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Not using the Act

Given that the Merger Act is an all-encompassing codification of mergers, demergers, conversions and transfers of both assets and liabilities, the question arises whether, instead of using the new legislation, it is still possible to conduct transactions according to other provisions of corporate law which have the same economic effect as transactions regulated by the Merger Act. Such transactions are not forbidden, as the new legislation simply regulates mergers, demergers, conversions and transfers of assets and liabilities as defined in the Act. It does not therefore exclude transactions that are based on other legal provisions, even if they lead to the same economic results as the transactions regulated by the Merger Act. Consequently, it will still be possible to conduct the following transactions:

- takeovers by exchange of shares;
- the demerger of companies by contribution in kind; and
- the transfer of defined assets and liabilities.

Takeover by exchange of shares

It is possible to combine two companies - A and B - if the owners of company B transfer their shares to company A against the issuance of new shares in company A. After such a transaction, the shareholders of the two companies that were combined in this manner own shares in company A. So the transaction has the same economic effect as a merger between company A and company B. The only difference to a formal merger is that company A does not directly hold the assets and liabilities of company B but the shares of company B. This can, however, later be corrected by a liquidation of company B or a merger of companies A and B - a merger that will be exempt from most procedural provisions if, after the transaction, company A owns at least 90% of the shares of company B.

This combination of two companies by the contribution of shares will, it is thought, still be used in many instances where it is not possible to exempt a merger from the procedural requirements. It also has the added attraction of avoiding the danger of a complaint under article 105 of the Merger Act which, in an extreme case, could result in a complete financial rebalancing of a transaction. Furthermore, the takeover by the exchange of shares method will continue to be used in exchange offers for takeovers of public companies where the boards of directors of the two companies find it impossible to agree on a merger, and therefore the acquirer has to address its offer directly to the shareholders of the target company.

Demerger of companies by contribution in kind

A result that is similar to a split regulated by the Merger Act is to form a subsidiary and contribute certain assets and liabilities to that subsidiary. In a second step, the shares of the new subsidiary can then be distributed to the companies' shareholders. The combination of these two steps leads, in the end, to exactly the same result as a demerger under the Merger Act. The advantage of this two-step approach, however, is that the new company does not remain legally responsible for the liabilities of the pre-demerger company. Because of this exposure, it is thought that the direct demerger as defined by the Merger Act will not be popular and that most companies will continue to use the two-step procedure described above.

The transfer of certain assets and liabilities

After the Merger Act, it will also be possible to structure the transfer of a business in an asset deal as a transfer of certain clearly defined assets and liabilities rather than as a transfer of assets and liabilities as defined in the Merger Act. The disadvantage of such a procedure is that every asset and liability has to be transferred in the form prescribed by the Civil Code and the Code of Obligations for the transfer of such assets and liabilities. This requirement will often result in a series of single transfers, whereas, in a transfer of assets and liabilities as defined in the Merger Act, one single act of transfer will be sufficient. However, the advantage of single transfers is that the acquirer only acquires the liabilities listed in the

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Mergers: procedure and protection of shareholders

Mergers will be the most important type of transaction under the new Merger Act. In contrast to the old legal position, under the new merger legislation it will be possible to have triangular mergers and even a squeeze-out. Moreover, under certain conditions, it will also be possible to have a merger as a restructuring measure.

A merger is the combining of all the assets, liabilities and contractual obligations of two or more companies in circumstances where there is always one absorbing company and one or several transferring companies. All active and passive legal relationships, as well as all contractual obligations, are transferred through universal succession upon the registration of the merger in the commercial register. At the same time, the members in the transferring company generally become members in the absorbing company and the transferring company is dissolved.

Merger agreement

The first step in the conclusion of a merger is for the merging companies to execute a merger agreement. This agreement has to be concluded by the supreme managing or administrative body of each merging company and must be in writing. A notarisation of the merger agreement is not necessary, even if real property is to be transferred through the merger.

The Merger Act sets out a list of particulars that must be contained in the merger agreement. Several of these particulars concern the exchange of participation rights in the transferring company for participation rights in the absorbing company. Notwithstanding these issues, the merger agreement must also contain all special benefit agreements for the members of the supreme managing or administrative bodies as well as specifying the date on which the merger will take effect. The date of effectiveness is of direct relevance only to the merging companies. As regards third parties, a merger will always become effective as of the date of registration in the commercial register.

Safeguarding participation rights

As already mentioned, an essential part of a merger agreement relates to the compensation of the members in the transferring company for their participation rights in the transferring company. The Merger Act embodies the principle of continuity of participation. This is considered to be a basic principle in each and every merger. According to this principle, members in the transferring company are entitled to participation rights in the absorbing company that are equal to their former participation rights. The determination of the exchange ratio shall be made upon a valuation of the merging companies, whereby such valuation shall be made on a standalone basis of each company. The relevant date for the determination of the value of a company is the date of the conclusion of the merger agreement. If the last audited balance sheet is more than six months prior to the date of the conclusion of the merger agreement, the merging companies must establish an interim balance sheet.

Although the new Merger Act embodies the principle of continuity of participation, an important exception is made. A merger agreement may give members of the transferring

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company a right to choose between a participation in the absorbing company, or otherwise a settlement. Moreover, a merger agreement might provide for a settlement only. In such a case, the merger agreement would have to be approved by 90% of the members in the transferring company. The settlement might be in cash or in the form of other assets - for example, shares in a parent company. Such provision would enable the parties to conduct a triangular merger through which the members in the transferring company would not become members in the absorbing company but, instead, in its parent company.

If participation or membership rights are not adequately safeguarded, or if the settlement itself is inadequate, each member has the right (within two months after the publication of the merger) to request the court to fix an adequate compensation payment, payable by the absorbing company. Such a judgment would be effective for all members in the participating companies so long as they have the same legal status as the claimant. The costs of the proceeding would be borne by the surviving company. It should be noted that the participation quota in the company will not be changed by such a claim.

Merger report and audit

In addition to the merger agreement, each company has a duty to prepare a written report on the merger. The responsibility for the merger report lies within the supreme managing or administrative bodies of the various merging companies. The merger report must explain and justify from both a legal and economic viewpoint the purpose and the consequences of the merger, as well as certain aspects of the merger contract. The merger report must also explain and justify the consequences of the merger for employees and for the creditors of the merging companies. The merging companies may write a joint report.

The merging companies must have the merger contract, the merger report and the balance sheet on which the merger is based verified by a specially qualified auditor if the absorbing company is a company with stated capital or a co-operative with participation certificates. The auditor must provide a written audit report focusing mainly on the determination of the exchange ratio for participations or the settlement.

In the case of a merger of companies with a loss of capital or overindebtedness, a specially qualified auditor must also confirm that the other company has freely disposable equity equivalent to the amount of insufficient coverage or, if need be, of the overindebtedness, or that creditors of the merging companies will subordinate their claims in an equal amount.

Information to partners and employees

Prior to the approval of a merger agreement by the members, each of the merging companies must give its members 30 days to inspect the merger contract, the merger report, the audit report and the annual accounts and annual reports for the preceding three business years of all the merging companies. Each member may request copies of these documents, which must be given to them free of charge. As each of the merging companies must inform its members (in an appropriate form) of the possibility of inspection, this notification will in most cases be combined with the invitation to the general meeting. This also means that - in the case of a corporation - the 20-day period for the invitation for the general meeting will normally be extended to a 30-day period.

The companies involved in a merger must notify their employees' representatives according to article 333a of the Swiss Code of Obligations. The notification must take place prior to the merger resolution of the general meeting. The supreme managing or administrative body must inform the general meeting of the result of the consultation, prior to the merger resolution. If the companies do not comply with these provisions, the employees' representatives may request the court to prohibit the entry of the merger in the commercial register.

Finally, if considerable changes in the assets or liabilities occur in one of the merging companies between the date of conclusion of the merger agreement and the resolution by the

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general meeting, the supreme managing or administrative body of that company must inform the supreme managing or administrative bodies of the other merging companies. In this case, all merging companies must examine whether the merger agreement should be changed, or if the merger should be stopped. In such an event, they must withdraw their motion for approval. Otherwise, they must justify to the general meeting why the merger agreement does not need to be modified.

Approval

The merger agreement must be submitted to the general meeting of each company for approval. The merger resolution needs to be in the form of a public deed. In the case of a corporation, the approval requires a majority of two-thirds of the votes of the shares represented at the general meeting, and the absolute majority of the par value of the shares represented. If the merger contract provides only for a settlement, the merger resolution must require the consent of at least 90% of the shareholders having voting rights in the transferring company. The taking over of a company by a corporation with unlimited members requires, in addition to the ordinary majorities, the written consent of all members with unlimited liability.

As soon as all merging companies have adopted the merger resolution, their supreme managing or administrative bodies need to apply for the registration of the merger with the commercial register. The merger will become legally effective upon registration in the commercial register. When that happens, the transferring company is deleted.

Simpler procedures

In the case of a merger between sister companies with stated capital, a merger agreement need only contain some of the particulars requested in normal mergers. Moreover, such sister companies do not have to:

- establish a merger report;
- ensure that the merger contract is verified;
- grant the right to inspection; or
- submit the contract to the general meeting for approval.

In the case of a merger between a parent company with a subsidiary in which it possesses at least 90% of the issued capital, a merger agreement need only contain some of the particulars required in a normal merger if holders of minority shares, in addition to participation rights of the surviving company, are offered a settlement that corresponds to the real value of their participation rights. Moreover, in this case, they neither have to establish a merger report nor submit the contract to the general meeting for resolution.

Small and medium sized enterprises may, if all members agree, dispense with having a merger report, the verification of the merger contract and the merger report, and the inspection procedure.

Creditor protection

Unlike the current law, which contains detailed provisions for the protection of creditors of the merging companies, the Merger Act provides for no direct creditor protection. However, after the registration of a merger with the commercial register, the absorbing company must secure the claims of the creditors of the merging companies, if requested, within three months after the registration. The merging companies must inform their creditors of their rights unless a specially qualified auditor asserts that no claims are known or expected that could not be satisfied by the freely disposable assets of the merging companies. There is no duty to secure if the company proves that satisfaction of the claim is not jeopardised by the merger.

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