Mergers & Acquisitions Comparative Guide

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AVOCATS 1907

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1. Deal structure

1. 1. How are private and public M&A transactions typically structured in your jurisdiction?

Switzerland
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In Switzerland, private M&A transactions are most commonly structured as either share deals (involving the transfer of all or part of the shares in a company) or asset deals (involving the transfer of specific assets and liabilities).

In a share deal, ownership and control of the target company are transferred to the buyer, while all underlying assets, rights, and obligations remain vested in the company itself.

In an asset deal, the buyer acquires all or selected assets and liabilities directly from the target. Asset deals in Switzerland can generally be structured in two ways:

- Individual transfer under the Swiss Code of Obligations, where the buyer acquires the identified assets and liabilities on an item-by-item basis. Each asset or liability must be transferred in accordance with the formal requirements applicable to its type (for example, assignment of contracts, endorsement of negotiable instruments, transfer of possession of movable assets, or registration of intellectual property).
- Universal transfer of assets and liabilities under the Swiss Merger Act, which allows the transfer of an entire business or a defined part thereof by operation of law through a single registration with the Commercial Register. This method simplifies implementation by avoiding multiple individual assignments and achieving legal succession in one step. However, the existence of the transfer and its key terms (including the purchase price) become publicly accessible in the Commercial Register.

Another common form of transaction is a merger under the Swiss Merger Act, through which two or more companies may be combined either by (i) one company absorbing the other(s), or (ii) several companies merging to form a new legal entity. In both structures, the shareholders of the absorbed or merging companies receive either (a) shares in the absorbing or newly formed company, determined on the basis of a conversion ratio that preserves their relative ownership, or (b) a cash consideration. Upon completion, the absorbed or merging entities cease to exist automatically, without the need for winding-up or liquidation. The transaction must generally be approved by the boards of directors and the shareholders' meetings of all participating companies.

Finally, public M&A transactions are generally effected through public tender offers governed by the Swiss Financial Market Infrastructure Act and supervised by the Swiss Takeover Board. Acquirers may also obtain control through privately negotiated block trades followed (where the 33⅓% voting threshold is exceeded) by a mandatory offer, unless an exemption applies. Statutory mergers are legally available but rarely used for listed companies, given their procedural complexity and disclosure obligations.

1. Deal structure

1. 2. What are the key differences and potential advantages and disadvantages of the various structures?

Switzerland
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The key distinction among M&A structures in Switzerland lies in the nature of the transaction's legal object and the corresponding allocation of risk, liabilities, and procedural complexity.

- Share deals involve the transfer of ownership and control of the target company. They are generally straightforward to implement, ensure continuity of contracts and operations, and usually do not require third-party consents. From a tax perspective, they are often favoured by individual sellers, as capital gains on privately held shares are usually exempt from Swiss income tax. However, the buyer assumes all existing and contingent liabilities of the target company, there is no tax step-up in asset values, and extensive due diligence and warranty protection are required.

- Asset deals (individual transfers) allow parties to select specific assets and exclude unwanted liabilities, with potential for a tax step-up in asset value and confidentiality of terms. Their main drawbacks are the formal and time-consuming transfer process, possible VAT and transfer taxes, and the need for third-party consents and compliance with employee-transfer rules.
- Asset deals (universal transfers) simplify implementation by transferring all defined assets and liabilities through a single filing. Yet the transaction and its key terms become publicly accessible in the Commercial Register, and the statutory documentation and audit requirements may be disproportionate for smaller transactions.
- Mergers are efficient for intra-group reorganisations or post-acquisition integrations, as all rights and obligations transfer automatically. They are, however, procedurally rigid, require shareholder approval, and expose the process to creditor protection and potential minority challenges.
- Public tenders offer a transparent and regulated route to control and eventual full ownership through a post-offer squeeze-out merger. They are subject to strict procedural, timing, and disclosure requirements, and the mandatory offer threshold (33⅓%) limits flexibility in structuring.

1. Deal structure

1. 3. What factors commonly influence the choice of sale process/transaction structure?

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The structure of a Swiss M&A transaction depends on a mix of legal, tax, regulatory and commercial factors, as well as on the nature and objectives of the parties. In practice, Swiss deal-making tends to be pragmatic, aiming to balance certainty of execution with practical efficiency.

Key factors include:

- **Nature of the target**: whether the transaction involves an entire company or a business division, a listed or private entity, and whether the activity is regulated, asset-heavy or service-based.
- **Tax considerations**: capital gains and transfer taxation, VAT exposure, loss carry-forward preservation and any opportunity for a tax step-up in asset values.
- **Liability allocation**: risk-averse buyers may opt for asset deals to isolate liabilities, while sellers usually opt for share deals for simplicity and tax reasons.
- **Transfer restrictions and consents**: change-of-control provisions may point towards asset transfers, whereas non-assignment clauses or statutory consent requirements may make a share deal more practical.
- **Financing and timing**: buyers relying on external funding may prioritise structures allowing quicker completion or easier collateralisation; auction dynamics can also dictate the format.
- **Seller profile**: private equity funds generally seek clean exits via share sales, while corporates may favour carve-outs to retain specific assets or liabilities.
- **Confidentiality**: share and individual asset deals remain private, whereas universal transfers and mergers require public registration.

In the end, parties choose the structure that best reconciles commercial goals with tax efficiency, regulatory compliance and discretion.

2. Initial steps

2. 1. What documents are typically entered into during the initial preparatory stage of an M&A transaction?

Switzerland
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The preparatory phase of a Swiss M&A transaction usually includes the execution of several key documents:

- Confidentiality (non-disclosure) agreements, entered into before due diligence to protect proprietary or sensitive information. Swiss law imposes no formal requirements, but such agreements are almost always made in writing. Because confidentiality obligations can be difficult to enforce, parties often include contractual penalties to enhance deterrence and facilitate enforcement.

- Letters of intent (LOIs), term sheets or memoranda of understanding, which outline the main commercial terms agreed between the parties and set the framework for further negotiations. These are generally non-binding, except for specific provisions such as confidentiality, exclusivity, governing law or cost allocation.
- Exclusivity agreements, sometimes included within the LOI, granting the prospective buyer a defined period to conduct due diligence and negotiate without competition.
- Due diligence request lists and data-room rules, establishing the scope and process for the exchange of information between the parties.
- Process letters in auction situations, which set out the procedure and timeline for submitting offers and advancing through the bidding stages.

Taken together, these preparatory documents help structure the transaction process, ensure an orderly exchange of information, and provide a degree of protection and predictability ahead of formal contract negotiations.

2. Initial steps

2. 2. Are break fees permitted in your jurisdiction (by a buyer and/or the target)? If so, under what conditions will they generally be payable? What restrictions and other considerations should be addressed in formulating break fees?

Switzerland
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Break fees are permissible under Swiss law, provided they serve a legitimate economic purpose and do not constitute an unlawful penalty or breach of directors' fiduciary duties.

In private M&A, break fees are uncommon but may be agreed contractually, typically payable upon wilful breach or failure to close for reasons attributable to one party. They must be reasonable and proportionate to the expected transaction costs or damages; excessive amounts may be reduced by the courts under Article 163(3) of the Swiss Code of Obligations.

In public M&A, break fees are subject to stricter scrutiny. The Swiss Takeover Board permits them only where they are limited in amount (generally 1–2 % of the transaction value), do not unduly restrict competing offers, and are approved by the target's board as being in the company's and shareholders' best interests (see TOB Circular 1/2013). Reverse break fees (payable by the bidder) are more common and less problematic.

2. Initial steps

2. 3. What are the most commonly used methods of financing transactions in your jurisdiction (debt/equity)?

Switzerland
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Swiss M&A transactions are financed through a mix of equity, shareholder loans, bank debt, and increasingly private debt provided by non-bank lenders. The financing structure depends on the deal size, sector, and risk profile.

- Private transactions are often financed by a combination of equity and acquisition financing from banks or private credit funds.
- Private equity deals commonly use leveraged acquisition structures, with senior and mezzanine debt secured by shares or assets of the target group.
- Corporate acquisitions are frequently funded through balance-sheet cash or intra-group loans.
- Public takeovers typically rely on confirmed cash funding, which must be supported by a bank confirmation demonstrating that the bidder has sufficient funds to complete the offer.

2. Initial steps

2. 4. Which advisers and stakeholders should be involved in the initial preparatory stage of a transaction?

Switzerland
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Typical participants at the early stage include:

- Legal counsel (for both buyer and seller) to structure the process, prepare preliminary documentation, and identify regulatory or contractual constraints.
- Financial advisers and investment banks, particularly in competitive or public transactions, to run the process, assist with valuation, and prepare fairness opinions.
- Tax advisers, often essential to optimise transaction structure and ensure efficient repatriation or integration.
- Accounting and financial due-diligence advisers, especially where quality of earnings or working-capital adjustments are relevant.
- Regulatory specialists, including competition or sector-specific counsel (e.g., FINMA, healthcare, telecoms, technology, real estate/Lex Koller).
- Internal stakeholders, notably board members and, where relevant, major shareholders or financing banks, who must approve or be informed of key terms early in the process.

2. Initial steps

2. 5. Can the target in a private M&A transaction pay adviser costs or is this limited by rules against financial assistance or similar?

Switzerland
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Switzerland does not have a general prohibition on financial assistance comparable to those in certain EU jurisdictions. However, the ability of a Swiss target to bear transaction costs depends on corporate-law principles of corporate purpose, capital maintenance and directors’ duties.

- The target may pay its own advisory costs (for example, valuation, legal or tax advice) if such expenses serve a legitimate corporate purpose, such as facilitating a transaction or restructuring that is in the company's interest.
- The target should not pay or reimburse costs incurred by the seller, unless the company itself derives a clear and direct benefit from the transaction. Otherwise, such payments could constitute an unlawful distribution of assets or a breach of capital-maintenance rules.
- Similarly, covering the buyer's transaction costs (e.g., due-diligence or financing fees) would normally fall outside the target's corporate purpose and risk being treated as a hidden profit distribution.

The board of directors must assess and document the corporate benefit and ensure that any payments are proportionate, commercially justified, and in the company's interest. This is particularly critical in leveraged or management-buy-out scenarios, where the line between legitimate transaction support and financial assistance can blur.

3. Due diligence

3. 1. Are there any jurisdiction-specific points relating to the following aspects of the target that a buyer should consider when conducting due diligence on the target? (a) Commercial/corporate, (b) Financial, (c) Litigation, (d) Tax, (e) Employment, (f) Intellectual property and IT, (g) Data protection, (h) Cybersecurity and (i) Real estate.

Switzerland
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a. ***Commercial/corporate***
Swiss due diligence typically focuses on corporate governance, share capital, transfer restrictions and shareholder arrangements. Buyers should review the articles of association, share register, documentation regarding past share transfers and any shareholders' agreements to confirm ownership and assess restrictions (e.g., transfer limitations under Article 685b of the Swiss Code of

Obligations). In addition, board composition, decision-making procedures and compliance with corporate law reforms should be verified.

b. ***Financial***

Financial due diligence should assess the accuracy of statutory accounts prepared under the Swiss Code of Obligations, which differ from IFRS or US GAAP standards. Key focus areas include hidden reserves, intercompany balances, dividend distributions, and compliance with new capital and liquidity rules where applicable. For smaller private companies, limited audit requirements may reduce transparency, making the quality of earnings and working capital analysis critical.

c. ***Litigation***

Buyers should review any pending, threatened or contingent litigation, as well as arbitration or administrative proceedings. Particular attention should be paid to employment, construction, tax, and commercial disputes, which are common in Swiss practice. Given the limited public access to court filings, the seller's disclosure and representations are essential to identify potential exposure.

d. ***Tax***

Swiss tax due diligence typically focuses on corporate income tax, VAT, and withholding tax compliance at both federal and cantonal levels. Buyers should verify loss carry-forwards, history of shareholding, transfer-pricing documentation, stamp duty exposure, and the target's treatment of intercompany financing or dividends. The cantonal differences in tax rates and rulings can materially affect valuation. Transactions involving real estate, foreign ownership or restructurings may also trigger real estate gains tax, or transfer tax implications.

e. ***Employment***

Employment law in Switzerland is relatively flexible but includes mandatory employee-transfer rules (Article 333 CO) in asset deals and mergers. Due diligence should review key employment contracts, bonus and incentive schemes, pension arrangements (notably under the Swiss Federal Act on Occupational Pensions, BVG/LPP), non-compete clauses and compliance with collective bargaining agreements or social security contributions.

f. ***Intellectual property and IT***

Buyers should confirm ownership and registration of IP rights (patents, trademarks, domain names) and ensure that IP created by employees or contractors has been properly assigned. IT due diligence should cover software licences, maintenance agreements, and dependence on third-party vendors. Swiss law recognises implied IP transfers only in limited circumstances, so express assignments are critical.

g. ***Data protection***

Switzerland's Federal Data Protection Act largely aligns with the EU GDPR but has specific local requirements. Buyers should review the target's data processing activities, cross-border data transfers, data retention policies, and the appointment of a data protection officer where applicable. Non-compliance can result in administrative fines and reputational risk.

h. ***Cybersecurity***

Cyber risk is an increasing area of focus, particularly for financial institutions, healthcare providers, and critical infrastructure operators. Buyers should evaluate the target's IT security governance, incident response policies, and cyber insurance coverage. While there is no comprehensive cybersecurity statute, obligations arise from data protection law, FINMA circulars, and industry-specific standards.

i. ***Real estate***

Due diligence on real estate should confirm title, encumbrances, zoning, and building compliance through the land register and cantonal planning records. Transactions involving foreign investors or non-Swiss-controlled entities may fall under the Lex Koller regime, restricting acquisitions of residential real estate. Environmental due diligence is also important, particularly regarding soil contamination and building energy standards.

3. Due diligence

3. 2. What public searches are commonly conducted as part of due diligence in your jurisdiction?

Switzerland
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Publicly available information in Switzerland is relatively limited compared with many other jurisdictions, but several official registers and databases can be searched as part of legal due diligence. Common searches include:

- **Commercial Register (*Registre du commerce / Handelsregister*)** – provides company details such as incorporation date, registered office, share capital, directors, signatory rights, and any capital band or merger history. Extracts are available online through the cantonal portals and the central platform (Zefix).
- **Land Register (*Registre foncier / Grundbuch*)** – discloses ownership, encumbrances, easements, and mortgages affecting real estate. Full extracts require legitimate interest, but summary ownership information is often accessible.
- **Intellectual Property Registers** – maintained by the Swiss Federal Institute of Intellectual Property (IPI) for trademarks, patents, and designs; separate domain registries (e.g., SWITCH for .ch domains) may also be consulted.
- **Debt Enforcement and Bankruptcy Registers** – local offices record enforcement proceedings and bankruptcies; searches typically require the debtor's address and demonstrate a legitimate interest.
- **Court and insolvency publications** – the Swiss Official Gazette of Commerce (SOGC) publishes notices of bankruptcies, mergers, capital reductions, and other statutory announcements.
- **Land-use, environmental and construction records** – cantonal or municipal databases provide zoning plans, building permits, and contamination information for real-estate-related transactions.
- **Regulatory and licensing registers** – depending on the industry, searches may include FINMA's public register (banks, insurers, asset and wealth managers), healthcare facility lists, or energy-sector concessions.

Because access to litigation and shareholder information is restricted under Swiss privacy law, buyers rely heavily on seller disclosure, warranties, and due-diligence questionnaires to complement public searches.

3. Due diligence

3. 3. Is pre-sale vendor legal due diligence common in your jurisdiction? If so, do the relevant forms typically give reliance and with what liability cap?

Switzerland
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Vendor legal due diligence (VDD) has become quite common in Switzerland, particularly in auction processes or private equity exits where a controlled and efficient sale process is desired. It is also used in bilateral transactions when the seller wishes to anticipate potential red flags and streamline buyer due diligence.

VDD reports are typically prepared by the seller's legal counsel and made available to prospective buyers, either in full form or as a redacted version summarising key findings. In most cases, the report is provided for information purposes only, with a disclaimer excluding reliance by potential buyers.

Where reliance is requested, it is usually negotiated and granted solely to the successful bidder, generally through a separate reliance letter. Any reliance is limited in scope and duration, with the adviser's liability capped on a case-by-case basis and subject to Swiss professional liability restrictions.

In practice, reliance remains the exception rather than the rule, as most Swiss advisers and sellers prefer to limit exposure by providing VDD reports on a non-reliance basis.

4. Regulatory framework

4. 1. What kinds of (sector-specific and non-sector specific) regulatory approvals must be obtained before a transaction can close in your jurisdiction?

Switzerland
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M&A transactions in Switzerland are generally not subject to general foreign investment restrictions or to governmental approval (Switzerland has no cross-sector foreign direct investment (FDI) screening regime to date). However, a number of sector-specific and competition-related approvals may apply depending on the nature of the target and the parties involved.

- **Merger control** – Transactions meeting the turnover thresholds set out in the Swiss Cartel Act must be notified to and cleared by the Swiss Competition Commission (COMCO) prior to closing. Switzerland applies a mandatory pre-closing notification regime, though the thresholds are relatively high, so filings remain limited to large domestic or cross-border transactions.
- **Financial sector** – Acquisitions of qualified participations (from 10%) in banks, securities firms, fund managers, insurance companies or other regulated entities require prior FINMA's authorisation or notification. FINMA assesses the acquirer's reputation, financial standing, and the impact on prudent business conduct.
- **Real estate / Lex Koller** – Foreign investors acquiring residential real estate or shares in companies owning such property may need to require approval under the Federal Act on the Acquisition of Real Estate by Persons Abroad (Lex Koller). Commercial property is generally exempt.
- **Other sector-specific approvals** – Additional authorisations may be required in regulated industries, such as telecommunications, energy, transport, or healthcare.

A limited number of transactions may also require cantonal or municipal approvals, for instance in public infrastructure or real estate development contexts.

4. Regulatory framework

4. 2. Which bodies are responsible for supervising M&A activity in your jurisdiction? What powers do they have?

Switzerland
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Switzerland does not have a single central M&A regulator, but several authorities may supervise transactions depending on their nature:

- **Swiss Takeover Board** – Supervises public tender offers under the Swiss Financial Market Infrastructure Act. The Swiss Takeover Board ensures compliance with takeover rules, including disclosure, equal treatment and pricing. It can issue binding orders, require corrective disclosures, and impose sanctions. Its decisions can be appealed to FINMA, and ultimately to the Swiss Federal Administrative Court.
- **Swiss Financial Market Supervisory Authority (FINMA)** – Oversees acquisitions in the financial sector (banks, insurers, asset managers, etc.) and enforces financial market laws. FINMA can approve or prohibit qualifying acquisitions and may impose conditions to protect prudent business conduct or financial stability.
- **Swiss Competition Commission (COMCO)** – Reviews merger control filings under the Swiss Cartel Act. COMCO may clear, conditionally approve, or prohibit a concentration that significantly restricts effective competition.
- **Cantonal Commercial Registers** – Verify and register corporate reorganisations (mergers, demergers, transformations, transfers of assets and liabilities) under the Swiss Merger Act.

Other regulators may be involved for sector-specific transactions (e.g., OFCOM for telecommunications, ElCom for energy, or Swissmedic for pharmaceuticals).

4. Regulatory framework

4. 3. What transfer taxes apply and who typically bears them?

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Switzerland levies several transaction-related taxes, depending on the structure:

- **Securities transfer stamp duty (issuance and transfer stamp tax)** – A 0.15% tax applies to transfers of Swiss securities and 0.3% to foreign securities if a Swiss securities dealer (including most banks, brokers and Swiss companies with >CHF 10 million in securities on their balance sheet) acts as an intermediary. The tax is generally borne by the buyer, though parties may agree otherwise (half-half allocation is also frequent).

- **Real estate transfer taxes** – Levied at the cantonal or municipal level upon transfer of Swiss real property or, in some cantons, upon share deals involving real estate companies. Rates vary (typically 1–3% of the purchase price) and are often shared between buyer and seller, subject to local practice.
- **Withholding tax (WHT)** – Not triggered by share or asset transfers per se, but relevant in connection with dividends, deemed distributions, or intra-group restructurings (currently 35% rate, subject to treaty relief or exemption). In certain situations (e.g. use of a Swiss acquisition company, under certain conditions), strict anti-abuse practices developed by the Swiss federal tax administration may jeopardize the right to WHT refund of the buyer even if the latter would in principle have be entitled to refund.
- **Value added tax (VAT)** – May apply to asset deals (but not share deals), although transfers of an entire business as a going concern are usually VAT-neutral if both parties are VAT-registered.

In practice, parties typically allocate tax costs contractually: buyers bear transfer and stamp duties, while sellers bear income or capital gains taxes arising from the sale.

5. Treatment of seller liability

5. 1. What are customary representations and warranties? What are the consequences of breaching them?

Switzerland
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Representations and warranties (R&Ws) in Swiss M&A transactions typically cover a broad range of areas, the scope of which varies according to the nature, size and complexity of the deal. They commonly include:

- Title and capacity (valid ownership of shares or assets, authority to sell);
- Corporate matters (due incorporation, capitalisation, no insolvency);
- Financial statements (fair presentation, absence of undisclosed liabilities);
- Material contracts (validity and absence of defaults);

- Litigation and compliance (no pending claims or breaches of law);
- Employment, tax and real estate;
- Intellectual property, data protection and environmental matters.

The consequences of a breach are contractual in nature, as Swiss law provides no efficient statutory warranty regime for share or asset sales beyond the general provisions of the Swiss Code of Obligations on error, fraud or defect (Articles 23 et seq. and 197 et seq. CO).

Accordingly, remedies depend entirely on the contractual allocation of risk, typically entitling the buyer to indemnification for losses, and in rare cases to rescission. Swiss law affords parties considerable flexibility to define the scope, duration and exclusions applicable to such claims.

5. Treatment of seller liability

5. 2. Limitations to liabilities under transaction documents (including for representations, warranties and specific indemnities) which typically apply to M&A transactions in your jurisdiction?

Switzerland
Borel & Barbey

Seller liability is routinely limited through quantitative, temporal and qualitative caps, which are heavily negotiated:

- **Caps**: General R&W liability is often capped at 10–30% of the purchase price; specific indemnities or fundamental warranties (title, authority, tax) may be uncapped or capped at 100%.
- **De minimis / basket:** A de minimis threshold (typically around 0.1% of the purchase price, or CHF 10,000–50,000 in smaller transactions) excludes minor claims, while an aggregate basket (usually 0.5–1% of the purchase price) must be exceeded before the buyer is entitled to recover losses.
- **Time limits**: R&W claims usually expire 12–24 months after closing, with longer periods for tax, environmental, or fundamental warranties.

- **Knowledge and disclosure qualifiers**: Sellers frequently qualify R&Ws by reference to actual knowledge and by disclosure of information in the data room or disclosure letter.
- **Mitigation and exclusions**: Buyers are expected to mitigate losses, and consequential or indirect damages are often excluded.

5. Treatment of seller liability

5. 3. What are the trends observed in respect of buyers seeking to obtain warranty and indemnity insurance in your jurisdiction?

Switzerland
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W&I insurance is increasingly used in Switzerland, particularly in private equity exits and competitive auction processes, where sellers aim to achieve a clean exit and limit residual liability.

Current trends include:

- Use of "synthetic" warranties or seller-friendly liability caps, with most risk now transferred to insurers.
- Policies typically governed by English law and underwritten by London-based insurers, although Swiss-law governed policies are also available.
- Retention amounts and coverage limits broadly follow European market practice, with moderate deductibles and coverage commonly set as a percentage of the purchase price.
- Premiums have become increasingly competitive, reflecting the maturity of the Swiss and wider European W&I market.

Once reserved for larger transactions, W&I insurance is now commonplace in mid-market deals, often introduced at the buyer's initiative to enhance bid competitiveness. However, the time required to put in place such W&I insurance is sometimes to long to be worth it.

5. Treatment of seller liability

5. 4. What is the usual approach taken in your jurisdiction to ensure that a seller has sufficient substance to meet any claims by a buyer?

Switzerland
Borel & Barbey

Buyers commonly protect themselves through a combination of escrow arrangements, retention mechanisms and guarantees:

- **Escrow arrangements**: A portion of the purchase price (often between 5% and 10%) is deposited in escrow for all or part of the warranty period.
- **Holdbacks or deferred consideration**: The buyer retains a portion of the purchase price to secure potential warranty or indemnity claims.
- **Parent or bank guarantees**: Frequently used when the seller is a holding company or private equity fund approaching liquidation.
- **W&I insurance**: Increasingly serves as an alternative to traditional security mechanisms, particularly in competitive auction processes.

In transactions involving individual sellers, private equity funds or SPVs, the use of escrow or W&I insurance has become usual practice, given the limited recourse against the seller once proceeds have been distributed.

5. Treatment of seller liability

5. 5. Do sellers in your jurisdiction often give restrictive covenants in sale and purchase agreements? What timeframes are generally thought to be enforceable?

Switzerland
Borel & Barbey

In Swiss M&A transactions, sellers commonly undertake restrictive covenants, typically covering non-competition, non-solicitation, and confidentiality obligations.

Non-competition undertakings are enforceable under Swiss law provided they are reasonable in scope, duration and geography, striking a balance between protecting the buyer's legitimate business interests and preserving the seller's economic freedom. Their duration generally ranges from two to three years, and may exceptionally extend to up to five years for substantial businesses or where the seller remains active in the same industry.

Non-solicitation clauses (of employees or customers) are generally upheld on similar timeframes.

These limitations derive from Article 27 of the Swiss Code of Obligations, which invalidates contractual restrictions that unduly limit a party's freedom of economic activity. Swiss courts may reduce or annul covenants that are found to be disproportionate.

5. Treatment of seller liability

5. 6. Where there is a gap between signing and closing, is it common to have conditions to closing, such as no material adverse change (MAC) and bring-down of warranties?

Switzerland
Borel & Barbey

Where there is a gap between signing and closing, it is standard to include conditions precedent, typically covering:

- Regulatory approvals, including merger control, FINMA or Lex Koller clearances where applicable;
- Third-party consents, particularly from key contractual counterparties or financing institutions;
- No breach of representations and warranties;
- No material adverse change (MAC) affecting the target's business; and
- Covenants requiring the target to operate in the ordinary course of business between signing and closing.

MAC clauses are usually narrowly drafted, focusing on target-specific adverse events rather than broader market or macroeconomic conditions, and are rarely invoked in practice.

Under Swiss practice, representations and warranties are generally given as of both signing and closing, unless expressly limited to a specific date. Separate bring-down conditions are unusual, though they may appear in cross-border or private equity transactions with a longer signing-to-closing period.

Failure to satisfy the conditions precedent before the agreed long-stop date typically entitles one or more parties to terminate the transaction without liability (save for pre-agreed cost or break-fee arrangements, if any).

6. Deal process in a public M&A transaction

6. 1. What is the typical timetable for an offer? What are the key milestones in this timetable?

Switzerland
Borel & Barbey

In Swiss public takeover practice, the timetable follows a relatively well-defined sequence of steps, although the precise duration depends on the transaction's complexity and regulatory context:

- Initial preparation: confidential discussions between the bidder, its advisers and, in friendly deals, the target.
- Pre-announcement: an optional public statement of intent to make an offer; once issued, the rules of the Swiss Takeover Board apply.
- Publication of the offer prospectus: following a pre-announcement, the bidder must publish the full prospectus within six weeks.
- Offer period: after publication, a short cooling-off period (typically around ten trading days) precedes the main acceptance period, which generally lasts 20 trading days and may be extended to 40 trading days on the SIX Swiss Exchange.

- Publication of results: interim results are published shortly after the acceptance period, followed (if applicable) by an additional acceptance period and the publication of final results.
- Settlement: payment of the consideration, transfer of shares and completion of the offer.

Overall, the Swiss takeover timetable is relatively compact compared to other jurisdictions but can be extended where regulatory approvals, financing arrangements or complex negotiations are involved.

6. Deal process in a public M&A transaction

6. 2. Can a buyer build up a stake in the target before and/or during the transaction process? What disclosure obligations apply in this regard?

Switzerland
Borel & Barbey

A buyer may build up a stake in the target before or during the offer process, but such acquisitions are subject to Swiss securities-law disclosure obligations and the takeover rules.

Under the SIX Exchange Regulation and the Swiss Financial Market Infrastructure Act, any person whose holding of voting rights in a listed company reaches, exceeds or falls below 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% must notify both the target and the exchange within four trading days, and the target must publish the notification within two trading days.

If an acquirer (alone or acting in concert) exceeds 33⅓% of the voting rights, this triggers a mandatory public takeover offer, unless the target has validly opted out or opted up in its articles of association.

During an offer period, the bidder is further bound by equal treatment and transparency obligations under the Takeover Ordinance, and any abusive stake-building may be challenged by the Swiss Takeover Board.

Stake-building is therefore permissible in Switzerland, but must be carefully structured and closely monitored to ensure full regulatory compliance.

6. Deal process in a public M&A transaction

6. 3. Are there provisions for the squeeze-out of any remaining minority shareholders (and the ability for minority shareholders to 'sell out')? What kind of minority shareholders rights are typical in your jurisdiction?

Switzerland
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In Switzerland, following a successful public takeover, the offeror may seek to delist the target and squeeze out remaining minority shareholders either through:

- a statutory squeeze-out under takeover law, available once the offeror holds 98% or more of the voting rights, allowing it to cancel the remaining shares and pay the offer price; or
- a squeeze-out merger under the Swiss Merger Act, available once the offeror holds 90% or more of the voting rights, whereby minority shares are exchanged for cash compensation (subject to potential judicial review).

Swiss law does not provide a general sell-out right enabling minority shareholders to compel the bidder to purchase their shares outside the offer process. However, the best-price rule ensures equal treatment if higher prices are paid during the offer period or within six months thereafter.

Typical minority shareholder rights include:

- Equal treatment and transparency under takeover law;
- Disclosure obligations (notification thresholds at 3%, 5%, 10%, etc.);
- Corporate governance rights, such as the ability to place items on the agenda (from 0.5% of share capital) or call an extraordinary general meeting (from 5%);
- The right to request a special investigation by the court if shareholders representing at least 5% of the share capital or voting rights so demand; and

- Judicial review of squeeze-out compensation in merger scenarios.

Overall, while minority protections are well established, statutory sell-out mechanisms remain limited, and Swiss takeover law primarily focuses on equal treatment and procedural fairness rather than forced liquidity rights.

6. Deal process in a public M&A transaction

6. 4. How does a bidder demonstrate that it has committed financing for the transaction?

Switzerland
Borel & Barbey

In a Swiss public takeover, the bidder must demonstrate that it has secured committed financing to fully satisfy the offer consideration.

Typically, this is done by providing a bank confirmation (often referred to as a certainty of funds confirmation) issued by a Swiss-licensed bank, confirming that sufficient funds are available to settle the offer in full. Alternatively, financing may be evidenced through irrevocably committed facilities, escrowed funds, or a parent guarantee, depending on the structure of the offer.

The offer prospectus must include detailed information on the sources and terms of financing, enabling shareholders to make an informed decision. The Swiss Takeover Board (TOB) reviews the financing disclosures and may request additional documentation to ensure that the offer is credible, unconditional as to funding, and capable of completion.

In practice, Swiss banks are cautious when issuing confirmations and conduct their own internal review to verify that the bidder’s funds or credit facilities are sufficient and legally available to cover the total purchase consideration.

6. Deal process in a public M&A transaction

6. 5. What threshold/level of acceptances is required to delist a company?

Switzerland
Borel & Barbey

A delisting of a Swiss public company requires a qualified shareholders' resolution, passed by at least two-thirds of the votes represented and the majority of the nominal value of shares represented at the general meeting.

Under the SIX Swiss Exchange Listing Rules, the Regulatory Board may approve a delisting upon a justified application by the issuer. The justification may be concise, but the Board must take into account the legitimate interests of investors, the market, and the company. It may impose transitional periods or publication requirements to protect investors. The company must submit evidence of all required corporate authorisations when applying.

Shareholders may appeal the Regulatory Board's decision, but only with respect to the length of the transition period between the delisting announcement and the last trading day, not the principle of the delisting itself.

In practice, delistings typically follow a successful takeover where the bidder has acquired 90% or more of the share capital, allowing implementation of a squeeze-out merger under the Swiss Merger Act, or a squeeze-out under takeover law once 98% of the voting rights are reached.

6. Deal process in a public M&A transaction

6. 6. Is 'bumpitrage' a common feature in public takeovers in your jurisdiction?

Switzerland
Borel & Barbey

"Bumpitrage" (or "bump arbitrage"), the acquisition of shares to pressure a bidder into raising its offer price, is not common in Switzerland.

Although shareholder activism, including activism around M&A transactions, has increased in recent years, the effectiveness of bumpitrage tactics is often limited by the presence of anchor or controlling shareholders in many Swiss listed companies.

In addition, the mandatory offer threshold at 33⅓%, the equal-treatment rule, and the strict disclosure obligations under the Swiss Financial Market Infrastructure Act further constrain such strategies. While pre-bid stake building occurs, tactical acquisitions aimed at forcing a price increase are rare and subject to Swiss Takeover Board scrutiny.

6. Deal process in a public M&A transaction

6. 7. Is there any minimum level of consideration that a buyer must pay on a takeover bid (eg, by reference to shares acquired in the market or to a volume-weighted average over a period of time)?

Switzerland
Borel & Barbey

Swiss takeover rules include both minimum-price and best-price requirements to ensure equal reatment of shareholders.

- **The minimum-price rule** provides that the offer price must be at least equal to the higher of (i) the 60-day volume-weighted average price (VWAP) before the pre-announcement or publication of the offer, and (ii) the highest price paid by the bidder (or any concert party) for target shares in the preceding 12 months.
- **The best-price rule** requires that any higher price paid by the bidder (or any concert party) during the offer period or within six months after its expiry be extended to all shareholders.

Together, these minimum-price and best-price rules ensure that all shareholders are treated equally and fairly in Swiss public takeover bids.

6. Deal process in a public M&A transaction

6. 8. In public takeovers, to what extent are bidders permitted to invoke MAC conditions (whether target or market-related)?

Switzerland
Borel & Barbey

Swiss takeover law distinguishes between voluntary and mandatory offers.

- **In mandatory offers** (triggered upon acquiring 33⅓% or more of the voting rights), the bidder may include only very limited conditions, generally restricted to regulatory or merger control approvals or other objectively necessary steps for completion. Broader conditions, such as financing or MAC clauses, are not accepted.
- **In voluntary offers**, bidders may include conditions, including MAC clauses, provided these are objective, do not depend on the bidder's own will or actions, are verifiable, serve a legitimate interest, and are clearly understandable to an average investor. In practice, the Swiss Takeover Board accepts target-specific MACs only if they are quantified and objectively measurable (for example, an adverse change beyond a specified threshold in EBITDA or revenues).

By contrast, general market or macroeconomic MAC clauses are not permitted, as they lack objective measurability and legal certainty. Swiss practice is therefore narrower and less flexible than in many other jurisdictions.

6. Deal process in a public M&A transaction

6. 9. Are shareholder irrevocable undertakings (to accept the takeover offer) customary in your jurisdiction?

Switzerland
Borel & Barbey

In Swiss public takeovers, irrevocable undertakings (also referred to as tender commitments or commitment letters) from key shareholders are common, particularly in friendly transactions or auction processes. They increase deal certainty and help the bidder secure the required level of acceptances.

Such undertakings must comply with Swiss takeover rules, notably the principles of equal treatment, transparency, and no undue restriction on other shareholders. Their terms are typically disclosed in the offer prospectus, and large shareholders often enter into standard market-form agreements confirming their intention to tender.

Exceptions apply in the event of a competing offer, in which case these undertakings generally lapse or become non-binding if a superior competing offer is launched, in line with the Swiss Takeover Board's anti-frustration and equal-treatment principles.

Properly structured, such commitments can strengthen the credibility of the offer and enhance its prospects of success, while maintaining full compliance with Swiss takeover rules.

7. Hostile bids

7. 1. Are hostile bids permitted in your jurisdiction in public M&A transactions? If so, how are they typically implemented?

Switzerland
Borel & Barbey

Hostile bids are permitted in Switzerland, although they remain relatively uncommon due to the prevalence of anchor or controlling shareholders in many listed companies.

A hostile offer is typically structured as a public tender offer made directly to all shareholders without prior board approval or support. The bidder must comply with the same procedural and disclosure requirements as for friendly offers, including publication of a pre-announcement and an offer prospectus reviewed and approved by the Swiss Takeover Board.

While legally feasible, hostile bids are challenging in practice, as bidders generally face limited access to non-public information, active defensive communication by the target, and tight regulatory timelines under Swiss takeover rules.

7. Hostile bids

7. 2. Must hostile bids be publicised?

Switzerland
Borel & Barbey

Once a pre-announcement of an offer has been made (or if circumstances clearly indicate that a takeover offer is imminent) the bidder must immediately disclose its intentions. The Swiss Takeover Board may also require publication where rumours, leaks, or unusual market activity suggest that an offer is being prepared.

The same transparency and timing requirements apply to both hostile and friendly offers. The offer prospectus must be published within six weeks of the pre-announcement, and any amendments, withdrawals, or competing offers must likewise be disclosed publicly.

7. Hostile bids

7. 3. What defences are available to a target board against a hostile bid?

Switzerland
Borel & Barbey

Before the announcement of a bid, a company may adopt structural defences under general corporate law to discourage unsolicited offers. Such measures may include voting-right limitations, transfer restrictions, or the creation of share classes with different voting powers.

Once a takeover offer has been pre-announced or published, the target board becomes subject to the “board neutrality rule” (also known as the anti-frustration principle) under Swiss takeover law. From that point, the board may not take any action that could significantly alter the company’s assets or liabilities or otherwise frustrate the offer without prior approval of the shareholders’ meeting. This restriction applies, for example, to:

- selling or purchasing significant assets;

- issuing new shares or convertible instruments, unless previously authorised by shareholders; and
- buying or selling the company's own securities.

These restrictions do not apply to measures resolved by the shareholders' meeting itself.

Any defensive action (whether taken before or after the offer) must also comply with general corporate law requirements, meaning it must be in the company's best interest, treat shareholders equally, and be reasonably justified.

Within these limits, the board may pursue informational and procedural responses, such as:

- recommending that shareholders reject the offer and communicating its assessment;
- conducting public relations or communication efforts;
- seeking alternative bidders ("white knight"); and
- engaging in negotiations with the bidder.

Overall, Swiss law allows certain structural protections before an offer, but once an offer is launched, defensive measures are strictly limited under the board neutrality rule. Active defensive tactics such as poison pills or staggered boards are not part of Swiss practice.

8. Trends and predictions

8. 1. How would you describe the current M&A landscape and prevailing trends in your jurisdiction? What significant deals took place in the last 12 months?

Switzerland
Borel & Barbey

The Swiss M&A market has remained resilient and active, supported by a stable macroeconomic environment, strong corporate balance sheets, and renewed activity from both private equity and strategic buyers. Recent trends include portfolio optimisation, transfer of family businesses, spin-offs and carve-outs, and growing interest in technology, life sciences, and industrial consolidation.

The UBS–Credit Suisse merger, completed in July 2024, continues to shape the financial and regulatory landscape, influencing subsequent restructuring and divestiture activity.

Notable transactions over the past 12 months include:

- Holcim's spin-off and dual listing of Amrize (North America) on the SIX Swiss Exchange and the NYSE;
- Swisscom's EUR 8 billion acquisition of Vodafone Italia, integrating with Fastweb;
- Roche's acquisition of 89bio (up to USD 3.5 billion) and Novartis's acquisition of Anthos Therapeutics (up to USD 3.1 billion); and
- SIX Group's acquisition of Aquis Exchange.

At the same time, several delistings from SIX reflect ongoing portfolio rationalisation and take-private activity.

8. Trends and predictions

8. 2. Are any new developments anticipated in the next 12 months, including any proposed legislative reforms? In particular, are you anticipating greater levels of foreign direct investment scrutiny?

Switzerland
Borel & Barbey

Legislative attention in Switzerland remains focused on the proposed Foreign Investment Screening Act, which aims to introduce a review mechanism for foreign acquisitions of Swiss companies active in critical sectors (such as defence, energy, telecommunications, and healthcare). The draft law would apply primarily to state-controlled or state-backed investors. The bill is still under parliamentary debate, with the Council of States expected to consider it in late 2025. Once enacted, it is anticipated to result in greater scrutiny of foreign direct investments, although Switzerland is expected to maintain a relatively liberal framework compared with the EU.

Separately, the reopening of EU–Swiss stock market equivalence in 2025 allows dual listings of Swiss shares on EU exchanges, facilitating share-for-share mergers and cross-border consolidation.

Deal activity is expected to remain robust, particularly in telecommunications, AI and digital technologies, and life sciences, with private equity investors continuing to play a central role as financing conditions stabilise.

9. Tips and traps

9. 1. What are your top tips for smooth closing of M&A transactions and what potential sticking points would you highlight?

Switzerland
Borel & Barbey

In Switzerland, successful deal execution depends above all on clear understanding and early alignment between the parties. Before committing significant time and resources, it is important to agree on the core commercial and legal terms of the transaction and to establish realistic expectations regarding process, documentation, and timing. Engaging experienced legal, tax, and financial advisers at an early stage helps maintain momentum and anticipate potential friction points.

Given that the vast majority of Swiss targets are small or medium-sized enterprises (SMEs) (often family-owned or controlled by a small group of founders) foreign investors should expect varying levels of familiarity with formal M&A processes. Swiss sellers are sometimes less accustomed to extensive or common law–style documentation and may prefer a more concise and principle-driven approach. By contrast, larger corporates and listed companies tend to be well aligned with international market standards.

Top tips:

- **Plan regulatory clearances early**. Merger control, Lex Koller clearance, FINMA approval and, in the future, foreign investment screening can all define the critical path to closing.
- **Secure funding and price structure**. Ensure financing is truly committed and consistent with closing conditions. Align purchase-price mechanisms (locked box, completion accounts, earn-out) and leakage definitions early.
- **Prepare completion logistics**. Anticipate corporate resolutions, KYC checks, escrow arrangements and notarisation if required (e.g., amendments to articles of association, real estate transfer or merger approvals).
- **Address carve-out readiness**. Clearly define perimeter, IP, contracts and employees; negotiate transitional-service arrangements in parallel.
- **Manage stakeholder dynamics**. In family or founder-owned businesses, build alignment early and anticipate minority approval or veto rights.
- **Maintain process discipline**. A clean data room, clear communication lines and well-organised closing checklists prevent last-minute friction.

Common sticking points:

- **Regulatory timing**. Clearance processes under merger control, Lex Koller, FINMA, etc. can all determine the overall transaction timeline and become the critical path to closing.
- **Purchase-price disputes**. Locked-box leakage or earn-out metrics frequently lead to disagreement if not objectively defined.
- **MAC and termination precision**. Swiss law requires objective, measurable triggers; broad or discretionary clauses are rarely enforceable.

- **W&I insurance coverage**. Exclusions (tax, pensions, transfer pricing) and retention levels may leave residual exposure.
- **Execution logistics**. Apostilles, legalisations, bank KYC, and coordination of signatures across jurisdictions can delay simultaneous closings.
- **Public-deal overlay**. In takeovers, the Swiss Takeover Board strictly limits conditionality, and SIX delisting procedures can extend post-offer timelines.

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