

# SWISS INVESTMENT REPORT\* 24

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\* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. (“Wenfei”), a Swiss law firm which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

The Swiss Investment Report provides background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor’s perspective.

## Healthcare, Technology and Real Estate M&A in Switzerland

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# Healthcare, Technology and Real Estate M&A in Switzerland

## I. Introduction

The number and volume of M&A deals in Switzerland declined slightly in 2019. However, in sectors such as healthcare, technology and real estate, Switzerland is home to a large number of innovative companies and interesting investment targets for foreign investors' portfolios. The following article examines the general principles of M&A transaction in Switzerland and discusses specific M&A problems regarding healthcare, technology and IP and real estate M&A from a practical point of view. This article is specifically directed at foreign investors with an interest in Swiss healthcare, technology an IP companies and Swiss real estate.

## II. M & A in Switzerland – the basics

Companies are dynamic entities that constantly have to undergo adjustments e.g. because the size or the structure is not optimal and a merger with, or a takeover by another company becomes evident, business activities that are no longer part of the core business are split off or a company is split into several new companies, the legal form becomes unsuitable and not at least, international business combinations open up new business opportunities. In recent years, M&A projects involving innovative healthcare and tech-companies but also the acquisition of real estate in Switzerland have attracted the attention of Chinese companies and investors. Often, such business cases were motivated by restructuring measures or portfolio management decisions.

The main legal authority for business combinations in Switzerland is incorporated in the Swiss Code of Obligations (CO) and the Federal Act on Merger, Demerger, Transformation and Transfer of Asset (Merger Act). Business combinations can be accomplished by asset or share deals. The main difference between the two is that during a share deal, a company is sold indirectly, by selling it shares to another company, while during an asset deal, the assets and liabilities of a company are sold directly. If an asset transfer is governed by the Merger Act, all assets must be transferred universally by law. The transfer takes place at the time of registration with the commercial registry. If the parties decide to exclude the Merger Act, all assets have to be transferred individually (according to the CO), however, this transaction can be executed confidentially since there is no registration with a public register required.

The process of business combinations, be it by merger or by asset transfer can be split up into four phases:

- *Preliminary phase*: Trust building, letter of intent (term sheet, memorandum of understanding), due diligence, pre-contractual protection and information obligations and pre-contractual liability;
- *Conclusion of contract*: Negotiations purchase agreement, side contracts, signing;
- *Execution of contract*: Compliance with execution conditions (such as merger control), providing the financing, closing;
- *Integration*: Integration of the acquired company into its own entity (post-merger integration).

This article shows some crucial points in terms of the afore-mentioned phases regarding technology, healthcare and real estate M&A in Switzerland.

### **III. Focus: Healthcare**

Looking at the composition of the Swiss healthcare market, a number of possible co-operations or business combinations catch the eye. Swiss healthcare companies differ significantly in terms of size, organization, development stage and business fields. From start-up companies in the R&D phase to established cash-cows, from drug producers to bio-tech researchers, from manufacturing of fin-tech medical devices to medical and elderly care service providers, the Swiss healthcare market includes a vast number of innovative companies. But what are critical aspects when considering a business combination with a healthcare company in Switzerland?

Where the target is a company at an early stage of development, the business combination will usually take the form of a minority equity investment in the target by one or more larger companies or financial investors. The shareholders' meeting of the target company or its board of directors decides about such a capital increase. The investors will then subscribe for new shares in the context of a capital increase. In the context of the transaction, the shareholders' meeting of the generally elects a representative of the lead investor to the board of directors, whereas other investors may be entitled to appoint observers to the board.

If the foreign investor is interested in acquiring an entire company, the business combination is often designed as a purchase of the entire share

capital of the target. On the contrary, if the acquirer intends to acquire parts of the business, the combination is often carried out by a transfer of assets to the acquirer. It is no unusual that the relevant assets are initially transferred to a newly established subsidiary as an intermediate step. In case of a transfer of assets and liabilities according to the Merger Act, the transfer is completed by operation of law at the time the transfer is registered with the relevant commercial register. Therefore, the transfer agreement and its enclosures have to be submitted to the commercial register.

On the contrary, if the Merger Act has been excluded by the parties, each asset has to be transferred separately. The scope of the combination must be transferred individually. These transfers enable the preservation of confidentiality about the transaction, as there are no filing requirements with the authorities. The choice between one type of transfer or another mainly is dependent from the type and the amount of assets to be transferred, as well as the confidentiality requirements of the parties.

Furthermore, if the combination relates to a drug that has not yet been approved, the parties may, as a first step, work together to advance development under a licensing and development agreement and to conduct the healthcare M&A according to the Development Agreement. Such agreements may foresee the acquisition of shares in the company that develops the drug upon reaching certain milestones.

An equity investment in connection with a healthcare M&A usually take less time than the purchase of shares. The latter, however, is likely to encounter less obstacles. In general, it takes about six months to complete such a business combination.

#### **IV. Focus: Technology and IP**

In addition to the above-mentioned M&A transactions with Swiss healthcare companies we would like to take a closer look at the due diligence in the light of tech-companies. Such tech-oriented due diligence is likewise relevant for healthcare companies. Usually tech- as well as healthcare companies hold a significant amount of intangible assets. In order to reveal the value of intangible assets of targeted companies, special aspects have to be taken into account during the due diligence.

First of all, it must be verified that the IP rights used for business are actually owned by the company. If the intellectual property used by the target company is owned by third parties or shareholders, it has to be examined whether the

target company has concluded sufficient license agreements and whether there are agreements for the continued use of such intangible assets.

The due diligence carried out with regard to ownership includes assessing whether a clear and complete chain of titles can be identified and whether there are any security interests or liens created over the intellectual property. The main focus of IP due diligence is to ensure the title and scope of protection of IP assets. The buyer must analyze, whether the IP rights are owned by the target company and are validly registered in the countries where the company operates. Other areas of due diligence include the examination of intellectual property litigation by or against the target company.

In addition, software is usually protected by copyright. Copyright protection arises in the moment, when the work is created. There is no general copyright register in Switzerland. Hence, software due diligence mainly focusses on the rightful transfer of the copyrights to the target company by operation of law or by contract.

Finally, a company's data handling should be subject to due diligence too, especially if the targeted tech-company includes data processing in their business model. In particular, compliance with applicable data protection laws and data security measures against the misuse of data as well as protection of trade secrets are subject to data focused due diligence.

## **V. Focus: Real Estate**

Real estate M&A typically are structured as asset deals i.e. purchase of assets or transfer pursuant to the Merger Act - or as share deals i.e. by acquisition of shares of a company holding real estate, or by taking over a listed real estate company by a public tender offer.

The start of negotiations is usually indicated by the mutual signing of a non-disclosure agreement (NDA), followed by a letter of intent (LOI) by the parties. This is followed by a detailed due diligence regarding the property or real estate company and often exclusivity is granted. Once an agreement on business terms is reached, the parties enter into an asset purchase agreement, a share purchase agreement and an asset transfer agreement. The first two cases require public notarization.

In case of a public takeover bid supported by the board of directors of the target company (a friendly takeover), the bidder and the target company often conclude a transaction agreement, which is usually followed by a public takeover bid.

In general, the legal basis for business combinations involving real estate can be found in the Swiss Code of Obligations, the Merger Act and with specific regard to real estate, in the Swiss Civil Code, the Act on the Acquisition of Real Estate by Persons Abroad (Lex Koller), the Ordinance on the Land Register and the Act on Rural Land Rights.

For foreign investors willing to acquire residential property in Switzerland the so-called Lex Koller applies in cases of direct or indirect acquisition of shares of a company holding real estate, mergers, demergers, asset transfers or gifts. The acquisition of solely commercially used property, however, is not restricted by the Lex Koller. According to the general rule set out by the Lex Koller, the acquisition of residential property by a person abroad or the take-over of a Swiss real estate company by a person abroad, is subject to the approval of the competent authorities.

## **VI. Conclusion**

The Swiss economy, driven by innovation, is bringing new companies onto the market at a high rate, particularly in the healthcare, technology sector. Many of these companies are depending on fresh capital and therefore are for negotiations with foreign investors. Switzerland offers a fertile ground for business combinations.

From a legal point of view, M&A transaction in connection with healthcare and tech companies require a detailed analysis, particularly in terms of due diligence. Real estate M&A demand an even closer look at possible obstacles and ways around them, due to specific legal regulations directed at foreign investors, i.e. persons abroad who want to acquire residential property in Switzerland. A careful planning of M&A projects has proven to be a key factor for a smooth transition.

Wenfei will continue reporting about M&As in Switzerland and will keep you up to date with follow-ups on the topics of M&A and due diligence.

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