

Wenger &amp; Vieli

# Exit and Broker!?

**One of the key questions which regularly comes up in the early stage of a sales process is whether or not to engage a broker. The following shall shed some light as to the pros and cons of seeking support from a broker for the exit from a lawyers' perspective.**

## What is a Broker?

A broker is an individual, independent person that arranges transactions between a buyer and (a) seller(s) for a commission when the deal is executed, and thus a broker is the third-person facilitator between a buyer and a seller (Wikipedia). Brokers can be regulated (for example as banks or securities trader), but that's not a prerequisite. In Switzerland, standard brokerage in an M&A process does not require a licence. In most M&A deals, brokers are engaged by the target company; should it come to an exit though, such expenses will have to be borne by the seller(s) for tax reasons.

## Tasks of a Broker

In order to match the seller(s) with potential buyers, brokers usually produce a teaser (which is a short but anonymous description of the target) as well as a more detailed information memorandum (and, in recent times more frequently seen, a financial facts book consisting of further financial information in addition), they assist the sellers (or their legal counsel) in drafting a non-disclosure agreement as well as in the negotiations, and in general, they try to get the deal done.

## Pros of a Broker

A broker can bring added value to the transaction in various aspects:

First of all, it has a vast network and is in constant touch with potential buyers. It knows their needs, and it knows the right person to talk to personally. Such network should not be undervalued: M&A is in particular, but not limited to, a perfect match between the right parties at the right time at the right terms and conditions. The more prospective buyers can be attracted, the likelier is it to achieve a satisfying purchase price.

Second, a broker is aware of the current market conditions, such as the prices which can be realistically achieved and whether we are in a more buyer- or seller-friendly environment. This can have an impact on the (contingent) liabilities the seller(s) may need to enter in the transaction documents (e.g. the share purchase agreement).

Third, a broker can take the lead or is at least a good sparring partner when it comes to any questions with respect to the financials, including the purchase price.

Fourth, a good broker leads the process proactively, and gets the deal done. This is basically a strong asset of valuable broker, which could have a negative effect as well though (cf. below under "Cons of a Broker").

## Cons of a Broker

Hiring a broker has its costs. Usually, brokers request (humble) retainers for their preparatory work. For a transaction < CHF 100m, they ask for some CHF 10 to 20k per month over a period of up to 4 months. In case of a successful exit, they ask for a success fee between 2 and 4% on the enterprise (not equity!) value, whereby the retainer shall be deducted. Given that (a) seller(s) divest their company for CHF 50m, a broker may – as a rough indication and being aware that individual case may deviate materially from these principles – receive between CHF 1m to CHF 2m.

Having a too pushy broker may also have an impact on the risk side of the transaction: As they are incentivized to bring the deal to a success (as they would otherwise not earn the success fee), they could negotiate hard on the enterprise value, but may have a more lax attitude towards risks which the seller(s) (but not the broker...) need to enter into. As they start to accelerate the transaction towards signing in view of their success fee, this could lead to conflict of interest between the broker and the seller(s) and their legal counsels.

## Summary

Should sellers not know their potential purchaser already and maintain a good and personal relationship with them yet, and being aware of the costs and potential conflicts of interest of a broker, a broker can bring added value to a transaction in various respects. Since the money is so cheap these days, many broker have made their clients really happy as the terms and conditions of the transaction were beyond the expectations of the seller(s).

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## Facts and Figures

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