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# Exit

Beat Speck  
Pascal Honold  
Thomas Egli



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# Agenda

- Definition / Recent Exits
- The Process (Thomas Egli)
- Legal Insights (Beat Speck / Pascal Honold)
- Tax Insights (Beat Speck / Pascal Honold)
- Q&A

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## Definition of Exit

- Trade Sale (Asset/Share Deal; BA and VC Focus)
- (IPO; potentially dual track)
- [Liquidation]
- [Bankruptcy]
- [Share Buyback]

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## Recent Exits - Targets



4-Antibody

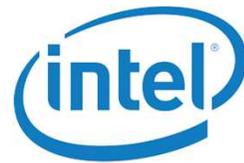


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## Recent Exits – Buyers



agenus tamedia:



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## Recent Exits - IPOs



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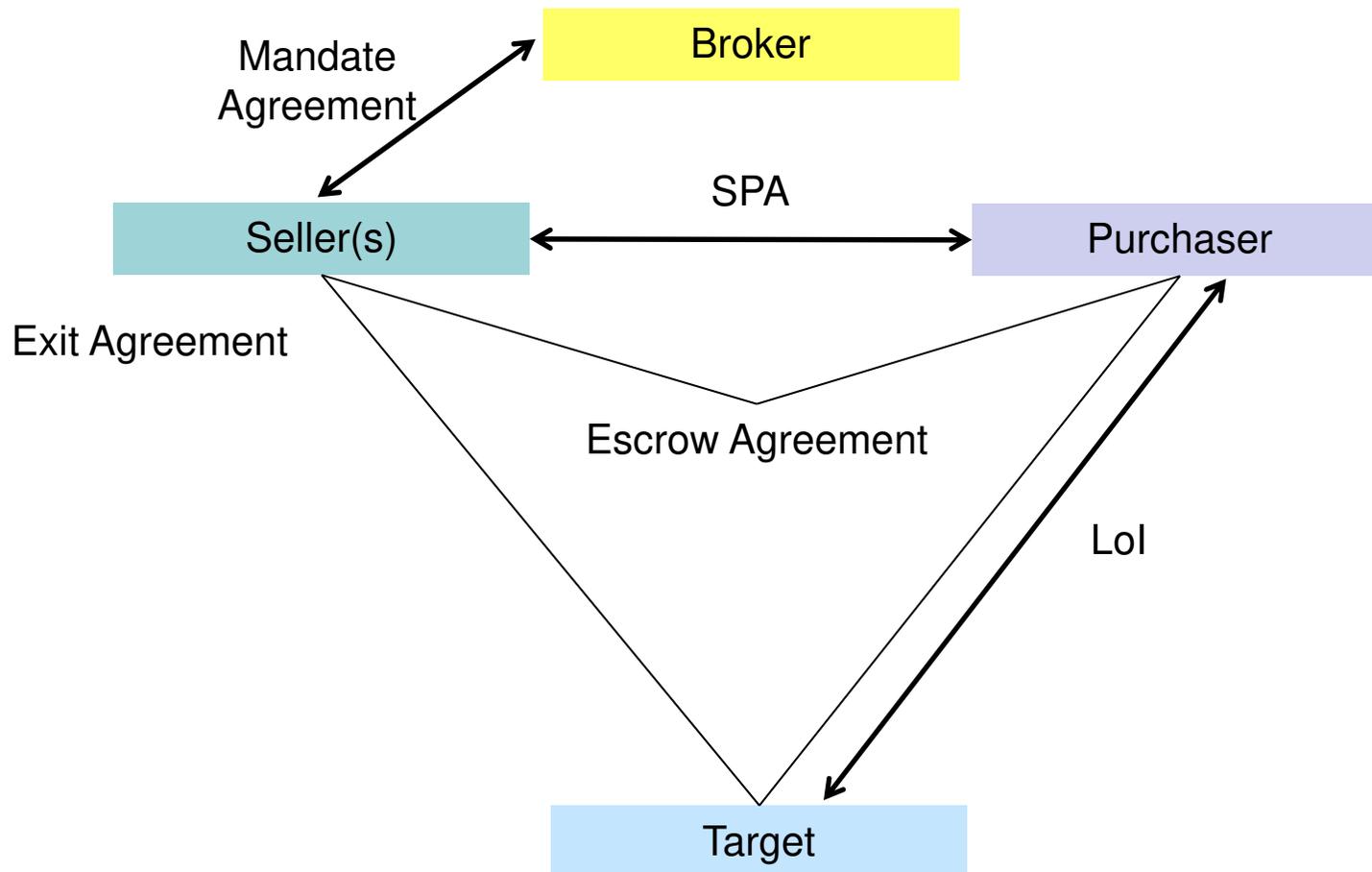
# The Process

Thomas Egli, GCA Altium

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# Legal Insights: The Agreements (I)

## Overview



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## Legal Insights: The Agreements (II)

### Letter of Intent / Memorandum of Understanding / Term Sheet

- Exclusivity
- Transaction
  - Key issues (Purchase Price)
  - (Closing) Conditions
  - Covenants
  - Non-compete
  - Etc.
- Timetable
- Costs / Break up Fees
- Applicable Law / Jurisdiction of TS and Agreements

Legally binding?

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## Legal Insights: The Agreements (III)

### SPA / APA

- Parties
- Shares or Assets?
- Purchase Price (Installments, Escrow, Earn-Out, Share Exchange, Locked Box or Completion Accounts?)
- Closing Conditions (Bring Down, MAC...)
- Representations and Warranties / Indemnities
- Remedies
- Non-Compete
- Indirect Partial Liquidation
- Applicable Law / Jurisdiction / Arbitration

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# Legal Insights: The Agreements (IV)

## Sellers' Agreement

- Parties
- Power of Attorney
- Payouts (less Transaction Costs)
- Claim Management
- Termination of internal Agreements (SHA, Phantom Stock, ...)
- Applicable Law / Jurisdiction

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# Legal Insights: The Agreements (V)

## Broker Agreement

<b>Pros</b>	<b>Cons</b>
Proximity to potential Buyers	Costs
Setup of an auction process	Conflict of Interest
Financial know-how	
Leading the process	

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## Legal Insights: Key Learnings

- Exit starts earlier than expected...
- SHA: «Gouverner, c'est prévoir» (ROFR, Drag along, Tax,...)
- SHA: Dynamic drafting regarding adaptations
- SHA: No issuance of shares
- SHA: Good Corporate Governance
- Comply with the (tax) Law (still enough leeway with creative lawyers ...)
- Make an excellent first impression
- Don't sign agreements when being under pressure
- Don't sign agreements if you don't know the benchmark
- Build up of an experienced exit team you trust (board committee, broker, lawyer, auditor)
- Make a SWOT-Analysis of both, Target and Purchaser
- Negotiate hard where necessary, give up on details

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## Tax Insights: Pre-Exit Phase

### **Transfer of IP at fair market value**

If not, risk of (a portion of) purchase price not being a tax-free capital gain

### **Determination of market salary (no payout, but at least documented and accounted for)**

If not, risk of (a portion of) purchase price being requalified as salary

### **Make all declarations (salary, social security, stamp tax, withholding tax...)**

If not, (i) bad impression, (ii) late interest payments (5%)

### **Early exercise of ESOP (if any at all...)**

If not, difference between fair market value and issue price = salary

### **No share transfers among shareholders prior exit**

If, difference between fair market value and issue price = salary

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## Tax Insights: Exit Phase (I)

- Asset versus share deal
- Tax free capital gain – but
  - indirect partial liquidation
  - earn-out: market salary (if not, [partial] requalification of capital gain as salary)
  - Non-compete: could lead to requalification of capital gain as salary
- Tax Findings: Could lead to a full carve out of the «not-tainted» business

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# Tax Insights: Exit Phase (II)

## Tax issues for individuals

- Benefits based on employee participations
- Transactions on the level of shareholders / employees / investors
- Valuation for wealth tax purpose
- Discrepancy between basis for income and wealth tax

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# Tax Insights: Exit Phase (III)

## Tax issues for entities

- Social security; potential liability risk for board members
- Obligation to issue salary certificates
- Source tax payments must be made by employer
- 10/20 lender rule

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