

Real Estate M&A

Contributing editor
Steven L Wilner



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GETTING THE
DEAL THROUGH 

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Contributing editor

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1 What is the typical structure of a real-estate-related business combination?

Business combinations in connection with the acquisition of either one or several properties can be accomplished in four different ways. First of all, it is possible to purchase real estate by way of an asset deal. The second possibility is an asset or business transfer pursuant to the Merger Act (as defined below) that allows a transfer of one or several properties in a single act by operation of law. Such asset or business transfer may, for example, be a suitable option in a portfolio deal when real estate is located in different Swiss cantons. The third possibility is to acquire real estate by way of a share deal (ie, by acquiring the share capital of a company holding real estate). The last possibility is a public tender offer if an acquirer wishes to take over a listed real estate company. While options one and two constitute asset deals, options three and four constitute share deals.

2 Describe the process by which real-estate-related business combinations are typically initiated, negotiated and completed.

The beginning 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. Hereinafter, detailed due diligence (DD) with regard to real estate or the real estate company is carried out. Once an agreement on the commercial terms is reached, the parties will enter into an asset purchase agreement, a share purchase agreement or an asset transfer agreement (in the form of a public deed in the first two cases). In case of a public tender offer, which is supported by the board of directors of the target company (friendly takeover), the offeror and the target company often enter into a transaction agreement followed by the launch of a public tender offer.

3 What are some of the primary laws and regulations governing or implicated in real-estate-related business combinations?

Are commercial, residential or agricultural real estate assets subject to specific regulation that would be material in a typical transaction?

The general legal basis with regard to business combinations is enacted in the Swiss Code of Obligations (CO) and the Federal Act on Merger, Demerger, Transformation and Transfer of Assets (the Merger Act). With regard to real estate, the Swiss Civil Code (CC), the Act on the Acquisition of Real Estate by Persons Abroad (Lex Koller), the Ordinance on the Land Register (OLR) as well as the Act on Rural Land Rights (PLRA) are the primary laws that apply. Furthermore, the Federal Act on Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act (FMIA)) governs public tender offers for shares of a Swiss or foreign company that are listed on a Swiss stock exchange, while commercial aspects are covered by the Unfair Competition Act (UCA). Any questions that might arise in connection with a real-estate-related business combination regarding environmental protection are mainly covered by the Environmental Protection Statute (EPS), the Impact Study Ordinance (ISO), the Federal Water Pollution Statute (WPS), the Air Pollution Ordinance (APO), the Noise Pollution Ordinance (NPO), the Disaster Protection Ordinance (DPO) as well as the Dangerous Substances Ordinance (DSO). Additionally, the listed statutes may be

clarified by an ordinance. The Zoning Statute (ZS) and its Ordinance to Zoning Statute (OZS) are the legal basis regarding zoning on the federal level.

4 Are there any specific regulations relating to cross-border combinations or foreign investors or acquirers that are material to real-estate-related business combinations and related structures?

If a foreign investor wishes to acquire residential property in Switzerland (directly or indirectly), the Act on the Acquisition of Real Estate by Persons Abroad (Lex Koller) applies. The Lex Koller not only applies to a straight sale or acquisition of real estate, but also to indirect acquisitions by way of acquiring shares of an entity holding real estate, mergers, demergers, asset transfers or gifts. It does, however, not limit the acquisition of commercially used property (ie, office or production buildings) unless the commercial property contains areas that are used for residential purposes or consist of more than one-third (or under specific circumstances up to half) of undeveloped and unused land (land reserves).

As a rule, the acquisition of residential property by a person abroad (as defined by the Lex Koller) requires approval from the competent authorities. The same requirement applies if a person abroad takes control of a real estate company or in case of an acquisition of residential property by a company that qualifies as a person abroad. A (Swiss) company qualifies as a non-Swiss residential acquirer if more than one-third of the share capital is held by non-Swiss shareholders. However, for the acquisition of shares in a listed company, Lex Koller provides for a general exemption: no approval with regard to the share transfer is required. Nevertheless, should more than one-third of the share capital of a listed company be held by non-Swiss shareholders, the listed company would not be allowed to buy additional residential property in Switzerland, which might substantially restrict the business activities of the listed company.

5 What territory's law typically governs the definitive agreements in the context of real-estate-related business combinations? Which courts typically have subject-matter jurisdiction over a real-estate-related business combination?

The underlying contracts for the acquisition of real estate are usually governed by Swiss law because the transfer of the ownership in the underlying asset (ie, in the Swiss real estate or the shares in a Swiss company) and thus the transfer of the rights in rem are subject to Swiss law.

The competent court in first instance generally is the local district court of the relevant canton. With an amount in dispute exceeding 100,000 Swiss francs and with the consent of the parties, the mandatory obligation to first attempt conciliation can be waived, and a direct action before the higher court is possible. Some cantons (Zurich, St. Gallen, Bern and Aargau) even designate the Commercial Court as the first and sole cantonal instance.

6 What information must be publicly disclosed in a public-company real-estate-related business combination?

An offer prospectus pursuant to article 127 FMIA has to be published in case of a takeover of a publicly listed real estate company by way of a

public tender offer. The offer prospectus has to contain all information necessary for the target's shareholders in order to conclude an informed decision about the offer. The offer prospectus must contain the minimum content as specified in the regulations of the Swiss Takeover Board (the Takeover Board). This includes, inter alia, specifying the involved persons (particularly the offeror and persons acting in concert with the offeror), the financing of the offer, conditions to the offer as well as an abstract of the future business plans of the offeror with regard to the target company. Public tender offers are subject to supervision of the Takeover Board as well as the Swiss Financial Market Supervisory Authority (FINMA). The Takeover Board examines whether the applicable provisions for public tender offers are being complied with. The board of directors of the target company has to publish a report stating whether the board of directors recommends the acceptance or rejection of the offer or it may refrain from a recommendation and, as an alternative, summarise the benefits and the disadvantages of the offer.

In the event that the transaction is carried out by way of a merger, the provisions of the Swiss Merger Act apply with regard to the content of the merger agreement and the report of the board of directors of the surviving (offering) company and the transferring (target) company. The merger agreement, including the underlying merger balance sheet, and the merger report of the board of directors as well as the audit report of a qualified audit firm, has to be filed with the Commercial Register and will become open to the public. Additionally, the cantons may provide that all acquisitions of immovable property shall be published.

7 Give an overview of the material duties, if any, of the directors and officers of a company towards company stakeholders in connection with a real-estate-related business combination. Do controlling shareholders have any similar duties?

The members of the board of directors and officers have to comply with the duty of care and duty of loyalty towards the company, act in the best interests of the company (including shareholders and other stakeholders) and are obliged to treat all shareholders equally (under equal circumstances). There are certain additional aspects to be taken into account with regard to public takeovers, particularly with regard to the restrictions to carry out certain defence measures after a public tender offer is pre-announced or published (as the case may be).

Further, specific requirements apply to the board of directors of a target company with regard to the recommendation to accept or reject a public tender offer: particularly, the board of directors has to disclose in its report whether any conflict of interests of the members of the board or management exist and inform the shareholders about the measures taken due to such conflicts (eg, whether the recommendation is based on a fairness opinion of a qualified independent valuation expert or whether conflicted members of the board abstained from voting).

There are no fiduciary duties of controlling shareholders towards the company itself or any other shareholders. Duties arising out of shareholders' agreements are preserved. However, in case of a public tender offer, the report of the board of directors of the target company has to disclose the intentions of substantial shareholders regarding the public tender offer (ie, of shareholders owning more than 5 per cent of the target company's voting rights) to the extent that the board of the target company has knowledge thereof.

8 What rights do shareholders have in a public-company real-estate-related business combinations? How do acquirers address and structure around the risks associated with shareholder dissent in the context of real-estate-related business combinations?

By owning at least 3 per cent or more of the shares of a listed company that is subject to a tender offer, the shareholder may participate in the procedures of the Takeover Board, the Swiss Financial Market Supervisory Authority (FINMA) as well as all courts as a party and, accordingly, has a right to appeal, file applications and lodge complaints. For doing so, the 3 per cent stake must already be held by the time of the (pre-)announcement of the relevant tender offer. With such attempt a shareholder may significantly influence and delay the timing of a transaction and, thereby, increase pressure on the offeror to raise the offer price; however, the shareholder may not prevent the tender offer. In general, the minimum price rule (if applicable) and the best price rule shall ensure that the existing shareholders receive

a fair consideration or at least that all shareholders are treated equally. Further, if the securities of the target company are illiquid (as defined by the takeover regulations), the offer price must be based on the valuation established by a qualified auditing company or a securities dealer.

9 Which kinds of termination fees are permissible, and what is their magnitude?

In Switzerland, break-up fees and reverse break-up fees are permitted. However, the amount of such fee is only deemed to be appropriate as long as it does not exceed the actual damage occurred in case of failure of the takeover. A punitive character of break-up fees is therefore to be avoided; approximate costs in connection with the offer and its preparation as well as the actual financial situation of the company may be considered. Break-up fees shall never endanger the sustainable survivability or the future development of an undertaking and, thus, shall neither deter third parties from making an offer nor restrict the freedom of choice of the shareholders. So far, the Takeover Board has accepted break-up fees reaching up to 1.99 per cent of the offer price.

10 How much advance notice must a public target give its shareholders in connection with approving a real-estate-related business combination, and what factors inform this analysis? How is shareholder approval typically sought in this context?

Target companies do not have to give their shareholders any (advance) notice with regard to a public business combination. The board of directors will only publish its report with its recommendation to accept or reject the tender offer; such report is either part of the offer prospectus (in case of a friendly transaction) or separately published during the offer period (in a hostile transaction). Further, there is no requirement under Swiss law that a shareholders' meeting of the target company is convened in order to approve a public tender offer. Each shareholder has the individual right, but not the obligation, to accept the offer of an offeror and tender its shares in the course of the tender offer. However, the Swiss takeover regulations set forth specific time periods that need to be complied with by an offeror.

Even though it is not mandatory, the first action of an offeror is typically the publication of a pre-announcement, thereby triggering an obligation to launch a public tender offer or to publish the offer prospectus, respectively, no later than six weeks after such pre-announcement. With the pre-announcement the offeror, among others, sets the record date for the calculation of the minimum price and the best price rule becomes applicable. On the other hand, defence measures that can be taken by a target company are limited as from the pre-announcement date. The publication of the offering prospectus will be followed by a cool-off period lasting 10 trading days, after which the offer period that usually lasts for 20 trading days, but may be extended up to 40 trading days, starts. This first period for tendering the shares to the offeror will be finished by the publication of the interim result stating whether certain conditions precedent to the offer (if any) are fulfilled and, thus, whether the offer was successful or not. A (mandatory) additional acceptance period of 10 trading days follows, allowing the remaining shareholders – knowing that the offer was successful and will be completed – to tender their securities and exit the target company. Finally, the procedure will be finished by the publication of the final result and the completion of the exchange (equity shares against offer price (in case of a cash offer) or against shares (in case of an exchange offer)). If the offeror holds more than 98 per cent of the voting rights of the target company after completion of the tender offer, the offeror has the right to request the transfer of the remaining shares in the course of a squeeze-out procedure according to the FMIA. Where the offeror holds between 90 and 98 per cent of the voting rights, a regular merger or a squeeze-out merger pursuant to the rules of the Swiss Merger Act can be carried out between the (now controlled) target company and the offeror or one of its affiliated companies.

In the event that a shareholders' meeting must be called in connection with the acquisition of real estate, for example, in the case of a merger or if a capital increase will be resolved in order to finance or refinance a transaction, the notice period of at least 20 calendar days prior to the meeting needs to be observed and the invitation must be published or distributed pursuant to the provisions in the company's articles of association.

11 What are some of the typical tax issues involved in real-estate-related business combinations and to what extent do these typically drive structuring considerations? Are there certain considerations that stem from the tax status of a target?

Acquisitions of real estate or the majority of the shares in a Swiss real estate company may be subject to real estate transfer tax of usually between 1 and 3 per cent depending on the canton where the property is located. Certain cantons do not apply a real estate transfer tax, such as Zurich, which abolished real estate transfer tax a few years ago. It should be noted that in certain cantons, tax laws may foresee a lien on the property to secure the transfer taxes.

As a rule, transfers of real estate are excluded from VAT. However, there is the possibility to opt for VAT if the real estate is not used for private purposes. The real estate gains tax can possibly be reduced or eliminated in case of a share deal compared with an asset deal. Also, under certain circumstances, restructuring relief could be applicable, thus preventing capital gains tax from applying.

12 What measures are normally taken to mitigate typical tax risks in a real-estate-related business combination? How important are tax issues in evaluating structuring alternatives in the context of a real-estate-related business combination?

Tax considerations are very important in real estate transactions. However, a generally valid answer to mitigate taxes cannot be given, as tax risks and mitigation strategies depend heavily on the specific situation of the parties involved and the real estate in question.

13 What form of acquisition vehicle is typically used in connection with a real-estate-related business combination, and does the form vary depending on structuring alternatives or structure of the target company?

If in a real-estate-related business combination an adequate acquisition vehicle already exists, it is usually used as it is (a corporation, limited liability company, general partnership, limited partnership, association or foundation). Otherwise, a corporation is usually formed. Under a few (older) double tax treaties, a foreign acquisition vehicle can be beneficial in view of a future share deal exit.

14 What issues typically face boards of real-estate-related public companies considering a take-private transaction? Do these considerations vary according to the structure of the target?

A take-private transaction and the procedures applicable for a delisting are governed by the Delisting Directive of SIX Swiss Exchange. The decision about whether a company shall be delisted is taken by the board of directors unless the articles of incorporation allocate such decision to the shareholders' meeting. Shareholders have the right to appeal a delisting decision of SIX Exchange Regulation within 20 days of publication or to raise liability claims against the board of directors if the directors have violated their duties.

15 How long do going-private transactions typically take in the context of a public real-estate-related business combination? What are the major milestones in this process? What factors could expedite or extend the process?

The listed company has to apply for a delisting no later than 20 exchange days prior to the requested announcement. Any necessary time for preliminary negotiations exempted, the period between the delisting announcement and the last trading day may last between three to 12 months for an ordinary delisting. The specific time period is to be determined by SIX Exchange Regulation on a case-by-case basis taking into account the timing, free float, liquidity or trading volume. In case of a qualified delisting (eg, following a merger or liquidation, public tender offer or statutory squeeze out) SIX Exchange Regulation may shorten this period to as little as five exchange days.

16 Are non-binding preliminary agreements before the execution of a definitive agreement typical in real-estate-related business combinations, and does this depend on the ownership structure of the target? Can such non-binding agreements be judicially enforced?

Yes, such non-binding preliminary agreements, including letters of intent and non-disclosure agreements are commonly used to ensure

a smooth transfer from a pre-contractual to a contractual relationship between the involved parties. Especially for bigger and more complex transactions such non-binding preliminary agreements became standard and are recommended. Pure non-binding preliminary agreements are legally not binding and do not result in an obligation to carry out the envisaged transaction. However, damages arising out of breach of basic principles, such as acting in good faith, are enforceable. Further, certain provisions in an LOI are often declared to be binding (eg, confidentiality provisions, break-up fees, non-solicitation clauses, choice of law and jurisdiction) and are therefore enforceable.

17 Describe some of the provisions contained in a purchase agreement that are specific to real-estate-related business combinations? Describe any standard provisions that are contained in such agreements.

Most standard provisions contained in a purchase agreement in the context of real-estate-related business combinations are similar to the ones that can be found in customary asset and share purchase agreements. Real-estate-related purchase agreements do, however, provide for a more comprehensive set of provisions regarding rental agreements and service (maintenance) contracts and may deal with authorisation requirements under Lex Koller (see question 4) or contain specific warranties dealing with environmental liabilities and contamination sites.

If an asset deal is executed pursuant to the Merger Act, assets and liabilities listed in the inventory are, by operation of law, automatically transferred. In other words, except for the notarisation of transfers of real estate, the usual formal requirements regarding the transfer of each individual asset must not be complied with, which means that the entry in the Land Register has a purely declaratory meaning and title will already have been transferred upon registration of the asset transfer with the Commercial Register.

If real estate is transferred by way of singular succession, agreements and governmental authorisations can, as a rule, only be transferred with the consent of all parties involved. Exceptions apply to rental agreements, certain insurance policies and, in case of a transfer of business, to employment agreements (unless such transfer is opposed by the relevant employee).

18 Are there any limitations on a buyer's ability to gradually acquire an interest in a public target in the context of a real-estate-related business combination? Are these limitations typically built into organisational documents or inherent in applicable state or regulatory related regimes?

A gradual acquisition of an interest in a public target is generally limited by the applicable disclosure and reporting obligations set out in the FMIA requiring each person or a group that reaches, exceeds or falls below certain voting right in a listed company thresholds (3, 5, 10, 15, 20, 25, 33.3, 50 or 66.6 per cent) to notify the company and the disclosure office of SIX Swiss Exchange within four trading days after a threshold is reached.

Further, if an acquirer (stand-alone or together with persons acting in concert) exceeds the threshold of 33.3 per cent of the voting rights in a target company, an obligation to submit a mandatory public tender offer is triggered. Exceptions apply if the articles of association of the target company include a provision (i) based on which the threshold to trigger the mandatory offer is raised from 33.3 to 49 per cent (opting up) or (ii) that the obligation to submit a mandatory public tender offer is waived (opting out).

In the case of a listed real estate company, the articles of association often contain further limitations and the possibility to restrict the transferability of registered shares that are listed on a stock exchange. Based on such transfer limitation clauses, the board of directors of the real estate company may be allowed to refuse the registration of a non-Swiss acquirer as a shareholder with voting rights if and to the extent such registration could prevent the company from providing evidence that less than one-third of its shareholder base is non-Swiss and, therefore, compliance with the requirements under the Lex Koller could not be ensured (see question 4).

Update and trends

On 10 March 2017 the Swiss Federal Council opened the consultation regarding the revision of the Lex Koller. The consultation period had been postponed several times until 30 June 2017. It was unusual that the Swiss Federal Council presented new proposals to amend the Lex Koller less than three years after a similar attempt had been dismissed by the Swiss parliament. It was also unusual that the Swiss Federal Council provided for alternative options in some of its suggested amendments.

19 Describe some of the key issues that typically arise between a seller and a buyer when negotiating the purchase agreement, with an emphasis on building in certainty of closing? How are these issues typically resolved?

In an asset deal, deal certainty can only be achieved by entering into a purchase agreement in the form of a public deed. This means that the negotiation phase should be kept as short as possible in order to mitigate the risk that the other party decides to pursue a different opportunity.

In a share deal, the seller usually tries to avoid any conditions precedent to closing and even wishes to agree on a simultaneous signing and closing in order to achieve deal certainty. The buyer usually wishes not only to achieve deal certainty by not allowing the seller to walk away from the deal (which is addressed by exclusivity obligations combined with liquidated damages clauses), but has an interest in achieving certainty with regard to certain specific issues already prior to closing. These are, for example, (i) potential risks discovered in the course of the due diligence (eg, existence of environmental liabilities), (ii) obtaining tax rulings or (iii) the waiver of specific change-of-control rights under important rental or financing agreements, (iv) merger control clearance or (v) the absence of material adverse changes, which are typically addressed by the buyer as conditions precedent to closing, indemnities, deductions, holdbacks from the purchase price or earn-out provisions. In the end, it often depends on the negotiation powers of the parties involved which provisions or mechanisms will find their way into the agreement.

20 Who typically bears responsibility for environmental remediation following the closing of a real-estate-related business combination? What contractual provisions regarding environmental liability do parties usually agree?

As a general rule, Swiss environmental law rests on the 'polluter pays principle'. In an asset deal, the buyer acquiring a real estate will be held liable as the new owner of the relevant asset or real estate for any forthcoming environmental damage. The liability for previous contamination is not affected and thus remains with the former owner. In the context of a share deal, the target remains liable for the clean up of the pollution and the costs associated therewith. Therefore, environmental liability is not altered by a change in ownership.

However, the parties are free to deviate from the 'polluter pays principle' in the purchase agreement. The allocation of liability is subject to negotiation among the relevant parties. Typically, the buyer will request specific warranties or indemnities to cover such risks with regard to any environmental risks relating to the period prior to closing.

21 What other liability issues are typically major points of negotiation in the context of a real-estate-related business combination?

The buyer wants to ensure that the target has obtained any and all permits required by law and that it complies and has complied with the terms and conditions of such permits, in particular that the real estate has been constructed and used in accordance with such permits.

Another key aspect of negotiation in the context of a real-estate-related business combination is how the real estate gains tax (the gain realised through the real estate transfer is subject to tax either as a special real estate income tax or as normal income tax) and the real estate transfer tax, if applicable, is split between the parties. While the parties usually agree that the real estate gains tax shall be payable by the seller, the real estate transfer tax, if applicable, is frequently borne by the buyer, although the prevailing local law may provide differently. In certain cantons, tax laws may foresee a lien on the property to secure the transfer taxes.

In an asset deal, the value-added tax treatment of the building is a very important issue, although transfers of real estate are, as a rule, excluded from VAT. However, waiver of exemption and option for VAT on the purchase price of the building (which can either be paid or declared by way of the notification procedure) is possible, provided that the real estate is not used for private purposes. As a result, the investor will be able to reclaim Swiss input VAT on the purchase price (the current VAT rate is 8 per cent). Many interesting questions may arise regarding VAT and Swiss real estate that cannot be treated in more detail here, although they may be very relevant in economic terms and should therefore be carefully considered.

22 In the context of a real-estate-related business combination, what are the typical representations and covenants made by a seller regarding existing and new leases?

A list regarding all leases containing information, inter alia, regarding the parties, the size, location, term, including options to extend the lease, and rent) is usually attached to the purchase agreement. In the context of representations and warranties, the seller represents and warrants that this list is true, correct and complete. No representations and warranties are given regarding the collectability of rents.

23 Describe the legal due diligence required in the context of a real-estate-related business combination. What specialists are typically involved and at what point in the transaction are the various teams typically brought in?

Obviously, the legal due diligence puts the emphasis on the real estate and on the issues that are important for the real estate, such as the agreements, charges and notifications set forth in the Land Register, the lease agreements, maintenance agreements, permits and environmental issues. Sometimes there are (potential) disputes with neighbours or it is important to clarify future construction possibilities. The legal due diligence is interconnected with the technical and environmental due diligence and sometimes includes tax due diligence.

24 How are title, lien, bankruptcy, litigation and tax searches typically conducted? On what levels are these searches typically run? What protection from bad title is available to buyers, and does this depend on the nature of the underlying asset?

Due to the legal assumption that the Land Register is complete and correct and everyone may in good faith rely on it, no further searches regarding title need to be carried out. Any person is entitled to obtain the following information from the Land Register without showing a legitimate interest:

- the name and description of the real estate;
- the name and identity of the owner;
- the form of ownership and the date of acquisition;
- the charges and mortgages; and
- the notifications (subject to exceptions).

A person showing a legitimate interest is entitled to consult the Land Register or to be provided with an extract. Furnishing evidence to establish a legitimate interest, however, takes time. In practice, it is thus more convenient for the buyer to get a complete extract from the Land Register via the seller.

Further, the buyer may inspect the records and registers of the debt enforcement and bankruptcy offices and request excerpts thereof if the buyer demonstrates a legitimate interest. There is, however, no tax debt register in Switzerland.

25 What are some of the primary lease issues and other agreements that the legal teams customarily review in the context of a real-estate-related business combination, and does the scope vary with the structure of the transaction?

See questions 17, 22 and 23. It should be noted that the buyer and seller are jointly liable for Swiss income tax on brokerage fees paid to a foreign (non-Swiss) broker involved in the transaction. The tax liability is limited to 3 per cent of the purchase price of the property.

26 What are the typical remedies for breach of a contract in the context of a real-estate-related business combination, and do they vary with the ownership of target or the structure of the transaction?

In case of an asset deal, an asset transfer under the Merger Act or a share deal, the typical remedy provided for in the purchase agreement in case of a breach of contract is a right of the seller to cure the breach of contract combined with the right to claim for damages suffered by the buyer. Less often, a reduction of the purchase price paid or the right to rescind the purchase agreement are agreed; more often, these remedies are explicitly excluded in the purchase agreement.

27 How does a buyer typically finance real-estate-related business combinations?

In an asset deal, real-estate-related business combinations are to a large extent financed by way of mortgages on real estate, usually in the form of mortgage certificates. Up to 80 per cent of the real estate value may be financed by means of mortgages. However, it should be noted that banks generally apply a conservative approach when assessing the value of real estate.

As a general rule, the financing of real-estate-related business combinations in the context of a share deal does not differ from other business transactions (ie, financing occurs by means of equity or debt and it may sometimes be the aim of a buyer to (partly) finance the purchase price from the target's assets).

In the event of a public takeover offer, the funding must be in place – at the latest – once the offer prospectus is published. The mandated review body has to issue a confirmation (as part of the offer prospectus) regarding the certainty of the funding (in case of a cash offer) or that all measures have been taken that the offered shares will be available at completion of the public tender offer (in case of a share exchange offer).

28 What are the typical obligations of the seller in the financing?

Where a seller, for example, as guarantor, or its banks are involved in the financing of the target, such financing is usually replaced in the course of a transaction. In the case of loans being secured by mortgages on real estate, some coordination work is necessary in order to ensure a smooth transaction.

29 What repayment guarantees do lenders typically require in the context of a real-estate-related business combination? For what purposes are reserves usually required?

Lenders usually ask for real estate collateral and other collateral to secure their loans granted to the relevant borrower. Additionally, in particular with regard to share deals, borrowers are required to comply with various covenants, such as financial covenants or collateral covenants as well as covenants regarding information undertakings (see question 30). It might also be the case that additional guarantees and securities from third parties are required.

30 What covenants do lenders usually insist on in the context of a real-estate-related business combination? Does this vary with the overall financing of the transaction?

In the case of an asset deal mortgages on the relevant real estate are often the only securities. Covenants may include reporting requirements.

In a share deal, lenders want to make sure, in particular in the event of senior unsecured debt, that a negative pledge clause is included in the loan agreement. Additionally, they usually insist on having financial covenants or collateral covenants included in the loan agreements. For mezzanine financing, financial covenants usually provide for greater flexibility regarding senior debt. A loan agreement in the context of a real-estate-related business combination usually also provides for other standard covenants typically found in loan agreements, such as covenants in relation to merger restrictions and compliance with law.

31 What equity financing provisions are common in a going-private real-estate-related transaction? Does it depend on the structure of the buyer?

A going-private transaction may involve the launch of a public tender offer and thus the issue of an offer prospectus. The offer prospectus must contain all relevant information regarding the financing of the offer. The mandated review body has to verify the financing and issue a confirmation (see question 27). It will not be possible to subject the success of a public cash offer to the condition that the offeror will obtain the necessary funds to complete the offer (no financing out).

In the event of equity financing the review body will usually request – prior to the issuance of its confirmation – financial evidence by requesting account and deposit statements, interim financial statements, the liquidity planning, copies of a committed term sheet from the financing bank or the executed loan agreement (not containing any conditions that differ from the conditions under the offer prospectus), as well as written confirmation by the offerors that the relevant offeror undertakes to keep the necessary funds available until completion of the offer.

32 Are there particular legal considerations that shape the formation and activities of REITs?

Swiss law does not provide for this type of collective investment vehicle and, therefore, Switzerland does not offer the option of a REIT to potential investors. However, the Swiss real estate fund is a vehicle similar to a REIT. The taxation of real estate funds varies depending on whether a real estate fund holds its properties directly or indirectly via real estate companies. In the case of direct ownership, taxation occurs at the level of the fund, while investors are exempt from income taxes on distribution of profits (but subject to wealth tax on the value of their interest). In the case of indirect ownership, the real estate companies held by the real estate fund are taxed on income and capital. Moreover, investors are subject to tax on the distribution of profits and on the value of their interest (wealth tax).

The legal framework for such real estate funds is set out in the Federal Act on Collective Investment Schemes (CISA), its implementing ordinance (CISO) and the Ordinance of the Swiss Financial Market



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Supervisory Authority (FINMA) on Collective Investment Schemes (CISO-FINMA). FINMA licences are required.

33 Are there particular legal considerations that shape the formation and activities of real-estate-focused private equity funds? Does this vary depending on the target assets or investors?

The two main legal structures used for private equity funds in Switzerland are the limited partnership (LP) and the investment company with fixed capital (SICAF). They are mainly governed by the CISA, CISO and the CISO-FINMA. The LP and the SICAF constitute the only closed-ended investment schemes provided for in the CISA.

Both the LP and the SICAF must be authorised by FINMA as institutions. Additionally, the partnership agreement of the LP and the articles of association and investment regulations (constituting documents) of the SICAF are subject to FINMA's approval.

Contractual funds and investment companies with variable capital (SICAV), on the other hand, are rarely used as legal vehicles for private equity funds due to their open-ended structure.

Getting the Deal Through

Acquisition Finance	Enforcement of Foreign Judgments	Ports & Terminals
Advertising & Marketing	Environment & Climate Regulation	Private Antitrust Litigation
Agribusiness	Equity Derivatives	Private Banking & Wealth Management
Air Transport	Executive Compensation & Employee Benefits	Private Client
Anti-Corruption Regulation	Financial Services Litigation	Private Equity
Anti-Money Laundering	Fintech	Private M&A
Appeals	Foreign Investment Review	Product Liability
Arbitration	Franchise	Product Recall
Asset Recovery	Fund Management	Project Finance
Automotive	Gas Regulation	Public-Private Partnerships
Aviation Finance & Leasing	Government Investigations	Public Procurement
Aviation Liability	Healthcare Enforcement & Litigation	Real Estate
Banking Regulation	High-Yield Debt	Real Estate M&A
Cartel Regulation	Initial Public Offerings	Renewable Energy
Class Actions	Insurance & Reinsurance	Restructuring & Insolvency
Cloud Computing	Insurance Litigation	Right of Publicity
Commercial Contracts	Intellectual Property & Antitrust	Risk & Compliance Management
Competition Compliance	Investment Treaty Arbitration	Securities Finance
Complex Commercial Litigation	Islamic Finance & Markets	Securities Litigation
Construction	Labour & Employment	Shareholder Activism & Engagement
Copyright	Legal Privilege & Professional Secrecy	Ship Finance
Corporate Governance	Licensing	Shipbuilding
Corporate Immigration	Life Sciences	Shipping
Cybersecurity	Loans & Secured Financing	State Aid
Data Protection & Privacy	Mediation	Structured Finance & Securitisation
Debt Capital Markets	Merger Control	Tax Controversy
Dispute Resolution	Mergers & Acquisitions	Tax on Inbound Investment
Distribution & Agency	Mining	Telecoms & Media
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