# Key issues of Swiss private M&A in the technology sector

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This article analyses selected current and future challenges in the technology sector, focusing on typical legal risks and challenges, typical legal structure of tech deals under Swiss law, dealing with legal risks and challenges in tech deals, and challenges of blockchain technology and cryptocurrencies.

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Among investors, the technology sector (or tech sector) is understood as businesses related to research, development and/or distribution of technology based goods and services. Tech companies depend on innovation which allows them to fundamentally change existing businesses or create new ones. This disruptive potential is often reflected in enormous price-to-earnings multiples. The technology sector now spans from start-ups to multinational giants, such as Apple and Google, as well as from semi-conductor industry to e-commerce business, mobile apps and social media.

When it comes to M&A, tech companies require a strong focus on intangible assets, such as technology, but also on users and customers (for example, of a social network) or employees' know-how. Tech companies often have a cross-border context in terms of their own business and/or foreign investors.

The past 20 years have shown that the tech sector has grown and changed very quickly. It will presumably continue to change quickly and look very different in future, along with related M&A. Key topics are "cryptocurrencies", "block chain" and "distributed ledger technology".

This article includes selected current and future challenges posed by these technologies, and focuses on:

- Typical legal risks and challenges.
- Typical legal structure of tech deals under Swiss law.
- Dealing with legal risks and challenges in tech deals.
- Challenges of blockchain technology and cryptocurrencies.

## Typical legal risks and challenges

One or more of the following issues arise in M&A transactions in the tech sector.

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## Intellectual property rights (IPR)

IPR are typically the most critical part, since they are the main reason why the tech company has been selected by the buyer as a target. Valuable and relevant IPR must be identified and then assessed in terms of scope, ownership and control, valuation, validity and duration.

Transferability must be ensured, taking into account the different types of IPR. For example, hardware may be protected by patents, whereas computer programs are generally protected in Switzerland by copyright law.

The analysis of licences and representations and warranties in customer and supplier agreements plays a major role. Key issues are "open source software", "change of control-clauses", "cybersecurity", "data protection" and "non-compete clauses".

A buyer must also identify potential liability for infringements, and potential litigation over ownership.

## Secrecy

Trade secrets, know-how and client databases are vital for tech companies whose business is built on customer relations. The analysis of these intangible assets is very important for buyer.

However, the buyer may be a competitor of the target company and secrets may be insufficiently protected by law. There might be a risk that the buyer takes advantage of information received during the due diligence process. Protecting business secrets of the target company is therefore crucial and must be reconciled with the buyer's information needs.

## Employees

An acquisition of a tech company is also an investment in its human resources. Founders and key employees have key know-how or significant potential for innovations which the buyer wants to profit from. Transfer and long-term binding of founders and employees requires specific attention, including tailor-made contracts with these key players.

## Inexperienced seller

Tech companies, such as start-ups or family-owned companies, are often sold by the founders to a larger, international company or private equity firm.

In this case, the buyer has experience in M&A and regularly works with external advisers, whereas the seller is not acquainted with standard transaction procedures. This kind of buyer also has formal internal procedures that define the approval of M&A and the integration of a target. Such a buyer (and its advisers) request specific documents and answers from the target.

Start-ups and family-owned companies often do not have established internal procedures and documentation that allow them to respond in due time to such requests. Further, due to cost sensitivity, founders may refrain from hiring advisers at the beginning of an M&A transaction. This causes delays in the due diligence process, may lead to uncertainties and finally result in a lower acquisition price and/or more extensive representations and warranties or even jeopardise the transaction.

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# Typical legal structure of tech deals under Swiss law

Acquisitions of businesses under Swiss law basically follow two types of structures, which also apply to tech deals: share purchase and asset purchase. It is less common to take over a target company by way of a merger and demerger. A merger and demerger are most commonly used for intercompany restructurings. However, it can be appropriate to solve deadlock situations. Other notable, but rather uncommon, deal structures are joint ventures, co-promotions, co-marketing or licensing deals.

Due to their high relevance in practice, this article focuses on selected aspects of share and asset deals.

## Share deal

The object of the purchase is not the company itself but its shares. A share purchase is the acquisition of all shares and voting rights of the target or at least the controlling majority. The company itself is not affected, as only the shares are acquired by the buyer. Regarding the specific risks and challenges of an acquisition of a tech company, there are several notable advantages and disadvantages.

**Advantages.** The main advantages of a share deal include:

- **Simplicity.** All assets and liabilities, rights and contracts are acquired through the transfer of the shares, including all types of IPR as well as employees.
- **Transfer of ownership.** Shares can be transferred in a straightforward procedure.
- **Consistency.** The business of the target is not directly affected by the acquisition.
- **Standard.** It is probably the most common acquisition structure.
- **Tax.** It is often the most tax-efficient structure for the seller, in particular for founders.

**Disadvantages.** The main disadvantages of a share deal include:

- **Comprehensive due diligence required.** Since the entire company, including its history, is acquired, potential liabilities must be identified in a due diligence procedure and reflected in the purchase agreement (representations and warranties, and price).
- **Number of shareholders.** The share purchase agreement is more complex due to the increasing number of sellers.
- **Taxes.** It is often not the most tax-efficient structure for buyers.

In Switzerland, a share purchase agreement does not require specific legal formalities and could, in theory, even be concluded orally. This also applies if the target company has real estate property or IPR. However, it is highly recommended and business standard to enter into written agreements.

## Asset deal

The object of an asset purchase are specific assets, liabilities and contracts of the target company, and not the entity itself. This requires individual identification and transfers of the objects of purchase to the buyer, and may require

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third party consents and be subject to certain legal formalities (for example, for the transfer of real estate property and IPR).

**Advantages.** The main advantages of an asset deal include:

- **Accuracy.** Only the relevant assets, liabilities and contracts are transferred (cherry picking).
- **Limitation of risks.** Liabilities or inherited burdens can remain with the seller.
- **Tax.** It is often the most tax-efficient structure for the buyer.

**Disadvantages.** The main disadvantages of an asset deal include:

- **Complexity.** An extensive purchase agreement is needed, which covers all objects of the purchase individually.
- **Administrative and legal efforts.** All objects of the purchase must be individually transferred.
- **Legal obstacles.** Consent of third parties may be required to transfer the objects of the purchase to the buyer and formalities must be fulfilled.

Besides the individual transfer, the Swiss Merger Act also allows the transfer of a bundle of assets and liabilities (for example, a division) by partial universal succession (*partielle* Universalsukzession), as a so-called asset transfer (Vermögensübertragung). The objects of the transfer are listed in an inventory. In this form, consent of third parties such as creditors is not required (although there is some uncertainty about the transfer of contracts). Instead, the law imposes joint liability of the previous debtor with the new debtor for a period of three years. In addition, the inventory of the transferred assets is accessible to third parties through the commercial register. Such an asset transfer (Vermögensübertragung) is mainly used among related companies.

Depending on the object of the purchase, asset purchase agreements must fulfil statutory formalities, such as a notary deed for real estate property.

## Dealing with legal risks and challenges in tech deals

### Letter of intent

There are several reasons for the target company and the buyer to sign a letter of intent for a transaction in the tech sector:

- It gives the target company, the buyer and the advisers a common understanding of the contemplated transaction, which minimises misunderstandings in its later stages.
- It allows the identification of differences on key points at the beginning.
- It helps to ensure business confidentiality.

A letter of intent should cover the following items:

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- Outline of the material elements of the transaction.
- Definition of the main terms and conditions.
- Rules regarding the conduct of due diligence.
- Timeline of the transaction.
- Confidentiality agreement.
- Exclusivity for the potential buyer, for a certain period of time.
- Provision regarding costs.
- Applicable law and jurisdiction.
- Specification of which clauses are binding and non-binding.

Typically, the first four items above are not binding, as they may change during the transaction. It is crucial that the parties clearly state which clauses are binding and which are not. It is common for the last five items above to be binding.

**Confidentiality agreements.** The buyer has a vital interest in deep and comprehensive due diligence. On the other side, the seller and the target company must protect their intangible assets, particularly unregistered IPR such as secrets, know-how or customer relations.

A confidentiality agreement should be concluded at the beginning of the transaction. It can later be replaced by clauses in the letter of intent and then the acquisition agreement. The confidentiality undertaking should be combined with a penalty clause (Konventionalstrafe) to ensure compliance and enforceability.

It may be advisable to govern further issues in the confidentiality agreements or in separate agreements, such as non-solicitation of employees or specific protection of IPR.

For highly sensitive information, the seller and the target company may request specific confidentiality agreements from the buyer's advisers, so that the buyer only has restricted access to the secret information while full access is granted to its advisers. The advisers are then obliged to not share the sensitive information with the buyer and to prepare only a restricted report, which is first reviewed by the target company.

## Due diligence

The buyer and its advisers must identify key IPR that are most valuable for the transaction. This may require involving external technology experts. Accordingly, comprehensive planning and a timeline are essential.

The due diligence is accelerated if the target already has an internal list of its IPR which is up to date. Due diligence should at least cover the following issues:

- IPR due diligence request list that describes all relevant patents, patent applications, supplementary protection certificates, unregistered inventions, trade marks, domain names, copyrights, trade secrets, know-how and licences.
- Analyse the material scope of IPR. If the target is an affiliated company of a group, the IPR are commonly not held directly but in a group IPR-company. Further, the IPR may be developed in joint ventures or co-

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operation agreements with other companies. It is crucial for a tech transaction to assess precisely the scope of IPR, to avoid unexpected disruptions and litigation at a later stage.

- Examination of whether a chain of title can be established from the inventor, author, or former owner to the target. A list of all employees and third parties involved in the development of the target's IPR should thereby be obtained. Under Swiss law, inventions and copyrights principally belong to the creator. However, there are specific rules regarding employee inventions and/or work products of employees. The parties can also implement different rules by mutual agreement. Register entries for trade marks and patents do not constitute legal ownership, so that legal ownership may, for example, be with an affiliated company of the target company.
- Review whether all relevant registrations with the relevant filing office have been obtained and are up to date, and that all fees have been paid.
- Validity of IPR must be assessed in relation to pending or threatened IPR infringement suits against the target, or invalidity proceedings such as opposition or cancellation proceedings. Any insurance cover should be reviewed. Further, it must be assessed whether a third party has violated the target's IPR.
- Examination of any encumbrances on the IPR, for example security interests or liens.
- Review of internal policies regarding all relevant IPR, such as trade secrets and employee inventions.
- Research on open source software, and assessment whether it is a key asset that generates revenue. Assessment of potential loss of ownership/exclusive rights, breach of representations and warranties in customer agreements and reputational risk.
- Examination of licence and other agreements that include IPR, such as collaboration agreements, including duration and potential termination, change of control clauses, exclusivity rights, liability, assignment provisions, and necessary consents or additional licences.
- Assessment whether a public entity has funded or supported the technology such as universities, the military or foundations and, if yes, analysis whether this involvement may influence the transaction.
- Ensuring the transferability of the IPR in view of the contemplated deal structure (share/asset purchase or merger/demerger).
- Review of export/import compliance regarding target company products by examining trade policies, procedures and practices, especially in relation to sanctions and embargos, if applicable.
- A data privacy assessment, identifying which type of information from customers, suppliers or third parties the target company may have, determining the relevant law/jurisdictions and reviewing internal policies and practices.

## Structuring the purchase price

A key point of any M&A transaction is structuring the purchase price, which is often subject to longer negotiations between the parties. The following common purchase price mechanisms are also used in tech transactions: locked-box price mechanism, adjustment price mechanisms and earn-outs. In this context, several characteristics should be considered.

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**Locked-box price mechanism.** The buyer and seller agree on a price based on the most recent financial statements (Locked box date) and take measures to ensure that no financial items (other than so-called permitted leakage) will flow out to a related party between the Locked box date and the closing date (no leakage).

A locked-box price mechanism is considered as rather seller-friendly, since it ensures price certainty at an early stage. Tech companies acquired for their IPR regularly have insignificant items that could flow out during the locked period. However, potential flow out can be covered by a locked-box clause, which makes the clause also more attractive for buyers. The buyer may also request a material adverse change clause to safeguard its interests.

A locked-box price does not fit all tech transactions. It requires an audited financial report related to costs and not all companies are audited. Swiss law allows small companies such as start-ups to opt-out from audited statements or only conduct a limited audit (a so-called review). Further, a locked box mechanism is designed for acquisitions or mergers of the whole target company. For carve-out transactions, which only involve a part of the target, as well as other asset transactions, the locked-box mechanism is generally inappropriate.

Since the locked-box mechanism fixes the price, later adjustments of the purchase price can only be made due to breach of contract, warranties and indemnities (including leakage). This usually requires notifications and providing evidence (of damage, breach of contract, causality, and probably liability). Further, enforcement of the claim may be restricted by foreign law or the risk of the seller defaulting on its debt.

**Adjustment price mechanism.** Traditionally, the parties agree an enterprise value based on a specific method, such as a multiple of EBITDA, discounted cash flow, value of main IPR and so on. Since the buyer does not want to pay extra for cash and debts, it is common to agree that the purchase price is calculated on a cash-free/debt-free basis. As the cash and debts of the target company change daily, an adjustment date and mechanism must be defined for the purchase price. Generally, cash and debts as of closing form the basis for the final purchase price calculation.

The day-to-day business requires working capital. It is therefore also common to define a level of working capital for the target company in the purchase agreement. Any reduction or increase of the pre-defined working capital at closing will then cause an adjustment of the final purchase price.

The adjustment price mechanism is usually appropriate for tech companies. It requires sophisticated and tailor-made contract clauses. However, for small businesses with minimal working capital and small cash and debt positions, the mechanisms can be drafted in a straightforward way.

A notable difference between the locked-box and the adjustment price mechanism is the timing of the shift of the economic risk and benefit of the target company's daily business from the seller to the buyer. Under a locked-box mechanism, the shift takes place at the locked-box date, which is typically before signing. Under the adjustment price mechanism, the shift occurs at the time of closing.

**Earn-out clauses.** An alternative way to calculate and adjust the price takes the future, that is, the post-closing, business of the target company into account (earn-out). This has particular advantages if the seller remains a key-player in the target company. Such a mechanism is ideal for tech start-ups and binding their founders.

However, earn-out clauses are inappropriate if the buyer intends to integrate or restructure the target company. Earn-out clauses also require comprehensive provisions to minimise the risk of manipulation of post-closing earnings and the purchase price. For example, the calculation should be based on EBITDA and not on net profits, to avoid manipulations through aggressive depreciation. The applicable accounting standard should also be defined, as well as an accounting firm to determine any disagreements with the purchase price. However, earn-out clauses

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have recently come under the scrutiny of the Swiss tax authorities. They tend to re-qualify a tax-free capital gain of a seller on the sale of its shares into taxable income, if the seller retains a key function in the target after the sale.

Instead of references to economic criteria, the parties occasionally agree to technical milestones. The challenge here is to define milestones specific enough and within the influence of the seller to ensure that he/she is committed to the target company after closing.

## Representations and warranties

To shift risk, the parties must agree on representations and warranties, which is often the last open issue in negotiations. However, Swiss law has peculiarities which must be considered. The statutory provisions of the Swiss Code of Obligations (CO) include two remedies for defects in purchased goods:

- **Warranty of title (*Article 192, CO*).** The seller must transfer the purchased goods to the buyer free from any rights enforceable by third parties against the buyer that exist at the time the contract is concluded.
- **Warranty of quality and purpose (*Article 197, CO*).** The seller is liable to the buyer for any breach of warranty of quality, and for any defects that would materially or legally negate or substantially reduce the value of the sale object or its fitness for the designated purpose.

These statutory provisions have different impacts on share deals and asset deals.

**Share deals.** The Federal Supreme Court has ruled in several decisions that the statutory remedies of the CO only apply to the shares as the goods being sold, and not to the company. Buyers therefore request broad representations and warranties in the purchase contract from the seller regarding the target company. Tech companies are no exception. Specific attention should be paid to remedies relating to:

- Ownership of the shares and due authorisation to sign and perform the purchase agreement.
- Due incorporation and existence of the target under Swiss law.
- Financial statements (in accordance with a known standard and the law).
- Disclosure of liabilities.
- No material adverse changes between signing and closing.
- Compliance with regulatory requirements, in particular data protection law.
- Disclosure of all authorisations subject to a change of control clause.
- Pending and settled legal proceedings, orders and legal disputes.
- Relationships with related persons.
- Compliance with material contracts.
- Tax issues.
- IPR:
    - disclosure of all relevant registered and unregistered IPR;

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  - the target company's rights to its IPR and the validity of such IPR;
  - absence of third party rights and third party demands;
  - absence of any infringement, misappropriation or other violation of the target's IPR by third parties;
  - absence of any infringement, misappropriation or other violation of third parties' IPR by the target company; and
  - definition of the scope of IPR, in terms of relevance to the target's business and potential use by third parties.

- Authorisations and licences are very important to the buyer of a tech company. The buyer will therefore often request a warranty from the seller that the target has obtained all authorisations and licences necessary to conduct its business. Such authorisations and licences may also be subject to change of control clauses. For authorisations within the competence of an authority and licences with a change of control clause, the buyer is advised to contact the authority/licensor before signing, and request confirmation that the transaction will not affect the authorisation/licence. If such confirmation is obtained, the seller's warranty here may be limited to disclosure of all relevant authorisations and licences to conduct the business.
- Additional warranties regarding product and service liability. In tech companies, liability for products and services can scale up to high amounts. The buyer may therefore request warranties that the seller will bear liability for any claims that arise before closing and for which the target has insufficient insurance cover.

The representations and warranties should also cover subsidiaries, if any.

**Asset deals.** According to the Federal Supreme Court, an asset deal is not considered a statutory purchase contract for the sale of goods (*Nominatvertrag*) but rather as a contract *sui generis*, including goods such as receivables and liabilities, contracts or licences, and IPR. The statutory CO remedies relating to goods do not directly apply to other assets and liabilities. As a result, there is uncertainty on the statutory remedies applicable to contracts or licences and IPR, which are highly important in a tech transaction.

To minimise uncertainty and avoid future disputes and discrepancies, it is essential to draft representations and warranties in asset deals very carefully. The above list for representations and warranties in share deals can apply equally as a guideline. However, the agreement should also include the following warranties that:

- At the time of closing of the purchase agreement, all assets in the inventory (attached as an annex to the agreement) have been validly transferred to the buyer. For tech companies in particular, all IPR should be directly specified in the inventory.
- Assets required by the buyer to conduct the seller's business in the same way as the seller have been transferred at the time of closing of the purchase agreement. This should also cover third party rights, including, for tech companies, licences.

It is common for representations and warranties, in a share or an asset deal, to be limited to information not disclosed in the due diligence process (general disclosure) or in the purchase agreement and its annexes (specific disclosure).

In general disclosure, all information fairly disclosed (attached as an annex) by the seller is excluded from any representation and warranty. In specific disclosure, which is more buyer friendly, the exclusion to the representations and warranties is disclosed expressly and specifically, for example by a disclosure letter.

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Frequently, the amount of liability is limited. A de minimis clause ensures that a party does not raise minor claims, whereas a cap on liability limits the maximum amount that a party can claim. De minimis clauses are usually defined as a specific amount such as CHF100,000, whereas caps are defined as a ratio of the purchase price, such as 50%.

Generally, the commonly agreed representations and warranties in Switzerland are in line with standard international merger and acquisition practice. This also applies to tech companies. However, in practice, the individual agreement is a result of negotiation between the buyer and seller. The representations and warranties are only one factor along with price, negotiation power and economic potential of the business sold.

## Employees

In tech deals, there is often a strong desire of the buyer to continue collaboration with the seller. Besides key competences and knowledge, it is also an effective way under Swiss law to implement a non-competition clause. In such cases, the seller typically remains in a management position. An employment agreement with the seller as well as organisation bye-laws, which govern the internal powers and duties of directors, are ideally attached as annexes to the purchase agreement. An alternative to an employment agreement is a consultant agreement with the seller.

If the buyer and seller seek long-term co-operation, the employment or consultant agreement must carefully set incentives such as a bonus/malus-system, earn out clauses or a stock option plan. In employment agreements, there are limits regarding such incentives, since the economic risk cannot be totally shifted to the employee.

In a business asset deal, the law provides an automatic transfer of the employees with the business (*Article 333, CO*). However, each employee has the right to deny the transfer. In this case, his/her employment ends according to the statutory termination period and not according to the termination period in his/her contract.

## Post-contractual non-compete clauses

In tech deals, the acquirer seeks an economic advantage through the acquired technology and know-how. Since not all IPR can be protected by law in terms of exclusive rights, there is a risk of the seller starting a new business right after the transaction and competing against the buyer.

Commonly, tech deals include non-compete clauses which bar the seller from further economic activity in the field of the acquisition. Typically, the buyer requests non-compete clauses that prohibit direct as well as indirect competition through participation in other businesses.

Swiss law generally allows extensive non-compete clauses, as the Swiss courts regard this as freedom of contract. However, a non-compete clause which is too broad and/or has a very long duration may not, or only partially be, valid. Non-compete clauses should therefore be drafted specifically for the transaction and limited in terms of region, time and subject. Further, effective non-compete clauses include a penalty payment in the event of a breach, since it is often very difficult and cumbersome to establish damage suffered by such a breach.

## Undertakings and consent of third parties

In some tech deals, it is necessary for the seller and buyer to agree an undertaking, which entitles the buyer to enter into certain agreements with the target company. This may be necessary if the target company is an affiliated company of the seller and uses IPR of other group companies of the seller.

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Asset deals that follow the traditional way (*Singularsukzession*) usually need several consents from third parties, such as creditors or contractors with a non-assignment clause. Such consents will then be part of the conditions precedent for closing.

### Escrow account

To secure liability claims, an escrow account, where part of the purchase price is deposited for a certain period of time, is widely acknowledged as an appropriate instrument to protect the buyer's reasonable interests. It is especially useful in tech transactions, where the seller is an individual with a small financial capacity.

The details of such a deposit including the appointment of an escrow agent, escrow fees and the release of the funds, are usually governed by an escrow agreement.

## Challenges of blockchain technology and cryptocurrencies

In the past few years, blockchain technology and cryptocurrencies have received increasing attention in the tech sector. These developments also lead to some challenges in related M&A transactions.

### Status quo

Blockchain technology is a way to hold the same list of records among several decentralised parties, which are linked through cryptography. Blockchain technology is considered to have a wide scope of applications, such as providing fraud resistant registers or cryptocurrencies. To date, cryptocurrencies have received most attention, particularly Bitcoin.

There have also been several initial coin offerings (ICO). The Swiss Financial Market Supervisory Authority (FINMA) qualifies ICOs as an event in which investors transfer funds, usually in the form of cryptocurrencies, to the ICO organiser. In return, they receive a quantity of blockchain-based coins or tokens created and stored in a decentralised form, either on a blockchain specifically created for the ICO, or through a smart contract on a pre-existing blockchain.

### Challenges

In M&A transactions in the tech sector it is crucial to identify all relevant IPRs and ensure their transfer. In negotiations and drafts of the purchase agreement, focus should be made on the shift of risk regarding uncertainties and the adequate allocation of risks between the seller and buyer. Blockchain technology and cryptocurrencies raise various questions, for example:

- Swiss law currently does not provide specific provisions on blockchain technology. There is a broad discussion in practice on the legal qualification of blockchains in general and cryptocurrencies in particular. Legal qualification is essential to assess the risks of a contemplated acquisition concerning blockchain technology, and to ensure a due transfer of legal rights to the blockchain technology itself and the cryptocurrency.
- FINMA has published guidance on the regulatory treatment of ICOs, as well as guidelines for enquiries regarding the regulatory framework for ICOs. FINMA categorises ICOs according to the token involved (payment tokens, utility tokens, asset tokens, or hybrid tokens). Depending on the nature of the token, FINMA considers securities law, collective investment law and anti-money laundering law to apply. Further, the Federal Law on Banks and Savings Banks must be taken into consideration. Transactions involving ICOs

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or which relate to prior ICOs must be assessed with respect to regulatory issues, and cover the corresponding risks in the purchase agreement.

- Blockchains are registers that can store information. Information is generally related to data protection law, and sensitive personal data (for example, health data) is specifically regulated in Switzerland. However, there is little experience on the application of data protection law in the context of blockchain technology so far.

For the transfer of legal ownership, regulatory issues and data protection, the buyer must comprehensively analyse and understand how the target company uses blockchain technology, to ask the correct questions for a legal assessment. This legal assessment will involve several uncertainties, which must then be adequately reflected in the purchase agreement. To ensure a complete transfer of all rights to blockchain technology held by a target company, a share purchase of the target company seems to be the preferred option. However, a share deal also includes the transfer of potential hidden liabilities, which must be covered in extensive representatives and warranties. Market practice will show how risks are allocated between the buyer and seller, and how the price will reflect these issues.

## Five key takeaways

The following should namely be borne in mind when doing private M&A transactions in the Swiss technology sector.

### Typical legal risks and challenges

IPR are typically the main reason for the acquisition of a tech company and therefore require special attention in a tech deal. Legal challenges include the inherent legal uncertainties of IPR (for example, scope and ownership) as well as business secrecy of the target company, transfer and retention of key employees.

### Identification of business model/relevant IPR

At the beginning of the legal assessment, the business model of the target company and its relevant IPR should be analysed. Based on the outcome, the assessment by the buyer and its advisers should focus on the specific risks of the target company.

### Due diligence

A main focus of the due diligence is IPR. This often involves highly confidential information of the target company. Therefore, special confidentiality agreements and advisers acting as intermediaries between the seller and the target company may be required.

### Asset or share deal

The common structure in an acquisition of a tech company is an asset or share deal. Depending on the involved business model and IPR, one will be more advantageous than the other. For both structures the transfer of the relevant IPR must be ensured and specific representations and warranties are required.

### Challenges of blockchain technology and cryptocurrencies

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To date, the legal qualification of key characteristics of blockchain technology in general and cryptocurrencies in particular is not clear. This leads to specific legal uncertainty which requires comprehensive and additional representations and warranties, in asset deals and share deals.

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**Recent transactions**

- Advising a private equity firm regarding the investment in a provider of high-tech transportation solutions for pharmaceutical products.
- Advising a leading Swiss technology company regarding the due diligence of a provider of digital banking solutions.
- Advising a foreign energy services provider regarding the acquisition of a Swiss tech company.
- Advising a large international retail group regarding a major reorganisation and re-grouping of assets and participations.
- Representing a leading international service provider in the acquisition of a Swiss competitor.
- Advising a global healthcare investment firm regarding a major investment in a Swiss based pharmaceutical company.
- Advising a multinational South American pharma group regarding the acquisition of various pharmaceutical products.
- Advising the shareholders of a Swiss metal industry company on the sale of the company to a listed Swedish group.

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- Advising the shareholders of an international aviation services group on a carve-out of part of the group, through a leveraged management buy-out including a private equity investor.

**Languages.** German, English, French, Italian.

**Professional associations/memberships.** Zurich Bar Association (ZAV); Swiss Bar Association (SBA); International Bar Association (IBA); SMB next (KMU next).

**Publications (selection).**

- Global Legal Insights - Pricing and Reimbursement 2018 and 2019; Swiss chapter.
- Wenger Plattner Newsletter 4/17: EU General Data Protection Regulation: Implications for Swiss businesses.
- Challenges and key aspects of life sciences M&A in Switzerland, Thomson Reuters, Practical Law, Life Sciences Global Guide and Private M&A Global Guide.
- Newsletter 1/17: Practical implementation of the new disclosure requirements for shareholders and LLC members.
- The life sciences, drugs and healthcare industry in 2016 and beyond: trends and predictions: Edited by Thomson Reuters, Practical Law, London (June 2016).

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**Recent transactions/cases**

- Advising a private equity firm regarding the investment in a provider of high-tech transportation solutions for pharmaceutical products.
- Advising a leading Swiss technology company regarding the due diligence of a provider of digital banking solutions.

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- Advising a foreign energy services provider regarding the acquisition of a Swiss tech company.
- Representing a Swiss based business software/software services group in litigation proceedings regarding the acquisition of subsidiaries in Switzerland and abroad.
- Advising a multinational immigration service company regarding the acquisition of a Swiss based immigration service company.
- Advising a large private equity company regarding the acquisition of a Swiss based service company in the building sector.

**Languages.** English, German, French

**Professional associations/memberships.** Zurich Bar Association (ZAV); Swiss Bar Association (SBA)

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