemes, including their Swiss asset managers, are not subject to the authorization and supervision by the FINMA unless they are marketed or advertised in or from Switzerland or unless they are re-qualified as having their main place of management in Switzerland. Irrespective of the possibility of such re-qualification, legislative amendments are currently under way in Switzerland to align the rules applicable to the management, safekeeping and distribution of collective investment schemes in Switzerland with the international standards, in particular with the requirements set out for third country regimes by the EU Directive on Alternative Investment Fund Managers of 8 June 2011. The proposal for a partial revision of CISA was approved by the Parliament in autumn 2012 and entered into force

in 2013. It introduces a general authorization and/or supervision requirement (subject to only very limited exceptions) for Swiss investment advisors of collective investment schemes both domiciled in Switzerland and abroad.

## VI Joint Ventures

### 1 General

Companies may be combined not only by an acquisition or merger but also by a joint venture where each party transfers assets to a new enterprise in exchange for membership rights. In Switzerland, joint ventures may be formed as partnerships (article 530 et seq. CO), although more commonly they are organized as corporations. In any event the organization of the joint venture and the relationship between its members is governed by a joint venture agreement.

A typical agreement contains clauses covering the following topics:

- Contributions of each partner to the joint venture, share capital of the entity, domicile and name of the company, its purpose and an agreement to elect an auditor acceptable to both parties.
- Composition of the board of directors and the competencies of the board. Usually each of the parties undertakes to vote its shares in favor of an agreed number of directors designated by the other party. Rules on decision-making of the board, and the chairmanship of the board are typically also included. Generally, the shareholders' meeting has more competencies than is typical in a public company. Often the parties agree that certain transactions may only be entered into with the approval of all the parties involved or based on unanimous written consent of all the board members, whereas for other transactions a majority vote in the shareholders' or board meeting will be sufficient. If both parties hold 50 percent, deadlock devices will have to be agreed (casting vote of the chairman, appointment of an expert arbitrator, blind bid, etc.).
- Rules regulating transactions between the joint venture and the parties as well as duties of the parties to provide additional financing if necessary.
- Dividend policy.
- Put and call options, rights of first refusal, pre-emption rights, and 'drag and tag along' clauses in the event of a transfer of the shares to a third party.
- Non-competition clause, confidentiality clause.
- Termination of the joint venture agreement and liquidation of the joint venture company.
- Applicable law and jurisdiction.
- Means ensuring the enforcement of the provisions of the joint venture agreement (e.g. deposition of all shares in the joint venture corporation into an escrow account in order to avoid transfers outside of the contractual rules or claims for specific performance).

## 2 Special Features of Swiss Law

The following points are noteworthy in structuring a Swiss joint venture:

- A Swiss joint venture corporation ("JVC") cannot legally bind itself by entering into a contractual agreement when it comes to subject matters falling within the competency of the shareholders' meeting (like a share capital increase) or the board of directors (e.g. with respect to board majority requirements, delegation of business to management, or the approval of a share transfer). As a consequence, a Swiss corporation should normally abstain from executing a joint venture agreement, except with regard to a specified list of rights and obligations involving non-corporate issues, such as e.g. the entering into of a license, loan, lease or purchase agreement with one of the joint venture partners acting as a counter-party (matters like these are sometimes also addressed in separate satellite agreements).

In instances related to corporate matters, only the (future) shareholders may assume contractual obligations in the joint venture agreement where they will usually agree that the necessary steps must be taken to implement the contractual arrangements at the corporate level, e.g. by exercising shareholders' rights to achieve a share capital increase or to instruct the board members to draft internal organization rules containing the agreed arrangements or to appoint specified managers. Unfortunately, not all contractual arrangements can be exactly mirrored by the corporate documents.

Where the contractual arrangements are not or cannot be translated into the corporate documents, each joint venture partner still has the possibility of suing the other party for specific performance. For instance, a party may be sued in its capacity as a shareholder of the JVC to exercise its voting right in a manner consistent with its contractual obligations under the joint venture agreement in a shareholders' meeting, which may have to be called specifically for the purpose of a new resolution. The same is true for board resolutions provided that a shareholder is in a position to instruct a board member how to vote, given that a director is subject to non-transferable and inalienable fiduciary duties. If specific performance is impossible, the party who breached the joint venture agreement will be liable for damages.

- As a matter of principle, both shareholders' and board resolutions may be made subject to special quorum and majority requirements. Whilst the rules governing shareholders' resolutions must be laid down in the articles of association, which are available for inspection at the commercial registry, quorum and majority requirements related to board resolutions and matters involving the organization and decisions of the management must be contained in the organization rules, which are issued by the board. These organization rules do not have to be filed and have to be disclosed in limited circumstances only.

Legal writers are predominantly of the opinion that veto rights of individual board members are illegal under Swiss corporate law, though the requirement of a unanimous consent for certain matters (where *de facto* all of the board members have a veto right) is thought to be permissible. Some controversy exists, however, as to what limits there are in relation to quorum or super

majority or unanimous consent requirements, particularly if they are excessively burdensome for the operation of the JVC.

- The transferability of the shares in a JVC may be restricted and made – at least to a certain extent – subject to the approval of the board of directors or the shareholders' meeting.

Therefore, the parties to a joint venture agreement normally focus on a list of contractual rights and obligations governing the transfer of shares to a third party. The parties increasingly agree on additional security measures to avoid a forbidden transfer to third parties (like the transfer of JVC shares to an escrow account, penalty payments, co-ownership, etc.).

- Joint ventures may not be entered into for an indefinite period of time. If the joint venture agreement does not specify a valid term, by operation of Swiss law each party will have a right of termination upon six months' notice. Though the Swiss Supreme Court upheld the validity of a clause providing for the termination of the joint venture in the event of death of one of its individual members, such a provision (relating then to bankruptcy or liquidation) would most probably be ineffective if the member were a legal person. Likewise, according to legal doctrine, a valid term would not be agreed if the joint venture were entered into for the duration of the JVC. Yet, the majority view concedes that it would be permissible to provide that a joint venture should not be able to be terminated for as long as its members continue to be shareholders, provided that there are grounds for termination in the event of major occurrences, such as a repeated breach of the joint venture agreement by one of the parties, an IPO, a change of control in one of the parties or insolvency of a party.

## 3 Tax Considerations

Whilst a (concentrative) joint venture for competition law purposes is deemed to be a merger, the tax authorities used to qualify contributions to a joint venture as spin-offs before the Merger Act entered into force on 1 July 2004 with the result that asset transfers from the parents to the JVC were subject to a five-year holding period in order to remain tax neutral. The Merger Act dispensed with the holding period requirement for spin-offs, but not for hive-downs: Consequently, joint venture contributions have now to meet the requirements governing a hive-down, including the five-year holding period.

## VII Public M&A Transactions

### 1 Scope of Takeover Regulation

#### 1.1 Rules Governing Public Tender Offers

Public tender offers are governed by the SESTA and a number of ordinances, including the Takeover Ordinance ("TOO"), the Stock Exchange Ordinance ("SESTO") and the Ordinance of the Swiss Financial Market Supervisory Authority FINMA on Stock Exchanges and Securities Trading ("SESTO-FINMA").

The SESTA regulates all types of public tender offers. It is founded on the principles of transparency, equal treatment of investors and fairness to ensure the competitiveness of the Swiss takeover market. Within this framework, the SIX Swiss Exchange Ltd. ("SIX") is responsible for issuing regulations regarding the admission of securities to listing as well as the continued fulfillment of the listing requirements. The regulations of the SIX and the Swiss Takeover Board ("Takeover Board") must be approved by the FINMA.

Besides the specific SESTA tender offer regime, a number of other laws apply in the context of public tender offers:

- Swiss general corporate law (Swiss Code of Obligations), which governs shareholders' rights and directors' fiduciary duties;
- the listing rules of the SIX, which define *ad hoc* disclosure requirements in relation to price-sensitive information, and regulate the listing and delisting of shares;
- the Federal Antitrust Act, which contains merger control regulation;
- the Federal Act on the Acquisition of Real Estate by Foreigners (Lex Koller), which restricts the direct or indirect acquisition of residential property or land by foreign persons, or foreign-controlled companies.

The SESTA stipulates the offenses of insider trading and market manipulation. Further, specific rules apply to certain industries such as the financial sector (regulated by the FINMA), the telecommunications sector (regulated by the Communication Commission) and the energy sector (regulated by the Swiss Federal Office of Energy).

"Takeovers" of Swiss public companies by way of statutory mergers are governed by the Merger Act as well as the SESTA's takeover regime.

#### 1.2 Public Tender Offers

The Swiss tender offer regime applies if the target company has its registered office in Switzerland and at least one class of equity securities listed on a Swiss stock exchange. It also applies to foreign companies with a main listing of some or all of its equity securities in Switzerland. If in such situations, both the foreign and the Swiss takeover regime apply and conflict with each

other, the Takeover Board may waive the applicability of the Swiss regime in case the shareholder protection under the foreign regime is equivalent to the one under the Swiss regime. Swiss takeover law does not apply to companies whose equity securities are exclusively listed on a foreign exchange, irrespective of the location of their registered offices, headquarters or shareholder base.

Swiss takeover law in principle, does not apply if none of the target company's equity securities are listed. However, in specific situations the takeover rules have been applied to companies in the absence of any listing in Switzerland, e.g. where the target company was spun off from a Swiss public company shortly prior to the transaction (e.g. Clair Finanz Holding AG).

Public takeover offers are widely defined to cover offers made to the shareholders to purchase shares against a consideration in cash or equity or a combination thereof. What the term 'public' exactly means is unclear and depends on the circumstances of a particular case, especially on whether the recipients of the offer are in a position to negotiate rather than merely accept or reject an offer.

Creeping tender offers, where a stake is steadily built up by purchases on or off exchange, do not fall within the ambit of the Swiss takeover rules (unless the threshold of 33 1/3 percent is passed in which case the acquirer must make a mandatory public tender offer to the remaining shareholders); however, such a tactic is difficult to pursue due to the disclosure obligations of significant shareholdings.

The Swiss takeover regime distinguishes between voluntary and mandatory offers. A shareholder is obliged to publish a public tender offer for all listed equity securities of the target company if he passes the threshold of 33 1/3 percent of the target's voting rights whether exercisable or not (mandatory offer obligation). By amending their articles of association, public companies may, however, increase the triggering threshold to up to 49 percent of the voting rights (opting up) or completely waive the offer obligation (opting out). Furthermore, the Takeover Board may grant exemptions from the obligation to make an offer in certain circumstances such as restructurings. Despite the fact that most public tender offers are made to acquire the entire share capital, the SESTA also allows for partial tender offers.

Voluntary offers are either purely voluntary (i.e. partial offers or offers for target shares where the target has a valid opting out) or change of control offers (i.e. offers which extend to shares whose acquisition would entail a mandatory offer obligation).

An offer that is supported by the board and management of the target company is generally referred to as a friendly offer, whereas an offer which does not carry the recommendation of the board is called hostile. The SESTA regulates both friendly and hostile offers.

If following the launch of a takeover offer a second bidder makes another offer for all outstanding shares, such second offer is called a competing offer.

### 1.3 Purchase of Own Shares

A public announcement by a listed company to its shareholders to repurchase own shares are deemed to be public offers as well, albeit after review of the offer the Takeover Board may exempt the company from the obligation to comply with the takeover rules. The SESTO defines safe harbours where share buybacks do constitute neither insider trading nor market manipulation. In its circular no. 1, the Takeover Board additionally laid down the requirements that must be satisfied for buyback programs to be exempted from normal takeover rules:

- The purpose or purposes of the buyback program must be defined clearly and completely.
- The buyback program must extend to all classes of the offeror's listed equity securities.
- The implementation of the buyback program may not result in any material change in the control exercised over the offeror.
- The total volume of the buyback program may not exceed 10 percent of either the capital or voting rights as entered in the Commercial Register.
- The total volume of the buyback program may not exceed 20 percent of the tradable portion of the securities (free float).
- As a result of implementing the buyback program, the free float may not fall below the minimum threshold required for listing in accordance with the rules of the stock exchange on which the securities are listed.

During certain blackout periods, buyback programs must be suspended (and may not be announced).

Additional requirements apply to all buyback programs such as an equitable relationship between the prices offered for different classes of securities; others apply depending on whether the repurchase is executed by issuing put options, made at a fixed price or at market value.

### 1.4 The Takeover Board

The Takeover Board and its supervisory authority FINMA are responsible to ensure compliance of the market participants with the Swiss takeover regime.

The Takeover Board is appointed by the FINMA; it may request all relevant information from an offeror or the target company to ensure compliance with the takeover rules. The Takeover Board issues decisions and, with respect to each public tender offer, states whether the takeover rules are complied with.

The decisions of the Takeover Board may be appealed to the FINMA by the offeror, the target company and any qualified shareholder, holding at least three percent of the voting rights in the target company at the date of the publication or the pre-announcement respectively of the offer.

Decisions of the FINMA may be appealed to the Swiss Federal Administrative Court. A further appeal to the Swiss Federal Court is not possible. The decisions of all instances are published on [www.takeover.ch](http://www.takeover.ch).

It is customary for offerors to contact the legal counsels (*Rechtskonsulenten*) of the Takeover Board at an early stage of the process, especially if it is doubtful whether a proposed structure is in accordance with the takeover rules. Besides, offerors usually submit drafts of the pre-announcement, the offer prospectus and the offer notice to the Takeover Board for prior review of the offer.

## 2 Procedure

### 2.1 Overview: Takeover Timetable

Once an offer has been pre-announced, the offeror must publish the offer prospectus within six weeks. If the offeror must obtain clearances from competition or other regulatory authorities prior to the formal publication of the offer, the Takeover Board may extend the six-week period.

Prior to publishing the offer, the offeror must appoint a review body to assess the offer and issue a report as to whether the offer complies with takeover law (*inter alia* regarding completeness of prospectus, financing of the offer and availability of funds and compliance with price rules). Audit firms which are admitted by the FINMA to audit securities dealers or FINMA regulated securities dealers may act as review body. Securities dealers supervised by foreign supervisory authorities are not eligible as review bodies. The review body must be independent from both the bidder and the target company.

In a friendly setting, the prospectus will include the report on the offer of the target company's board of directors. The Takeover Board will publish its decision regarding the compliance of the offer on the date of publication of the prospectus. Following the publication of the prospectus, a cooling-off period of generally 10 trading days applies during which a qualified shareholder may join the takeover proceedings as a party and appeal the decision of the Takeover Board before the Takeover Board (and thereafter the FINMA and the Federal Administrative Court).

The main offer period lasts between 20 and 40 trading days and may be extended or shortened in specific situations by the Takeover Board. It may be reduced to 10 trading days if:

- prior to the offer, the offeror holds the majority of the voting rights in the target company; and
- the report of the target company's board has been included in the prospectus.

On the trading day following the end of the offer period, the bidder must publish the provisional interim result of the offer, disclosing the number of shares tendered under the offer and the number of shares held by the offeror. The definitive interim result must be published no later than four trading days fol-

lowing the end of the offer period, and must specify whether the conditions of the offer have been met or waived.

If the offer has been successful (i.e. the offer conditions have been met or waived), the offer must be open for acceptance during an additional acceptance period of 10 trading days after publication of the definitive interim result. The final result of the offer must be published again on a provisional basis on the trading day following the end of the additional acceptance period, and in final form no later than four trading days following the end of said period.

The following table reflects a typical timing of a public tender offer. The dates in the left-hand column are given by reference to the day when the offer is published (P-Day).

P - 6 weeks	Voluntary pre-announcement of the offer on the offeror's website, in two principal electronic media and (after no more than three trading days) in at least two national newspapers (one in German and one in French).
P-Day	Publication of the offer prospectus (or a notice of the offer containing certain information including a reference to the complete prospectus) on the offeror's website, in two principal electronic media and (after no more than three trading days) in at least two national newspapers (one in German and one in French). The Takeover Board will post the offer prospectus and the notice of the offer on its website.
P + 10	End of the cooling-off period which may be altered by the Takeover Board.
P + 15	If the report of the target company's board of directors on the offer has not been published in the prospectus, publication of the board report by the same means that the prospectus has been published.
P + 30/50	End of the offer period, having lasted at least 20 trading days (10 trading days in exceptional circumstances) and without the Takeover Board's consent not more than 40 trading days.
P + 31/51	Calculation of the shares tendered on a provisional basis and notification to the Takeover Board and the Disclosure Office of the SIX Swiss Exchange as well as publication on the offeror's website and in two principal electronic media. The Swiss Takeover Board publishes the provisional interim result on its website.
P + 34/54	Notification of the definitive interim result to the Takeover Board and publication in the same newspapers that the offer prospectus had been published. The Takeover Board publishes the definitive interim result on its website.

P + 44/64	End of the additional acceptance period, having lasted 10 trading days.
P + 45/65	Notification of the provisional end result to the Takeover Board and the Disclosure Office of the SIX Swiss Exchange and publication on the offeror's website and in electronic media. The Takeover Board publishes the provisional end result on its website.
P + 48/68	Notification of the definitive end result to the Takeover Board and publication in the same newspapers that the offer had been published. The Takeover Board publishes the definitive end result on its website.
P + 54/74	Settlement (within 10 trading days from the end of the additional acceptance period).

If the tender offer is hostile, the main difference to a friendly offer is that the report of the board of directors of the target company will not be included in the offer prospectus but must be published no later than 15 trading days following the publication of the offer prospectus. Typically, the target company's board will not sign a transaction agreement with the bidder and will recommend to its shareholders to not accept the offer.

If the target company's stock is deemed illiquid according to the Takeover Board's circular no. 2, the bidder must provide a valuation of the target company prepared by the review body based on publicly available information. In an unfriendly setting, the Takeover Board will only decide on the offer once the target company has been able to comment on the offer documents in a formal proceeding initiated by the Takeover Board. Except for any appeal, which may be lodged by the target company and which may prolong the cooling-off period, the offer timetable does, in principle, not change.

If a competing offer is made, the timetable set by the Takeover Board will take into account that the shareholders must be in a position to choose between the competing offers. A competing offer must be published no later than the last trading day of the offer period of the first offer and must remain open at least 10 trading days. Upon publication of the competing offer, the in coffer period for the first offer is extended in order for all offers to close at the same date.

## 2.2 Pre-Announcement

Under the Swiss takeover rules, the offeror may inform the market of its intention to launch a tender offer in a 'pre-announcement' (*Voranmeldung*) before the offer is actually made. This leaves the offeror an interval of six weeks to prepare the offer prospectus. If the offeror needs clearance from competition or other regulatory authorities prior to launching the offer, the Takeover Board may extend the six-week period.

Due to the offeror's obligation to proceed with the offer within six weeks, the decision to make a pre-announcement must not be taken lightly (no walk away right). A pre-announcement is particularly advisable in the event that:

- the SIX Swiss Exchange's *ad hoc* publicity rules would require disclosure to the markets anyway, for instance if there has been a leak of price-sensitive information concerning a contemplated offer;
- a competing bid is being prepared of which the market should be advised as soon as possible;
- clearance needs to be obtained from the competition authorities before an offer can be made;
- the offeror wants to lock in the minimum offer price in case the minimum price rule applies; or
- the offeror seeks to restrict the target's options concerning defensive measures.

The pre-announcement must contain:

- the offeror's name and registered office;
- the target company's name and registered office;
- the equity securities to which the offer relates;
- the price of the offer;
- the expected date of publication of the offer and its duration; and
- conditions attached to the offer.

If a pre-announcement is made, the main consequences are that:

- the date of pre-announcement, rather than the date of publication of the offer, is the time (i) when the offer price must meet the minimum price rule, (ii) when special notification duties arise for the offeror as well as for the target's qualified shareholders, (iii) as from when certain defensive measures are prohibited; (iv) as from when the duty of the offeror to comply with the best price rule applies, (v) when the calculation of the time limit of 12 months prior to the launch begins, for which the offeror has to disclose the quantity of equity securities in the target company and related financial instruments that have been bought or sold as well as the highest price paid; and
- the offer prospectus may contain modifications in comparison with the pre-announcement only if these are favorable to the recipients of the offer.

Since the offer (including the offer price) as published in the pre-announcement is binding, the offeror must for all practical purposes have arranged financing of the transaction at this stage already, albeit information on the type of financing and a confirmation by the review body that the necessary funds are available will only have to be provided in the prospectus.

## 2.3 Publication of the Offer

The offer must be published in a prospectus containing information on the offeror, the financing, the offer price, the securities to which the offer relates to and the target company. Although the prospectus must be submitted to the Takeover Board not later than the date of publication, the offeror will normally provide the Takeover Board with a draft as early as possible to prevent it from asking for amendments after publication, which would need to be published again.

Instead of the complete offer prospectus, the offeror may publish a notice of the offer containing the key information and a reference to the full offer prospectus in at least one newspaper in German and one in French. The offer prospectus and notice of the offer must also be sent to at least two principle electronic media.

The Takeover Board will post the offer prospectus and the notice on its website ([www.takeover.ch](http://www.takeover.ch)).

## 2.4 Offer Period and Publication of Results

Following the publication of the prospectus, a cooling-off period of generally 10 trading days applies during which a shareholder, holding at least three percent of the voting rights in the target company, may apply for party status in the takeover proceedings. In an unfriendly setting, the target company may challenge the offer in a proceeding initiated by the Takeover Board. Under normal circumstances, the Takeover Board decides on the challenged compliance of the offer with Swiss takeover rules within the cooling-off period.

The normal offer period of between 20 and 40 trading days may be reduced to 10 trading days provided that the offeror already holds the majority of the voting rights in the target company before the publication of the offer and the report of the target company's board is included in the prospectus. Conversely, an offer period of less than 40 trading days may be extended to up to 40 trading days without the approval of the Takeover Board if the offeror has reserved the right to do so in the prospectus.

On the trading day following the expiry of the offer period, the offeror must notify the Disclosure Office of the SIX Swiss Exchange and the Takeover Board and publish the provisional interim result on its website and in two electronic media, stating the number of shares acquired and held by the offeror. No later than four trading days after the expiry of the offer, the offeror must publish the definitive interim result (in the same newspapers that the offer has been published) and notify the Takeover Board. The definitive interim result must declare whether the conditions of the offer (if any) are met and if not, if the offeror has waived them.

If the offer is successful (i.e. any conditions met or waived), the offer must be open for acceptance during an additional acceptance period of 10 trading

days after publication of the definitive interim result. The final results will then be published again, like the interim result, first on a provisional basis and then in definitive form.

## 2.5 Costs

A public offer entails printing and publication costs (roughly CHF 80,000 and more), fees of the review body (CHF 70,000 up to CHF 180,000 assuming no valuation is required), a fee of the Takeover Board (between CHF 25,000 [easy case with very low transaction volume] and CHF 375,000 [very complex case with very large transaction volume]), a commission per tendered share payable to the depository banks and fees payable to the provider of a fairness opinion, if any (to be borne by the target company). In addition, advisors' fees and the Swiss transfer stamp duty will arise.

## 3 Offer Price Rules

### 3.1 Purchases of Shares in Target Company prior to the Offer

In principle, the offeror is free to purchase target securities prior to the announcement of the offer. However, in order to comply with the minimum price rule, the offer price in the public tender offer must at least correspond to the highest price that the offeror has paid for target shares in the 12 months preceding the publication of the offer.

The disclosure obligations of the SESTA require an offeror to notify the reaching, passing and the falling below of certain thresholds, starting at three percent. Whoever directly, indirectly or in concert with other parties purchases or sells equity securities or acquisition and disposal rights (e.g. call or put options) in a company with registered offices in Switzerland or abroad, and some or all equity securities classes listed on a Swiss stock exchange (for companies abroad with a main listing in Switzerland) and as a result reaches, exceeds or falls below any of the thresholds of 3, 5, 10, 15, 20, 25, 33 1/3, 50 and 66 2/3 percent of the voting rights (whether exercisable or not), is obliged to notify this fact within four trading days to the company and the respective stock exchange (the Disclosure Office if the shares are listed on the SIX Swiss Exchange). Therefore, stake building does not go unnoticed.

Possible sanctions for breaching disclosure obligations consist of a fine of up to CHF 10 million, disgorgement of profits, temporary suspension of voting rights or temporary prohibition to acquire additional shares in the company. Stakebuilding to prepare for a subsequent takeover offer benefits from a safe harbor under the insider trading rules, provided that the bidder does not possess any price-sensitive information other than the plan to launch a tender offer.

Once the offer has been announced, the best price rule requires equal treatment of all shareholders. If the offeror pays a price higher than the offer

price to any shareholder (on or off exchange), all recipients of the offer are entitled to the same higher price. The best price rule applies from the date of pre-announcement or, if no pre-announcement is made, from the date of publication of the prospectus until six months following the expiration of the additional acceptance period.

### 3.2 Minimum Price Rules

The offer price must be equal to at least the higher of: (i) the market price (stock exchange price) and (ii) the highest price paid by the offeror for equity securities of the target company in the preceding 12 months. To calculate the stock exchange price, the volume-weighted average price of all transactions executed during 60 trading days prior to the publication of the offer or the pre-announcement is relevant.

In the event that the target company's shares are deemed illiquid according to the Takeover Board's circular no. 2, the market price referred to under (i) above must be replaced by a valuation prepared by the review body. Due to the fact that such valuation work is time consuming, it is advisable to determine early on whether the target's shares are deemed illiquid.

This two-fold 'minimum price rule' applies to (i) mandatory offers and (ii) change of control offers (i.e. if the offer extends to a number of shares exceeding the threshold triggering the mandatory offer obligation).

### 3.3 Best Price Rule

The offeror is bound by the offer price during the offer period and for at least six months after the end of the additional acceptance period ('best price rule'), i.e. the offeror may not purchase shares of the target company during this period at a higher price (or if so, the offeror has to offer such higher price to all recipients of the offer).

### 3.4 Form of Consideration

As consideration an offeror may offer cash, (listed and non-listed) equity securities as well as other securities including securities issued by a foreign company; a combination of these is also possible. If the securities offered in exchange are not listed or if their market is illiquid, a valuation must be prepared by the review body so as to allow an assessment whether or not the minimum price rule is adhered to.

There are a number of rules on when an offeror in an exchange offer must offer an all-cash alternative. In mandatory offers, an all-cash alternative must always be offered. With respect to change of control offers, an all-cash alternative must be offered if the offeror (or persons acting in concert with the bidder) has purchased 10 percent or more of the target shares for cash during the 12-month

period preceding the announcement of the exchange offer. If the offeror acquires any target shares for cash during the period between the announcement of the offer and until the settlement of the offer, the offeror must provide for an all-cash alternative for all recipients of the offer. This rule applies to all types of offers (including partial offers and situations where the target has a valid opting out in its articles of association). As no restrictions apply once the offer is settled, the offeror may purchase target shares for cash within the limits of the best price rule if it wishes so e.g. in order to reach the squeeze out level.

In all of the situations where a cash alternative must be provided, the shares offered in exchange may have a higher value than the cash alternative, provided that the cash alternative complies with the minimum price rule (i.e. while the exchange offer includes a premium, the cash alternative is set at the minimum price and therefore unlikely to be chosen by the recipients of the offer).

The offer prospectus must include detailed information about the offeror, its operations and results, as well as information on the securities offered in exchange. If the offeror intends to list the securities offered in exchange on the SIX Swiss Exchange, a listing prospectus must also be prepared.

## 4 General Principles

The classical takeover situation involves an offer by a Swiss or a foreign company to acquire the entire (or a portion of) the equity capital of a listed Swiss company. The obligations and requirements arising for the offeror, the target company and their respective boards of directors as well as for qualified shareholders are numerous. The general principles which apply to all transactions may be summarized as follows:

### 4.1 True and Complete Information and Equal Treatment of Shareholders

The offeror must publish the offer in a prospectus, the contents of which are set out below. The prospectus must contain true and complete information so as to enable the recipients of the offer to reach an informed decision. While this is not specifically spelled out in the SESTA, it may be assumed that the general prospectus liability provisions will apply to an offer prospectus that contains false or misleading information.

In addition, the offeror must treat all shareholders of the target company equally. This has several implications. While the offer price may be fixed at the discretion of the offeror (provided that the offer is not subject to the minimum price rule), the principle of equal treatment requires that all shareholders of the target company are entitled to get the best price paid. If the offeror continues to buy shares of the target on and off the exchange during the offer period, the best price must be offered to all shareholders. The best price rule applies from the date of the pre-announcement until six months after the additional acceptance period has expired.

Furthermore, equal treatment extends to different classes of equity instruments in that the offer must cover all classes of listed shares of the target company with the possible exception of financial instruments. Prices offered for different classes of shares and financial instruments must preserve an equitable ratio. If a partial offer is made, the acceptances must be taken into account on a *pro rata* (as opposed to a first-come-first-served) basis.

## 4.2 Offer Conditions and Withdrawal of the Offer

Certain conditions may be attached to the offer. In the context of voluntary offers (i.e. change of control offers and purely voluntary offers), conditions are generally permissible if: (i) their satisfaction is outside the offeror's control, (ii) they are stated clearly, objectively and in a transparent way in the offer documents, and (iii) they do not require any actions from the target company that could be unlawful (in particular a violation of the board's fiduciary duties). If the offeror's participation is required to satisfy the conditions, the offeror must take all reasonable steps to ensure that they are met.

In voluntary offers, typical conditions are: (i) a minimum acceptance threshold, (ii) a MAC relating to the target company, (iii) the registration of the offeror in the share register in case of registered shares or alternatively the cancellation of transfer and/or voting restrictions in the target company's articles, (iv) regulatory approvals, (v) replacement of the board; and (vi) no injunction.

In mandatory offers, only very few conditions are accepted by the Takeover Board. Conditions are typically limited to: (i) regulatory approvals, (ii) no injunction, and (iii) the cancellation of any transfer and/or voting restrictions in the target company's articles (if applicable).

The offeror may and usually does reserve the right to waive certain conditions upon lapsing of the offer period. When publishing the definitive interim results, the offeror must declare whether the conditions have been met, and if not, whether they are waived. If the offeror demonstrates an overriding interest (e.g. outstanding regulatory approvals), the decision as to whether certain conditions are satisfied may, with the approval of the Takeover Board, be postponed until settlement of the offer.

The offeror is not obliged to close his offer in the event that one or more conditions fail to be met. In such a case, he is allowed to withdraw the offer. Except for situations of competing bids, it is, however, extremely rare in Switzerland for an offer not to close.

## 4.3 Disclosure Obligations

From publication of the pre-announcement, if any, or the offer prospectus until expiry of the additional acceptance period, all parties in a takeover proceeding, qualified shareholders (i.e. holding at least 3 percent in the target company) as well as persons acting in concert with the offeror or a qualified shareholder

must disclose all transactions in securities relating to the offer to the Takeover Board and the Disclosure Office of the SIX Swiss Exchange. The transactions must be disclosed individually on a daily basis. A form for the disclosure of transactions is available on the Takeover Board's website ([www.takeover.ch](http://www.takeover.ch)). The Takeover Board publishes the transaction notifications on its website.

## 4.4 Persons Acting in Concert

Persons are acting in concert when they are co-ordinating their conduct by contract or any other method to purchase or sell securities or exercise voting rights. As a general rule, persons acting in concert with the offeror must be disclosed in the prospectus and comply with the offeror's obligations, such as the obligation to treat shareholders equally, to notify transactions and to comply with transparency requirements. The shareholdings of persons acting in concert with the offeror are added to those of the offeror when calculating the offer's interim and final results. If the shares held by persons acting in concert in the aggregate exceed 33 1/3 percent of the voting rights in a listed company and if these shares were acquired in view of obtaining joint control, a mandatory offer must be launched for all outstanding shares.

## 4.5 Conduct of the Target Company

The board of directors of the target company normally advises its shareholders whether to accept or reject the bid in a report, the minimal content of which is defined by takeover law. This board report is published either as part of the offer prospectus (in the event of a friendly offer) or separately no later than 15 trading days after publication of the offer, see also section 6.2). Instead of making a recommendation, the board may merely enumerate the advantages and disadvantages of the proposed offer. The directors must assure that no statements are made which could mislead shareholders or the market and have to disregard their personal situation or interest as directors of the target company. If a director has a conflict of interest (e.g. because he is promised an interesting position in the combined entity), he cannot participate in this process. Furthermore, the board may not take any frustrating action by employing defensive tactics intended to significantly alter the assets, liabilities or earning power of the target company without the shareholders' approval.

## 4.6 Put up or Shut up

Potential offerors have to be mindful of public statements. A public statement that the launch of a public takeover offer is being considered may trigger certain obligations, even if it does not fulfill the requirements of a pre-announcement.

If a potential offeror announces such a potential offer, the Takeover Board may set the potential offeror a deadline to either 'put up' by making a formal offer or 'shut up' by confirming that it will refrain from launching a tender offer for a period of six months (put up or shut up rule). This six-month period may

be waived by the Takeover Board under certain circumstances (e.g. if a third party makes an offer for the target company).

The put up or shut up rule aims at liberating the target company which is taken hostage by the destabilizing effects of a potential offer.

The consequence of any violation of the put up or shut up rule is that any subsequent formal offer, which is made by the potential bidder, will be subject to the best price and the minimum price rule determined at the higher value of (i) the date of the announcement of the potential offer or (ii) the actual offer.

## 5 Funding of the Offer

The offer prospectus has to contain certain information on the funding of the offer. More importantly, the review body must confirm in its report (which is included in the prospectus) that funding (e.g. a committed credit line) is in place or that the offeror has taken all necessary steps to ensure that shares offered in exchange will be available on the date of settlement (e.g. that a shareholder meeting is being called to pass a capital increase). During its review, the review body requires the offeror to disclose the financing agreements. In practice, the offeror will not pre-announce the offer unless it has at least an informal approval of the review body that it will confirm certainty of funding in its report. The reason for this is that upon the pre-announcement, the offeror is obliged to follow through with the offer. The Takeover Board applies a rigid standard to the requirement of availability of funds.

## 6 Offer Documents

### 6.1 Offer Prospectus

The recipients of the offer must be provided with sufficient information to be able to reach an informed decision. More specifically, the following items have to be covered in the prospectus:

In relation to the offeror:

- name, registered office, equity capital and main activities;
- identity of the shareholders or groups of shareholders holding more than 3 percent of the voting rights, including the percentage of their holdings;
- information on the shareholders who directly or indirectly control the offeror insofar as this is significant for the recipients of the offer;
- persons acting in concert with the offeror in respect to the offer;
- reference to the offeror's latest published financial statements;
- the offeror's shareholdings in the target company in relation to capital and voting rights, irrespective of whether or not the votes may be exercised; and

- the number of shares in the target company that the offeror purchased and sold in the 12 months preceding the offer, including the highest purchase price paid (in the event of an exchange offer, the information has to be provided separately for shares acquired for cash and in exchange for securities).

In relation to the financing:

- key information regarding the financing of the offer;
- confirmation by the review body that the necessary funds are available on the settlement date; and
- confirmation by the offeror that all necessary measures have been taken for an exchange of shares.

In relation to the targeted securities and the offer price:

- capital of the target company;
- securities to which the offer extends;
- the maximum number of securities to which the offer extends, in case of a partial offer; and
- the price offered for each kind of security, or in the event of an exchange offer, the exchange ratio (as well as the price of the cash alternative, if any).

In relation to the target company:

- the offeror's main intentions regarding to the target company;
- existing agreements between the offeror and the target company, its shareholders or its directors and key executives;
- confirmation by the offeror not to be privy to confidential information about the target company which the offeror received either directly or indirectly from the target company and which could be of material relevance to the recipients of the offer when deciding on whether or not to accept the offer; this requirement is of relevance where a due diligence has been conducted by the offeror prior to the offer; in practice, there is hardly ever any disclosure under this item.

Further disclosures are required in case of public exchange offers, including information on the securities offered as consideration and on the company whose securities are offered as well as information about the anticipated effects of a successful offer on the assets and liabilities, financial position and earnings of the company whose securities are being offered in exchange. If the offered securities are not listed, the review body's valuation report must be included in the prospectus.

Prior to its publication, the review body must review the offer prospectus. The review includes the completeness and accuracy of the prospectus, compliance with the principle of equal treatment (i.e. Best price and minimum price rule as well as rules on the obligation to offer an all cash alternative in certain exchange offers), the availability of funds to finance the offer and the availability of any

securities offered in exchange. In the event that the target shares are deemed illiquid, the review body must prepare a valuation of the target shares in order to determine the minimum price. The results of the review are to be included in a written report in the offer prospectus.

## 6.2 Target's Board Report

The directors of the target company must publish a report whenever a public offer is made to the target's shareholders or when a pending offer has been revised. In this report, the board of the target company has to outline its position on the offer and recommend either the acceptance or non-acceptance of the offer to the recipients. Instead of making a recommendation, the board may merely enumerate advantages and disadvantages of the offer. When assessing the offer, the directors are bound by their fiduciary duty and must act in the best interest of the target company. In practice, the board of the target company will base its recommendation on a fairness opinion provided by an independent and qualified expert (audit firm or qualified corporate finance advisor). A fairness opinion is mandatory if less than two board members are deemed independent.

The board's report aims at advising the recipients of the offer to make an informed decision. Therefore, the report setting forth the position of the target's board must contain sufficient information and advice and must be accurate as well as complete. In particular, the report must disclose the known intentions of the shareholders owning more than three percent of the voting rights, any intention of the board with respect to defensive measures, potential conflicts of interests involving directors and senior managers and a description of the measures taken to prevent these conflicts from negatively impacting the recipients of the offer (provision of a fairness opinion, formation of an independent committee, etc.). The report must describe significant changes with respect to the last published results and any changes in the business outlook of the company. The Takeover Board requests that in case that at the end of the offer period the closing date of the last full or interim financial statements of the target company dates back more than six months, interim result must be established. Such interim result are part of the target company's board report but may be included by reference.

If the board report intentionally contains untrue and incomplete information or if the board fails to submit or publish such report, the board members may be sanctioned with a fine of up to CHF 500,000.

## 7 Tender Agreements with Shareholders

Offerors may collect irrevocable tender commitments from or enter into share purchase agreements ("SPA") with shareholders prior to the offer. Takeover law allows shareholders to revoke their (even irrevocable) tender commitments if a competing offer is announced. SPAs which are not conditional upon the public tender offer may not be cancelled if a higher competing offer is launched. Block

trades prior to the announcement of a bid may provide effective protection against a competing offer.

Depending on the extent to which the agreement is linked to the public tender offer, the shareholders may be deemed acting in concert with the offeror. Parties acting in concert with the offeror are among other obligations subject to the best price rule.

The offeror has to disclose the main content of any agreement entered into with shareholders during the 12 months preceding the announcement of the offer in the offer prospectus. Transactions with shareholders of the target company, which have been entered into during the 12-month period preceding the announcement of the offer, affect the minimum price. They are subject to the best price rule only if they are directly or indirectly linked to the success of the offer.

## 8 Defensive Measures

### 8.1 In General

During the course of an offer, the board of the target company may not enter into transactions which would have the effect of significantly altering the target's assets, liabilities or earning power without the prior approval of the shareholders in a shareholders' meeting. Although this means that, in general, the board of the target company may not take steps designed to make the company less attractive to the offeror or harder to acquire, there are permissible maneuvers to defeat a hostile bidder, especially if they are put into place before a bid surfaces.

### 8.2 Pre and Post-Offer Techniques

In takeover situations, the shareholders' meeting must deal with a number of subject matters for which under general corporate law the board of directors has exclusive competence. Once a tender offer has been announced, the shareholders' meeting may authorize the board to take specific measures against a hostile bid.

Transactions entered into by the board of a target company in violation of the restrictions on frustrating actions are null and void and may therefore be challenged by any person at any time.

Permissible pre-offer techniques include:

- Restrictions of transferability of registered shares which may be achieved by Swiss companies through a clause in their articles of incorporation stipulating a maximum shareholding that no shareholder may exceed, generally expressed as a percentage of two to five percent of the outstanding share capital. Yet, the articles of incorporation often make it clear that the board

of directors may grant exceptions, thus entrusting the incumbent board with discretion to give preference to a white knight over a raider.

If the registration of an offeror is refused within 20 days after notification of the transfer, the offeror must remain registered as a shareholder without voting rights. As a consequence, a raider may increase his relative voting power even by acquiring shares without voting rights. If the articles of incorporation fix the maximum at 10 percent, a raider could, at least theoretically, purchase that percentage plus a further 60 percent of the shares, for which he will be registered as a non-voting shareholder. Still, among the shares carrying voting rights he will control 25 percent, which is often sufficient to change the board of the company.

Acquirers have tried to effectively fight against transfer restrictions by making their offer conditional upon (a) a shareholders' meeting changing the articles of incorporation, or (b) the board of directors declaring that it will enter the acquirer in the share register if it has the discretion to do so.

- The creation of supervoting shares and the placing of shares with 'friendly' parties requires a qualified majority vote in the shareholders' meeting and valid grounds for the withdrawal of pre-emption rights. This double hurdle is generally difficult to pass.
- Buybacks of own shares of up to 10 percent of the share capital are generally permissible. Shares held by the target or by its subsidiaries cannot be voted.
- The articles of incorporation may limit the number of shares that any person may represent at a shareholders' meeting. Certain Swiss companies have included such clauses in their articles of association which have proven to be an effective anti takeover instrument. Legal doctrine generally requires that there are valid reasons for such limitations and that the shareholders be treated equally. If the board of directors is empowered to grant an exception, the reasons to do so should be specified in the articles.
- Staggered boards, where a certain percentage of all directors is elected for a defined period each year, though increasingly popular, are not a very effective anti takeover instrument under Swiss law because the shareholders' meeting may force directors to step down at any time (article 705 CO).

For a long time, defences adopted by Swiss companies were sustained by the practice of Swiss banks to vote the shares represented by them on behalf of their clients in favor of the board of the company (the total of such shares often constitute 30 to 50 percent of all shares represented at a general meeting). Banks are required to seek specific instructions from their clients prior to voting their shares. Therefore, the outcome of shareholders' resolutions adopting frustrating actions is now less evident. Defensive measures that clearly violate the provisions of company law are regarded as inadmissible even if they are taken prior to the announcement of the offer.

As opposed to the pre-offer techniques set out above, most post-offer maneuvers are forbidden by the Swiss takeover rules or subject to shareholder approval, including:

- a 'scorched earth policy', where the board either sells or buys business assets at a value or a price of more than 10 percent of the balance sheet total or that contribute more than 10 percent to the earning power of the company;
- a 'crown jewel option', whereby the target's management grants a third party the right to acquire a part of the company's most valuable business assets or intangibles if these have been specified as crown jewels by the offeror;
- 'golden parachutes', i.e. agreements between the company and its directors or senior managers providing for unusually generous payments to be made in the event they resign from their position or are terminated;
- the issuance of new shares or bonds with conversion or option rights based on authorized or contingent share capital without pre-emption rights or priority subscription rights of the existing shareholders, unless the shareholders' meeting which created the authorized or the contingent share capital expressly resolved that the board would be entitled to issue new shares in the event of a tender offer by a third party;
- the acquisition or sale of treasury shares or shares of the company whose shares are being offered in exchange, or related financial instruments;
- the issuance or grant of rights to acquire shares of the target company, in particular conversion or option rights.

Transactions mentioned in the last two bullet points above are permitted if they are carried out as part of an employee equity participation scheme or in fulfillment of obligations entered into before publication of the offer.

Some post-offer techniques are permissible without shareholders' approval, provided they do not substantially affect the company's assets, such as:

- defensive lawsuits against the offeror;
- finding a white knight willing to acquire the company and to enter into a competing bidding process (under the assumption that all bidders are treated equally);
- re-capitalizations to increase the company's short-term value to the shareholders, for instance by borrowing and paying out generous dividends;
- 'Pacman defenses', i.e. an offer launched by the target company to acquire the hostile offeror (provided that the shareholders approve such counter offer).

## 9 Competing Offers

### 9.1 Procedure

Occasionally, a company attracts the attention of more than one offeror. The guiding principle in relation to competing offers is that the shareholders of the target company must be free to choose between the offers. A competing offer may be published at any time but no later than the last trading day prior to the expiry of the offer period of the initial offer. The offer period of the competing

offer must end simultaneously with the initial offer and must remain open for at least 10 trading days.

As a consequence, if the initial offer would have lapsed before the end of the competing offer, the initial offer must be extended until the expiry of the competing offer, and the shareholders who have already accepted the initial offer may withdraw their acceptances until the extended initial offer expires. Both the initial offer and the competing offer may be revised until five trading days before the expiry of the (extended) offer period. The revised offer must remain open for 10 trading days. The Takeover Board may set shorter periods in order to prevent the target company from being taken hostage for too long a period.

## 9.2 Equality of Information

The target company must treat offerors equally, mainly by providing information given to one potential offeror also to another offeror, even if the other offeror is not welcome to the target's board. In 2007, the Swiss Supreme Court ruled that the target company must, however, not disclose the information given to an offeror to mere potential bidders. Equality of information should be kept in mind by the directors of a target company when being approached with a welcome offer, for any information divulged to a friendly suitor may subsequently have to be disclosed to an unwelcome raider. Still, unequal treatment of individual offerors may be permissible with the consent of the Takeover Board on the grounds of overriding company interests. Competitors may therefore find themselves in a position where they do not receive all the information supplied to other offerors.

Based on corporate law, the directors of the target company are personally liable for any contravention of the principle of equal treatment of shareholders and are well advised to seek independent outside counsel to avoid the pitfalls of favoring one offeror over the other instead of creating a level playing field for all would-be bidders.

## 9.3 Shareholder Withdrawal Right

If a competing offer is made, each shareholder has a right to revoke the acceptance of an earlier offer. In a landmark decision in 2003, the Federal Banking Commission (now FINMA) ruled that the withdrawal right in the event of a competing offer is mandatory and may not be contractually waived. As a result, irrevocables or lock-up agreements between an offeror and shareholders involving undertakings of the latter either to irrevocably tender their shares on the occasion of a public tender offer or to sell their shares on the condition that the public offer is completed, are an ineffective means to achieve deal security for an offeror, at least in case of a competing offer (the irrevocable undertaking remains binding otherwise). However, where a share purchase is not conditional upon the success of a public offer, it is still possible for an offeror to first buy a stake in the target company and only subsequently launch an offer.

## 10 Mandatory Offers

### 10.1 General

Whilst the general takeover rules relate to voluntary offers, under certain circumstances a person may be required to make a public offer to buy all the equity capital of a company. No such mandatory offer requirements exist for example under US federal laws. A mandatory offer is triggered by an acquisition of shares (completion of the sale), resulting in a shareholding exceeding 33 1/3 percent of the voting rights of a target company, irrespective of whether or not such voting rights may be exercised.

Although mandatory offers are generally governed by the same rules and regulations as voluntary bids, they are in certain respects stricter. The minimum price rule applies, i.e. the offer price must equal to at least the higher of (i) the market price (stock exchange price) and (ii) the highest price paid by the offeror for equity securities of the target company in the preceding 12 months. The offer price may be settled in cash or in exchange for shares. Settlement by means of an exchange against securities is, however, only permitted if an all-cash payment is offered as an alternative. Mandatory offers, unlike voluntary tender offers, may be made subject to only a very limited number of conditions, such as antitrust clearance, the removal of transfer or voting restrictions or no injunction.

### 10.2 Opting Out, Opting Up

In contrast to many other jurisdictions, the SESTA allows a Swiss target company to opt out of the mandatory offer rules by adopting a provision to this effect in its articles of association. Target companies may also opt up the threshold triggering a mandatory offer requirement in their articles of incorporation from 33 1/3 up to 49 percent. The Takeover Board has recently tightened its practice with respect to the rules on the introduction of a valid opting out provision.

The shareholders' resolution on the introduction of an opting out is presumed to be in the interest of the target company or its shareholders, if a majority of votes is reached, both by counting the votes of all shareholders represented and by counting the votes of only such shareholders who have no interest in introducing the opting out provision (i.e. a majority shareholder and the shareholder who has tabled the vote on the opting out as well as persons acting in concert with such shareholders are excluded from the count). Even with such requirement being fulfilled, the Takeover Board may, in exceptional circumstances, hold that the presumption proves wrong. If the shareholders' resolution does not fulfill the requirements of the double counting of the votes, the Takeover Board presumes that the opting out is to the disadvantage of the minority shareholders and therefore not validly introduced. In such a situation, a current or future offeror, who wishes to rely upon the provision, would need to demonstrate the contrary or reintroduce a valid opting out.

In order to allow an informed decision of the shareholders' meeting, information on the composition of the shareholder base, the plans of the requesting

shareholder, such as an envisaged change of control or another planned transaction, must be disclosed to the shareholders. If the transparency requirements are not fulfilled, the opting out will be deemed invalid by the Takeover Board.

In addition to the Takeover Board's practice, shareholders may always challenge the shareholders' resolution introducing an opting out before the competent civil court (within two months from the shareholders' meeting).

### 10.3 Exemptions from the Mandatory Offer Obligation

The obligation to make a mandatory offer does not apply to (a) a restructuring involving a capital reduction immediately followed by a capital increase so as to offset a loss, and (b) the underwriting of securities by banks or securities dealers provided the securities exceeding the relevant threshold are re-sold within three months. The shareholders triggering the threshold must notify the facts justifying such an exemption to the Takeover Board.

Further, the Takeover Board may exempt offerors from the obligation to make an offer in justifiable cases, for example where:

- voting rights are transferred within a group;
- the total voting rights of the target company are reduced and where as a consequence the threshold is exceeded;
- the threshold is exceeded only temporarily;
- the shares are subscribed for without consideration;
- the target company is in a situation of a restructuring; and
- the purchaser is not in a position to control the company.

If an exemption is granted, the board of the target company has to issue a report and the decision is published on the Takeover Board's website. The report of the target company must be published in two principal electronic media and (after no more than three trading days) in at least two national newspapers (one in German and one in French). The parties, including qualified shareholders, may challenge this decision before the FINMA within five trading days.

## 11 Squeeze Out and Delisting

### 11.1 Squeeze Out

An offeror holding more than 98 percent of the voting rights of the target company following the completion of a successful public tender offer, is entitled to request the cancellation of the remaining shares against payment of the offer price by way of a statutory squeeze out according to the SESTA. The statutory squeeze out procedure is a court procedure. The respective action must be filed within three months following the end of the additional acceptance period. It has been accepted by several cantonal courts that during such a three-month

period, the offeror may continue to purchase target shares in order to reach the 98 percent hurdle. The duration of the statutory squeeze out procedure varies between four to six months. Shareholder rights to challenge the statutory squeeze out are limited to certain formal requirements and do not allow for any claim to an increased compensation (there may be an exemption if the offeror already held 98 percent at the time it launched the offer).

In the event that following the completion of the public tender offer, the offeror holds more than 90 percent of the outstanding voting rights but does not reach the 98 percent threshold, minority shareholders may be forced out by way of a squeeze out merger. In a squeeze out merger, the target company is merged into a (often newly created) company and the target shareholders may be forced to accept a cash compensation or any other form of consideration at the choice of the offeror (e.g. the bidder company's shares), provided that the value equals the (intrinsic) value of the target shares. The target shareholders have no right to obtain shares of the absorbing company. Shareholders that are squeezed out in this manner may challenge the merger and/or the compensation in court within two months from the shareholder's meeting approving the merger. Such appraisal claims are relatively common in Switzerland.

### 11.2 Delisting

In principle, public companies may apply for their securities to be delisted at any time and do not require the shareholders' approval to do so. The delisting must be in the best interest of the company. In the event of a successful tender offer followed by a squeeze out merger or statutory squeeze out, and in the event that the intention to delist the target company's securities has been disclosed in the offer prospectus, the requirements for a delisting are a mere formality and the timetable is very compact (no post-delisting trading required).

The delisting application including any relevant documentation must be filed with the SIX Exchange Regulation at least one month prior to the announcement of the delisting. The SIX Exchange Regulation decides on the timetable of the delisting and it sets the date of the announcement of the delisting, the last trading day and the date of delisting, generally following the proposal of the issuer.

## VIII Mergers

### 1 Statutory Long Form Mergers

#### 1.1 Statutory Framework

The Merger Act provides for two methods of statutory mergers: mergers by consolidation and mergers by absorption. In a consolidation, the assets and liabilities of the merging companies are amalgamated into a new legal entity by operation of law. Consolidations are rare in practice. The preferred method involves a merger of the target into the acquirer so that by operation of law the assets and liabilities (and contracts) of the target are transferred to the acquirer and the target's shareholders receive shares in the acquirer in exchange for their target shares (absorption). In both instances, the transferring companies are dissolved without a formal liquidation process.

Prior to the enactment of the Merger Act, large mergers were carried out mostly through the formation of a joint subsidiary into which the parent companies were merged. Such reverse absorptions facilitated the timing of shareholders' meetings while competition clearances were pending. In cases of merger of equals, absorptions were more acceptable to the parties, as technically none of the two entities survived. Absorption was used, for example, in the merger between Sandoz and Ciba-Geigy to form Novartis, and between Swiss Banking Corporation and Union Bank of Switzerland to create UBS. Since the Merger Act is in force, this system has still been used in e.g. the Implen merger and in a few cross-border deals (e.g. Aryzta). It remains to be seen whether the same *modus operandi* will continue to be applied.

Mergers are permissible between most types of Swiss companies, although article 4 MA imposes certain restrictions on the amalgamation of companies of different legal forms:

- Companies with a stated capital (corporations, corporations with unlimited partners and limited liability corporations) may merge (i) with other companies with a stated capital, (ii) with cooperatives, (iii) as surviving companies with general and limited partnerships, and (iv) as surviving companies with associations registered in the commercial register.
- General and limited partnerships may merge (i) with other general and limited partnerships, (ii) as transferring companies with companies with a stated capital and with cooperatives.
- Cooperatives may merge (i) with other cooperatives, (ii) with companies with a stated capital, (iii) as surviving companies with general and limited partnerships, (iv) as surviving companies with associations registered in the commercial register, and (v) if no cooperative shares exist, as transferring entities with associations registered in the commercial register.
- Associations may merge (i) with other associations and, provided they are registered in the commercial register (ii) as transferring companies with companies with a stated capital, (iii) as transferring companies with cooperatives, and (iv) as surviving companies with cooperatives without shares.

Under-capitalized companies whose assets do not cover at least half of the equity capital stated in the articles of incorporation, or over-indebted companies whose liabilities exceed the assets, may only merge with a company that has freely disposable reserves to cover the deficit in equity. No such restriction applies if creditors of the merging companies agree to subordinate their claims to all other creditors, provided that the subordinated claims equal the amount of under-capitalization or over-indebtedness, as the case may be (article 6 MA).

According to article 7 MA, the exchange ratio may be set in a way to provide for a cash compensation not exceeding ten percent of the shares' value. The merging companies may also agree in the merger agreement that their members will be entitled to elect between shares in the surviving company or a cash-out payment, or that only a cash-out payment will be made (article 8 MA); tax law, however, makes this option unattractive in practice, and it requires an approval of 90 percent of the shareholders of the transferring company.

If the most recent statutory balance sheets of the merging companies date back more than six months or a material change in the financial conditions of the merging companies has occurred, an interim balance sheet must be prepared (article 11 MA). Whether or not the interim balance sheet needs to be audited by the statutory auditors is subject to controversy; in any event, it will be subject to review by the special auditors who must be appointed by the board specifically in connection with the merger. If the statutory six-month period is accepted at face value (rather than interpreted to actually mean nine months as some legal commentators argue), and considering that it will usually take about two months to prepare financial accounts, mergers may effectively only be carried out in the short intervals between March and June, and – based on an interim balance sheet – between September and December.

## 1.2 Merger Agreement

The top executive or supervisory body of the companies involved (i.e. the board in case of a corporation) must enter into a merger agreement. According to article 13 MA, the agreement has to include:

- the name, registered office and legal form of each of the merging companies;
- the exchange ratio for the shares and possibly the amount of the cash compensation, information on the membership in the surviving company, respectively the cash-out payment in a squeeze out;
- the process regarding the exchange of the shares;
- the time as from when the new membership rights entitle their holders to a share of the profits;
- the point in time as from when the acts of the disappearing entity are deemed to be carried out for the account of the surviving company;
- special privileges and benefits granted to the top executive bodies, managers and auditors;
- the members with unlimited liability (if any).

In addition, the merger agreement will normally contain other provisions customary for such transactions, such as conditions precedent (the most important being shareholders' approvals), representations and warranties as well as indemnities (which will, however, unless given by shareholders, not survive the merger), disclosure and confidentiality obligations, as well as governing law and jurisdiction clauses.

Break-up fees providing for a substantial penalty in the event of non-completion of a merger (e.g. if the target's shareholders refuse to approve the merger agreement in view of a higher offer from a third party) may not be binding if they are deemed to be *ultra vires*. However, payments to compensate the other party for costs and expenses incurred in connection with an aborted merger (including for lost management time) are thought to be permissible.

## 1.3 Merger and Special Auditor's Reports

The members of the highest executive body of the merging companies must furthermore prepare a report on the merger setting out and explaining, from a legal and an economic point of view,

- the purpose and the consequences of the merger;
- the merger agreement;
- the exchange ratio and possibly the amount of any compensation;
- the reasons why a cash-out payment (if any) is to be made in lieu of an exchange of shares;
- special considerations in connection with the valuation of the shares in light of the exchange ratio;
- the amount of the capital increase of the surviving company (if any);
- possible personal obligations and liabilities arising for the members of the disappearing entity as a result of the merger;
- consequences of the merger for the employees and the contents of a social plan (if any);
- consequences of the merger for the creditors of the merging companies; and
- information on the authorizations received and to be obtained from supervisory and state authorities (article 14 MA).

Specially qualified auditors must review the merger agreement, the merger report and the balance sheet on which the merger is formally based and confirm the fulfilment of certain requirements in a written auditor's report (article 15 MA). The shareholders of the merging companies are entitled to inspect the merger agreement (which they receive with the invitation to the shareholders meeting), the merger report, the special auditors' merger report as well as the financial statements of the last three business years.

## 1.4 Shareholders' Resolutions

By virtue of article 16 MA, each merging company must make the following documents available for inspection during a period starting 30 days prior to the date of the shareholders' resolutions:

- the merger agreement or plan;
- the merger report;
- the special auditor's report; and
- the annual financial statements of the three most recent business years, as well as the interim statement (if any).

The merger must be approved by the general meetings of the companies in accordance with special majority requirements, which vary depending on the type of company (see article 18 MA). If the agreement provides for a cash-out payment only, the merger must be approved by at least 90 percent of the shareholders of the transferring company who are entitled to vote. The interpretation of this requirement is subject to debate when it comes to companies with a stated capital. In that instance, the majority view construes it as meaning 90 percent of the votes (rather than the members), though whether the votes represented or all of the existing votes should be the benchmark is unresolved.

Most often, the shareholders of the surviving company will not only have to approve the merger agreement but also resolve to increase the share capital to create the required merger consideration. For technical reasons, authorized share capital is generally created for that purpose, given that under the regime of the Merger Act there is no limitation on the number of shares which may be issued based on authorized capital; and ordinary share capital increases continue to be subject to a three-month time limitation, which can pose a problem when regulatory approvals or clearances must be obtained. In addition, the Merger Act provides exemptions with respect to the corporate requirement for certain disclosures in connection with contributions in kind.

## 1.5 Registration in the Commercial Register

The resolutions of the members of the general meetings must be registered with the commercial register. The merger becomes effective when the entries in the commercial registers are made (article 22 MA). It is at the time of registration when by operation of law (a) all the assets and liabilities (and contracts) of the disappearing company are transferred to the surviving company, (b) the shareholders of the transferring company become members of the surviving entity, and (c) the transferring company is dissolved without liquidation.

## 1.6 Protection of Creditors and Employees

At the request of the merging companies' creditors, the surviving company must secure outstanding claims within three months after the effective date

of the merger (article 25 MA). The creditors must be advised of this by three publications in the Swiss Commercial Gazette. No publication is required if a special auditor confirms that no claims are known or expected to arise in connection with the merger which the surviving entity could not easily pay. There is further no duty to provide security if the surviving company proves that the merger will not jeopardize the payment of claims. Instead of providing security, the company may also discharge individual claims provided that other creditors will not suffer a damage as a result thereof.

Employees of the transferring company may refuse to change the employer with the effect that their employment will be terminated with the statutory notice period. In addition, each of the transferring and the surviving companies must consult the employees' representative body before the shareholders' resolve to approve the merger. In the event of a breach of the requirement by the merging companies, the employees' representative body may request in court that the entry of the merger into the commercial register be prohibited. Mere consulting is sufficient, there is no necessity to address concerns voiced (but shareholders need to be informed about such concerns).

## 1.7 Cash-Out Mergers

The Merger Act contains a novelty under Swiss law by dealing with what is called a squeeze out or a 'cash-out merger' (see sections VII11.1 and IX2.4 for approval hurdle).

## 1.8 Cross-border Combinations

Together with the Merger Act the Federal Act on Private International Law was revised to expressly deal with cross-border statutory mergers.

An 'immigration merger' of a foreign company into a Swiss company is now permissible if the applicable foreign law allows the foreign (disappearing) entity to merge into a Swiss company and if the requirements arising under foreign law are satisfied. Besides this, the merger will be subject to Swiss law.

Conversely, in an 'emigration merger' a Swiss company will be able to be merged into a company domiciled abroad provided that the Swiss company can prove that (a) with the merger its assets and liabilities are transferred to the foreign company and (b) the rights of its shareholders in the foreign company will be adequately maintained. The emigrating Swiss company is subject to Swiss law applying to a transferring entity in a Swiss merger, which means, *inter alia*, that the creditors of the Swiss company must be advised of the merger and their right to be secured. Apart from that, the merger is subject to foreign law. A company which is registered in the Swiss commercial register may be deleted only based on a report by specially qualified auditors confirming that the creditors' claims have been secured or satisfied or that the creditors have agreed to the dissolution of the company. In addition, if the Swiss company is the disappearing and a foreign company the surviving entity, it must be shown

that the merger has become effective under the applicable foreign law, and a specially qualified auditor must confirm that the foreign company has granted the members of the disappearing Swiss company the rights they are entitled to or given adequate compensation or cash-out payments. In any event, due to prohibitive tax consequences, an emigrant merger will continue to be rare in practice.

In reality, these cross-border mergers are usually done by exchange offers and not by a direct merger due to the relatively complicated and burdensome rules.

## 1.9 Appraisal Rights and Triangular Mergers

Contrary to other jurisdictions where there are appraisal rights, Swiss merger law does not provide for a compulsory buyout right of the minority shareholders who vote against the merger.

Triangular mergers are possible under Swiss law only with the same super majority requirement as in a squeeze out merger (i.e. 90 percent of all the voting rights of the transferring company) and commercial registers seem reluctant to allow reverse mergers.

## 2 Statutory Short Form Mergers

### 2.1 General

There are two types of short form mergers under the Merger Act: mergers within a group of companies (see sections 2.2 and 2.3 below), and mergers involving a small or medium-sized company (see section 2.4 below).

### 2.2 Upstream and Sideways Mergers

According to article 23 MA, companies with a stated capital may be combined by a short form merger if the surviving company holds title to all of the transferring company's shares with voting rights. Based on the letter of the law, legal commentators have pointed out that the short form privileges are available for upstream mergers only and not for downstream or reverse mergers, where a parent company is merged into its wholly owned subsidiary. Sideways mergers involve companies whose shares are held by the same parent or one or several persons who form a group either on legal grounds (e.g. a community of joint heirs) or through a contractual arrangement (like a general partnership) may be effectuated by the same simplified procedure.

The short form privileges for upstream and sideways mergers are as follows:

- the merger agreement may contain less information than is required for a regular merger (particularly, there is no need to provide information on the exchange ratio);

- neither a merger report nor an auditor's report has to be produced;
- there is no right of inspection; and
- no shareholders' resolutions have to be passed.

According to most legal writers, in the absence of a body of precedents short form mergers should also be permissible where the shares of the transferring subsidiary are held only indirectly by the surviving company, and where the merging sister companies' shares are held by a company through one or several intermediate entities.

### 2.3 Upstream Mergers Involving less than Ten Percent Minority Shareholdings

Where a parent company holds title to 90 percent of the transferring company's stock, certain exemptions are available from the long form merger requirements, provided the minority shareholders have a right to opt for cash or shares in the surviving company and will not be subject to personal liability. The exemptions are less extensive than those applying to an upstream merger involving a wholly owned subsidiary:

- no merger report has to be produced; and
- no shareholders' resolutions have to be passed.

Squeeze out mergers where there is a compulsory freeze-out cannot be done as short form merger.

### 2.4 SME Exemptions

The shareholders of a small or medium-sized entity may by unanimous consent waive the requirements of (a) a merger report, (b) an auditor's review of the merger agreement, the merger report and the balance sheet on which the merger is based, as well as (c) the right of inspection.

By definition, a small or medium-sized company is a company that

- is not listed or has no outstanding bonds; and
- during the two business years prior to the merger has not exceeded two of the following thresholds: (i) a balance sheet total of CHF 20 million, (ii) a turnover of CHF 40 million, (iii) 200 full-time employees (annual average).

### 3 Merger Alternatives

#### 3.1 Unauthentic Merger or Merger-like Combination (Quasi-Merger)

A 'normal' merger involves the dissolution of the transferring company without liquidation. An 'unauthentic' merger is characterized by a disappearing entity transferring its business to the surviving company by way of a contribution in kind (usually in the context of a share capital increase of the surviving entity) and the subsequent liquidation of the transferring entity.

A merger-like transaction, also referred to as a quasi-merger, involves an acquisition of all shares in a target company where the consideration consists of shares in the acquiring company and possibly additional cash (i.e. if public companies are an exchange offer). A quasi-merger will typically not result in the dissolution of the transferring company; rather, the transferring company will become a subsidiary of the offering entity. This technique is usually applied in cross-border mergers.

#### 3.2 Special Structures

##### 3.2.1 Single Headed Structure

Another possibility of combining businesses is for two entities to form a common holding company. With respect to privately held firms, this is achieved through a transfer of the shares in the combining entities to a (newly) formed company by a contribution in kind of those shares. The transferring shareholders will be receiving shares in the newly formed company and the transferred entities will continue to exist as subsidiaries of the new holding company.

Single headed structures involving public companies may be accomplished in several ways. One technique involves as a first step the combination under a holding company of the businesses of the combining companies (identical to the dual headed structure as set out in section 3.2.2 below). In a second step, one of the parent companies launches a public (exchange) offer to the shareholders of the other company, thus becoming the ultimate parent. Another technique presupposes the formation of a Newco initially held by a trustee. Subsequently, a public exchange offer is launched by the Newco to the shareholders of the combining companies, as a result of which the Newco will acquire the shares of the combining entities in exchange of issuing Newco Shares and thus become the new parent. This technique emphasizes the idea of a partnership of equals. In a second step, the Newco may absorb the company domiciled in the same jurisdiction as the Newco by way of a merger, thus allowing for a squeeze out of the minority shareholders who have not tendered their shares.

##### 3.2.2 Dual Listed Company Structure

Under the dual headed joint venture structure, the shareholdings of the members in the combining listed companies remain unchanged, whereas the businesses of the combining companies are brought under the roof of a jointly held entity based on a shareholders' agreement between the parent companies.

A dual headed joint venture, which at the time attracted considerable attention, was the 'merger' between ASEA and Brown Boveri ("BBC") to form ABB. Each of ASEA and BBC transferred its business and subsidiaries into a newly formed corporation called Asea Brown Boveri, and each received 50 percent of the shares in the new company. The shareholders of ASEA and BBC kept their shares in ASEA and BBC respectively, but the two companies were transformed into holding companies, each with the main asset consisting of a 50 percent interest in the joint venture. The same structure was originally used in the combination between Zurich Insurance and Allied plc. However, none of these double headed structures passed the test of time. They were transformed into single headed structures again, so as to have a one shareholders base to build on in view of future acquisitions and the goal to maintain sufficient liquidity in the market.

##### 3.2.3 Synthetic Merger

Another form of a dual headed structure is what is called a synthetic merger. A synthetic merger is not a merger in the legal sense but a pooling (in an agreed manner) of future income generated in the businesses of the companies concerned (generally in proportion to their valuation). Technically, this may be achieved by a swap of minority equity stakes in the parties' subsidiaries and an allocation of preference shares to the other entity to equalize profits. The pooling agreement will require the parties to pay out dividends up to the parent level if necessary. A synthetic merger does not require a combination of the businesses under a holding structure as described above. The pooling can cover both operating income and extraordinary income, arising for example as a result of a spin-off or a sale of a part of the business to a third party (or even a liquidation).

From a Swiss tax perspective, the minority participation should be worth at least CHF 2 million (market value) or represent at least 20 percent of the share capital. If this is the case, the dividend paid to a Swiss parent qualifies for the participation exemption from Swiss income taxes. However, such payments may still lead to (unrecoverable) withholding taxes. To avoid withholding taxes, distributions to the other party may possibly be altogether avoided, except in the event of extraordinary revenues as a result of spin-offs or a sale of part of the business.

A synthetic merger may in many instances prove to be too complicated in the long run and lack the required flexibility in the event of necessary reorganizations. In practice, no synthetic merger has survived for a substantial period of time as of yet.

## 4 Tax Considerations

### 4.1 Tax Consequences for Shareholders of Merging Companies with a Stated Capital

Capital gains of a Swiss resident individual arising from the disposition of privately owned shares are tax free. Consequently, the exchange of shares in a merger will not be subject to income or withholding tax, except if the individual shareholder receives shares in the surviving entity with an increased nominal value (the additional nominal value being taxable) or a compensation or cash-out payment.

If shares in the transferring company are business assets, no tax consequences will arise due to the merger, provided the book value of the shares remains unchanged. Differences in nominal value are irrelevant for income tax purposes when it comes to business assets, whereas cash payments in the context of a merger will attract income and withholding tax.

Special rules apply in the event of a merger involving an insolvent company.

### 4.2 Tax Consequences for Merging Companies with a Stated Capital

As a general rule, if the assets and liabilities of the disappearing company are transferred to the surviving entity at their existing book values, no profits or withholding taxes will be incurred on open or hidden reserves, provided the surviving company will remain subject to taxation in Switzerland (articles 61 para. 1 DFTA and 24 para. 3 DFTHA). In the event of a merger, no stamp duty will be levied on the issuance of new shares by the surviving entity. Losses carried forward by one of the merging entities may be used to offset future income of the surviving company.

#### 4.2.1 Upstream Merger

If a subsidiary is merged into the parent company, the book value of the subsidiary's assets and liabilities will rarely equal the value of the shares on the parent's balance sheet. Because of that, there is often either a merger gain or a merger loss.

A merger loss is tax deductible if it represents a genuine loss. A loss is 'genuine' if the value of the subsidiary shares is overstated, which is the case if the book value exceeds the value of the subsidiary's net assets (taking into account hidden reserves). A non-deductible 'artificial' merger loss may either be immediately written off against the surviving company's equity or activated as goodwill and written off over a five-year period against freely disposable reserves (without, however, any positive impact on taxes). By writing off an artificial merger loss, hidden reserves will be created.

A merger gain is subject to corporate income tax, which, however, is normally reduced due to the availability of the participation relief.

#### 4.2.2 Downstream / Reverse Merger

In the event of a downstream or reverse merger, the parent company is merged into a wholly owned subsidiary. As a result of the merger, the subsidiary receives the parent's assets, including subsidiary shares. These may be delivered to the shareholders of the parent company in exchange for the parent shares. In consequence, the surviving subsidiary will normally not have to increase its share capital.

On the part of the transferring parent company, a downstream merger is tax neutral, provided that the surviving entity continues to be subject to Swiss taxation and the assets and liabilities are transferred on the basis of their existing book values. As far as the surviving subsidiary is concerned, any surplus in assets amounts to a shareholders' contribution, which in the context of a downstream merger is tax neutral as well.

#### 4.2.3 Sideways Merger

Sister companies may be merged on a tax neutral basis provided that the surviving entity continues to be subject to Swiss taxation and there is no increase in the book values of the transferred assets and liabilities. If there is a difference between the amount by which the capital of the surviving entity is increased and the stated equity capital of the transferring company, capital surplus is created which is not subject to taxation.

## 4.3 Retroactive Effective Date for Tax Purposes

The effective date of a merger may be agreed on in the merger agreement to be retroactive as of the date of the most recent financial statements. While the Merger Act provides that a merger agreement must be entered into not later than six months after the date of the most recent annual financial statements (lest an interim balance sheet must be prepared), the tax authorities' point of reference is the filing of the registration with the commercial register rather than the signing of the merger agreement. In other words, if the registration of the merger is filed more than six months after the date of the latest financial statements, the retroactivity of the merger is rejected by the tax authorities.

## 4.4 Merger-like Combinations of Companies with a Stated Capital

The Merger Act is not concerned with merger-like combinations. In order for a transaction to qualify as a merger-like combination, tax authorities require the acquiring company (a) to own at least 50 percent of the voting rights of the

acquired company following completion of the transaction, and (b) not to have made cash payments or granted loans in an amount exceeding 50 percent of the value of the acquired company. A merger-like combination does not result in the dissolution of the acquired company.

A merger-like combination is tax neutral for the companies involved. There is no holding period requirement. A (partial) exchange of shares held by an individual as private property results in a tax free capital gain (or loss), just as cash payments received in exchange for the shares. If the shares are business assets, the quasi-merger is also tax neutral provided that the new shares are taken up in the books at a value corresponding to the book value of the transferred shares. However, cash payments are subject to taxation when the shares are business assets. Increases in nominal value are irrelevant, irrespective of whether the shares are private or business property.

#### 4.5 Statutory Mergers Following a Share Purchase / Quasi-Merger

In the event of a merger-like combination followed by an absorption, there are no tax consequences for the merging companies, provided that the general tax neutrality requirements are met (i.e. continued liability to Swiss taxation; transfer at book value). Individuals, however, will be subject to the merger tax regime, with the consequence that nominal value increases and cash payments will attract income and withholding taxes. No such requalification of a share-for-share deal into a merger transaction will occur if there is an interval of five years between the merger-like combination and the statutory merger. However, a requalification will also be likely where shares are purchased for cash first and then – if the tax authorities view the transaction as an indirect partial liquidation – a statutory merger is made.

## IX Spin-Offs

### 1 Statutory Framework

The Merger Act has introduced a legal procedure for a demerger by operation of law with the effect that a concurrent transfer occurs of both (a) the assets and liabilities to be conveyed to a (newly formed or existing) company and (b) the shares in the transferee company to the shareholders of the transferring entity (spin-off). In addition, the Merger Act covers demergers by which a company is split up meaning that (a) its business is transferred to separate (newly formed or existing) companies, (b) the shareholders of the original company receive shares in the transferee companies, and (c) the original company, after the bifurcation, is dissolved and deleted from the commercial register (split-up).

Spin-offs and split-ups are herein referred to as 'demergers'. In contrast, a 'hive-down' involves a 'downstream separation' by virtue of a push-down of assets and liabilities into a (newly formed or existing) subsidiary. Technically, a hive-down is usually made by way of a share capital increase where the consideration for the shares issued to the parent consists of the net assets contributed to the subsidiary. Because a hive-down does not affect the shareholders of the transferring company, it falls outside the scope of the demerger regime. The same is true for an 'upstream separation' in the form of an asset transfer by a company to its shareholders, which can nevertheless qualify as a tax privileged reorganization if it occurs within a group of companies.

Businesses may be de-merged symmetrically such that the new membership rights will be proportional to their original shareholdings, or asymmetrically where the shareholders' stakes in one or several of the companies will differ from the percentage originally held. Demergers are available only for companies with stated capital and cooperatives.

Whilst the provision of a cash compensation not exceeding ten percent of the value of the newly allocated shares is permissible, squeeze out demergers resulting in a shareholder being bought out from all the companies involved would be a violation of the requirement of membership continuity. This notwithstanding, some legal commentators think that partial squeeze out payments are in line with the Merger Act, provided that, following the demerger, all shareholders still hold title to shares in at least one of the companies involved.

The demerger balance sheet may be based on the most recent statutory balance sheet of the transferring company, provided, however, that it dates back a maximum of six months and no material changes have occurred in the financial conditions. If either of these conditions fails to be satisfied, interim balance sheets of all the companies involved must be prepared. The interim balance sheet of the transferring company must have been audited or at least reviewed.

## 2 Demerger Steps

### 2.1 Demerger Agreement

The demerger must be agreed between the companies' boards in (a) a demerger agreement if the demerger involves a transfer of assets and liabilities to an existing company, or (b) a demerger plan if the transfer is made to a newly formed company. According to article 37 MA, the demerger agreement or plan must include:

- the name, registered office and legal form of the companies involved;
- an inventory listing and allocating the items of the business to be transferred (real property, securities and intangible assets having to be itemized);
- the exchange ratio in relation to shares and cash compensations (if any);
- the procedure for the exchange of shares;
- the date as of which new membership rights entitle to a share in the profits;
- the point in time as from when actions by the transferring company are deemed to be taken for the account of the receiving company;
- special privileges and benefits granted to the members of the top executive bodies, senior management or auditors; and
- a list of the employment relationships to be transferred.

If assets or liabilities are not specifically assigned in the demerger agreement or plan to either of the parties, they will be deemed to be allocated to the transferring company (article 38 MA).

### 2.2 Demerger and Special Auditor's Reports

The board of directors is responsible for the preparation of the demerger report which from a legal and an economic point of view must set out and explain:

- the purpose and consequences of the demerger;
- the demerger agreement or plan;
- the exchange ratio for shares and the amount of cash payments (if any);
- special considerations regarding the valuation of the shares in view of the determination of the exchange ratio;
- personal obligations and liabilities possibly arising for members of the company as a result of the demerger;
- consequences of the demerger for the employees of the companies involved as well as the contents of a possible social plan; and
- the effects of the demerger on the creditors of the companies involved in the demerger.

The demerger agreement or plan and the demerger report must be reviewed by special auditors to be appointed by the board who, in a written report, must set out whether the intended share capital increase (if any) of the receiving company suffices to safeguard the rights of the members, whether the exchange ratio or the cash payment is justifiable, which method was used and for what reasons to determine the exchange ratio, and how, if several methods were used, they were applied in order to determine the exchange ratio; and what special circumstances were taken into consideration when determining the value of the shares in view of the determination of the exchange ratio.

### 2.3 Protection of Creditors and Employees

Prior to the shareholders' meetings, the creditors of the companies involved in the demerger must on three occasions be publicly advised of their right to request within two months that they be secured (article 45 MA). The right to be secured does not apply, however, if a company can prove that the demerger will not jeopardize the creditors' claims. Instead of providing security, the company may satisfy a claim provided that other creditors will not suffer a damage as a result thereof. The requested security (if any) must be given before the shareholders' resolutions are taken. In the context of a demerger the timing is therefore different from a merger where creditor protection is afforded only after the shareholders' meetings have approved the transaction agreement.

If the claims of a creditor are not satisfied by the company to which the respective debt was allocated, the other companies involved in the demerger will become jointly and severally liable. However, joint and several liability can only be enforced if the claims are not secured and if the company primarily liable is subject to bankruptcy or debt collection proceedings (issuance of a certificate of loss) or if it has transferred its domicile abroad with the effect that the enforcement of claims is substantially hindered.

Employees are protected by virtue of article 333 CO, which provides that employees of the transferring company may refuse to be taken over and thus effectively terminate their employment upon the statutory notice period. In addition, each company must consult the employees' representative body before the shareholders resolve to approve the demerger. In the event of breach of these requirements, the employees' representative body may request in court that the entry of the demerger into the commercial register be prohibited.

### 2.4 Shareholders' Resolutions

During a period starting two months prior to the date of the shareholders' resolutions, each company involved in the demerger must make the following documents available for inspection by its members (article 41 MA):

- the demerger agreement or plan;
- the demerger report;

- the special auditor's report; and
- the annual financial statements of the three most recent business years, as well as the interim statement (if any).

The shareholders' meetings of all companies involved must approve the demerger agreement (article 43 MA). If a corporation resolves to approve a demerger agreement, the majority requirement is two-thirds of the votes represented (and an absolute majority of the share capital represented in case there are super voting shares). In the event of an asymmetrical spin-off or split-up at least 90 percent of the members of the company, who are entitled to vote, must approve the agreement. When it comes to companies with stated capital, the majority view is that the 90 percent requirement is met if 90 percent of the votes (rather than the members) approve the transaction, albeit legal writers are divided as to whether the reference to 'votes' relates to all of the existing votes or to the votes represented at the meeting.

In the event of a spin-off, the shareholders of the transferring company will also have to resolve a share capital reduction in an amount corresponding to the nominal value of the newly created shares of the transferee company to avoid negative tax consequences. Furthermore, spin-offs to an existing company will often require the transferee company to increase its share capital to create the necessary spin-off consideration. Under the Merger Act, certain exemptions from corporate disclosure requirements relating to contributions in kind are then available.

If the demerger is made to a newly formed company, the public deed required for the formation of the transferee company may be taken up in the public deed on the shareholders' resolution to approve the demerger agreement, it being understood that the transferee company is formed by the transferring company on behalf of the future shareholders.

## 2.5 Registration in the Commercial Register

Finally, the board of directors of the transferring company must file the shareholders' resolution in relation to the demerger with the commercial registry. If the transferee company had to increase its share capital, an application for registration must also be filed by the transferee company. The demerger becomes effective upon registration in the commercial register (article 52 MA). At this point in time the assets and liabilities listed in the inventory are transferred to the receiving companies and the shareholders of the transferring company become members of the receiving companies (unless an asymmetrical allocation of shares has been agreed) by operation of law.

## 2.6 Cross-Border Demergers

An 'immigration demerger', which involves a foreign transferring company and a newly formed or existing Swiss transferee company, is generally subject to foreign law, save for those provisions of the Merger Act which protect legitimate

Swiss interests and must therefore be cumulatively applied, such as provisions on creditor protection, inspection rights of shareholders, a capital increase or the formation of a Swiss company.

In an 'emigration demerger', where the transfer is made from a Swiss company to a newly formed or existing foreign entity, Swiss law is applicable to the transferring company. In addition, the parties must have regard to any applicable foreign law provisions. In practice, emigration demergers will most probably remain out of favor due to prohibitive tax consequences.

## 2.7 SME Exemptions

The shareholders of a small or medium-sized enterprise may by unanimous consent waive the requirements of (a) the demerger report, (b) an auditor's review of the demerger agreement, the demerger report and the balance sheet on which the demerger is based, as well as (c) the right of inspection.

## 3 Spin-Off Alternatives

### 3.1 Asset Transfer

Legal entities other than companies with stated capital and cooperatives are not allowed from effecting demergers under the Merger Act. Alternatively, these legal entities may employ a device called 'asset transfer' to achieve the same economic result (see section IVIII4 above).

### 3.2 Traditional Two Step Spin-off

Traditionally, Swiss corporate law did not cover demergers, specifically not the basic form under which there is (a) a transfer of assets and liabilities to a separate legal entity and (b) a distribution of the shares in the receiving entity to the shareholders of the transferring company. To accomplish these effects, Swiss companies first had to hive-down those assets and liabilities intended to spin off to a subsidiary (either by an asset sale or by a contribution in kind), and secondly to procure the transfer of shares in the transferee company to the shareholders of the transferring company.

As to the second step, the ties between the parent company and its subsidiary were severed by means of a dividend in specie consisting of the entire share capital of the newly formed subsidiary paid to the shareholders of the parent company (used e.g. when Givaudan was created). Alternatively, the parent company in its capacity as the sole shareholder of the subsidiary resolved a rights issue where the subscription price was considerably less than the market value of the shares. The parent then waived its pre-emption rights for the benefit of its shareholders who had the option of exercising the rights against payment of the reduced subscription price. This was usually combined with a rights trading which enabled private individuals to realize a tax free capital gain

on the sale of the subscription rights (used e.g. in relation to Ciba Specialty Chemicals and Lonza). In either event, the spin-off normally required not only the shareholders' approval of the parent company but also a formal shareholders' meeting of the newly formed company resolving the increase of its capital. In a variation of this approach, the parent fully capitalized the subsidiary and distributed purchase options to its shareholders with a low strike price (used e.g. for the creation of Syngenta). Finally, as a third alternative the transferring parent fully capitalized the hived down subsidiary and then resolved to decrease the parent's share capital such that the reduced amount was repaid to the shareholders in the form of shares in the hived-down subsidiary (used e.g. in Sulzer-Medica).

As a matter of principle, traditional two step demergers continue to be available as an alternative to a fully fledged demerger as defined by the Merger Act.

## 4 Tax Considerations

The requirements for a tax-neutral spin-off or split-up are as follows (articles 61 para. 1 DFTA and 24 para. 3 DFTHA):

- The transferee company must continue to be subject to Swiss taxation;
- The assets and liabilities must be transferred on the basis of existing book values;
- The transfer must involve (part of) a business, and each of the transferring and the receiving companies must continue to operate at least one business unit (dual continuing businesses requirement).

Prior to the enactment of the Merger Act, there was an additional five-year holding period requirement. As this was abolished, shares in the transferring or the spun-off entities may now be sold immediately following completion of the spin-off without triggering the tax effects of a liquidation.

Theoretically, the transferring entity can write down the net value of the spun-off business against a share capital reduction or against open reserves. In order to avoid the creation of additional nominal share value (as the transferee company will normally have to issue new transferee shares), which would result in withholding tax duties for the transferring entity and income taxes for Swiss resident individuals, the transferring company will normally opt for a share capital reduction. Alternatively, negative tax consequences may be avoided if the shareholders make an equity contribution to the transferee company corresponding to the newly created nominal value of the transferee shares.

Where the shareholders receive not only shares in the de-merged company but also compensation or cash-out payments, such payments will trigger withholding and (corporate) income tax.

## X Corporate Conversions

### 1 Statutory Framework

#### 1.1 General Situation

Under the Merger Act, a company may change its form while maintaining its legal and economic identity (conversion). Since a conversion is a purely internal corporate occurrence, the converted company's legal relationships with third parties are not affected.

With respect to a company with stated capital, a conversion does not result in its dissolution or the formation of a new company, and will not involve a transfer of assets or liabilities. When it comes to the conversion of a general or limited partnership into a company with stated capital, a new company will be established, though technically only the entry in the commercial register must be amended. Conversions of general into limited partnerships and vice versa are not subject to the Merger Act but are governed by the contractual arrangements of the parties.

Although conversions are permissible for almost any type of company, in certain cases where there are fundamental differences in the legal or business organization of the entities concerned they are not allowed. For example, a corporation cannot be converted into a general or limited partnership. Likewise, it will not be possible to convert a company into a foundation. Yet, as per article 54 MA, it is permissible for:

- a company with stated capital (corporations, corporations with unlimited partners and limited liability corporations) to convert into (i) a company with stated capital under a different legal form or a cooperative;
- a general partnership to convert into (i) a company with stated capital, (ii) a cooperative, or (iii) a limited partnership;
- a limited partnership to convert into (i) a company with stated capital, (ii) a cooperative, or (iii) a general partnership;
- a cooperative to convert into (i) a company with stated capital, or (ii) an association provided that the cooperative has not issued certificates and that the association will be entered into the commercial register;
- a registered association to convert into a company with stated capital or a cooperative.

Generally, in a conversion the rights of the shareholders must be maintained and safeguarded (article 56 MA). This is obviously subject to the general – and possibly quite fundamental – mandatory changes occurring to the membership rights as a consequence of the newly adopted legal form. Members of entities without membership certificates have the right to receive at least one share if the company is converted into a company with stated capital. Whether the principle of continued membership generally rules out the possibility of squeeze out or compensation payments – even with the affected members' consent –

is subject to debate among legal commentators. In any event, where all the partners or shareholders agree on a given plan, the parties are basically free to structure the migration of their membership rights as they please.

When on the occasion of a conversion a new company must be formed, the mandatory provisions of the Civil Code and the Code of Obligations governing the new company apply, save for the provisions regulating the formation of a company with stated capital and the provisions on contributions in kind.

If the balance sheet on which the conversion report is based dates back more than six months or if the financial conditions have materially changed, an interim balance sheet must be produced. The interim balance sheet must have been audited or reviewed by the special auditors who need to be appointed by the top executive body in connection with the conversion.

## 1.2 Frequent Conversions in Practice

The most common conversions may give rise to the following practical issues:

- Conversion of a partnership into a company with stated capital: as such a conversion normally requires the consent of all the partners, the parties are free to agree the structuring and allocation of shareholders' rights relating to the company with stated capital.
- Conversion of a corporation with limited liability (GmbH/LLC) into a corporation: If the minimum nominal value of corporation shares is lower than that of LLC shares (which is usually the case), the conversion process does not pose any problems. If the LLC's total share capital, which as a minimum must be CHF 20,000, is less than the minimum capital of a corporation (CHF 100,000), the conversion will only be feasible if the share capital is increased prior to or concurrently with the conversion. This cannot be avoided by only partially paying up the corporation shares if the LLC shares were fully paid-up.
- Conversion of a corporation into a corporation with limited liability (GmbH/LLC): As each LLC share's nominal value must be CHF 100 or multiples thereof (whereas the corresponding amount for a corporation is CHF 0.01), a compensation or a contribution payment may become necessary (the latter requiring consent of the concerned shareholder). Squeeze outs of shareholders holding the equivalent of less than CHF 100 in nominal share value in aggregate are impermissible. Whether these minority shareholders could voluntarily agree to a cash-out payment is controversial.

## 2 Conversion Steps

### 2.1 Conversion Plan

The top executive body of the entity concerned must prepare a conversion plan, which needs to be approved by the general meeting. According to article 60 MA, the conversion plan must at least contain

- information on the name, registered office and legal form before and after the conversion;
- the new articles of incorporation; and
- the number, type and amount of shares the members of the entity will receive after the conversion, respectively information on the membership in the company after the conversion.

### 2.2 Conversion and Special Auditor's Reports

Furthermore, the top executive body of the company must prepare a written conversion report (article 61 MA). The report must set out and explain, from a legal and an economic point of view:

- the purpose and the consequences of the conversion;
- compliance with the mandatory requirements in relation to a newly formed legal entity;
- the new articles of incorporation;
- the conversion ratio of shares or membership details effective as of conversion;
- personal obligations and liabilities which might arise for the members due to the conversion; and
- the obligations that may be imposed on the members under the new legal form of the company.

Specially qualified auditors, who must be appointed by the top executive body in connection with the conversion, must review the conversion plan, the conversion report as well as the conversion balance sheet. Furthermore, members of the company have a right of inspection of the conversion plan, conversion report, special audit report as well as the financial statements of the last three business years.

### 2.3 Approval by the General Meeting

During a 30-day period, ending on the day when the general meeting's resolutions are taken, the entity to be converted must make the following documents available for inspection by its members (article 63 MA):

- the conversion plan;
- the conversion report;
- the special auditor's report;
- the annual financial statements of the three most recent business years, as well as the interim statement (if any).

Conversions of corporations (*AG*), corporations with unlimited partners (*Kommandit-AG*), limited liability corporations (*GmbH*), cooperatives (*Genossenschaft*) and associations (*Verein*) require the approval of the general meeting of the company's members (article 64 MA). Depending on the type of company involved, different super majority voting requirements apply:

- for a corporation and corporation with unlimited partners: at least two thirds of the votes represented and the absolute majority of the nominal value of the shares represented; if an obligation to make supplementary financial contributions or other personal contributions is introduced on the conversion into a limited liability corporation, all the shareholders concerned must consent;
- for a conversion of a company with stated capital into a cooperative: the consent of all the shareholders;
- for a limited liability corporation: at least three quarters of the shareholders who represent at least three quarters of the company capital;
- for a cooperative: at least two thirds of the votes cast, or at least three quarters of all members in the event that supplementary financial contributions, personal contributions or a personal liability is introduced or extended;
- for an association: at least three quarters of the members present at the general meeting; and
- for a general or limited partnership: consent by all partners, except if agreed that the consent of three quarters of the partners shall be sufficient.

## 2.4 Registration in the Commercial Register

The conversion will become effective at the time when it is entered into the commercial register (article 67 MA).

## 2.5 Protection of Creditors and Employees

Given that a converted company maintains its legal and economic identity, a conversion normally does not affect creditors. In any event, the Merger Act provides that persons liable for the company's obligations prior to the conversion continue to be liable during a period of three years for obligations which were existing and due prior to the publication of the conversion. Further, as the conversion has no impact on the employees, article 333 of the Code of Obligations does not apply.

## 2.6 Cross-Border Conversion

There are no provisions under the Federal Act on Private International Law providing for a direct conversion across borders. A cross-border conversion therefore must be effected by a two step transaction where first a company's domicile must be transferred abroad and then the conversion must be made under the foreign jurisdiction's legal regime, or vice versa.

## 2.7 SME Exemptions

The members of a small or medium-sized enterprise may by unanimous consent waive the requirements of (a) a conversion report, (b) an auditor's review of the conversion plan, the conversion report and the conversion balance sheet, as well as (c) the right of inspection.

## 3 Conversion Alternatives

Where a conversion cannot be effected in accordance with the Merger Act, the persons or entities involved may decide to incorporate the new legal form and use the mechanics of an asset transfer (see IV above) as an alternative to achieve the same economic result.

## 4 Tax Considerations

For tax purposes, the term conversion is broader than that used in the Merger Act.

### 4.1 Conversion from a Partnership into a Company with Stated Capital

The requirements for a tax neutral conversion from a partnership into a company with stated capital are as follows (articles 19 para. 1 and 2 DFTA and 8 para. 3 and 3<sup>bis</sup> DFTHA):

- the converted company must continue to be subject to Swiss taxation;
- the assets and liabilities must be transferred to the converted company at their previous book value;
- a business unit or part of a business unit must be transferred; and
- shares in the converted company which are the private property of an individual shareholder are subject to a five-year holding period.

### 4.2 Conversion from a Company with Stated Capital into another Company with Stated Capital or a Cooperative and vice versa

A conversion from a company with stated capital into another company with stated capital or a cooperative, and vice versa, will not be subject to taxation, provided that the following circumstances exist (articles 61 para. 1 DFTA and 24 para. 3 DFTHA):

- the converted company continues to be subject to Swiss taxation; and
- the assets and liabilities are migrated into the converted company at their previous book value.

Unlike for a conversion from a partnership into a company with stated capital, no holding period requirement applies.

For the shareholders who privately own shares in the converted company, a conversion will not trigger income tax provided there will be no nominal share value increase. If the shares of a converted company are part of the business property, a conversion will not result in income taxes for private individuals if the book value remains unaltered, irrespective of whether or not there is an increase in nominal values. The same principle applies for legal entities owning shares in a converted company with respect to corporate income tax.

## XI Cross-Border Transactions

### 1 Acquisition of Foreign Company by Swiss Company

#### 1.1 Merger of Foreign Company into Swiss Company (Immigration Merger)

Swiss International Private Law permits cross-border mergers of companies domiciled abroad into Swiss legal entities (see section VIII 1.8).

The documents to be filed with the commercial register in Switzerland include (a) the transaction documents required in the event of a merger between Swiss entities (merger agreement, merger report or special auditor, resolution of the shareholders approving the merger, capital increase documentation, if any), (b) documentary evidence of the legal existence of the foreign company (excerpt from the commercial register or certificate of good standing), (c) a certificate from the relevant foreign authority confirming the permissibility of the cross-border merger, and (d) evidence showing the compatibility of the legal entities to be merged, which usually takes the form of a letter of the Swiss Institute of Comparative Law.

Consequently, the permissibility of a cross-border merger, where the surviving entity is a Swiss company depends not only on Swiss law but also on the law of the foreign jurisdiction where the foreign company is domiciled. In line with past practice, foreign companies domiciled in the Bahamas, Belgium, Bermuda, Finland, France, the Principality of Liechtenstein, Italy, Luxembourg, Austria Portugal and Spain should in principle be able to merge into a Swiss company, whilst companies located in Germany, the United Kingdom, Canada, the Netherlands, Poland and Sweden do not seem to benefit from a local legal regime allowing such cross-border mergers.

#### 1.2 Triangular Merger

Triangular mergers are frequently used when Swiss companies acquire US companies given that many US state corporate laws allow triangular mergers which are subject to a favorable US tax treatment both for the companies and their shareholders.

A triangular merger is a merger between the target company and a wholly owned subsidiary of the acquiring company with the result that the shareholders of the target company become shareholders of the acquiring company. If the subsidiary survives and the target company disappears as a consequence of the merger, the transaction is called a 'forward triangular merger'. If the target company survives and becomes a subsidiary of the acquiring company, the merger is a 'reverse triangular merger'.

If a Swiss company acquires a US company through a triangular merger, the Swiss company will usually have to issue new shares to the shareholders of the US target whose shares in the US target will be cancelled.

Different merger structures provide different advantages and disadvantages. When it comes to the target's liabilities, both forward triangular and reverse triangular mergers (as opposed to direct mergers) allow the acquirer to shield itself from the target's liabilities. Under foreign (US) laws, direct mergers and forward triangular mergers are usually taxed as an asset acquisition, whilst most reverse triangular mergers are assessed as a share acquisition. In the event of a reverse triangular merger, existing contractual relationships, regulatory approvals or licenses are often not affected, whereas a forward triangular merger leads to the replacement of the target in any existing contractual relationships with third parties that may have the right to oppose any transfer of contract and may involve the need to re-apply for regulatory approvals or licenses.

### 1.3 Public Offer of Swiss Company to Shareholders of Foreign Company

Public offers are popular when Swiss companies acquire publicly listed foreign companies. As a rule, the takeover will be subject to the foreign law of the place where the target is listed.

## 2 Acquisition of Swiss Company by Foreign Company

### 2.1 Merger of Swiss Company into Foreign Company (Emigration Merger)

As seen, a cross-border merger of a Swiss company into a foreign company where the foreign company is the surviving legal entity is permissible (see section VIII 1.8) if the Swiss company proves that as a result of the merger its assets and liabilities will transfer to the foreign company and the equity or membership rights will continue to be adequately safeguarded in the foreign company.

In addition, the Swiss company must comply with Swiss merger law applying to disappearing entities (merger report, special audit of merger agreement and merger report, inspection rights, shareholders' resolution, which must be publicly notarized, entry of the merger into the commercial register, and employee protection measures). Creditors must be notified of the merger so that they can file any claims they may have. Other than that, the merger is governed by the law of the surviving foreign company. Under special circumstances, short-form mergers are also permissible.

The Swiss company may be deleted in the commercial register upon filing of (a) the transaction documents to be filed in the event of a merger between Swiss legal entities (merger agreement, merger balance sheet of transferring company, resolution of shareholders, merger report of special auditor), (b) documentary evidence of the legal existence of the foreign company (excerpt from the commercial register or certificate of good standing), (c) a certificate from the relevant foreign authority confirming the permissibility of the cross-border merger under foreign law, (d) a report of a special auditor confirming that the claims of the

creditors were either satisfied or secured, or that the claims of the creditors will not be jeopardized, or that the creditors agree with the deletion from the register, (e) evidence of the effectiveness of the merger under foreign law, (f) a report of a special auditor confirming that the shareholders were granted equity or membership rights, or that a compensatory payment was made or secured (on the basis of a shareholders' resolution with a super majority vote of 90 percent of the shareholders with voting rights), and (g) approval of the federal and cantonal tax authorities that the company may be deleted in the commercial register.

A cross-border merger of a Swiss listed company into a foreign company with the foreign company as the surviving entity is likely to be subject to negative Swiss (withholding) tax consequences. Such cross-border emigration mergers of Swiss listed companies are therefore rare in practice.

Whether or not a cross-border merger is possible where the foreign entity is the surviving company depends on the laws and tax regimes of the jurisdictions involved and requires a careful analysis in each case. Generally speaking, cross-border mergers of a Swiss company are feasible if the surviving entity is a foreign company domiciled in Belgium, Denmark, Finland, France, Italy, Luxembourg, Austria, Portugal, Spain and some states in the USA (e.g. Delaware), whilst Germany, the United Kingdom, Canada, the Netherlands, Poland and Sweden do not seem to allow such mergers.

### 2.2 Triangular Merger under Swiss Law

According to the Swiss Merger Act, the companies involved in a merger may agree that the shareholders of the transferring company should receive a 'compensation' (*Abfindung*) rather than shares in the surviving company. The compensation may consist of cash (cash-out merger) or other assets, such as shares in the parent company (triangular merger). As a consequence of this, a forward triangular merger is generally permissible under Swiss law, although subject to a super majority requirement that is difficult to achieve: 90 percent of the transferring company's shareholders entitled to vote must approve such triangular merger.

In the absence of any court precedents, it is subject to controversy whether or not a reverse triangular merger would be permissible under Swiss law. Those arguing against it point out that because only shareholders of the transferring entity may be 'compensated' under the relevant provisions of the Swiss Merger Act, it should not be possible to indemnify the shareholders of the target company which is the surviving, i.e. the receiving, entity in a reverse triangular merger. Those arguing for the permissibility of a reverse triangular merger are advocating a broad and more liberal interpretation of the Swiss Merger Act. To date no reverse triangular merger has been effected under Swiss law.

### 2.3 Public Offer of Foreign Company to Shareholders of Swiss Company

A public offer is the method most frequently applied if a foreign company seeks to acquire a Swiss listed company. If the Swiss company is listed on a Swiss exchange, Swiss takeover law applies. Its implications are set out in detail under section VII.

## 3 Re-Domiciliation

### 3.1 Re-Domiciliation of Foreign Company to Switzerland

A foreign company may relocate its domicile to Switzerland by ways other than a merger or public offer. In practice, two alternatives exist.

One method involves the formation of a new Swiss legal entity and a share capital increase in which the foreign company is contributed against the issuance of new shares to the shareholders of the foreign company. Under foreign law (in particular UK law or law modeled on UK law), this often involves the use of a scheme of arrangement, which ensures that all shareholders will participate. If the foreign company is listed on a stock exchange, it must be delisted and the new Swiss company must seek a new listing and admission for trading. The contribution in kind of the foreign company to effect the share capital increase of the new Swiss entity leads to a step-up in basis of the assets as reflected on the balance sheet of the Swiss parent. This increases the possibility of distributing dividends to shareholders free of withholding tax.

The second method involves a re-domiciliation. According to Swiss International Private Law, a foreign company may change its legal domicile from a jurisdiction abroad to Switzerland without liquidation and reincorporation simply by submitting itself to Swiss law if the foreign law by which the company is governed permits such re-location. To effect a re-domiciliation under Swiss International Private Law, a foreign corporation must adopt one of the forms of organization of Swiss law by amending its articles of incorporation to comply with Swiss law. The company will be governed by Swiss law and must provide that its centre of business activities has been moved to Switzerland, which involves a test that does not raise obstacles in practice (as the test applies, *inter alia*, to the transferred entity only and not to a group of companies). Technically, an auditor's report is required confirming that the company's share capital is fully covered by its net assets. The company will be entered into the commercial register upon filing of (a) documentary evidence of the legal existence of the foreign company abroad, (b) evidence that the re-domiciliation is permissible under foreign law, (c) evidence that the foreign company can be changed so as to comply with Swiss law, (d) evidence that the company has moved the centre of its business activities to Switzerland, and (e) the report of the special auditor confirming that the company's equity capital is fully covered by its assets.

### 3.2 Re-Domiciliation of Swiss Company to Foreign Jurisdiction

Swiss International Private Law permits a re-domiciliation of a Swiss company to a jurisdiction abroad without liquidation and reincorporation of the legal entity involved if the conditions imposed by Swiss law are satisfied and if the company continues to exist under foreign law. The creditors must be notified of the contemplated change and asked to submit any claims they may have. The Swiss company may be deleted in the commercial register upon filing of (a) documentary evidence that the company will continue to exist abroad, (b) a report of a special auditor confirming that the claims of the creditors were either satisfied or secured, that they are not jeopardized, or that the creditors agree with the deletion from the register, and (c) the resolution of the competent corporate body to subject the company to foreign law.

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