Real Estate M&A 2020

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the third edition of *Real Estate M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Nigeria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Getting The Deal Through

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Switzerland

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OVERVIEW

Typical transaction structures – public companies

1 What is the typical structure of a business combination involving a publicly traded real estate-owning entity?

Business combinations in connection with the acquisition of either one or several properties can be accomplished in Switzerland by:

1 purchasing real estate by way of an asset deal;
2 transferring an asset or business pursuant to the Merger Act (see question 4), which allows a transfer of one or several properties in a single act by operation of law (the asset or business transfer may be a suitable option in a portfolio deal when real estate is located in different Swiss cantons);
3 acquiring real estate by way of a share deal (ie, by acquiring the share capital of a company holding real estate); or
4 making a public tender offer, if an acquirer wishes to take over a listed real estate company.

Options (1) and (2) constitute asset deals and options (3) and (4) constitute share deals.

Typical transaction structures – private companies

2 Are there any significant differences if the transaction involves a privately held real estate-owning entity?

Option (4) in question 1 is not suitable for a privately held company unless it has many shareholders. Options (1) to (3) are available.

Typical transaction process

3 Describe the process by which public and private real estate 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, with regard to real estate or the real estate company, is carried out and, often, exclusivity is granted. Once an agreement on the commercial terms is reached, the parties will enter into an asset purchase agreement, a share purchase agreement and an asset-transfer agreement (in the form of a public deed in the first two cases).

In cases of a public tender offer, which is supported by the board of directors of the target company (a friendly takeover), the offeror and the target company often enter into a transaction agreement followed by the launch of a public tender offer.

LAW AND REGULATION

Legislative and regulatory framework

4 What are some of the primary laws and regulations governing or implicated in real estate business combinations? Are there any specific regulations or laws governing transfers of real estate 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 and the Federal Act on Merger, Demerger, Transformation and Transfer of Assets (the Merger Act).

With regard to real estate, the primary laws that apply are:

- 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.

Furthermore, the Federal Act on Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading (the 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.

Any questions that arise regarding a real estate-related business combination and environmental protection are covered by the following laws and regulations:

- the Environmental Protection Statute;
- the Impact Study Ordinance;
- the Federal Water Pollution Statute;
- the Air Pollution Ordinance;
- the Noise Pollution Ordinance;
- the Disaster Protection Ordinance; and
- the Dangerous Substances Ordinance.

Additionally, the listed statutes may be clarified by ordinances. The Zoning Statute and its Ordinance to Zoning Statute form the legal basis regarding zoning on the federal level.

Cross-border combinations and foreign investment

5 Are there any specific material regulations or structuring considerations relating to cross-border real estate business combinations or foreign investors acquiring an interest in a real estate business entity?

If a foreign investor wishes to acquire residential property in Switzerland (directly or indirectly), the Lex Koller applies. The Lex Koller not only applies to straight sales or acquisitions 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.

However, it does 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 and in the 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 its share capital is held by non-Swiss shareholders. However, for the acquisition of shares in a listed company, the 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.

Choice of law and jurisdiction

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

Swiss law usually governs the underlying contracts for the acquisition of real estate because the transfer of ownership in the underlying asset (ie, 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 the first instance is generally the local district court of the relevant canton. If an amount in dispute exceeds 100,000 Swiss francs and, with the consent of the parties, the mandatory obligation to first attempt conciliation can be waived, a direct action before a higher court is possible. Some cantons (eg, Zurich, St Gallen, Bern and Aargau) designate the Commercial Court as the first and sole cantonal instance.

APPROVAL AND WITHDRAWAL

Public disclosure

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

An offer prospectus pursuant to article 127 of the 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 to make 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, among other things, details of the involved persons (particularly the offeror and persons acting in concert with the offeror), details on the financing of the offer, the conditions to the offer and 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 and the Swiss Financial Market Supervisory Authority (FINMA). The Takeover Board examines whether the applicable provisions for public tender offers are being complied with. The target company's board of directors has to publish a report stating whether it recommends the acceptance or rejection of the offer. Alternatively, 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 must be published.

Duties towards shareholders

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

The members of the board of directors and company officers must comply with the duty of care and duty of loyalty towards their company, act in the best interests of the company (including shareholders and other stakeholders) and treat all shareholders equally (under equal circumstances). There are certain additional aspects to be taken into account with regard to public takeovers, particularly concerning the restrictions on carrying out certain defensive 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 recommending the acceptance or rejection of a public tender offer. In particular, the board of directors has to disclose any conflicts of interests of board members or management and inform the shareholders about 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 the 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 3 per cent of the target company's voting rights) to the extent that the board of the target company has knowledge thereof.

Shareholders' rights

9 What rights do shareholders have in a public-company real estate business combination? Can parties structure around shareholder dissent or rejection of a real estate business combination, and what structures are available?

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, FINMA and all courts as a party and, accordingly, has the rights to appeal, file applications and lodge complaints. To do this, the 3 per cent stake must already be held by the time of the (pre-)announcement of the relevant tender offer. With such attempts 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 a 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.

Termination fees

10 Are termination fees typical in a real estate business combination, and what is their typical size?

Break-up fees and reverse break-up fees are permitted in Switzerland, but are not common in connection with real estate business combinations. However, the amount of the fee is only deemed to be appropriate if it does not exceed the actual damage incurred if the takeover fails. A punitive break-up fee 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 must be considered. Break-up fees should never endanger the survival, sustainability or future development of an undertaking and, thus, should not deter third parties from making an offer nor restrict the freedom of choice of the shareholders. To date, the Takeover Board has accepted break-up fees reaching up to 1.99 per cent of the offer price.

Takeover defences

11 Are there any methods that targets in a real estate business combination can employ to protect against an unsolicited acquisition? Are there any limitations on these methods?

A listed company can provide a rule in its articles of association that shareholders will only be entered in the share register as shareholders if they hold voting rights beyond a certain percentage of the votes (eg, 10 per cent). The law restricts defensive measures once a public tender offer is launched. A non-listed company has more options to restrict the transfer of its shares in its articles of association.

Notifying shareholders

12 How much advance notice must a public target give its shareholders in connection with approving a real estate 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 publish a report with its recommendation to accept or reject the tender offer. The report either forms part of the offer prospectus (in a friendly transaction) or is 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 must be convened 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 a specific timetable that an offer must comply with.

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 the 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, defensive 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 cooling-off period lasting 10 trading days, after which the offer period starts, which usually lasts for 20 trading days but may be extended by up to 40 trading days.

This first period for tendering the shares to the offeror is 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 the case of a cash offer) or against shares (in the 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 a merger or if a capital increase will be resolved to finance or refinance a transaction – a 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.

TAXATION AND ACQUISITION VEHICLES

Typical tax issues and structuring

13 What are some of the typical tax issues involved in real estate 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 a real estate transfer tax of 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. For example, Zurich abolished the real estate transfer tax a few years ago. 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 value added tax (VAT). However, there is the possibility to opt for VAT if the real estate is not used for private purposes. It is also possible for the real estate gains tax to 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.

Mitigating tax risk

14 What measures are normally taken to mitigate typical tax risks in a real estate business combination?

This varies as tax risks and mitigation strategies depend heavily on the specific situation of the parties involved, the real estate in question and the canton in which the real estate is located.

Types of acquisition vehicle

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

If an adequate acquisition vehicle already exists in a real estate-related business combination (eg, a corporation, limited liability company, general partnership, limited partnership, association or foundation), it will usually be used. 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.

TAKE-PRIVATE TRANSACTIONS

Board considerations in take-private transactions

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

The Delisting Directive of SIX Swiss Exchange governs take-private transactions and the procedures applicable for delistings. The decision on whether a company should be delisted is taken by the board of directors, unless the articles of association allocate the 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.

Time frame for take-private transactions

17 How long do take-private transactions typically take in the context of a public real estate business? 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. With the exception of any necessary time for preliminary negotiations, the period between the delisting announcement and the last trading day may last between three and 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 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.

NEGOTIATION

Non-binding agreements

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

Yes. Non-binding preliminary agreements, including LOIs and NDAs, 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, using non-binding preliminary agreements is standard practice and is recommended.

Pure non-binding preliminary agreements are not legally binding and do not result in an obligation to carry out the envisaged transaction. However, damages arising out of a 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.

Typical provisions

19 Describe some of the provisions contained in a purchase agreement that are specific to real estate 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 provisions 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 the Lex Koller (see question 5) 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. This 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 the case of a transfer of business, to employment agreements (unless the transfer is opposed by the relevant employee).

Stakebuilding

20 Are there any limitations on a buyer's ability to gradually acquire an interest in a public company in the context of a real estate 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 group that reaches, exceeds or falls below certain voting rights in listed company thresholds (these are 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 of a threshold being 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 based on which the threshold to trigger the mandatory offer is raised from 33.3 to up to 49 per cent (opting up), or 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 5).

Certainty of closing

21 Describe some of the key issues that typically arise between a seller and a buyer when negotiating the purchase agreement for a real estate business combination, 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 to mitigate the risk of the other party deciding to pursue a different opportunity. In a share deal, the seller usually tries to avoid any conditions precedent to closing and wishes to agree on a simultaneous signing and closing to achieve deal certainty. The buyer usually not only wishes 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 also has an interest in achieving certainty with regard to certain specific issues prior to closing. These are, for example:

- potential risks discovered in the course of the due diligence (eg, existence of environmental liabilities);
- obtaining tax rulings;
- a waiver of specific change-of-control rights under important rental or financing agreements;
- merger control clearance; and
- 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, which provisions or mechanisms find their way into the agreement often depends on the negotiation powers of the parties involved.

Environmental liability

22 Who typically bears responsibility for environmental remediation following the closing of a real estate 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 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.

Other typical liability issues

23 What other liability issues are typically major points of negotiation in the context of a real estate 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 the permits (in particular, that the real estate has been constructed and used in accordance with the permits). Another key aspect of negotiations 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 either a special real estate income tax or a normal income tax) and the real estate transfer tax, if applicable, are 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 or customs 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 VAT treatment of a building is a very important issue, although transfers of real estate are, as a rule, excluded from VAT. However, a waiver of exemption and an option for VAT on the purchase price of a 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 7.7 per cent). Many interesting questions may arise regarding VAT and Swiss real estate that cannot be discussed in detail here, although they may be very relevant in economic terms and should, therefore, be considered carefully.

Sellers' representations regarding leases

24 In the context of a real estate 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 regarding, among other things, the parties, the size, location and term (including options to extend the lease and rent), is usually attached to the purchase agreement. In the context of representations and warranties (R&Ws), the seller represents and warrants that this list is true, correct and complete. No R&Ws are given regarding the collectability of rents.

DUE DILIGENCE

Legal due diligence

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

Legal due diligence will focus on the real estate and related 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.

Searches

26 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?

Based on the legal assumption that the Land Register is complete and correct and everyone may rely on it in good faith, 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 be provided with an extract. Furnishing evidence to establish a legitimate interest, however, takes time. In practice, it is 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.

Representation and warranty insurance

27 | Do sellers of non-public real estate businesses typically purchase representation and warranty insurance to cover post-closing liability?

The seller will try to contract away any warranty so that insurance will not be necessary. However, any agreement to exclude or limit a warranty obligation is void if the seller has fraudulently concealed its failure to comply with it. As the risks should be manageable, warranty insurance is uncommon, but is increasingly used in big transactions.

Review of business contracts

28 | What are some of the primary agreements that the legal teams customarily review in the context of a real estate business combination, and does the scope vary with the structure of the transaction?

In real estate transactions, the legal teams review agreements that are related to the property that may impact the purchaser in the future. The following agreements are customarily reviewed:
- lease agreements of current tenants;
- easement agreements and any associated documents;
- facility management agreements;
- various agreements with reference to service and maintenance;
- the present purchase agreement; and
- the draft of the new purchase agreement.

Depending on the transaction, there may also be agreements with insurance providers, authorities or a neighbour, among others.

BREACH OF CONTRACT

Remedies for breach of contract

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

In asset deals, asset transfers under the Merger Act or share deals, the typical remedy provided for in the purchase agreement in case of a breach of contract is the right of the seller to cure the breach of contract combined with the right of the buyer to claim for damages.

Less often, a reduction of the purchase price paid or the right to rescind the purchase agreement is agreed; more often, these remedies are explicitly excluded in the purchase agreement.

FINANCING

Market overview

30 | How does a buyer typically finance real estate 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's value may be financed by Swiss banks by means of mortgages. However, 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 the case of a cash offer) or that all measures have been taken to ensure that the offered shares will be available at completion of the public tender offer (in the case of a share exchange offer).

Seller's obligations

31 | 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, the 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 to ensure a smooth transaction.

Repayment guarantees

32 | What repayment guarantees do lenders typically require in the context of a property-level financing of a real estate business combination? For what purposes are reserves usually required in the context of property-level indebtedness?

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 33).

It might also be the case that additional guarantees and securities from third parties are required.

Borrower covenants

33 | What covenants do lenders usually insist on in the context of a property-level financing of a real estate business combination?

In 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.

Typical equity financing provisions

34 What equity financing provisions are common in a transaction involving a real estate business that is being taken private? Does it depend on the structure of the buyer?

This type of 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 30). 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) and written confirmation by the offerors that the relevant offeror undertakes to keep the necessary funds available until completion of the offer.

COLLECTIVE INVESTMENT SCHEMES

REITs

35 Are real estate investment trusts (REITs) that have tax-saving advantages available? 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, hence no tax-saving advantages may arise. 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 FINMA on Collective Investment Schemes (CISO-FINMA). FINMA licences are required.

Private equity funds

36 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), which are mainly governed by CISA, CISO and the CISO-FINMA. LPs and SICAFs constitute the only closed-ended investment schemes provided for in the CISA and must be authorised by FINMA as institutions. Additionally, the partnership agreement of an LP and the articles of association and investment regulations (constituting documents) of a SICAF are subject to FINMA's approval.

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

UPDATE AND TRENDS

Key developments of the past year

37 Are there any other current developments or emerging trends that should be noted?

Property technology companies are starting to shape the real estate industry. It is no surprise that SwissPropTech, the independent innovation and start-up community for the Swiss real estate and building industry, is growing fast (see www.swissproptech.ch/).

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