



Corporate Law Newsletter

Swiss Guide to Successful Cross-Border Mergers

Introduction

Cross-border mergers are still quite rare in Switzerland. According to our research based upon the publications in the Swiss Commercial Gazette ("SHAB") between 2013 and 2014¹ only eight immigration and eleven emigration mergers were registers in the commercial registry. These numbers do not include the mere immigration or emigration of a company without a merger. In the case of emigration mergers prominent names such as Tyco, Wheatherford, Pentair and Noble Corporation are included.

Alternatives to cross-border merger may include the migration of the company combined with a subsequent domestic merger or the transfer of all assets and, liabilities. Which alternative that will be ultimately chosen, depends primarily on tax considerations and from a Swiss perspective, whether the foreign law permits a cross-border merger.

General Swiss Legal Framework

According to Art. 163a Swiss Private International Law Act (SPILA)², a Swiss company may absorb or merge with a foreign company into a new company, provided the law of the foreign company permits this and the respective preconditions are met. The provisions of the Swiss Merger Act³ will apply.

Similarly, as Swiss company may be absorbed by or merge with a foreign company provided it can demonstrate that (i) all of its assets and liabilities are assumed by the foreign company and (ii) the shareholder or ownership rights of the Swiss company are adequately protected by the foreign company (Art. 163b SPILA). The Swiss company will need to comply with the Swiss law Merger provisions applicable to the transferred company.

Creditor Protection

In both cases a notice to the creditors will need to be published for the filing of their claims against the company. Such notice must inform the creditors of their right to request a security for their claims. In the case of an immigration merger no notice is required where a special qualified auditor confirms that there are no known and expected claims which cannot be satisfied from the company's free available assets. In the case of an emigration no security will be required where the company demonstrates that the creditors' claims are not jeopardized (see Art. 163b SPILA and Arts. 25 and 46 Swiss Merger Act).

Immigration Merger

Legal Opinion on Foreign Law

In a first step it must be verified, whether the law applicable to the foreign company permits a cross-border merger with a Swiss company. Depending upon the foreign law, it might be required to first change its legal form. Alternatively the domicile may have to be migrated to a different country permitting a cross-border merger. Once the permissibility of the cross-border merger can be confirmed in principle, a legal opinion from the Swiss Institute of Comparative Law must be obtained ("Institute").

Typically the corporate documents of the entities concerned must be submitted to the Institute which includes the merger agreement and other documents such as the merger report. The Institute will also examine, whether creditor and employee protection rules of the foreign entity will be complied with. The Institute's opinion forms part of the documents to be filed with the Swiss Commercial Registry (Art. 146 para. 1 b Commercial Registry Ordinance)⁴.

¹ www.shab.ch

² SR 291

³ SR 221.301

⁴ SR 221.411



Merger Balance Sheet

A merger balance sheet of the entity to be absorbed must be prepared. Typically the merger balance sheet will have to be audited, unless under the foreign law no audit is required. The merger balance sheet must not be older than six months.

Merger Agreement

From a Swiss law perspective, the Merger Agreement must contain the following mandatory elements (Art. 12 and 13 Merger Act):

- Name, registered domicile and legal form of the company's concerned;
- Information on exchange ratio or consideration and membership rights;
- Special rights granted to the holders of privileged rights, non-voting shares and benefit certificates;
- conversion modalities;
- date of dividend and other benefit entitlements;
- consideration other than membership rights (if any);
- date on which the actions of the transferred entity are for the account of the surviving or newly formed entity;
- special benefits granted to executives;
- designation of unlimited liability members (if any).

According to Art. 163c SPILA, the merger agreement must also comply with the mandatory provision of the laws applicable to the foreign companies concerned.

Merger Report

Merger report by the supreme executive body which must contain the following mandatory elements both from a legal and business perspective (Art. 14 Merger Act):

- purpose of merger
- merger agreement;
- exchange ratio and other compensation and membership rights;
- consideration in lieu of membership rights if any;
- peculiarities regarding the valuation for the purpose of the determination of the exchange ratio;
- amount of capital increase (if any)

- obligation to make further payments (not fully paid up shares) or personal liability for members;
- obligations for members in case of a merger of companies of a different legal form;
- effect of merger on employees;
- effect of merger on creditors;
- regulatory approvals.

Provided all of the members of the companies concerned consent to the merger, no merger report is required for smaller companies whose shares are not listed on a stock exchange, have not publicly issued bonds outstanding and which do not meet two of the following criteria: (i) Balance sheet sum CHF 20 Million, (ii) revenue CHF 40 Million and (iii) 250 full time employees (see Art. 14 Abs. 2 Swiss Merger Act).

Review of Merger Agreement and Merger Report

In the case of a stock corporation, limited liability corporation and stock corporation with unlimited liability members, the merger agreement, merger report and the merger balance sheet must be examined by a special qualified auditor. In the case no merger report is required (see above), no review will be required, provided all of the companies' members (share holders) consent to the merger.

Emigration Merger

In case of an emigration merger, substantially the same documents will be required as for an immigration merger. The Swiss company can only be deregistered if a special qualified auditor confirms that the claims of the creditors that have requested security for their claims have been secured or satisfied (Art. 164 para 1 Commercial Registry Ordinance and Art. 46 Swiss Merger Act). In addition it must be demonstrated that the merger has become effective under foreign law; and a special qualified auditor must confirm that the foreign entity has granted membership rights to the members of the Swiss entity or (if applicable) secured or paid the consideration in lieu of the membership rights (Art. 164 para. 2 SPILA).

Comment

Cross-border mergers are a multidisciplinary, document heavy exercise and need careful planning and coordination from all advisors of the jurisdictions concerned. Typically, once the financial, operational and legal ramifications of a cross-border merger have been evaluated, a step plan identifying the individual



steps, the responsible persons, the documents required and the timing will be drawn up. A detailed step plan will help to avoid unpleasant surprises with the execution of the merger. Language barriers between the different register offices and their practice in handling cross-border mergers must also be sorted out in advance.

A pre-filing examination of the documents is recommended from a Swiss perspective to avoid last minute changes and to ensure a smooth execution. The preparation of the documents required under Swiss and foreign law and the translations into the language at the register requires often more time than anticipated.

If after the first analysis it appears that a merger is not possible due to the incompatibility of the different jurisdictions or register offices involved, often a creative approach such as changing the registration office of one entity, its migration in another EU country from which an immigration merger is possible or alternative scenarios such as migration and completion of a domestic merger or a transfer of all assets and liabilities may lead to a similar result.

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THOUVENIN rechtsanwälte compact

THOUVENIN rechtsanwälte is an innovative and partner-centred law firm with more than three decades of experience in business law. Our experienced corporate law team advises on a wide range of contentious and non-contentious issues related to corporate law, restructuring, financing as well as mergers and acquisitions. Members of our corporate team are ranked by Chambers & Partners and legal 500.

Thouvenin Rechtsanwälte recently completed a successful cross-border merger between a Swiss group of companies and an Austrian group of companies. Arlette Pfister was leading the transaction from the Swiss side.

More detailed information and further corporate law Newsletters can be accessed at www.thouvenin.com