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NewsLetter

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New Merger Law in Switzerland

The Swiss Parliament passed the Federal Law Concerning Merger, Demerger, Conversion and Transfer of Assets and Liabilities *(Bundesgesetz über Fusion, Spaltung, Umwandlung und Vermögensübertragung)* (the "Merger Law") on 3 October 2003. The Merger Law establishes the framework for legal restructurings in Switzerland. It is expected to enter into force on 1 July 2004. This NewsLetter addresses only the corporate law aspects of restructurings.

Prior Legal Provisions

Mergers, demergers, changes in the form of the business organisation (conversions) and transfers of assets and liabilities were not clearly addressed in Swiss private law. Despite the flexible practices of the various commercial register offices, it seemed appropriate to create the Merger Law and establish clear legal provisions for these various forms of restructurings. The term "company" refers to the many types of organisations subject to the Merger Law, including a corporation *(Aktiengesellschaft)* and a limited liability company *(Gesellschaft mit beschränkter Haftung, GmbH).*

by Dr. Urs P. Gnos
+41 1 265 75 39
ugnos@wwp.ch

Merger

A merger can be described as the combination of two or more companies, with the result that the acquired company is dissolved without liquidation. Its assets and liabilities are transferred through the force of law, without any of the usual formalities for the transfer of ownership or the assumption of liability, to the acquiring company. The shareholders of the acquired company become shareholders of the acquiring company. The merger can be achieved through either an absorption of the acquired company into the acquiring company *(Absorption)* or by the amalgamation of two or more companies into a newly established acquiring company *(Kombination)*. In the case of an *Absorption*, one or more companies are dissolved without liquidation and the assets and liabilities are transferred to the acquiring company. In a *Kombination*, two or more companies are dissolved without liquidation and their assets and liabilities are assumed by a newly established company.

The shareholders of an acquired company have a fundamental right to become shareholders in the acquiring company. Their participation and membership rights in the acquiring company should reflect the assets and liabilities of the involved companies, as well as the voting rights and all other relevant facts relating to the rights of the shares of the acquired company. The merger agreement can in any case provide for the option of a distribution of cash or other compensation, or even for a compulsory compensation, in lieu of a distribution of shares in the acquiring company to the shareholders of the acquired company. Compulsory compensation requires a resolution approving the merger which is supported by 90% of the voting rights of the shareholders of the acquired company.

A specially qualified auditor *(besonders befähigter Revisor)* is to review the merger agreement, the merger report established by the ultimate management bodies and the financial statements. The shareholders' meetings of the involved companies must approve the merger. When registered in the commercial register *(Handelsregister)*, the merger becomes legally effective, all assets and liabilities of the acquired company are transferred to the acquiring company and the acquired company is then deleted from the commercial register.

The Merger Law provides simplified procedures for mergers between small and medium-sized companies and for mergers within the same corporate group. It further contains provisions for the protection of creditors and employees.

Demerger

A company can dispose of or divest a part of its assets and liabilities by transferring them to another company through a demerger in which participation and shareholder rights in the acquiring company are granted to the shareholders of the divesting company. A divesting

company can divide all of its assets and the related liabilities and transfer them to two or more acquiring companies which results in the dissolution of the divesting company *(Aufspaltung)* or it can transfer only a part of its assets and liabilities to another company *(Abspaltung)*.

A demerger is based on a demerger agreement or, if assets and liabilities will be transferred to a newly established company, a demerger plan. An inventory of the assets and liabilities of the divesting company must be prepared that shows their allocation to the divesting and the acquiring company. A specially qualified auditor is to review the demerger agreement, the demerger plan, the demerger report and the financial statements of the divesting company. The creditors of the companies involved in the demerger must be given notice in the Swiss Official Gazette of Commerce *(Schweizerisches Handelsamtsblatt)* that in the next two months they can require security for their claims. A resolution for approval of the demerger can be presented at the relevant shareholders' meetings only after security for such claims has been provided. The demerger becomes legally effective upon its entry in the commercial register. The Merger Law specifies measures for employee protection and provides for simplified demergers of small and medium-sized companies.

Conversion of Companies

The Merger Law governs how a company can change its legal form, for example convert from a limited liability company into a corporation. A specially qualified auditor is to review the written conversion plan, the conversion report drafted by the ultimate managing body and the underlying financial statements. A shareholders' meeting must adopt a resolution approving the conversion. The conversion becomes legally effective when it is registered in the commercial register. The Merger Law relies on the provisions applicable to mergers for creditors' and employees' protection and provides for a simplified conversion involving small and medium-sized companies.

Transfer of Assets and Liabilities

The assets and liabilities transfer provisions of the Merger Law are applicable to types of restructurings which were not specifically addressed in the law or as alternative procedures to regulated restructurings. They are furthermore suitable for transfers of assets and liabilities which occur (a) in the course of a contribution in kind in connection with the incorporation of a company (*Sacheinlage*) or (b) a distribution of assets to shareholders when a company is liquidated. The basis for a transfer of assets and liabilities is a written transfer agreement, which includes an inventory that specifically identifies the assets and liabilities to be transferred. The transfer becomes effective when registered in the commercial register. The Merger Law here again contains provisions for the protection of creditors and employees.

Additional Provisions

The Merger Law contains special provisions for (a) mergers and transfers of assets and liabilities involving foundations, (b) mergers, conversions and transfers of assets and liabilities of pension funds as well as (c) for mergers, conversions and transfers of assets and liabilities of public law institutions. Also included are provisions prescribing how shareholders can challenge resolutions of restructurings.

Interim Provisions

The Merger Law applies to restructurings which are entered into the commercial register after the effective date of the law (which is expected to be 1 July 2004). Those involved in the planning of such restructurings should ensure that transactions concluded under prior law are entered into the commercial register before the effective date of the Merger Law and that transactions which clearly will be concluded thereafter will be in compliance with the new law.

ww&p **Walder Wyss & Partners**
Attorneys at Law

Münstergasse 2
P.O. Box 2990
CH-8022 Zurich
Phone +41 1 265 75 11
Fax +41 1 265 75 50
reception@wwp.ch
www.wwp.ch

London Representative Office
9 Gray's Inn Square
London WC1R 5JQ
Phone +44 20 7405 2043
Fax +44 20 7405 0605