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西盟斯律师事务所 科技、传媒和电信法中国研讨会

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Private M&A in Europe
欧洲非上市公司收购

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Overview 概述

- Public M&A vs Private M&A 上市公司收购 vs 非上市公司收购
- Heads of Terms 条款清单
- Asset vs Share sale 资产收购 vs 股份收购
- Main Documents 主要交易文件
- Conditions 交割条件
- Competition law 竞争法问题
- Purchase price 收购价格
- Representations, Warranties and Indemnities 陈述、承诺与赔偿
- Non-compete 竞业限制
- Technology Transactions 科技公司的收购
- UK National Security and Investment White Paper 英国国家安全与投资白皮书

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What is Public M&A?
什么是上市公司收购？

- Governed by national takeover codes which largely reflect the Takeover Directive implemented in Member States

  遵循英国法收购法案（基本是反映了欧盟上市公司收购指令的要求）

  - Ensures target shareholders have sufficient information and time to reach a properly informed decision

    确保目标公司股东有足够的信息和时间作出适当的决定
  - Equivalent treatment for shareholders 同等对待目标公司股东
  - Prevents a target having a bid hanging over it indefinitely, siege principle

    防止目标公司被无限期要约收购，围攻原则
- Generally an offer for a public company listed on a stock exchange, where “control” is to be obtained

  通常是指向一家在证券交易所上市的公众公司发出要约，旨在获取“控制权”
- Specified form, structure and timetable of offer

  该要约应遵循特定的形式、结构和时间表
- Independent regulator on a national level

  在国家层面上有独立的监管机关

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What is Private M&A?
什么是非上市公司收购？

Purchase of private company / assets / business

购买非上市公司股权/资产/业务

No set timetable or structure

无规定的交易时间表或结构

Product of commercial bargaining power

商业谈判的产物

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Public or Private M&A?
上市公司或非上市公司收购？

blueprism®

Blue PLC, a company listed on the London Stock Exchange with a premium listing, makes an offer to acquire Indigo, a private company incorporated in the UK which has over 2,000 shareholders

Blue PLC，一家在伦敦证券交易所高级上市的英国公司，要约收购Indigo—一家在英国设立的拥有超过2000个股东的非上市公司。

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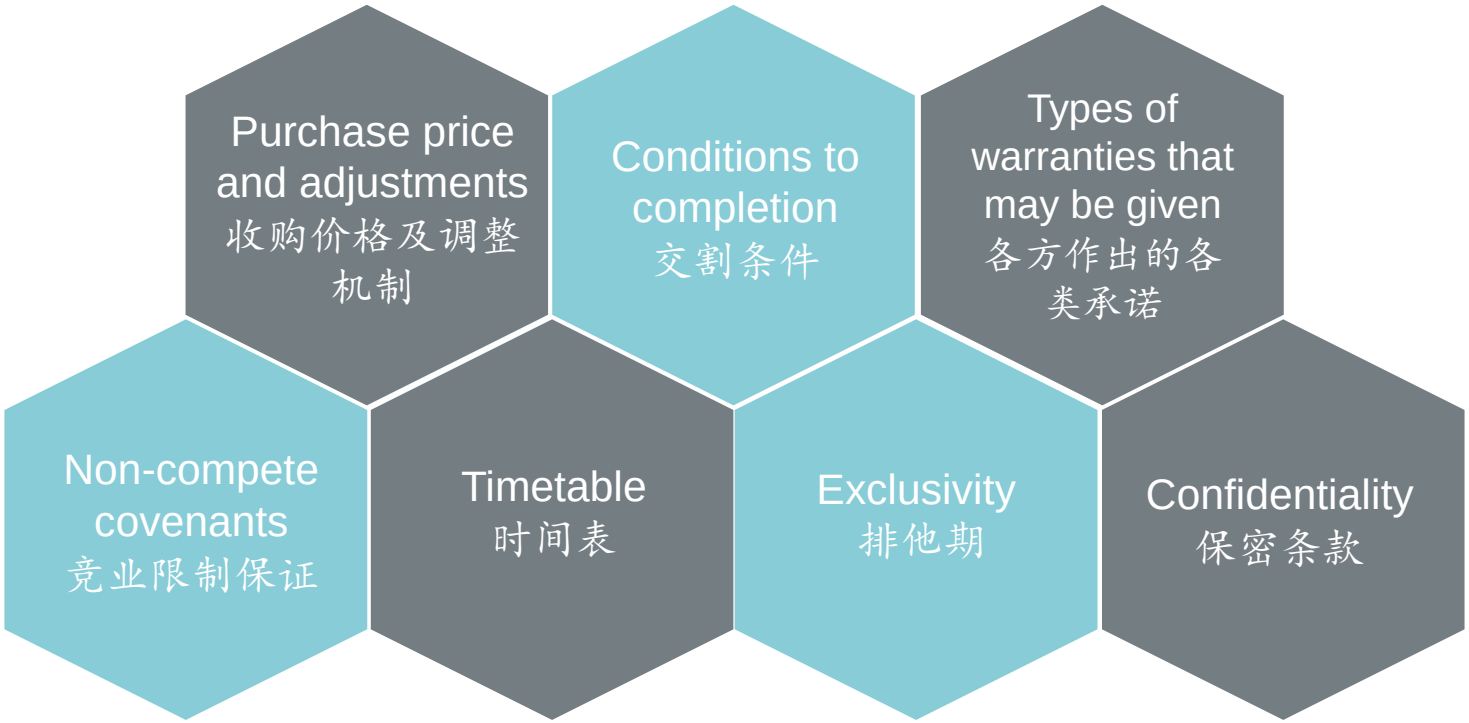
Heads of Terms / Letters of intent (1/2)
条款清单/意向书（1/2）

- Commonly, but not always, entered into during transaction negotiation stage
  通常在交易谈判阶段签订，但不乏例外

- Sets out parties key commercial terms and may include:
  列明各方的主要商业条款，其中可能包括：



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Heads of Terms / Letters of intent (2/2)
条款清单/意向书 （2/2）

Not usually legally binding – must be explicit on this
通常不具有法律约束力 – 这点必须在文件中明确规定

Does not, under English law, create an obligation to negotiate the transaction and parties can walk away at any time
在英国法下，不对双方产生谈判或达成交易的义务，当事人可随时放弃交易（也就是没有法定的缔约过失责任）

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Asset sale or share sale (1/2)
资产收购或股份收购（1/2）

- In an **asset sale**, the Buyer is only buying assets and not the company
  在**资产收购**中，买方购买的仅是公司的资产而非公司本身

- In a **share sale**, the Buyer is buying all of the shares and takes the whole company
  在**股份收购**中，买方购买的是所有的公司股份，成为公司的所有者

- In an **asset sale**, the Buyer can chose which assets to take and leave behind some or all liabilities
  在**资产收购**中，买方可选择购买某项特定资产并且排除某些或全部责任

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Asset sale or share sale (2/2)
资产收购或股份收购（2/2）

- **Asset sales** are more complex and Buyer does not take over a going concern (active business). Contracts with third parties, licences and ownership to assets need to be transferred and often third party consents are required
资产收购比较复杂，买方不自动受让公司的持续经营。公司与第三方的合同、资质许可及资产所有权需分别向买方转让，且转让一般都需要经第三方同意。

- Under English law, employees will automatically transfer even on an **asset sale**
根据英国法的规定，即使在**资产收购**中雇员也自动跟随资产一同转让给买方

- **Share sales** are simpler and usually preferred by the Seller
股份收购更为简单也更受卖方青睐

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Main documents for private transactions
非上市公司收购交易中的主要文件

Sale and Purchase Agreement
买卖协议

Disclosure letter
披露函

Tax Deed
税契

Board minutes/shareholder resolutions
董事会会议记录/股东决议

Stock transfer forms
股份转让书

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Common conditions
惯常交割条件

- Conditions to completion of the sale may include:
  常见的交割条件可能包括以下：
  - ✓ Shareholder approval 股东批准
  - ✓ Competition authority approval 竞争监管机构批准
  - ✓ Reorganisation of the group 集团重组
  - ✓ Regulatory consents (less common in England than in PRC)
    政府机关批准（常见于中国交易，英国交易中少见）
  - ✓ No material adverse change in the business since signing
    签署日后未发生重大不利变化

- Not common to have conditions relating to:
  以下交割条件较为少见：
  - ○ Internal approvals 内部批准
  - ○ Financing 与融资相关的条件

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Competition law issues (1/4)
竞争法问题（1/4）

- Does the transaction trigger any competition filings?
  该类交易是否会触发任何反垄断申报？
  - Mandatory or voluntary 强制或自愿性申报
  - Suspensory 中止交易
- How will any competition filings impact on the deal timetable?
  反垄断申报会对交易时间表造成什么影响？

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Competition law issues (2/4)
竞争法问题（2/4）

- What are the consequences of failing to make a competition filing where the thresholds are triggered?
  达到反垄断申报条件而未进行申报会引发什么后果？

Altice / PT Portugal

fined €124.5m by the European Commission
被欧洲委员会罚款一亿二千四百五十万欧元

Marine Harvest ASA

fined €20m by the European Commission
被欧洲委员会罚款两千万欧元

- Providing information in the competition filing that is not correct
  反垄断申报中的申报信息不准确

Facebook / WhatsApp

fined €110m by the European Commission
被欧洲委员会罚款一亿一千万欧元

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Competition law issues (3/4)
竞争法问题（3/4）

- Does the transaction raise substantive issues that may lead to a reduction in competition?
  该交易是否会产生实质性限制竞争的效果？
  - Because the parties are competitors or have a significant vertical relationship
    因为交易双方互为竞争对手或存在上下游关系
  - If so 如果是：
    - What is the likelihood that in-depth investigation will delay completion?
      深入调查而拖延交割时间的可能性有多大？
    - What is the risk that the deal will need remedies to address concerns and obtain clearance?
      交易需采取补救措施去解决竞争法问题从而获批的风险有多大？
    - What is the risk that transaction will not compete?
      交易无法完成的风险有多大？

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Competition law issues（4/4）
竞争法问题（4/4）

- All “group” companies are relevant to assessment of whether there is any substantive issue
  在评估实质影响时应将所有集团公司纳入考虑
  - How does that work in the case of Chinese State Owned Entities (SOE)?
    涉及国有企业的案例该如何操作？
  - Are all SOEs part of one “group”?
    是否所有国企均属于一个“集团”？

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Purchase price (consideration) and structure
收购价格（对价）及结构

- Parties are free to agree any purchase price structure they desire
  当事人有权自由协定收购价格和定价机制

- Common structures include 常见的结构包括：

Upfront purchase price and post completion adjustment 事先确定收购价格和交割后价格调整	Locked-box structure 锁箱机制	Earn-outs (common for early stage businesses) 业绩奖励（目标公司为初创企业的交易较为常见）	Escrow 第三方托管

- Issues arising include 引起的问题包括：

Calculation and preparation of accounts 财务报表的计算及准备	Security for post completion payments 交割后付款的担保	Dispute resolution 争议解决	Set off 抵销

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Representations (1/2)
陈述（1/2）

- Statements made by one party to another in connection with the sale. Becomes a “misrepresentation” if it is untrue and induced the other party to enter into the contract
  是由一方向另一方作出的与交易相关的陈述。若所陈述内容失实且诱导另一方订立本合同，则为虚假陈述。

- May or may not also be written in the sale and purchase agreement
  不一定是写在买卖协议中的

- Silence does not amount to a mis-representation but half truths can be (that is, a statement that is true but leaves something material unsaid which would be a misrepresentation).
  完全不说本身不视为虚假陈述，但不完全真实的陈述可能是虚假陈述（如只陈述部分事实而隐瞒某些实质相关的内容）

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Representations (2/2)
陈述（2/2）

- Can be 可以是:
  - Fraudulent (intentionally misleading)
    欺诈（故意误导）
  - Negligent (carelessly, without reasonable grounds);or
    过失（不合理的粗心大意）或
  - Innocent (made on reasonable grounds but untrue)
    无过错的（根据合理依据做出的但非真实的）

- Remedies can include damages and rescission (voiding the agreement)
  救济方式可包括赔偿损失和解除（协议自始无效）

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Warranties (1/2)
承诺（1/2）

- Principle of “caveat emptor” in English M&A
  英国并购法律中的“买方自慎”原则

- Warranties are contractual statements from the Seller contained in the sale and purchase agreement regarding the condition of the target company and its business
  承诺是指卖方在买卖协议中作出的关于目标公司及其业务状况的合同性质的陈述。

- Warranties seek to 承诺旨在：
  - Encourage disclosure to ensure a proper price; and
    鼓励卖方主动披露以确定合适的价格；及
  - Give the buyer a remedy in the event the statements are not true
    针对虚假声明给予买方救济权利

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Warranties (2/2)
承诺（2/2）

- Buyer can claim if a warranty is breached and it can demonstrate that the value of the target business is lower than it would have been if the warranty was true
  若卖方违反承诺且买方能够证明目标公司及业务的价值因承诺不真实而降低，则买方有权要求赔偿

- Buyer must mitigate its loss
  买方须补救自身损失

- Seller often seeks to limit its liability under the warranties in amount and time
  卖方通常会要求对其在承诺项下的责任在金额或期限上加以限制

- Seller makes disclosures against the warranties
  卖方针对各项承诺来进行不符合承诺的信息披露

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Indemnities
赔偿

- A promise by the Seller to reimburse the Buyer if a specific liability arises
  卖方针对某项特定的责任来补偿买方损失的承诺
- Tightly defined around an identified risk (for example, environmental liabilities or tax) 围绕某特定风险做出严格限定（如环保或税务责任）
- Indemnities seek to move liability from the Buyer to the Seller
  赔偿旨在将责任风险从买方转移至卖方
- No requirement for Buyer to prove loss or mitigate
  不要求买方证明损失或补救损失
- Buyer can recover on a “dollar-for-dollar” basis
  买方可以就实际损失获得全额补偿

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Warranty and Indemnity Insurance
承诺及赔偿保险

- Insurance provided by an insurer which covers claims under the warranties and indemnities
  由保险公司提供的承保因承诺及赔偿条款引起的索赔
- Can be taken out by the Buyer or the Seller
  可由买方或卖方投保
- Allows Seller to have a clean break with no remaining liability after the sale
  便于卖方在该交易后不再承担任何赔偿责任
- Protects Buyer from Seller bankruptcy or non-payment
  保护买方不遭受卖方破产或不付赔偿款导致的损失
- Can extend coverage to meet gap in negotiation position of parties
  可扩大承保范围以弥补双方谈判中的差距
- Carve-outs need to be carefully considered
  必须谨慎考虑免赔事项

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Non-compete provisions
竞业限制

- Protect the goodwill of the business once transferred to the Buyer
  保护买方接手后公司业务的商誉
- Need to consider scope of non-compete 需考虑竞业限制的范围：
  - Duration 持续时间
  - Types of business 业务种类
  - Geographic coverage 地理范围
- Compliance can be connected to payment of earn-out consideration
  可以将遵守竞业限制作为支付业绩奖励的条件

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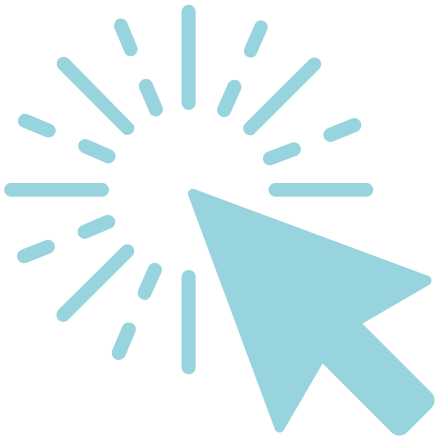
Technology transactions
科技公司的收购

- Intellectual property is key 知识产权是关键：
  - Due diligence 尽职调查
  - Warranties 承诺
  - Third party licences 第三方授权
  - Transfer 转让
  - Registration 登记
- Data protection 数据保护
  - Due diligence and avoiding a breach
    数据尽职调查与避免违约
  - Use by Buyer's group of target owned personal data
    买方集团使用目标公司拥有的个人数据
- Non-compete provisions 竞业限制
- Regulatory consents 主管机关的批准



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National security and investment regimes – A growing trend (1/2)
国家安全及调查制度 - 趋势（1/2）

- European governments are becoming increasingly interventionist on the grounds of national security
  欧洲各国政府以国家安全为由越来越多地进行干预
- What does “national security” mean?
  什么是“国家安全”？
- UK Department for Business Energy and Industrial Strategy “White Paper”
  英国商业、能源及产业策略部“白皮书”
  - Proposals for legislation that would radically change the way national security mergers are reviewed in the UK
    其中的立法提议将对英国审查国家安全并购的方式作出重大改变

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National security and investment regimes - A growing trend (2/2)
国家安全及调查制度 – 趋势 （2/2）

Germany and France are looking to tighten review of foreign investments
德国与法国计划收紧对外国投资的审查

EU also considering putting in place a framework
欧盟正在考虑出台国家安全审查框架

Rules apply also in relation to **minority investments**
审查制度同样适用于**少数股权的收购**

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UK National Security and Investment White Paper - What is caught? (1/2)
英国国家安全与投资白皮书–哪类交易将受到约束?（1/2）

Significantly extend current UK national security regime
显著扩展了现有的英国国家安全制度

Any “senior minister” can call in a transaction
任何“高级部长”均有权提名审查某项交易

Includes acquisition of:
包括：

- Assets 资产收购
- Minority stake in a target: 25% of shares and/or significant influence
  收购目标公司少数股权：25%的股权及/或产生显著影响

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UK National Security and Investment White Paper - What is caught? (2/2)
英国国家安全与投资白皮书 – 哪类交易将受到约束？（2/2）

"Risk to national security" higher where target active in certain areas:
若目标公司从事以下领域行业，"国家安全的风险"更高：

- Infrastructure 基础设施
- Advanced technology 先进科技
- Critical government assets 关键政府资产

Risk also identified as being higher in relation to certain acquirers – do they have the potential to use the target to undermine national security?
特定收购人亦被认定风险更高 – 是否存在利用目标公司危害国家安全的风险？

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UK National Security and Investment White Paper – The Process (1/2)
英国国家安全与投资白皮书 - 流程 （1/2）

- Government serves a “Call-In Notice”
  政府发出“审查通知”
  - Serving a Call-In Notice has suspensory effect
    发出审查通知可暂停交易
    - Non-completed transactions – stand-still: no further integration
      未完成交易 - 中止：不得继续进展
    - Completed transactions – cannot complete
      已完成交易 - 交割无效
  - 30 working days to assess if there is a national security risk
    30个工作日评估是否存在国家安全风险
  - Government can extend timetable by 45 working days and further extension in agreement with parties
    政府可将审查期限延长至45个工作日并可在当事人同意后进一步延长

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UK National Security and Investment White Paper – The Process (2/2)
英国国家安全与投资白皮书 - 流程（2/2）

- Parties can voluntarily notify deals which may raise national security risk
  当事人可主动向政府申报有可能引起国家安全风险的交易
- Expected that 预计：
  - Around 200 deals will be reviewed each year under the new powers
    每年约有200宗交易会依据新制度接受审查
  - A sub-set (around 100?) will be subject to full national security assessment
    当中的一部分（约100宗？）将会被进行全面国家安全评估
  - A further sub-set (around 50?) will be subject to imposition of remedies by government to prevent or mitigate national security risks, including blocking the deal
    被全面评估的交易中又有一部分（约50宗？）将被政府采取包括阻止交易在内的强制补救措施以防止或减轻国家安全风险

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New UK National Security and Investment Regime – What does a potential acquirer need to know?
英国国家安全与投资制度 – 潜在收购人需要知道什么？

- Could the regime apply to your deal?
  该制度是否适用于你的交易？
  - What are the activities of the target?
    目标公司从事哪些业务？
- Do you need to notify - or is it advisable to do so on a precautionary basis?
  你是否需要通知 – 或者是否建议作为预防措施而申报交易？
- How does the national security process fit in with any other competition filings triggered by the deal? 国家安全评估流程如何与交易触发的其他反垄断申报相结合？
- What additional conditions precedent do you need to reflect the risk of an intervention on national security grounds?
  需要哪些额外交割条件来防范以国家安全为由的政府干预对交易造成的风险？

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Appendix: Comparison between Private and Public M&A (1/4)

附录：非上市公司与上市公司收购对比 （1/4）

	Public M&A 上市公司收购	**Private M&A 非上市公司收购**
Parties **当事方**	Offeror/bidder, Offeree/target 要约方/收购方，受要约方/目标公司 Typically, a financial adviser required for both bidder and target 通常情形下，收购方和目标公司都要求聘用财务顾问	Seller(s), Buyer and (sometimes) Guarantor 卖方、买方和（有时）担保方
Negotiation **谈判**	Bidder negotiates with the target board (offer ultimately accepted/ rejected by the target shareholders) 收购方与目标公司董事会谈判（要约最终由目标公司股东接受/拒绝） May be recommended, hostile or contested 可以是友好、敌意或竞争	Buyer negotiates with target shareholder(s) 买方与目标公司股东谈判 Generally all parties must agree, although consider drag and tag provisions 通常须经过所有股东同意，但也考虑拖售权和随售权条款 All terms negotiated (other than competition, special industry etc.) 所有条款均由双方谈判确定（反垄断、特别行业等情形除外）

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Appendix: Comparison between Private and Public M&A (2/4)
附录：非上市公司与上市公司收购对比（2/4）

	Public M&A 上市公司收购	Private M&A 非上市公司收购
Due diligence 尽职调查	Usually a greater degree of publicly available information, provision of other information is dependent on target board 通常有较大程度的公开可获得信息，是否提供其他非公开信息取决于目标公司董事会 Restricted due diligence by acquirer 由收购方进行限制性尽职调查	Usually a lesser degree of publicly available information, provision of other information is dependent on relative commercial bargaining power of parties 通常有较小程度的公开可获得信息，是否提供其他非公开信息取决于各方的相对商业谈判能力 Extensive due diligence by acquirer is usual e.g. (virtual) data room 通常由收购方进行深入的尽职调查，例如通过线上数据库 Buyer beware vs. principles of good faith 买方注意 vs. 诚实信用原则
Documentation 文件	Standard documents sent to all shareholders 标准格式的文件发送至所有股东	Bespoke sale and purchase agreement 根据不同交易所定制的买卖协议

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Appendix: Comparison between Private and Public M&A (3/4)

附录：非上市公司与上市公司收购对比 （3/4）

	Public M&A 上市公司收购	Private M&A 非上市公司收购
Confidentiality 保密	Initially very private (confidentiality agreements etc.) and if the transaction progresses it becomes a public process 初始阶段非常保密 （签署保密协议等）但如果交易继续进展则成为公开过程 Offer documents are public 要约文件公开	Private process. Acquisition document is usually confidential 过程保密。收购文件通常是保密的
Risk allocation 风险分担	Risk on bidder as generally no recourse exists (no warranties or indemnities, no-one to sue). So up front due diligence. Possible use of contingent value rights (not pan-European) 收购方承担风险，通常无追索权（没有承诺或赔偿，无人去诉）。因此前期尽职调查很重要。可能可以依据或有价值权（并非适用于欧盟全部国家）	Contractual protections for the buyer (such as warranties, indemnities and post-completion accounts) are negotiated to allow recourse post-acquisition 双方谈判给予买方一定的合同上的保护（例如承诺、赔偿和交割后公司财务报表），收购完成后有追索权

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Appendix: Comparison between Private and Public M&A (4/4)

附录：非上市公司与上市公司收购对比 （4/4）

	Public M&A 上市公司收购	Private M&A 非上市公司收购
Availability of funds **资金可用性**	Cash confirmation required (certain funds) 要求现金保证（某些资金）	No regulatory requirement for a buyer to confirm the availability of funds, although in an auction process bidders may be required to provide some assurance as to funding 无强制要求买方确认资金的可用性，但在拍卖程序中收购方可能被要求提供资金保证

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