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Swiss Merger Act

An Introduction to the Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities (Merger Act)

With a Translation of the Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003 (Merger Act) and the Amendments to Existing Laws

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LIST OF ABBREVIATIONS

Acart	Federal Act on Cartels and Other Restraints of Competition (Act of Cartels) of 6 October 1995
Art.	Article
BGE	Decision of the Swiss Federal Supreme Court (*Bundesgerichtsentscheid*)
CC	Swiss Civil Code of 10 December 1907
CHF	Swiss francs
CO	Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: Code of Obligations)
DEBL	Debt Enforcement and Bankruptcy Law of 16 December 1994
FAHDT	Federal Act on the Harmonisation of the Direct Taxes of the Cantons and Municipalities of 14 December 1990
FAWT	Federal Act on Withholding Taxes of 13 October 1965
FDTA	Federal Direct Tax Act of 14 December 1990
LOB	Federal Law on the Occupational Old Age, Survivors and Disability Benefit Plan of 25 June 1982
Lugano Convention	Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988
MA	Federal Act Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003
p.	page
para.	paragraph
PIL	Federal Act on International Private Law of 18 December 1987
SFAJ	Federal Act on the Place of Jurisdiction in Civil Matters of 24 March 2000

SDA	Federal Act on Stamp Duty (Stamp Duty Act) of 27 June 1973
SOGC	Swiss Official Gazette of Commerce (*Schweizerisches Handelsamtsblatt*)

I. GENERAL

1. Introduction

The Swiss Code of Obligations[1] contained only a few provisions concerning mergers:

- Art. 748 et seq. CO provided for the merger of corporations (*Aktiengesellschaften*);
- Art. 770 para. 3 CO extended the application of Art. 748 et seq. CO to the merger of corporations including partners with unlimited liability (*Komanditaktiengesellschaften)*;
- Art. 914 CO governed the merger of cooperatives (*Genossenschaften*); and
- the acquisition by an institution under public law (*Institute des öffentlichen Rechts*) of the assets of a corporation was governed by Art. 751 CO and of a cooperative by Art. 915 CO.

Neither the Swiss Code of Obligations nor the Swiss Civil Code[2] contained any provisions for the merger of limited liability companies (*Gesellschaften mit beschänkter Haftung*), general partnerships, limited partnerships, associations (*Vereine*) or foundations (*Stiftungen*); and Art. 750 CO and Art. 770 para. 3 CO were the only provisions that addressed a merger between two legal entities with different legal forms. A legal basis for transnational mergers was missing and, with the exception of the conversion of a corporation into a limited liability company, there were no provisions governing the conversion of a legal entity from one legal form of business organisation to another. The subject of demergers was not taken into account and the acquisition of assets and liabilities was problematic because Art. 181 CO regulated only the acquisition of liabilities and the transfer of large numbers of assets by individual transfers was fraught with practical difficulties.

In spite of the many missing elements of statutory law, the Swiss Federal Supreme Court recognised the merger of two associations, as well as the merger of two foundations. Later, academic legal opinion would reach the conclusion that the merger of legal entities having different legal forms was permissible, even in the absence of a statute providing for their merger. The Federal register of commerce faced this issue for the first time in the early 1990s, which relying on an expert legal opinion, approved the transaction. Thereafter, the Federal register of commerce permitted the merger of legal

[1] Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: Code of Obligations) / (CO), SR 220.

[2] Federal Act on Swiss Civil Code of 10 December 1907 (CC), SR 210.

entities with different legal forms if a set of prerequisites were satisfied and it later extended the practice to the conversion of a legal entity from one legal form to another. The Swiss Federal Supreme Court noted the lack of adequate legislation governing mergers and conversions of legal form and endorsed the solutions adopted by the Federal register of commerce by ruling that mergers and conversions were permissible if:

- the legal forms involved were compatible;
- the continuity of the ownership of the assets and the composition of the company's partners[3] was maintained; and
- the merger or conversion did not adversely affect the existing or potential interests of creditors.

Although the improvisations of the Federal register of commerce and the Swiss Federal Supreme Court allowed modern business needs to be met, considerations of legal certainty, and the protection of creditors, employees and owners of minority interests in the affected enterprises, made it appropriate to create clear legal rules for mergers, conversions of legal form, asset and liability transfers and other forms of restructuring that explicitly addressed the competing interests of the parties affected by the transaction.

2. Subject Matter and Terms

2.1 Subject Matter

Art. 1 para. 1 MA lists the types of corporate reorganisations which are governed by the Merger Act: mergers (*Fusionen*), demergers (*Spaltungen*), conversions (*Umwandlungen*) and transfers of assets and liabilities (*Vermögensübertragungen*) and the types of legal entities which may engage in such reorganisations: corporate entities, general and limited partnerships, cooperatives, associations, foundations and sole proprietorships.

Pursuant to Art. 1 para. 2 MA, the goals of the Merger Act, are to guarantee legal certainty and transparency and to protect creditors, employees and persons with minority ownership interests.

Art. 1 para. 3 MA allows institutions under public law to participate in mergers with legal entities under private law, to convert their legal form into legal entities under private law and to participate in transfers of assets and liabilities[4].

[3] All terms are considered to be gender-neutral even if a linguistic form may suggest a specific gender (i.e. latin *creditor* being masculine). Thus, they are equally applicable to both men and women.

[4] See below II/7., p. 58 et seq.

2.2 Terms

The Merger Act regulates mergers, demergers, conversions and transfers of assets and liabilities independently of the legal forms of the legal entities involved in these transactions and in order to make the terminology consistent in this area of law, Art. 2 MA defines the following terms[5]:

a) Legal Entities (Rechtsträger)

The term "legal entities" means all forms of organisations dealt with in the Merger Act. "Legal entities" under the Merger Act are entities registered in the register of commerce, i.e. sole proprietorships (*Einzelfirmen*), general and limited partnerships (*Kollektiv- und Kommanditgesellschaften*), corporations (*Aktiengesellschaften*), corporations including partners with unlimited liability (*Kommanditaktiengesellschaften*), limited liability companies (*Gesellschaften mit beschränkter Haftung*), cooperatives (*Genossenschaften*), associations (*Vereine*) and foundations (*Stiftungen*), as well as institutions under public law (*Institute des öffentlichen Rechts*).

b) Companies (Gesellschaften)

The term "companies" comprises general and limited partnerships, corporations, corporations including partners with unlimited liability, limited liability companies, cooperatives and associations. Occupational old age, survivors and disability institutions are excluded from the term "companies" because Art. 88 et seq. MA provide special regulations for them in respect of mergers, conversions and transfers of assets and liabilities.

c) Corporate Entities (Kapitalgesellschaften)

Corporations, corporations including partners with unlimited liability and limited liability companies are defined as "corporate entities", but not cooperatives even if the cooperations have issued participation certificates.

d) Institutions under Public Law (Institute des öffentlichen Rechts)

"Institutions under public law " are all independent institutions under public law at the federal, cantonal or municipal level, regardless of whether they are an organisation of persons (corporation) or assets dedicated to a certain purpose (institution). Institutions under public law must be registered in the register of commerce and be independent in order to be considered a legal entity in terms of the Merger Act.

[5] The catalogue of definitions in Art. 2 MA is not exhaustive. Further terms are contained in Art. 3 MA (absorption merger and combination merger), Art. 29 MA (division and spin-off), as well as Art. 31 para. 2 MA (symmetrical demerger and asymmetrical demerger).

e) *Small and Medium-Sized Enterprises (kleine und mittlere Unternehmen)*

The Merger Act contains simplified rules for small and medium-sized enterprises[6]. According to the Merger Act, a company is a small and medium-sized enterprise if it:

- has no outstanding debt securities[7]; *or*
- has no shares listed on a stock exchange; *and*
- does not exceed two of the three following threshold criteria in the two business years prior to the adoption of the merger, demerger or conversion resolution:
  - total assets of CHF 20,000,000;
  - Turnover of CHF 40,000,000;
  - an annual average of 200 full-time employment positions.

f) *Partners (Gesellschafterinnen und Gesellschafter)*

The term "partners" refers to any type of participation in a legal entity regardless of whether the membership is represented by a share certificate or not. Thus, "partners" are all shareholders in accordance with Art. 2 lit. g MA, partners in general and limited partnerships, members of cooperatives without participation certificates as well as members of associations.

g) *Shareholders (Anteilsinhaberinnen und –inhaber)*

"Shareholders" are the owners of shares, participation or profit sharing certificates, partners of limited liability companies as well as members of cooperatives with participation certificates.

h) *General Meeting (Generalversammlung)*

The term "general meeting" serves as a generic term for the supreme corporate body of a corporation, a corporation including partners with unlimited liability, a limited liability company, a cooperative and the members of an association. In case of associations and cooperatives, it also refers to the meeting of delegates, if such meeting is authorized in the relevant articles of incorporation.

i) Occupational Old Age, Survivors and Disability Institutions (Vorsorgeeinrichtungen)

"Occupational old age, survivors and disability institutions" are all institutions subject to supervision pursuant to Art. 61 et seq. LOB[8] and which are constituted as a legal entity. Registered occupational old age, survivors and disability institutions in terms of the LOB, such as occupational old age, survivors and disability foundations pursuant to Art. 89bis para. 6 CC, also are considered occupational old age, survivors and disability institutions under the Merger Act. Excluded from the concept of occupational old age, survivors and disability institutions are annex-institutions of the occupational old age, survivors and disability benefit plan.

[6] See Art. 14 para. 2 MA, Art. 15 para. 2 MA, Art. 16 para. 2 MA, Art. 39 para. 2 MA, Art. 40 MA, Art. 41 para. 2 MA, Art. 61 para. 2 MA, Art. 62 para. 2 MA and Art. 63 para. 2 MA.

[7] See Art. 1156 et seq. CO.

3. Relationship to the Act on Cartels

In addition to the Merger Act, the Act on Cartels[9] also affects the combination of enterprises, but the two laws have different objectives: the Merger Act regulates in civil law the requirements for, and the consequences of, mergers, demergers, conversions and transfers of assets and liabilities with the goal of protecting the interests of creditors, employees and holders of minority interests. By contrast, the Act on Cartels seeks to ensure effective competition, which means that restrictions may be imposed on combinations. Thus, the Merger Act controls the permissibility in civil law of mergers, demergers, conversions and transfers of assets and liabilities while the Act on Cartels imposes certain restrictions on such transactions. Therefore, Art. 1 para. 4 MA explicitly states that the provisions of the Act on Cartels shall remain unaffected.

It follows from these different legislative objectives that both laws may be applicable to the same transaction. The Act on Cartels also covers mergers, demergers, conversions and transfers of assets and liabilities if they represent a combination of enterprises as defined under the Act on Cartels. Art. 4 para. 3 Acart defines a combination of enterprises as:

- the combination of two or more enterprises previously independent of each other;[10]
- each transaction, in particular the acquisition of a participation or the conclusion of an agreement, by which one or more enterprises gain direct or indirect control over one or more previously independent enterprises or parts thereof.[11]

It becomes clear from this definition that the concept of a combination of enterprises under the Act on Cartels is not identical with the concept used in the Merger Act. For

[8] Federal Law on the Occupational Old Age, Survivors and Disability Benefit Plan of 25 June 1982 (LOB), SR 831.40.

[9] Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Act on Cartels, Acart), SR 251.

[10] Art. 4 para. 3 lit. a Acart.

[11] See Art. 4 para. 3 lit. b Acart; concerning this: also see the more concrete definition in Art. 1 of the Ordinance on the Control of Combinations of Enterprises of June 17, 1996, SR 251.4.

example, the Merger Act covers the merger of two group companies[12], but this transaction does not represent a combination of enterprises under the Act on Cartels because the group companies to be merged are linked by common ownership. Conversely, demergers and transfers of assets and liabilities may also be combinations of enterprises under the Act on Cartels if the control over part of an enterprise is changed.

Consequently, each transaction should be reviewed to determine whether a transaction subject to the Merger Act is also a combination of enterprises under the Act on Cartels. The Swiss Competition Commission (*Wettbewerbskommission*) has to be notified about the combination of enterprises prior to its conclusion if:

- the enterprises involved have a total turnover of at least CHF 2 billion or if the total turnover originating in Switzerland is at least CHF 500 Million[13], and
- at least two of the enterprises involved have a turnover originating in Switzerland of at least CHF 100 Million each[14].

For certain industries[15] and for market-dominating enterprises[16], special notification requirements apply. If a required notification is not made or submitted late, the enterprise subject to the notification requirements will be fined[17]. Further, under the Act on Cartels, a transaction subject to the Merger Act also may have to be notified to foreign competition authorities regardless of the notification requirements in Switzerland.

After receiving the notification, the Competition Commission is required to decide within one month that the combination is either of no concern or that a more thorough examination is necessary. Such an examination should be completed within a further four months[18]. The Competition Commission can prohibit the combination or approve it under various conditions if the examination shows that the combination:

[12] See especially Art. 23 et seq. MA.

[13] Art. 9 para. 1 lit. a Acart; see Art. 4 et seq. of the Ordinance on the Control of Combinations of Enterprises of 17 June 1996 for the calculation of turnover.

[14] Art. 9 para. 1 lit. b Acart; see Art. 4 et seq. of the Ordinance on the Control of Combinations of Enterprises of 17 June 1996 for the calculation of turnover.

[15] For banks and insurance companies, Art. 9 para. 3 Acart applies; for media companies, the special rules will be repealed by the revision of the Act on Cartels, which is intended to enter into force as per 1 April 2004. For the calculation of turnover see Art. 4 et seq. of the Ordinance on the Control of Combinations of Enterprises of 17 June 1996.

[16] If an enterprise involved in the combination has been determined to have market dominance, then notification is mandatory in a previous proceedings, regardless of the turnover (Art. 9 para. 4 Acart).

[17] Art. 51 Acart; a fine of up to CHF 1 million may be imposed.

[18] Art. 32 et seq. Acart.

- creates or reinforces a market dominating position[19] which may eliminate effective competition; and
- does not result in an improvement of the competitive conditions in another market, which would outweigh the disadvantages of the market dominating position[20].

A combination carried out in compliance with the Merger Act cannot be registered in the register of commerce if the combination has not received either the required approval under the Act on Cartels or the deadline pursuant to Art. 32 para. 1 Acart has passed[21, 22]. Art. 14 para. 3 lit. k MA requires the merger report to refer to granted or pending applications for the approval of the competition authorities[23].

[19] Art. 10 para. 2 lit. a Acart.

[20] Art. 10 para. 2 lit. b Acart.

[21] Art. 34 Acart.

[22] Art. 22 para. 1 MA for mergers, Art. 52 MA for demergers, Art. 73 para. 2 MA for transfers of assets and liabilities.

[23] There is no requirement for information in respect of demergers (see Art. 39 MA) or transfers of assets and liabilities (see Art. 74 MA).

II. SPECIFIC PART

1. Merger of Companies

1.1 Permissible Transactions

The academic legal definition of a merger is the legal combination of two or more companies resulting in the assumption of all assets and liabilities of the acquired company by the acquiring company by the operation of law (*Universalsukzession*), the dissolution of the acquired company without its liquidation and, normally, the grant of participation or membership rights in the acquiring company to the partners of the acquired company[24].

Art. 3 para. 1 MA provides for two types of merger:

- the absorption merger (*Absorptionsfusion*), in which one or more companies are dissolved and their assets and liabilities are transferred to an existing company[25]; and
- the combination merger (*Kombinationsfusion*), in which two or more companies are dissolved and their assets and liabilities are transferred to a newly formed company[26].

Under Art. 4 MA, corporate entities, general and limited partnerships, cooperatives, associations, foundations, occupational old age, survivors and disability institutions and institutions under public law can merge, but not sole proprietorships, as follows:

- *corporate entities* of any type can merge with other corporate entities and with cooperatives, and they can also acquire, by way of a merger, a general or limited partnership or an association registered in the register of commerce[27].
- *general and limited partnerships* can merge with other general and limited partnerships or they can be acquired, through a merger, by corporate entities or cooperatives[28].
- *cooperatives* can merge with other cooperatives, with corporate entities and, as an acquiring company, with general and limited partnerships and associations registered in the register of commerce[29]. In addition, cooperatives without participation certificates can be acquired through a merger by associations registered in the register of commerce[30].
- *associations* can merge with each other. If they are registered in the register of commerce, they also can be acquired through a merger by a corporate entity or a cooperative[31]. Finally, associations registered in the register of commerce can acquire cooperatives without participation certificates through a merger[32]. Mergers between associations are subject to simplified rules[33].

Pursuant to Art. 5 para. 1 MA, a company in liquidation can be acquired through a merger if the distribution of its assets has not yet commenced. However, this can only occur if the company is in liquidation as a result of a dissolution resolution adopted at the general meeting. If a judge or other authority ordered the dissolution, then this order precludes a merger. A company in liquidation may acquire another company through a merger but only if the dissolution resolution can still be reversed[34].

Art. 6 MA controls the so-called restructuring merger. Art. 6 para. 1 MA permits mergers for companies which no longer have assets equal to at least half of the nominal value of their share capital, company or cooperative capital and the legally prescribed reserves, or which have liabilities exceeding their assets if the other companies involved in the merger have disposable equity capital equal to the amount of the excess liabilities. According to the second sentence of Art. 6 para. 1 MA, this condition does not apply if the creditors of the companies involved in the merger agree that their claims shall be subordinated to any other claims of all other creditors. Subject to such subordination, a restructuring merger does not relieve the competent company body of its duty to inform the court of its over-indebtedness[35]. But a postponement of bankruptcy can be applied for if a merger gives rise to the prospect of a financial restructuring in terms of Art. 725a para. 1 CO. Because of the risks for creditors and persons with minority ownership interests associated with a restructuring merger, the supreme management and administrative body must submit the confirmation of a specially

[24] Representative of many: Böckli, Peter, Schweizer Aktienrecht, 2. Auflage, Zürich 1996, N 294a and 294b.

[25] Art. 3 para. 1 lit. a MA.

[26] Art. 3 para. 1 lit. b MA.

[27] Art. 4 para. 1 MA.

[28] Art. 4 para. 2 MA.

[29] Art. 4 para. 3 lit. a - d MA.

[30] Art. 4 para. 3 lit. e MA.

[31] Art. 4 para. 4 lit. a - b MA.

[32] Art. 4 para. 4 lit. c MA.

[33] Simplifications are available, for example, with regard to the merger agreement (Art. 13 para. 2 MA) and the merger report (Art. 14 para. 5 MA).

[34] Concerning this, see BGE 123 III 473.

[35] See Art. 725 CO, Art. 725a CO, Art. 817 CO and Art. 913 CO.

qualified auditor to the register of commerce, stating that the requirements of Art. 6 para. 1 MA have been fulfilled[36].

1.2 Effects on the Participation and Membership Rights

In accordance with the principle of continuity of membership, Art. 7 para. 1 MA states that the partners of the acquired company are entitled to participation and membership rights in the acquiring company which, after considering the assets of the companies involved, the allocation of voting rights and all other relevant circumstances of their current participation and ownership rights[37], must be equivalent to their current participation and membership rights. In this context, Art. 14 para. 3 lit. c MA states that the exchange ratio for the participation and membership rights must not be determined arbitrarily and that it has to be explained in the merger report. Under Art. 15 para. 4 lit. b MA, a specially qualified auditor also has to verify whether the exchange ratio for the participation rights is reasonable, how it has been determined and why the method applied is considered appropriate[38].

According to Art. 7 para. 2 MA, it is permissible to combine the exchange ratio for the participation rights with a compensation payment in cash or in kind. In view of the principle of continuity of membership, this compensation payment is limited to one-tenth of the real value of the participation rights granted at the time the merger agreement was concluded. Art. 13 para. 1 lit. b MA requires the merger agreement to include details regarding the amount of the compensation payment. Under Art. 7 para. 3 MA, partners without participation certificates[39] are entitled to at least one participation right when their company is acquired by a corporate entity. Owners of participation certificates without voting rights must be granted participation rights of at least equal value or participation rights with voting rights in the acquiring company[40]. Partners of the acquired company who have special rights attached to their participation and membership rights, such as shares with privileged voting rights and preferred shares, must be granted at least equivalent rights or appropriate compensation for the loss of their special rights[41]. Finally, owners of profit sharing certificates must be granted equivalent rights or the profit sharing certificates must be repurchased for their real value at the time the merger agreement is concluded[42].

Contrary to the principle of continuity of membership, Art. 8 para. 1 MA provides that the companies involved in the merger may grant the partners of the acquired legal entity a choice between participation and membership rights, on the one hand, or cash or other compensation on the other hand. According to Art. 8 para. 2 MA, cash or other compensation may be paid in lieu of participation and membership rights if under Art. 18 para. 5 MA the merger resolution is required to be approved by at least 90% of the partners with voting rights in the acquired company. This cash or other compensation may, for example, consist of shares in a third company. In this manner, a so-called triangular merger may take place pursuant to which an acquired company merges along with in an acquiring company (being a subsidiary integrated in a group) and the partners of the acquired company receive shares in the parent company of the acquiring company.

1.3 Capital Increase, Formation of a New Company, and Interim Balance Sheet

Art. 9 para. 1 MA states that in an absorption merger, the acquiring company must increase its share capital to the extent necessary to protect the rights of the partners of the acquired company. Only if the acquiring company holds own shares[43] or shares in the acquired company or if the acquired company for its part owns own shares or shares in the acquiring company, a capital increase of the equivalent amount may not be required.

If the merger agreement provides for the right to choose between participation and membership rights on the one hand and cash or other compensation on the other hand pursuant to Art. 8 para. 1 MA, then the acquiring company can provide clarity, with an authorized capital increase[44], in respect of the uncertainty about the amount required to increase its share capital for the merger. Note that Art. 9 para. 2 MA states that Art. 651 para. 2 CO, which restricts the maximum amount of the authorized capital increase to one half of the current share capital, is not applicable to capital increase required in connection with a merger. Furthermore, Art. 9 para. 2 MA states that the provisions of

[36] Art. 6 para. 2 MA.

[37] For example, the development prospects of the companies involved in the merger or the synergies resulting from the merger.

[38] Concerning this, see below II./1.4, p. 12 et seq.

[39] Partners of general and limited partnerships, owners of cooperatives without participation certificates, and members of associations.

[40] Art. 7 para. 4 MA.

[41] Art. 7 para. 5 MA.

[42] Art. 7 para. 6 MA.

[43] Concerning this, also see Art. 659 et seq. CO as well as Art. 807 CO.

[44] See Art. 651 et seq. CO regarding an authorized capital increase for a corporation.

the Swiss Code of Obligations regarding contributions-in-kind[45] also are not applicable[46].

In case of a combination merger, the assets and liabilities of the acquired companies are transferred to a new company to be formed[47]. Therefore, Art. 10 MA provides that the provisions of the Swiss Civil Code and the Swiss Code of Obligations pertaining to the formation a company are applicable in a merger while the provisions for corporate entities concerning contributions-in-kind and the provisions concerning the number of founders are not.

Because the balance sheets of the companies involved play a central role in determining the exchange ratio pursuant to Art. 7 MA, it is a requirement that the balance sheets used are current when the merger agreement is concluded. In order to guarantee this, Art. 11 MA requires an interim balance sheet to be prepared, if:

- on the date the merger agreement is concluded, the relevant balance sheet date is more than six months earlier; or
- since the date of the last balance sheet, important changes have occurred in the assets and liabilites of the merging companies.

Art. 11 para. 2 MA specifies that the preparation of an interim balance sheet is governed by the provisions and principles regarding annual financial statements; provided however, that a physical inventory is not necessary and the valuation contained in the last balance sheet need only to be changed in accordance with movements in the company's books. Depreciation, revaluations and provisions for the interim period, as well as substantial unrecorded changes in asset values must be reflected in the interim balance sheet.

In addition, it should be mentioned, that Art. 11 MA is applicable only to those companies which, pursuant to Art. 957 CO, are required to keep accounts, i.e. for companies required to be registered in the register of commerce.

1.4 Merger Agreement, Merger Report, and Verification

Art. 12 MA contains principles in respect of the conclusion of the merger agreement. According to Art. 12 para. 1 MA, the responsibility for concluding a merger agreement rests with the supreme management or administrative bodies of the merging companies. Depending on the legal form, these are:

• corporation/ corporation including partners with unlimited liability	board of directors[48]
• limited liability company	managing officers[49]
• cooperative	administration[50]
• general and limited partnership	partners with unlimited liability[51]
• association	committee[52]

Art. 12 para. 2 MA requires the merger agreement to be in writing and to be approved by a resolution adopted at the general meeting or, in case of general and limited partnerships, by the partners[53].

Art. 13 MA controls the objectively essential elements[54] of a merger agreement:

- The companies involved in the merger must be described accurately by giving details of the name or registered name, the registered office and the legal form. In case of a combination merger, the relevant details also are to be provided for the new company to be formed[55].
- The specification of the exchange ratio for participation rights, as well as the amount of any compensation, and details about the membership of partners of the acquired company in the acquiring company[56].
- The rights granted to the holders of special rights are to be listed, in particular the owners of preferred shares, shares with preferred voting rights, shares without voting rights, participation certificates and profit sharing certificates[57].

[45] See in particular Art. 634 CO, Art. 635 CO and Art. 635a CO regarding contributions-in-kind for corporations.

[46] The provisions concerning the merger report and its verification (Art. 14 et seq. MA) make the application of the regulations on contributions-in-kind superfluous.

[47] See above II./1.1, p. 8.

[48] See Art. 707 et seq. CO and Art. 765 CO.

[49] See Art. 811 et seq. CO.

[50] See Art. 894 et seq. CO.

[51] See Art. 535 CO, Art. 557 CO and Art. 599 CO.

[52] See Art. 69 CC.

[53] See Art. 18 para. 1 and 2 MA, see below II./1.5, p. 19 et seq.

[54] In addition to the objectively essential elements, it is up to the merging companies to make the conclusion of the agreement dependent on additional, subjectively essential elements.

[55] Art. 13 para. 1 lit. a MA.

[56] Art. 13 para. 1 lit. b MA.

- The manner in which the exchange of shares will be made must be specified, including where and when the partners of the acquired company can exchange their participation rights[58].
- Specification of the time when the participation and membership rights confer an entitlement to a share in the profits of the acquiring company and all details pertaining to this entitlement[59].
- If the partners of the acquired company are paid cash or other compensation pursuant to Art. 8 MA, the amount of such compensation is to be stated in the merger agreement[60].
- Because the merging companies can make the merger retroactive for accounting or tax reasons, the point in time must be stated when the activities of the acquired company are regarded as being carried out for the account of the acquiring company[61, 62].
- Special advantages being granted to the members of a management or administrative body or to managing partners are to be specified[63].
- Depending on the legal form of the acquiring company, the responsibility for liabilities of the other company can be extended to the partners[64]. Therefore, the names of the partners with unlimited liability also must be identified[65].

Note that, pursuant to Art. 13 para. 2 MA, the elements mentioned in Art. 13 para. 1 lit. c - f MA are not applicable to a merger between associations.

According to Art. 14 para. 1 MA, the supreme management and administrative bodies of the companies involved in the merger must prepare a written report which explains

57 Art. 13 para. 1 lit. c MA.

58 Art. 13 para. 1 lit. d MA.

59 Art. 13 para. 1 lit. e MA.

60 Art. 13 para. 1 lit. f MA.

61 Art. 13 para. 1 lit. g MA.

62 A merger becomes legally effective only once it has been registered in the register of commerce and published in the Swiss Official Gazette of Commerce, cf. Art. 22 MA and Art. 932 para. 2 CO.

63 Art. 13 para. 1 lit. h MA.

64 For example, see Art. 552 CO and Art. 568 CO for partners of a general partnership, Art. 594 CO and Art. 604 CO for the general partners of a limited partnership, as well as Art. 764 para. 1 CO for the partners of a corporation including partners with unlimited liability, charged with managing the company.

65 Art. 13 para. 1 lit. i MA.

and substantiates the legal and business significance of the merger. If all partners agree, small and medium-seized enterprises may, pursuant to Art. 14 para. 2 MA, dispense with the preparation of a merger report. Each of the merging companies decides for itself whether it wants to dispense with the preparation of a merger report. According to Art. 14 para. 5 MA, a merger report is not required in case of a merger between associations, but it is required in a merger between an association and a company with a different legal form. The merger report must address the following elements:

- The intended purpose of the merger and its consequences, in particular, the principal motivations for the merger, the resulting changes of the legal forms as well as the business and other consequences for the merging companies[66].
- The merger agreement must be explained[67].
- In order for partners to be able to judge whether their participation and membership rights have been protected appropriately, the exchange ratio and possible compensation payments are to be explained and justified[68].
- If, instead of participation and membership rights in the acquiring company the merger agreement allocates either optional or mandatory cash or other compensation to the partners of the acquired company, then the amount of such compensation must also be explained in the merger report. If no right to choose with respect of the participation and memberships offered, but only a cash or other compensation payment is to be made, the reasons for a disruption in the continuity of membership also must be stated[69].
- If, based on the assets of the merging companies, there are special considerations in the assessment of shares, which may be important in terms of determining the exchange ratio, then these also must be explained in the merger report[70].
- Because, based on the exchange ratio of the shares, it may not be possible to calculate the amount of the required capital increase necessary to be implemented by the acquiring company, the extent of such capital increase must also be explained in the merger report[71].

66 Art. 14 para. 3 lit. a MA.

67 Art. 14 para. 3 lit. b MA.

68 Art. 14 para. 3 lit. c MA.

69 Art. 14 para. 3 lit. d MA.

70 Art. 14 para. 3 lit. e MA.

71 Art. 14 para. 3 lit. f MA.

- Depending on the legal form of the acquiring company, the legal position of the partners of the acquired company may change. Therefore, the partners must be extensively informed about new obligations (e.g. a personal obligation to make a supplementary capital contribution or a personal obligation to render services) or personal liabilities which result from the merger[72].
- In the case of mergers between companies with different legal forms, the merger report must explain in detail which duties may be imposed on the partners of the acquired company in the new legal form of the acquiring company[73].
- The merger report must provide details about the effects of the merger on the employees of the merging companies. If there is a redundancy program, details about it also must be provided[74].
- The merger report should also point out the consequences of the merger for the creditors of the merging companies[75].
- Because a merger may depend on the granting of an official approval (e.g. the approval by Swiss or foreign competition commission), reference must be made in the merger report whether such special approval is required for the merger and, if so, whether it has been obtained or the application for approval is still pending[76].

Finally, in the case of a combination merger, Art. 14 para. 4 MA requires a draft of the articles of incorporation of the new company to be formed to be added to the merger report.

Under Art. 15 para. 1 MA, in a merger of a corporate entity or a cooperative with participation certificates, the merging companies are required to have the merger agreement, the merger report and the balance sheet the merger is based on verified by a specially qualified auditor. According to Art. 15 para. 2 MA, this verification is not required for mergers between small and medium-sized enterprises if all partners agree.

Art. 15 para. 4 MA states that the results of the verification must be recorded in a written report comprising the following elements:

- In order to protect the participation and membership rights of the partners, the acquiring corporate entity must increase its share capital pursuant to Art. 9 MA with the amount of the capital increase being depending on a variety of factors. The amount of the capital increase is to be explained in the merger report[77]. The verification report must confirm that the planned capital increase of the acquiring company is sufficient to protect the rights of the partners of the acquired company[78].
- Because the exchange ratio is of importance for the partners and the determination of it may be associated with difficulties, the verification report must confirm that the exchange ratio is reasonable. The same applies to cash and other compensation permitted by Art. 8 MA[79]. The exchange ratio for participation rights can be determined by employing various methods. Thus, in the merger report, the method for determining the exchange ratio for participation rights is to be explained[80]. In addition, the specially qualified auditor has to explain why the method employed appears appropriate[81]. If several methods have been combined, the relative importance attached to the methods used must be stated[82].
- Finally, it is to be indicated in the verification report, which special considerations had to be taken into account valuing the participation rights of the merging companies in respect of the determination of the exchange ratio[83].

Art. 16 MA regulates the disclosure of the essential documents pertaining to the merger prior to the adoption of resolutions approving the merger at the general meetings. Each merging company must, at its registered office, allow the partners to inspect the following documents during a period of 30 days prior to the adoption of the merger resolution:

- merger agreement;
- merger report;
- verification report;
- annual financial statements and annual reports covering the last three business years, as well as an interim balance sheet if that is required pursuant to Art. 11 MA.

[72] Art. 14 para. 3 lit. g MA.

[73] Art. 14 para. 3 lit. h MA.

[74] Art. 14 para. 3 lit. i MA.

[75] Art. 14 para. 3 lit. j MA.

[76] Art. 14 para. 3 lit. k MA.

[77] See Art. 14 para. 3 lit. f MA.

[78] Art. 15 para. 4 lit. a MA.

[79] Art. 15 para. 4 lit. b MA.

[80] See Art. 14 para. 3 lit. c MA.

[81] Art. 15 para. 4 lit. c MA.

[82] Art. 15 para. 4 lit. d MA.

[83] Art. 15 para. 4 lit. e MA.

The inspection right applies to all companies involved in the merger. Thus, the partners of each company gain an opportunity to inspect the annual financial statements of each other company. The partners may demand copies of the above-mentioned documents from the merging companies, and these must be provided to them free of charge[84]. The merging companies have to inform the partners in an appropriate manner about the opportunity to inspect documents[85]. A publication in the publication organ of the company fulfils this requirement. If, however, all partners are known, a letter may suffice. According to Art. 16 para. 2 MA, small and medium-sized enterprises are not bound by this requirement if all partners agree.

Art. 17 para. 1 MA provides that the supreme management or administrative body of a company shall inform the supreme management or administrative bodies of the other companies involved if, for one of the merging companies, significant changes occur in its assets or liabilities between the conclusion of the merger agreement and its approval at the general meeting. Art. 17 para. 2 MA requires the supreme management or administrative bodies of all merging companies to then examine whether the merger agreement must be modified or if the merger must be abandoned. In the latter case, they shall withdraw their proposal for approval. Otherwise, they shall explain at the general meeting why the merger agreement does not need to be modified. If Art. 17 MA is not observed, the merger resolution may be subject to a challenge in court pursuant to Art. 106 MA. According to Art. 108 MA, the members of the supreme management or administrative bodies may also be held responsible for any losses.

[84] Art. 16 para. 3 MA.

[85] Art. 16 para. 4 MA.

1.5 Merger Resolution, Registration in the Register of Commerce, and Legal Effect

The merger agreement requires approval through a resolution adopted at the general meetings or – for general and limited partnerships – the approval of the partners[86]. Art. 18 MA sets out the majority requirements for the approval of a merger agreement:

- For corporations and corporations including partners with unlimited liability, at least two-thirds of the votes represented at the general shareholders' meeting and the absolute majority of the nominal share value represented by them[87].
- For a corporate entity to be acquired by a cooperative, the approval of all shareholders or, in case of a limited liability company, of all partners[88].
- For a limited liability company, at least three quarters of all partners who, in addition, represent at least three quarters of the company capital[89].
- In case of a cooperative, a majority of at least two-thirds of the votes cast is generally necessary. If, as a result of the merger, an obligation to make a supplementary capital contribution, another personal obligation or personal liability is introduced or extended, the approval of at least three-quarters of all cooperative members is required[90].
- For associations, the approval of at least three-quarters of the members present at the general meeting[91].
- For general and limited partnerships, the approval of all partners; however, the partnership agreement may provide that the approval of at least three-quarters of the partners is sufficient[92].

Art. 18 para. 3 - 6 MA provides for special majority requirements for certain important resolutions:

- If a corporation including partners with unlimited liability is to acquire another company, the written approval of all partners of the acquired company who, as a

[86] See Art. 12 para. 2 MA in conjunction with Art. 18 para. 1 MA; because a merger has a considerable effect on the merging companies, it should be the general meeting as the supreme body of the company which, as a matter of principle, adopts the merger resolution.

[87] Art. 18 para. 1 lit. a MA.

[88] Art. 18 para. 1 lit. b MA.

[89] Art. 18 para. 1 lit. c MA.

[90] Art. 18 para. 1 lit. d MA.

[91] Art. 18 para. 1 lit. e MA.

[92] Art. 18 para. 2 MA.

result of the merger, acquire the status of partners with unlimited liability, is required pursuant to Art. 18 para. 3 MA. This majority requirement is required in addition to the majorities provided for in Art. 18 para. 1 lit. a MA and prevents the imposition of new obligations on the partners of the acquired company against their will.

- Art. 18 para. 4 MA provides that if a corporation or corporation including partners with unlimited liability, is to be acquired by a limited liability company and, as a result, an obligation to make a supplementary capital contribution or another personal obligation is introduced, then the approval of all affected shareholders or partners is required.
- The principle of continuity of membership may be disregarded if cash or other compensation is offered to the partners of the acquired company[93]. If the merger agreement provides only for cash or other compensation, Art. 18 para. 5 MA prescribes that the approval of at least 90% of the partners of the acquired company with voting rights is required for approving the merger agreement.
- If a change in the company purpose occurs as a result of the merger, and if the legal or statutory majority requirement for a change in purpose is different than the majority required for the merger resolution, then both majority requirements apply. This provision prevents the merger majority requirement from supplanting the majority requirement a change in the company purpose.

Because an association is a person-based entity, Art. 19 para. 1 MA states that members of an association may resign from the association, without any obligations, within two months following the adoption of the merger resolution. Resignations become effective retroactively as of the date of the merger resolution[94].

The merger resolution, i.e. the approval of the merger agreement at the general meeting or by the partners, requires a notarial certification (*öffentliche Beurkundung*)[95]. However, in case of a merger between associations, a notarial certification is not required[96].

Art. 21 para. 1 MA obliges the supreme management or administrative bodies of the merging companies to apply for registration of the merger in the register of commerce as soon as the merger agreement has been approved at the general meetings or by the partners of all merging companies. Pursuant to Art. 21 para. 2 MA, if the share capital of a corporation, a corporation including partners with unlimited liability or a limited liability company is increased[97], the capital increase must be registered in the register of commerce at the same time as the merger. The acquiring company also must submit the amended articles of incorporation and the required statements about the capital increase to the register of commerce[98]. The acquired company is then deleted from the register of commerce[99]. Finally, as a matter of factual logic, Art. 21 para. 4 MA mentions that Art. 21 para. 1 - 3 MA is not applicable to associations not registered in the register of commerce. According to Art. 22 para. 1 MA, a merger becomes legally effective once it is registered in the register of commerce. At this point in time, all assets and liabilities, all rights and obligations and all agreements of the acquired company are passed by operation of law to the acquiring company. These transfers of rights and obligations[100] take place without the need to adhere to otherwise applicable regulations for the transfer. According to Art. 34 Acart, if the merger is a reportable combination of enterprises under Art. 9 Acart, a merger becomes legally valid only after the deadline pursuant to Art. 32 para. 1 Acart has expired or the approval for implementation has been obtained. Therefore, Art. 22 para. 1 MA expressly states that Art. 34 Acart is not affected by the Merger Act. Because associations not registered in the register of commerce are not required to register their merger in the register of commerce, the adoption of the resolutions approving the merger by all associations involved determines the legal effective date of such mergers.

1.6 Protection of Creditors and Employees

Art. 6 MA provides special provisions for so-called restructuring mergers and contains protective provisions for creditors[101]. Art. 25 para. 1 MA requires the acquiring company[102] to secure the claims of creditors if they demand this within a period of three months after the merger has become legally effective[103]. This duty to provide security extends to all debts of all merging companies which were incurred before the merger

93 See Art. 8 para. 2 MA, see above II./1.2, p. 10 et seq.

94 Art. 19 para. 2 MA.

95 Art. 20 para. 1 MA.

96 Art. 20 para. 2 MA.

97 See Art. 9 MA, see above II./1.3, p. 11 et seq.

98 See Art. 652g CO.

99 Art. 21 para. 3 MA.

100 Real estate, intangible assets, interests in other companies, duties, procedural defences, individual pesonal rights, claims based on company law etc.

101 Art. 6 para. 1 MA permits mergers for companies which no longer have assets equal to at least half of their nominal share capital, company or cooperative capital and the legally prescribed reserves or which have liabilities exceeding their assets if the other companies involved in the merger have disposable equity capital equal to the amount of the deficiency or over-indebtedness.

102 As a result of the merger, the acquiried companies no longer exist (see Art. 21 para. 3 MA).

103 A merger is legally effective upon the registration of the merger in the register of commerce (see Art. 22 para. 1 MA).

became legally effective. Creditors must be informed about their rights by a notice published three times in the Swiss Official Gazette of Commerce (*Schweizerisches Handelsamtsblatt*)[104]. The publication of this notice is not required if the specially qualified auditor has confirmed that no claims are known or expected that could not be satisfied by the disposable assets of the merging companies. In addition, Art. 25 para. 3 MA relieves the acquiring company from the obligation to provide security if it proves that the merger does not jeopardise the fulfilment of the claims for which security has been demanded. If necessary, the court, in response to an action by a creditor, decides whether security needs to be provided. Finally, Art. 25 para. 4 MA allows the relevant company to satisfy a claim instead of providing security if the other creditors are not harmed as a result[105].

A merger may result in the termination of the existing personal liability of partners for the debts of the company ceasing to exist. Therefore, Art. 26 para. 1 MA provides for the continuance of an existing personal liability of partners of the acquired company if these liabilities were established or incurred before the merger becomes legally effective. For partners who will not be personally liable for the liabilities of the acquiring company after the merger, their personal liability for debts of the acquired company will be barred by the statute of limitations no later than three years after the merger has taken legal effect[106]. For claims, which become due after the publication of the merger resolution, the three-year statute of limitations begins to run from the due date of the claim[107].

Art. 27 para. 1 MA states that Art. 333 CO is applicable in respect of the transfer of employment relationships to the acquiring company in a merger and thus the employment relationships, with all rights and obligations, are transferred to the acquiring company[108]. However, an employee may reject the transfer of the employment relationship and leads to the termination of the employment agreement after the expiry of the termination notice period[109]. According to Art. 27 para. 2 MA, employees of the merging companies may, under Art. 25 MA, demand the provision of security for their claims arising from the employment relationship which are due when the employment agreement legally could have been terminated or, if the transfer of the employment relationship is rejected by the employee, when it is terminated. Finally, Art. 27 para. 3 MA imposes personal liability on the partners of the acquired company for claims arising from employment agreements. This personal liability extends to those claims arising from the employment agreements, which are due when the employment relationship legally could have been terminated or is terminated if the employee rejects the transfer of the employment relationship.

Art. 28 para. 1 MA provides that the obligation to consult with the employees' representation bodies under Art. 333a CO applies to the acquired company as well as the acquiring company. Pursuant to Art. 28 para. 2 MA, the consultation of the employees' representation bodies must occur prior to the adoption of the merger resolution pursuant to Art. 18 MA and the supreme management or administrative body must provide information at the general meeting about the result of the consultation. If the provisions of Art. 28 para. 1 and 2 MA are not observed, the employees' representation bodies may seek a court order that prohibits the registration of the merger in the register of commerce[110]. Finally, Art. 28 para. 4 MA states that Art. 28 MA also applies to acquiring companies that have their registered offices abroad.

1.7 Simplifications for Corporate Entities

Art. 3 et seq. MA provide various protective provisions in favour of partners. Such protections are not necessary if there is no risk for the rights of partners. Therefore, Art. 23 para. 1 MA provides for a simplified merger of corporate entities if:

- the acquiring corporate entity owns all shares with voting rights of the acquired corporate entity (absorption of a subsidiary company by a parent company)[111]; or
- a legal entity, a natural person or a legally or contractually connected group of persons[112] hold all shares with voting rights in the corporate entities participating in the merger (merger between sister companies)[113].

Pursuant to Art. 23 para. 2 MA, a simplified merger also is possible if the acquiring corporate entity owns at least 90% of the shares with voting rights in the acquired company, provided that holders of minority shares:

- are offered as an option, in addition to the participation and membership rights in the acquiring company, a cash or other compensation pursuant to Art. 8 MA,

[104] Art. 25 para. 2 MA.

[105] See in particular Art. 285 et seq. DEBL.

[106] The reference is to the registration in the register of commerce (see Art. 22 para. 1 MA).

[107] Art. 26 para. 2 MA.

[108] See Art. 333 para. 1 CO.

[109] See Art. 333 para. 2 CO.

[110] Art. 28 para. 3 MA. Pursuant to Art. 29a of the Federal Act on the Place of Jurisdiction in Civil Matters of March 24, 2000, SR 272, the court at the seat of one of the companies involved in the merger is the relevant one.

[111] Art. 23 para. 1 lit. a MA.

[112] This refers in particular to a sole proprietorship, a general partnership and a limited partnership.

[113] Art. 23 para. 1 lit. b MA.

which must be equivalent to the real value of the participation and membership rights[114]; and

- do not become subject to an obligation to make a supplementary capital contribution, to perform some other personal obligation or to assume a personal liability as a result of the merger[115].

Art. 24 para.1 MA specifies that, to mergers in the cases described in Art. 23 para. 1 MA, the following provisions are not applicable:

- Art. 13 lit. b - e MA[116];
- Art. 14 MA (merger report);
- Art. 15 MA (verification of the merger agreement and the merger report);
- Art. 16 MA (inspection right); and
- Art. 18 MA[117].

Finally, if the conditions mentioned in Art. 23 para. 2 MA are fulfilled, the following provisions pursuant to Art. 24 para. 2 MA are not applicable:

- Art. 13 lit. c - e MA;
- Art. 14 MA (merger report);
- Art. 16 MA[118];
- Art. 18 MA[119].

[114] Art. 23 para. 2 lit. a MA.

[115] Art. 23 para. 2 lit. b MA.

[116] This refers to those items associated with the principle of the continuity of membership.

[117] The merger agreement does not require the approval by a resolution at the general meeting or by the partners.

[118] The inspection right needs not be granted.

[119] The merger agreement need not be submitted for approval at the general meeting or by the partners.

2. Demerger of Companies

2.1 Permissible Transactions

In a demerger, the divesting company divests all or parts of its assets and liabilities[120] to one or more acquiring companies in exchange for participation and membership rights for its partners in the acquiring company or companies.

Art. 29 MA provides for two permissible demerger transactions:

- the *division (Aufspaltung)*[121], in which a company divides all of its assets and liabilities into two or more parts and transfers them to two or more existing companies or companies formed in order to acquire the divested assets and liabilities. The partners of the divesting company become partners of the companies acquiring the transferred assets and liabilities. As a result of the division, the divesting company is dissolved and deleted from the register of commerce.
- the *spin-off (Abspaltung)*[122], in which a company separates some assets and liabilities and transfers them to one or more existing companies or companies formed in order to acquire the divested assets and liabilities. The partners of the divesting company become partners of the acquiring company or companies.

Demergers – in contrast to transfers of assets and liabilities[123] - are characterised by the principle of the continuity of the membership of the partners and the company's assets and liabilities, i.e. the partners of the divesting company receive participation and membership rights in the acquiring company[124].

Art. 30 MA states that corporate entities[125] and cooperatives can demerge into corporate entities and cooperatives. It is not required that the acquiring companies be companies of the same legal form as the divesting companies[126]. Compared to mergers[127], the range of demergers is limited because general and limited partnerships, associa-

[120] From a tax perspective, note that a tax exemption for the reserves transferred with a demerger is dependent on whether complete enterprises or complete business units of enterprises are being transferred.

[121] Art. 29 lit. a MA.

[122] Art. 29 lit. b MA.

[123] See below II./4., p. 42.

[124] See below II./2.2., p. 26.

[125] See Art. 2 lit. c MA.

[126] Thus, for example, a corporation also has the option to divide into a cooperative and a limited liability company.

[127] See above II./1.1, p. 8.

tions, foundations and occupational old age, survivors and disability institutions may not participate in a demerger.

If a demerger is not permissible pursuant to Art. 30 MA, a similar result in economic terms can be achieved through a transfer of assets and liabilities under Art. 69 et seq. MA[128].

2.2 Effects on the Participation and Membership Rights

In order to enforce the principle of continuity of membership of partners for demergers, Art. 31 para. 1 MA requires the protection of participation and membership rights pursuant to Art. 7 MA. With a reference to Art. 7 MA only, it is made clear that, contrary to a merger[129], cash or other compensation under Art. 8 MA may not be provided in case of a demerger.

Art. 31 para. 2 MA provides for two ways of allocating the participation and membership rights to the partners of the divesting company:

- The *symmetrical demerger*, in which the partners of the divesting company are allocated participation and membership rights in the acquiring company in proportion to their previous participation. In this transaction all partners must be treated equally[130].
- The *asymmetrical demerger*, in which the participation and membership rights in the companies involved in the demerger are allocated by changing the proportion of their previous participation[131]. Various ways to arrange this are conceivable:
  - The partners of the divesting company receive participation and membership rights in all acquiring companies, but not in proportion to their previous participation in the divesting company.
  - With two acquiring companies, one group of partners assumes the participation and membership rights of one of the acquiring companies and the other group assumes the participation and membership rights of the other acquiring company.
  - Certain partners receive participation and membership rights in the acquiring company and simultaneously resign from their positions in the divesting company and the remaining partners retain their participation and membership rights in the divesting company.

[128] See below II./4., p. 42 et seq.

[129] See above II./1.2, p. 10.

[130] Art. 31 para. 2 lit. a MA.

[131] Art. 31 para. 2 lit. b MA.

2.3 Capital Decrease, Capital Increase, Formation of a New Company, and Interim Balance Sheet

In the case of a division the divesting company is dissolved and deleted from the register of commerce[132]. A spin-off does not result in the dissolution of the divesting company, but in a capital decrease unless the divesting company has disposable assets in the amount of the book value of the portion of assets to be transferred[133]. Consequently, a capital decrease always must be carried out in case of a spin-off if the divesting company does not have disposable assets equal to the book value of the portion of assets to be transferred. In conjunction with this capital decrease, Art. 32 MA states that the provisions of the Swiss Code of Obligations concerning a capital decrease[134] need not be taken into account because the protection of creditors is guaranteed by Art. 45 et seq. MA[135].

In both a division and a spin-off, the acquiring companies must increase their capital to the extent necessary to protect the rights of the partners of the divesting companies[136].

In the same manner as to the rules applied for mergers[137], Art. 33 para. 2 MA states that, for a capital increase within the framework of a demerger, neither the provisions concerning contributions-in-kind[138] nor Art. 651 para. 2 CO apply.

Because a part of the divesting company's assets and liabilities may also be transferred to a newly formed company, Art. 34 MA requires - analogously to Art. 10 MA in the case of a merger – that the formation of the new company may only take place by applying the incorporation provisions relevant for the particular type of company. However, the provisions about the number of founders for corporate entities, as well as the provisions about contributions-in-kind are not applicable.

[132] See Art. 29 lit. a MA.

[133] If a spin-off does not take place in conjunction with a corresponding decrease of the share capital of the divesting company, this can lead to adverse tax consequences for those shareholders who hold their participation rights in private assets (nominal value principle).

[134] Art. 733 et seq. CO for a corporation and a corporation including partners with unlimited liability, Art. 788 para. 2 CO for a limited liability company and Art. 874 para. 2 CO for a cooperative.

[135] See below II./2.6., p. 32.

[136] Art. 33 para. 1 MA.

[137] See Art. 9 para. 2 MA; see above II./1.3., p. 11.

[138] Art. 634 CO, Art. 635 CO, Art. 635a CO and Art. 652e Chif. 1 CO.

As in a merger[139], an interim balance sheet in accordance with Art. 35 MA must be prepared if, as the date the demerger agreement was concluded or the demerger plan prepared, the date of the relevant balance sheet is more than six months earlier or if, important changes have occurred in the asset and liabilites of the companies involved in the demerger since the date of the most recent balance sheet.

2.4 Demerger Agreement, Demerger Plan, Demerger Report and Verification

The prerequisite for a demerger is either a demerger agreement or a demerger plan. Art. 36 para. 1 MA determines that the supreme management or administrative bodies[140] of the companies involved must conclude a *demerger agreement* if a company transfers assets and liabilities to an existing company via a demerger. However, if a company wants to transfer assets and liabilities via a demerger to a newly formed company, then according to Art. 36 para. 2 MA, its supreme management or administrative body has to prepare a *demerger plan*. The demerger agreement and the demerger plan are required to be in writing and have to be approved by a resolution at the general meetings[141].

Art. 37 MA lists the objectively essential elements[142] of a demerger agreement and a demerger plan. The content of the demerger agreement or the demerger plan follows the content of the merger agreement: The elements dealt with in Art. 37 lit. a, c – f as well as g – h MA correspond to the objectively essential elements of a merger agreement pursuant to Art. 13 lit. c, d, e, g and h MA[143]. In addition, the demerger agreement or the demerger plan must include the following:

- An inventory with an unambiguous identification of all assets and liabilities which are intended to be transferred by the demerger[144]. Real estate, securities and intangible assets must be listed individually. The inventory must show the division of all assets and liabilities and how they are allocated to the different acquiring companies[145].
- A list of the employment relationships transferred by the demerger[146].

Art. 38 MA regulates the allocation of asset and liabilities which could not be allocated to any of the companies involved in the demerger according to either of the demerger agreement or the demerger plan. Art. 38 para. 1 lit. a MA provides that such assets become, in case of a division, the joint property of all the acquiring companies, i.e. in proportion to the net assets transferred to them, as set out in the demerger agreement or the demerger plan. Pursuant to Art. 38 para. 1 lit. b MA assets not allocated remain, in case of a spin-off, the property of the divesting company. Pursuant to Art. 38 para. 2 MA, the same applies by analogy for claims and intangible assets. As far as non-allocated liabilities are concerned, Art. 38 para. 3 MA states that the companies involved in the division are jointly and severally liable for those liabilities. Because the divesting company remains in existence in a spin-off, it also continues to be liable for its liabilities.

According to Art. 39 para. 1 MA, the supreme management or administrative bodies of the companies involved in the demerger have to prepare a written report on the demerger. Art. 39 MA is largely a parallel statement of the provisions applying to a merger[147]. However, because cash and other compensation cannot be provided in case of a demerger[148], the demerger report need not address this issue[149]. Surprisingly, the legislators apparently assumed that a demerger did not require an official approval; thus the demerger report need not include references to official approvals which have been either obtained or are still pending[150].

Art. 40 MA specifically states that Art. 15 MA applies by analogy[151], so the demerger agreement or the demerger plan requires the same kind of verification report from a specially qualified auditor as does a merger.

Likewise, the inspection right of partners largely follows the relevant principles for mergers[152, 153]. Art. 41 MA, however, contains two elements deviating from Art. 16 MA:

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[139] See above II./1.3, p. 11 as well as Art. 11 MA.

[140] Concerning this, see above II./1.4., p. 12 et seq.

[141] Art. 36 para. 3 MA in conjunction with Art. 43 MA.

[142] Apart from the objectively essential elements, so-called subjectively essential elements can also be stipulated.

[143] See above II./1.4., p. 12.

[144] The transfer according to an inventory is basically always available for the transfer of any assets. Because the neutral tax treatment of demergers is dependent on whether a complete enterprise or a complete unit of an enterprise is being transferred, demergers in practice are almost exclusively used for the transfer of enterprise units.

[145] Art. 37 lit. b MA.

[146] Art. 37 lit. i MA.

[147] See Art. 14 MA; see above II./1.4., p. 12.

[148] See above II./2.2, p. 26 et seq.

[149] See Art. 14 para. 3 lit. f MA, being the corresponding provision for mergers.

[150] See Art. 14 para. 3 lit. k MA, being the corresponding provision for mergers.

[151] See above II./1.4., p. 12.

[152] See Art. 16 MA.

- In contrast to the 30-day period available to partners in case of mergers for exercising their inspection right, the period provided in Art. 41 para. 1 MA is two months.
- Each of the companies involved in the demerger must publish notice of the opportunity to inspect such documents in the Swiss Official Gazette of Commerce[154].

If, between the conclusion of the demerger agreement or the preparation of the demerger plan and the resolution approving the demerger by the general meeting, significant changes occur in the valuation of the assets and liabilities, then Art. 17 MA applies by analogy[155].

2.5 Demerger Resolution, Registration in the Register of Commerce, and Legal Effect

A demerger has far-reaching consequences for the rights of the partners[156] and therefore the resolution must be approved at the general meetings or by the partners[157].

Art. 43 para. 1 MA states that a resolution for the approval of the demerger agreement or the demerger plan may only be submitted for approval at the general meetings if the claims of the creditors have been secured when required by Art. 46 MA[158]. Art. 43 para. 2 MA requires the same majorities for the approval of demerger resolutions as under Art. 18 para. 1, 3, 4 and 6 MA require for the approval of merger resolutions[159]. Because general and limited partnerships cannot be the object of a demerger[160] and cash and other compensation cannot be paid in connection of a demerger[161], there was no need for references to Art. 18 para. 2 and 5 MA. The same applies to Art. 19 MA, Art. 20 para. 2 MA, Art. 21 para. 4 and Art. 22 para. 2 MA, because associations cannot be

153 See above II./1.4., p. 12.

154 Art. 41 para. 4 MA. Pursuant to Art. 16 para. 4 MA, a notification in the appropriate form may be sufficient in case of a merger, which may possibly be just a letter to the partners containing a relevant message.

155 Art. 42 MA; see above II./1.4., p. 12.

156 For example, a redistribution of the shareholdings, establishment of new participation and membership rights, reduction of the company assets of the divesting company or dissolution of the divesting company.

157 See Art. 36 para. 3 MA in conjunction with Art. 43 MA.

158 See below II./2.6, p. 32.

159 See. above II./1.5., p. 19.

160 See above II./2.1, p. 25 et seq.

161 See above II./2.2, p. 26.

the object of a demerger[162]. However, Art. 43 para. 3 MA provides that in the case of an asymmetrical demerger, at least 90% of all partners with voting rights in the divesting company must approve the demerger. In case of a demerger involving the formation of new companies, an approval by the general meeting of the new acquiring companies, is not possible because these companies will exist only after the demerger has been registered in the register of commerce[163]. Thus, the approval of the demerger by the divesting company is sufficient.

Just as with a merger resolution[164], the demerger resolution must be certified by a notary pursuant to Art. 44 MA.

A demerger, too, must be registered in the register of commerce and, by applying Art. 931 para. 1 CO, notice of the demerger must be published in the Swiss Official Gazette of Commerce[165]. As in a merger[166], the supreme management or administrative bodies must, pursuant to Art. 51 para. 1 MA, apply for registration of the demerger with the register of commerce. Art. 51 para. 2 MA requires, in addition, that the amended articles of association of the divesting company are to be submitted to the register of commerce if the divesting company must decrease its capital as a result of the spin-off[167]. Finally, Art. 51 para. 3 MA states that, in case of a division, the divesting company will be deleted from the register of commerce when the demerger is registered[168].

In the same manner as a merger pursuant to Art. 22 MA[169], Art. 52 MA provides that a demerger is legally effective with its registration in the register of commerce, i.e. a constitutive effect is attached to the registration of the demerger in the register of commerce. At this point in time, by operation of law, all assets and liabilities listed in the inventory[170] are passed from the divesting company to the acquiring companies. In case of demerger, a partial universal succession (*partielle Universalsukzession*)[171] takes

162 See above II./2.1, p. 25 et seq.

163 See Art. 51 et seq. MA.

164 See Art. 20 MA; concerning this, see above II./1.5., p. 19 et seq.

165 Art. 51 para. 1 MA.

166 See Art. 21 para. 1 MA, concerning this, see above II./1.5., p. 19 et seq.

167 See analogous determination in Art. 21 para. 2 MA regarding capital increase in case of a merger.

168 See analogous determination in Art. 21 para. 3 MA regarding the deletion, in case of a merger, of the acquired company.

169 See above II./1.5., p. 19 et seq.

170 See Art. 37 lit. b MA.

171 The partial universal succession (*partielle Universalsukzession*) is a „partial" one only because it does not cover all assets and liabilities of the divesting legal entity but merely those assets and liabilities, which the legal entities involved want to transfer (see Beretta, Piera, Vertragsübertragun-

place, and therefore no approval of a third party is required for the transfer of the contractual relationship[172]. A further effect of a demerger concerns the relationship between partners. With the registration of the demerger in the register of commerce, the partners of the divesting company receive participation and membership rights in the acquiring company as set out in the demerger agreement or the demerger plan[173]. As in the case of a merger[174], Art. 34 Acart remains unaffected [175], i.e. a demerger which must be notified to the competition commission is deferred until the expiry of the deadline under Art. 32 para. 1 Acart or the approval of the demerger.

2.6 Protection of Creditors and Employees

Compared to a merger, a demerger may be associated with increased risks for the creditors because the spin-off reduces the asset base of the divesting company by the transferred assets. The asset base becomes correspondingly smaller because either a capital decrease occurs equivalent to the amount of the book value of the transferred assets[176] or disposable assets are reduced accordingly. Furthermore, a division always results in a change of debtor. Therefore, in contrast to a merger[177], the application of protective measures for creditors must take place before a demerger develops its effects. The demerger agreement or the demerger plan must not be submitted to the general meeting or the partners until the claims of creditors who have made a relevant request, have been secured[178]. Thus, Art. 45 MA provides that the creditors of all companies involved in the demerger are to be notified by the publication of notice in the Swiss Official Gazette of Commerce that they may demand security for their claims.

Art. 46 MA largely corresponds to the protection provisions for creditors in respect of mergers under Art. 25 MA[179]. Although in the case of a merger the creditors of the companies involved may demand security within a period of three months after the merger has taken legal effect[180], all companies involved in the demerger must, according to Art. 46 para. 1 MA, secure their liabilities if the creditors demand this in accordance with Art. 45 MA, within two months after the third publication of the notification in the Swiss Official Gazette of Commerce. In addition to the entitlement of security pursuant to Art. 46 MA, Art. 47 para. 1 MA provides for secondary joint liability of all companies involved in the demerger if the claims of a creditor are not satisfied by the company to which liabilities were allocated pursuant to the demerger agreement or the demerger plan (company with primary liability). Due to this joint liability, each of the companies can be sued for all liabilities. Recourse to the other companies involved remains open in respect of their internal relationships. Under Art. 47 para. 2 MA a company with secondary liability can be sued only if the claim has not been secured[181] and the company with primary liability:

- has become bankrupt;
- has been granted a composition moratorium or postponement of bankruptcy;
- has been subject to debt enforcement resulting in the issuance of a final certificate of loss;
- has transferred its registered office to a foreign country and can no longer be sued in Switzerland; or
- has transferred its registered office from one foreign state to another and, as a result, a considerable impediment to legal prosecution has arisen.

Art. 48 MA applies the personal liability provisions of Art. 26 MA to demergers by analogy[182]. The provisions regarding the transfer of employment relationships, security for claims arising from employment agreements, the personal liability of partners for claims arising from employment agreements and the consultation of employees' representation bodies are also applied by analogy to the relevant provisions for mergers[183].

gen im Anwendungsbereich des geplanten Fusionsgesetzes, in SJZ 98 (2002) No. 10 p. 249 et seq.; dissenting opinion: Turin, Nicholas, Le transfert de partimoine selon le projet de loi sur la fusion, thesis Neuchâtel 2003, p. 56 et seq.).

172 Beretta, Piera, Vertragsübertragungen im Anwendungsbereich des geplanten Fusionsgesetzes, in SJZ 98 (2002) No. 10 p. 249 et seq.; dissenting opinion: Turin, Nicholas, Le transfert de partimoine selon le projet de loi sur la fusion, thesis Neuchâtel 2003, p. 114 et seq.

173 See Art. 37 lit. c and e MA.

174 See Art. 22 para. 1 MA; see above II./1.5., p. 19.

175 Art. 52 last sentence MA.

176 See Art. 32 MA.

177 See Art. 25 para. 3 MA and above II./1.6, p. 21 et seq.

178 Art. 43 para. 1 MA.

179 See above II./1.6, p. 21 et seq.

180 See Art. 25 para. 1 MA and above II./1.6, p. 21 et seq.

181 See Art. 46 MA.

182 See above II./1.6., p. 21 et seq.

183 Art. 49 et seq. MA; see above II./1.6., p. 21 et seq.

3. Conversion of Companies

3.1 Permissible Transactions

Art. 53 MA provides that a company can change its legal form (conversion) without modifying its legal relationships. This means that the company retains its identity and type of legal personality despite a change in the legal form, i.e. a conversion does not require a company to be re-formed in the new legal form.

In the same manner as the provisions regulating mergers [184] and demergers[185], Art. 54 MA lists the following permissible conversions:

- a corporate entity may convert into a corporate entity with a different legal form[186] or a cooperative[187].
- a general partnership may convert into a corporate entity or a cooperative[188]. Because a general partnership does not have the status of a legal entity, a new legal entity emerges as a result of the conversion of a general partnership into a corporate entity or cooperative. Furthermore, a general partnership can be converted into a limited partnership[189]. For the conversion of a general partnership into a limited partnership, special rules under Art. 55 MA, explained below, apply as well.
- a limited partnership can be converted into a corporate entity, a cooperative or a general partnership[190]. For the conversion of a limited partnership into a general partnership, the special rules under Art. 55 MA also apply.
- a cooperative with or without participation certificates may be converted into a corporate entity[191]. A cooperative without participation certificates also can be converted into an association if the association is then registered in the register of commerce[192].
- an association may be converted into a corporate entity or a cooperative if the association has been registered in the register of commerce[193].

[184] See Art. 4 MA, see above p. 8.

[185] See Art. 30 MA, see above p. 25.

[186] Art. 54 para. 1 lit. a MA.

[187] Art. 54 para. 1 lit. b MA.

[188] Art. 54 para. 2 lit. a and b MA.

[189] Art. 54 para. 2 lit. c MA.

[190] Art. 54 para. 3 lit. a - c MA.

[191] Art. 54 para. 4 lit. a MA.

[192] Art. 54 para. 4 lit. b MA.

[193] Art. 54 para. 5 MA.

Art. 55 MA contains special rules for the conversion of general or limited partnerships. The conversion of a general partnership into a limited partnership may take place by a limited partner joining the general partnership[194] or the acquisition of the position of a limited partner by a partner having unlimited liability[195]. A limited partnership may be converted into a general partnership by all limited partners resigning from the limited partnership[196] or becoming partners having unlimited liability[197]. The provisions of Art. 53 - 68 MA are otherwise not applied to conversions pursuant to Art. 55 MA. Finally, Art. 55 para. 3 MA permits the continuation of a general or limited partnership as a sole proprietorship pursuant to Art. 579 CO and the provisions of the Merger Act are not applicable here.

3.2 Effects on the Participation and Membership Rights

Art. 56 para. 1 MA states that participation and membership rights remain intact following a conversion. Thus, the partners must receive participation or membership rights in the new company which are related to their current ownership interests, even if they are not identical. Despite the granting of continuity of membership, partners are not protected against changes in their rights and obligations as a result of the change in legal form[198]. In contrast to mergers[199] and demergers[200], Art. 56 MA does not provide for a compensation payment. As in demergers[201], but in contrast to mergers[202], it also is not possible in conversions to provide the partners of the company to be converted with cash or other compensation. The rights of the partners without participation certificates as well as the rights of the holders of shares without voting rights, of special rights and of profit sharing certificates are set out in Art. 56 para. 2 - 5 MA and parallel the content of Art. 7 para. 3 - 6 MA, applicable to mergers[203].

[194] Art. 55 para. 1 lit. a MA.

[195] Art. 55 para. 1 lit. b MA.

[196] Art. 55 para. 2 lit. a MA.

[197] Art. 55 para. 2 lit. b MA.

[198] If, for example, a corporation is converted into a cooperative, the former shareholders are, pursuant to Art. 866 CO, charged with a new duty of loyalty. In case of the conversion of a corporation into a limited liability company, a new competition prohibition pursuant to Art. 818 CO now exists.

[199] Art. 7 para. 2 MA, see above II./1.2, p. 10.

[200] Art. 31 MA in conjunction with Art. 7 MA, see above II./2.2, p. 26.

[201] See above II./2.2, p. 26.

[202] See above II./1.2, p. 10.

[203] See above II./1.2., p. 10.

3.3 Formation and Interim Balance Sheet

A conversion leads to a change in legal form and not to the formation of a new company. Nevertheless, the specific incorporation prerequisites applicable to the new legal form must be observed. Therefore, Art. 57 MA states that the provisions of the Swiss Civil Code and the Swiss Code of Obligations pertaining to the incorporation of companies also apply to conversions[204]. This guarantees that a conversion is not used to circumvent the incorporation requirements, for example, provisions relating to the contribution for the share capital, the registered name, the purpose and the organisation of the company, as well as the prescribed forms[205]. A company has to adapt its articles of incorporation or other constitutional documents to eliminate those elements that are not compatible with the new legal form. If necessary, governing company bodies required in the new legal form are to be appointed. Although the incorporation provisions of the new legal form are to be observed, Art. 57 MA specifies that the provisions about the number of founders for corporate entities and the provisions about contributions-in-kind are not applicable[206]. However, because a cooperative is not a corporate entity, the minimum number of seven founders for the conversion into a cooperative must be observed in any case. This is based on the cooperative principle of own common action pursuant to Art 828 para. 1 CO, which is based on the idea of several persons joining together.

A conversion may only take place on the basis of a recent balance sheet. If the relevant balance sheet date is more than six months earlier than the date of the conversion report, then, pursuant to Art. 58 MA, an interim balance sheet must be prepared. The same applies if significant changes have occurred in the assets and liabilities of the company since the balance sheet was prepared regardless of the relevant balance sheet date. The discussion of the interim balance sheet under Art. 11 MA in relation to mergers[207] and Art. 35 MA in relation to demergers[208] applies here as well.

[204] Art. 10 MA is similar in relation to combination mergers and Art. 34 MA is similar in relation to demergers.

[205] Thus, for example, for a conversion of a limited liability company into a corporation, the mandatory share capital is CHF 100'000.-- (see Art. 621 CO); in addition, the company is required to elect an auditor (see Art. 727 et seq. CO). In case of the conversion of a cooperative (see Art. 828 para. 1 CO) into an association, the economic purpose of the cooperative has to be changed into a non-economic one (see Art. 60 para. 1 CC). For the conversion of a corporation into a limited liability company, at least 50% of the company contributions should have been made (see Art. 774 para. 2 CO).

[206] See identical rules for combination mergers (Art. 10 MA) and demergers (Art. 34 MA).

[207] See above II./1.3., p. 11.

[208] See above II./2.3., p. 27.

3.4 Conversion Plan, Conversion Report and Verification

A conversion is based on a written conversion plan which, pursuant to Art. 59 para. 1 MA, is to be prepared by the supreme management or administrative body[209]. As set out in Art. 64 MA, the conversion plan must subsequently be submitted for approval at the general meeting or, in case of a general and limited partnership, to the partners[210].

Art. 60 MA lists the required elements of the conversion plan, which are fewer in number than those required for the merger agreement[211], the demerger agreement or the demerger plan[212]:

- The name or registered name, the registered office and the legal form prior to and after the conversion[213];
- the articles of incorporation of the new company so that the partners may be able to inform themselves about the legal form of the company after the conversion[214]; and
- the number, the kind and the amount of participation rights allocated to partners or more detailed information about the content of the membership rights of the partners after the conversion[215].

As in the merger report for mergers[216] and the demerger report for demergers[217], a conversion report must be prepared for a conversion, which is meant to provide information for the partners and to protect their interests. Just as for a merger[218] and a demerger[219], the preparation of the written conversion report is, under Art. 61 para. 1 MA, the responsibility of the supreme management and administrative body. Art. 61

[209] See Art. 12 MA as well as above II./1.4, p. 12.

[210] See the same rules regarding merger agreements (Art. 12 para. 2 MA in conjunction with Art. 18 MA) or regarding demerger agreements and demerger plans (Art. 36 para. 3 MA in conjunction with Art. 43 MA).

[211] See Art. 13 MA as well as above II./1.4, p. 12 et seq.

[212] See Art. 37 MA as well as above II./2.4, p. 28 et seq.

[213] Art. 60 lit. a MA.

[214] Art. 60 lit. b MA.

[215] Art. 60 lit. c MA.

[216] Art. 14 MA.

[217] Art. 39 MA.

[218] See Art. 14 para. 1 MA.

[219] See Art. 39 para. 1 MA.

para. 3 MA defines the content of the conversion report. The objectives and consequences of the conversion[220], the exchange ratio for participation rights or the membership rights of the partners[221], a potential obligation to make a supplementary capital contribution, other personal obligations and the personal liability which results from the conversion for the partners[222] and obligations which may be imposed on the partners in the new legal form[223] follow the provisions of Art. 14 para. 3 lit. a, c, g and h MA in relation to the merger report or Art. 39 para. 3 lit. a, c, e, and f MA in relation to the demerger report[224]. The conversion plan must explain the following additional elements:

- It must be confirmed that the incorporation provisions for the new legal form have been observed[225].
- Because, pursuant to Art. 60 lit. b MA, the new articles of incorporation adopted form an integral part of the conversion plan, the partners have to be informed in detail about them[226].

Given the requirement that all partners approve the conversion, Art. 61 para. 2 MA relieves small and medium-sized enterprises of the obligation to prepare a conversion report.

As with mergers[227] and demergers[228], a specially qualified auditor must verify the documentation used as the basis for the conversion, i.e. the conversion plan, the conversion report and the balance sheet on which the conversion is based on. Pursuant to Art. 62 para. 3 MA, the company is obliged to provide the auditor with all relevant information. According to Art. 62 para. 4 MA, the auditor must confirm that the prerequisites for the conversion have been met and, in particular, that the rights of the partners will be protected after the conversion. Most of all, this item addresses the preservation of participation and membership rights required by Art. 56 MA and the provisions regarding the formation a company which are contained in Art. 57 MA. In these respects,

220 Art. 61 para. 3 lit. a MA.

221 Art. 61 para. 3 lit. d MA.

222 Art. 61 para. 3 lit. e MA.

223 Art. 61 para. 3 lit. f MA.

224 See above II./1.4, p. 12 ff. or II./2.4, p. 28 et seq. Since it is obvious that, in case of a conversion, no compensation payment can be paid, the conversion report does not need to contain details in this respect.

225 Art. 61 para. 3 lit. b MA.

226 Art. 61 para. 3 lit. c MA.

227 See Art. 15 MA, above II./1.4, p. 12 et seq.

228 See Art. 40 MA, above II./.2.4, p. 28 et seq.

the content of a verification report in connection with a conversion differs from a verification report in connection with a merger or demerger[229].

Consistent with the provisions for mergers[230] or demergers[231], small and medium-sized enterprises need not obtain this verification if all partners agree[232].

Art. 63 MA deals with the inspection right of partners which is in line with the relevant provisions regarding mergers[233] and largely repeats the provisions regarding demergers[234]. Art. 63 para. 1 MA prescribes that the company, at its registered office, must provide the partners, during a period of 30 days prior to the adoption of the resolution approving the conversion[235], with an opportunity to inspect the following documents[236]:

- the conversion plan pursuant to Art. 60 MA;
- the conversion report pursuant to Art. 61 MA;
- the verification report pursuant to Art. 62 MA; and
- the annual financial statements and annual reports of the last three business years as well as, if applicable, the interim balance sheet pursuant to Art. 58 MA.

Partners are entitled to receive copies of these documents free of charge[237]. Pursuant to Art. 63 para. 4 MA, the company is obliged to inform the partners in an appropriate manner about the opportunity to inspect these documents. This provision is consistent with Art. 16 para. 4 MA in case of mergers and with Art. 41 para. 4 MA in case of demergers[238]. Pursuant to Art. 63 para. 2 MA, small and medium-sized enterprises also need not permit the inspection of these documents if all partners agree[239].

229 See Art. 15 MA, above II./1.4, p. 12 et seq. or Art. 40 MA in conjunction with Art. 15 MA, above II./.2.4, p. 28 et seq.

230 See Art. 15 para. 2 MA, above II./1.4, p. 12 et seq.

231 See Art. 40 MA in conjunction with Art. 15 para. 2 MA, above II./.2.4, p. 28 et seq.

232 Art. 62 para. 2 MA.

233 See Art. 16 MA, above II./1.4, p. 12 et seq.

234 See Art. 41 MA, above II./2.4, p. 28 et seq.

235 Art. 41 para. 1 MA states that, in case of a demerger, access to the relevant documents must be made available during the two months prior to the resolution.

236 See Art. 63 MA.

237 Art. 63 para. 3 MA.

238 See above II./1.4., p. 12.

239 Art. 63 para. 2 MA; see Art. 16 para. 2 regarding mergers or Art. 41 para. 2 MA regarding demergers.

3.5 Conversion Resolution, Registration in the Register of Commerce, and Legal Effect

As in the case of the merger agreement for mergers[240] and the demerger agreement or the demerger plan for demergers[241], the conversion plan must be submitted for approval at the general meeting or, in case of general and limited partnerships, to the partners[242]. The majorities required for the adoption of the conversion resolution, specified in Art. 64 para. 1 MA, follow those in Art. 18 MA for mergers between companies of different legal form[243]. However, Art. 64 MA does not contain a provision identical to Art. 18 para. 3 MA, i.e. in case of a conversion into a corporation including partners with unlimited liability, the written approval of all partners, in addition to the majorities pursuant to Art. 64 para. 1 MA, who obtain the status of partners with unlimited liability as a result of the conversion, is not required. Because a payment of compensation is not permissible in case of a conversion, a provision equivalent to Art. 18 para. 5 MA does not appear in Art. 64 MA.

As in the case of mergers[244] and demergers[245], the conversion resolution must be certified by a notary pursuant to Art. 65 MA for reasons of legal certainty and because a company, as a result of the conversion, assumes a new legal form for which a notarial certification is required[246].

Because all companies that are allowed to convert pursuant to Art. 54 MA must be registered in the register of commerce, a conversion always requires a modification of the current registration in the register of commerce. Therefore, Art. 66 MA prescribes that the supreme management or administrative body has to apply for registration of the conversion in the register of commerce. Finally, Art. 67 MA states that the conversion takes legal effect upon its registration in the register of commerce, i.e. according to this provision, a constitutive effect is attached to the registration of the conversion in the register of commerce[247]. For conversions, in contrast to mergers and demergers, the registration in the register of commerce does not result in a universal succession (*Universalsukzession*) because there is no legal transfer; rather the current legal entity continues to exist, albeit in a new legal form[248].

3.6 Protection of Creditors and Employees

In case of a conversion, a company merely changes its legal form. Thus, there is no change in debtor for the creditors. A conversion has no influence on the existence or amount of a company's assets. Therefore, the risk that the interests of creditors are harmed is less likely in case of a conversion than a demerger or merger. Nevertheless, the rights of the company's creditors may be harmed under certain conditions; for example, if the liability for debts is changed to the disadvantage of creditors by selecting a particular legal form[249]. To address this, Art. 68 para. 1 MA specifies a protective measure: the continuation of the partners' personal liability under Art. 26 MA[250].

Such protective requirements in case of a conversion are of less importance for employees than with other restructuring transactions. In order to guarantee the continuation of a possible personal liability of the partners for the company's debts arising from an employment agreement, Art. 68 para. 2 MA declares that Art. 27 para. 3 MA is applicable to conversions by analogy[251].

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240 See Art. 12 para. 2 in conjunction with Art. 18 MA, see above II./1.5, p. 19 et seq.

241 See Art. 36 para. 3 MA in conjunction with Art. 43 MA, see above II./2.5, 30 et seq.

242 Art. 64 para. 1 and 2 MA.

243 See above II./1.4., p. 12 and II./2.4, p. 28.

244 See Art. 20 para. 1 MA and above II./1.5, p. 19 et seq.

245 See Art. 44 MA and above II./2.5, p. 30.

246 See Art. 65 MA.

247 The same with mergers (see Art. 22 para. 1 MA and above II./1.5, p. 19 et seq.) and demergers (see Art. 52 MA and above II./2.5, p. 30 et seq.).

248 See Art. 53 MA.

249 If a general partnership, for example, in which the partners have an unlimited, secondary liability for the company's debts, is converted into a corporation, the creditors will be deprived of this unlimited, secondary liability of the partners.

250 See above II./1.6, p. 21 et seq.

251 See above II./1.6, p. 21 et seq.

4. Transfer of Assets and Liabilities

4.1 General

General and limited partnerships, corporations, corporations including partners with unlimited liability, limited liability companies, associations, cooperatives, as well as sole proprietorships registered in the register of commerce may carry out a transfer of assets and liabilities. The transfer of the assets and liabilities, including contractual relationships, takes place by operation of law in one act via partial universal succession (*partielle Universalsukzession*)[252]. The registration in the register of commerce of the divesting legal entity is necessary because a transfer of assets and liabilities may be carried out without complying with the usual requirements for the transfer of such assets and liabilities. It is only possible to do so without complying with the usual requirements for such transfers, in particular without the entry into the land register, if the necessary notice to third parties of the transfer is accomplished by the registration in the register of commerce[253].

The transfer of assets and liabilities by institutions under public law – both the divestiture as well as acquisition – is governed by Art. 99 para. 2 MA[254]. Foundations and occupational old age, survivors and disability institutions also may carry out a transfer of assets and liabilities, which is governed by Art. 86 et seq. MA[255] and Art. 98 MA[256].

Because the transfer of assets and liabilities pursuant to Art. 69 et seq. MA and the demerger pursuant to Art. 29 et seq. MA have certain similarities, Art. 69 para. 1 second sentence MA provides that only the demerger provisions apply if the partners of the divesting company receive participation or membership rights in the acquiring company. It is a characteristic of the transfer of assets and liabilities that the participation and membership rights of partners of the divesting company remain intact. A possible consideration for this transfer is to be paid to the divesting company.

In order to protect the rights and interests of the creditors of the divesting company, Art. 69 para. 2 MA states that the legal and statutory provisions about capital protection and

[252] The universal succession is only a "partial" one because it is not related to all the assets and liabilities of the divesting legal entity, but merely to those items which the legal entities involved would like to transfer (see Beretta, Piera, Vertragsübertragungen im Anwendungsbereich des geplanten Fusionsgesetzes, in SJZ 98 (2002) No. 10 p. 249 et seq.; dissenting opinion: Turin, Nicholas, Le transfert de partimoine selon le projet de loi sur la fusion, thesis Neuchâtel 2003, p. 56 et seq.).

[253] Concerning this, see Art. 73 MA.

[254] See below II./7., p. 58.

[255] See below II./5., p. 48 et seq.

[256] See below II./6., p. 52 et seq.

the liquidation of a company in case of a transfer of assets and liabilities remain unaffected [257]. Thus, for the protection of creditors, it is assumed, that a legally valid dissolution resolution of the divesting company exists if the transfer of the assets and liabilities of the divesting company is equivalent to an act of liquidation.

4.2 Transfer Agreement

As in the case of mergers[258] and demergers[259], a transfer of assets and liabilities also is based on an agreement which, under Art. 70 para. 1 MA, must be concluded by the supreme management or administrative bodies of the legal entities involved in the transfer of assets and liabilities. In addition to this agreement, resolutions adopted at the general meeting or by the partners are possible and even required if, in respect of a transfer of assets and liabilities, an amendment of the articles of incorporation is required as a result of a capital decrease or a change in the purpose of the company, or if the transfer of assets and liabilities is equivalent to a de facto liquidation and, as a consequence, a dissolution resolution must be provided. In this context, it should also be mentioned that according to legal precedent set by the Swiss Federal Supreme Court[260], the sale of the entire enterprise with all assets of the company is not a legal act covered by the company purpose. In other words, the board of directors is prevented from selling the entire enterprise.

According to Art. 70 para. 2 MA, the transfer agreement is required to be in writing. If real estate is transferred, the relevant parts of the agreement must be certified by a notary. A single notarial certification is, however, sufficient, even if the real properties are located in different cantons. The notarial certification shall be established by a notary serving the same geographic area in which the registered office of the divesting legal entity is located.

Art. 71 para. 1 MA lists the objectively essential elements that need to be contained in the transfer agreement. In addition, the parties may include subjectively essential elements in the transfer agreement.

The transfer agreement must contain the following elements:

[257] Covered by this, for example, are the prohibition, for corporations, of the repayment of share capital to shareholders (Art. 680 para. 2 CO) or the provisions regarding liquidation (Art. 739 et seq. CO), in particular the call for filing of claims pursuant to Art. 745 para. 2 CO.

[258] Art. 12 et seq. MA; see above II./1.4, p. 12.

[259] Art. 36 et seq. MA, see above II./ 2.4, p. 28.

[260] BGE 116 II 323.

- The registered name or name, registered office and legal form of the legal entities involved in the transfer of assets and liabilities[261].
- For reasons of legal certainty, the assets and liabilities to be transferred must be specifically identified in an inventory and real estate, securities and intangible assets[262] must be listed individually[263] because an inventory forms the basis of a transfer of assets and liabilities[264].
- The transfer agreement must provide the total value of the assets and liabilities to be transferred. Under Art. 71 para. 2 MA, the difference between these two amounts must be a positive value[265].
- The consideration to be paid by the acquiring legal entity is an essential element of the transfer agreement. Regardless of whether the transfer takes place with or without a consideration, either the value of this consideration is to be mentioned in the transfer agreement or it is to be stated that no consideration will be provided. As has been mentioned already[266], the consideration must not consist of participation or membership rights in the acquiring company which are conferred to the partners of the divesting company. However, the consideration may consist of participation or membership rights in the acquiring company if they are allocated to the divesting company.
- Because the transfer of assets and liabilities or parts thereof may include the transfer of employment relationships[267], the transfer agreement must include a list of the employment relationships that are transferred[268].

For reasons of legal certainty and because the divesting legal entity continues to exist after a transfer of assets and liabilities, Art. 72 MA states that the assets, accounts receivable and intangible assets that cannot be allocated clearly pursuant to the inventory, remain part of the assets and liabilities of the divesting legal entity[269].

[261] Art. 71 para. 1 lit. a MA.

[262] For example, know-how and goodwill.

[263] Art. 71 para. 1 lit. b MA.

[264] See analogous rules for demergers in Art. 37 lit. b MA; see above II./2.4, p. 28.

[265] Art. 71 para. 1 lit. c MA.

[266] See Art. 69 para. 1 second sentence MA; see above II./4.1, p. 42.

[267] Pursuant to Art. 76 para. 1 MA, Art. 333 CO is applicable.

[268] Art. 71 para. 1 lit. e MA.

[269] See the corresponding rules for demergers pursuant to Art. 38 para. 1 lit. b and para. 2 MA; see above II./2.4, p. 28. For that reason, too, one can refer to it as a partial universal succession.

4.3 Registration in the Register of Commerce and Legal Effect

The principle of the partial universal succession[270] allows, in case of a transfer of assets and liabilities, a totality of rights and obligations, assets and liabilities, as well as entire contractual relationships to be transferred without complying with the usual formal requirements for the transfer of such items[271]. Not complying with these formal requirements makes it mandatory, though, that notice of the transfer is given to third parties in a different manner. Thus, the registration of the transfer of assets and liabilities in the register of commerce is required because inspection of the register of commerce allows the reconstruction of the fact that a transfer of assets and liabilities has occurred. Therefore, Art. 73 para. 1 MA requires the supreme management or administrative body of the divesting legal entity to register the transfer of assets and liabilities in the register of commerce. Pursuant to Art. 931 para. 1 CO, this is to be published in the Swiss Official Gazette of Commerce.

Under Art. 73 para. 2 MA, the transfer of assets and liabilities takes legal effect upon its registration in the register of commerce[272]. At this point in time, all assets and liabilities listed in the inventory are transferred by operation of law to the acquiring legal entity. Thus, a constitutive effect is attached to the entry into the register of commerce. Art. 34 Acart remains unaffected by this provision[273].

4.4 Information of the Partners

Art. 70 MA requires the transfer agreement to be concluded by the supreme management or administrative body of the legal entities involved in the transfer of assets and liabilities. Except for certain circumstances[274] and in contrast to mergers[275], demergers[276] or conversions[277], there is no requirement to obtain approval by a resolution from the general meeting or, in case of general or limited partnerships, from the partners for

[270] See above II./4.1, 42.

[271] Constitutive entries into the land register, endorsement of order papers as well as the assignment of claims or the approval of third parties regarding the transfer of contractual relationships are not required.

[272] Thus, it is the same as for mergers (see Art. 22 para. 1 MA), demergers (see Art. 52 MA) and conversions (see Art. 67 MA).

[273] See Art. 22 para. 1 MA regarding mergers, see above II./1.5., p. 19 and Art. 52 MA regarding demergers.

[274] See above II./4.2., p. 43

[275] See Art. 18 MA; see above II./1.5., p. 19.

[276] See Art. 43 MA; see above II./2.5., p. 30.

[277] See Art. 64 MA; see above II./.3.5., p. 40.

a transfer of assets and liabilities. In contrast to mergers[278], demergers[279] or conversions[280], the Merger Act does not require the preparation of a verification report or the observance of a special inspection right for partners with regard to transfers of assets and liabilities. Under to Art. 74 para. 1 MA, the supreme management or administrative body of the divesting company must, however, inform the partners about the transfer of assets and liabilities in the appendix to the annual financial statements. If the divesting company is not required to prepare annual financial statements, information about the transfer of assets and liabilities is to be provided at the next general meeting .

Art. 74 para. 2 MA prescribes that legal and business implications of the transfer to be explained and substantiated in the appendix or at the general meeting:

- the purpose and the consequences of the transfer of assets and liabilities[281];
- the content of the transfer agreement[282];
- the consideration for the transfer or the fact that no consideration will be paid[283];
- the consequences of the transfer of assets and liabilities for employees, as well as the content of the redundancy plan, if any[284].

The obligation to inform as stated in Art. 74 MA does not apply if the transferred assets constitute less than 5% of the total assets of the divesting company[285]. The basis for this calculation is the last balance sheet prepared by the company and which may also have been approved by the general meeting.

4.5 Protection of Creditors and Employees

As protection for creditors whose claims are being transferred, Art. 75 para. 1 and 2 MA incorporate the provisions for joint and several liability of Art. 181 para. 2 CO and extended their duration from two to three years[286]. Thus, the current debtors are jointly and severally liable with the new debtors for the transferred debts for a period of three

[278] See Art. 14 and 16 MA; see above II./1.4., p. 12.

[279] See Art. 39 and 41 MA; see above II./2.4., p. 28.

[280] See Art. 61 and 63 MA; see above II./3.4., p. 37.

[281] Art. 74 para. 2 lit. a MA.

[282] Art. 74 para. 2 lit. b MA.

[283] Art. 74 para. 2 lit. c MA.

[284] Art. 74 para. 2 lit. d MA.

[285] Art. 74 para. 3 MA.

[286] For the adaptation of Art. 181 para. 2 CO see below II./9.1., p. 65.

years. This period starts with the publication of the transfer of assets and liabilities[287] or, for claims becoming due at a later date, with their due date. Art. 75 para. 3 MA additionally provides that the legal entities involved in the transfer of assets and liabilities must provide security for the claims if:

- the joint and several liability no longer applies before the three year period expired[288, 289]; or
- the creditors are able to substantiate that the joint and several liability does not provide sufficient protection[290].

Instead of providing security, legal entities involved in the transfer of assets and liabilities may, pursuant to Art. 75 para. 4 MA, satisfy such creditors' claims to the extent that other creditors are not harmed. The prerequisite for early payment is that there is no reason for it to be regarded as not permissible because of the content, the circumstances or the nature of the agreement[291].

As with mergers[292] and demergers[293], the transfer of assets and liabilities or a portion of assets and liabilities may result in the transfer of employment relationships to the acquiring legal entity. Art. 76 para. 1 MA makes Art. 333 CO applicable to the transfer of assets and liabilities, i.e. the employment relationship, including all rights and obligations is transferred to the acquirer of the assets and liabilities unless the employee rejects it. For the protection of employees, Art. 76 para. 2 MA further makes Art. 75 MA applicable to debts owed to employees. All claims arising from an employment agreement which are due up to the point in time when the employment agreement legally can be terminated or, if the transfer of the employment relationship is rejected by the employee, when it is terminated, are subject to the joint and several liability and the right of security for claims.

Art. 77 para. 1 MA also makes Art. 333a CO applicable to the divesting legal entity and the acquiring one for consultations with employees' representation bodies. Thus, be-

[287] This is different from mergers (see Art. 26 para. 2 MA), demergers (see Art. 48 MA in conjunction with Art. 26 para. 2 MA) and conversions (see Art. 68 para. 1 MA in conjunction with Art. 26 MA) where the legal effect of a merger, demerger or conversion is taken upon the registration in the register of commerce (see Art. 22 para. 1 MA, Art. 52 MA or Art. 67 MA).

[288] See Art. 75 para. 3 lit. a MA.

[289] Thus, in particular after the bankruptcy of a legal entity involved in the transfer of assets and liabilities .

[290] Art. 75 para. 3 lit. b MA.

[291] See Art. 81 CO.

[292] See Art. 27 para. 1 MA; see above II./1.6., p. 21.

[293] Art. 49 para. 1 MA, see above II./ 2.6., p. 32.

fore the transfer is completed, the divesting legal entity has to inform the employees' representation body or, if there is none, the employees themselves about the reasons for, as well as the legal, economic and social consequences, of the transfer for the employees. Because, in case of a transfer of assets and liabilities, employees of the divesting legal entity and the acquiring one may be affected equally by the consequences of the transfer of assets and liabilities, Art. 77 para. 1 MA requires consultations for both legal entities involved. Art. 77 para. 2 MA states that the employees' representation bodies may seek an injunction in court prohibiting the registration of the transfer of assets and liabilities in the register of commerce if the provisions of Art. 77 para. 1 MA are not observed. Finally, Art. 77 para. 3 MA provides that Art. 77 MA also is applicable to acquiring legal entities that have their registered offices abroad. Art. 77 para. 2 and 3 MA are largely equivalent to the corresponding provisions for mergers[294] and demergers[295].

5. Merger and Transfer of Assets and Liabilities of Foundations

Foundations are also legal entities under Art. 2 lit. a MA, but they are structurally quite different from companies. Companies are defined as an association of persons based on an agreement to pursue a common goal, whereas foundations are constituted by the dedication of assets to a special purpose[296]. Foundations do not have members, but the interests of its beneficiaries are to be protected. The differences between foundations and companies are reflected in the Merger Act. In the case of a foundation, the transactions permissible under the Merger Act are limited to the merger between foundations[297] and the participation of a foundation in a transfer of assets and liabilities[298]. Because a foundation has no members, a demerger makes no sense. A direct conversion of a foundation into a company is not possible because of the incompatibility of their basic structures. For mergers and transfers of assets and liabilities in respect of occupational old age, survivors and disability foundations, which are subject to Art. 61 et seq. LOB, special rules apply[299].

294 See Art. 28 para. 1, 3 and 4 MA; see above II./1.6., p. 21.

295 Art. 50 MA in conjunction with Art. 28 para. 1, 3 and 4 MA, see above II./2.6., p. 32.

296 Institutions defined under Art. 80 et seq. CC.

297 See below II./5.1, p. 49.

298 See below II./5.2., p. 51.

299 See below II./6., 53.

5.1 Mergers

Art. 78 para. 1 MA allows foundations to merge with other foundations, a transaction previously permitted under a decision of the Swiss Federal Supreme Court[300]. A merger of a foundation with a company, however, is not possible because of the structural differences. Art. 78 para. 2 MA authorises a merger between foundations if with respect to both the acquired foundation and the acquiring one:

- it can be factually justified and, in particular, if it protects the purpose of the foundation.
- (in exceptional cases) the beneficiaries are entitled to legal claims in respect of a foundation, these must be protected.

If a change in the purpose of a foundation is required before the merger, the procedure set out in Art. 86 CC is applicable[301].

The supreme governing body of the foundations, i.e. the foundation council, is responsible for the conclusion of the merger agreement[302]. The list of the objectively essential elements of the merger agreement is reduced in comparison to the rules in Art. 13 MA[303] that apply to companies because the issues regarding membership are not applicable here:

- name, registered office and purpose of the merging foundations[304];
- details about the position of the beneficiaries of the acquiring foundation which have legal claims in respect of the acquiring foundation[305]; and
- the point in time when the activities of the acquired foundation are regarded as being carried out for the account of the acquiring foundation[306].

Art. 79 para. 3 MA, as with companies[307], requires the merger agreement to be in writing. For family and ecclesiastical foundations, which are neither required to be regis-

300 BGE 115 II 415 et seq.

301 Art. 86 CC states that, under certain conditions, the purpose of a foundation may be changed by the competent cantonal authority or the competent department of the federal government upon application by the supervisory authority and after the supreme governing body of the foundation has had an opportunity to make its position on the proposed change known.

302 Art. 79 para. 1 MA.

303 See above II./1.4., p. 12.

304 Art. 79 para. 2 lit. a MA.

305 Art. 79 para. 2 lit. b MA.

306 Art. 79 para. 2 lit. c MA.

307 See Art. 12 para. 2 MA, see above II./1.4., p. 12.

tered in the register of commerce[308] nor subject to governmental supervision[309], the merger agreement, however, must be certified by a notary in order to guarantee legal certainty[310].

Under Art. 80 MA, a merger between foundations also requires a merger balance sheet. If necessary, an interim balance sheet is to be produced[311].

Pursuant to Art. 81 MA, the merger agreement and the balance sheets are to be verified by an auditor. In contrast to the merger of companies[312], there is no need for a specially qualified auditor. The foundations involved also may appoint a joint auditor. The auditor sets out in a written report whether the potential legal claims of the beneficiaries have been protected[313] and verifies whether the assets of the foundations involved are sufficient to satisfy all known or expected claims.

Beneficiaries with legal claims in respect to the foundation are to be informed according to Art. 82 MA about the planned merger and its effects on their legal position by the supreme governing bodies of the foundations prior to the filing of an application with the supervisory authority. In case of a family or ecclesiastical foundation, this information must be provided before the merger resolution is adopted.

For foundations under governmental supervision[314], the supreme governing bodies of all foundations involved must file an application with the responsible supervisory authority[315] requesting the approval of the merger according to Art. 83 para. 1 MA. The application must show that the prerequisites for the merger have been fulfilled[316]. The supervisory authority examines the application and issues an order. If the supervisory authority approves the application, it applies for the registration of the merger in the register of commerce[317]. The merger becomes legally effective when it is registered

[308] See Art. 52 para. 2 CC.

[309] See Art. 87 para. 1 CC.

[310] Art. 79 para. 3 second sentence MA.

[311] See Art. 11 MA, see above II./1.3., p. 11.

[312] See Art. 15 para. 1 MA.

[313] Art. 78 para. 2 MA.

[314] According to Art. 84 CC, foundations are subject to governmental supervision (federal, cantonal, municipal) depending on their purpose; family foundations and ecclesiastical foundations are not supervised (Art. 87 para. 1 CC).

[315] The responsible supervisory authority is solely the one for the acquired foundation (Art. 83 para. 2 MA).

[316] In particular the prerequisites according to Art. 78 para. 2 MA.

[317] Art. 83 para. 3 MA. If the supervisory authority rejects the merger, the remedies of the foundation law are available against this resolution.

and Art. 83 para. 4 MA relies on the corresponding provision for mergers of companies[318].

Family and ecclesiastical foundations are exempt from governmental supervision[319], which is why a merger of such foundations is not required to obtain official approval. They are not obliged either to be registered in the register of commerce[320]. Therefore, Art. 83 MA is not applicable to the merger of such foundations. Thus Art. 84 para. 1 MA specifies that a merger for these foundations takes legal effect with the approval of the certified merger agreement[321] by the supreme governing bodies of all merging foundations. However, under Art. 84 para. 2 MA, beneficiaries with legal claims and members of the supreme governing foundation body who did not vote in favour of the merger can challenge the merger resolution in court within three months after its adoption if the preconditions of a merger have not been met.

Art. 85 para. 1 MA requires creditors to be notified by the supervisory authority that they may demand security for their claims through the publication of a notice three times in the Swiss Official Gazette of Commerce before the merger is approved. For a family or ecclesiastical foundation without a supervisory authority, the foundation council of the acquired foundation has to arrange these notices to be published prior to the adoption of the merger resolution. Beneficiaries with legal claims in respect of these foundations are not entitled to security[322]. If the creditors have been notified, Art. 25 MA is applicable[323]. According to Art. 85 para. 2 MA, there is no need to notify creditors if, based on the report of the auditor, no claims are known or to be expected that could not be satisfied out of the assets of the merging foundations.

5.2 Transfers of Assets and Liabilities

The comprehensive permission for transfers of assets and liabilities of foundations provides an alternative for the fact that there do not exist provisions regarding the conversion into a company, the merger with a company, as well as the demerger of foundations because of the incompatibility of the basic structures of foundations and corpora-

[318] See Art. 22 para. 1 MA; see above II./1.5, p. 19.

[319] See Art. 87 para. 1 CC.

[320] See Art. 52 para. 2 CC.

[321] Art. 79 para. 3 MA.

[322] However, they are protected in particular by Art. 78 para. 2 MA, Art. 81 MA, Art. 83 MA and Art. 84 para. 2 MA.

[323] Art. 85 para. 3 MA; see above II./1.6. first paragraph, p. 21.

tions[324]. The transfer of assets and liabilities makes it possible for foundations to carry out transactions economically equivalent to the otherwise non-permissible transactions.

Art. 86 para. 1 MA allows a foundation to transfer all its assets and liabilities or parts thereof to another legal entity. It is mandatory that the divesting foundation is registered in the register of commerce. Family and ecclesiastical foundations, which generally are not registered, can easily be registered in the register of commerce, if required, prior to a transfer of assets and liabilities. The conditions for the transfer of assets and liabilities of foundations are equivalent to those of companies[325]. Under Art. 87 MA, the procedure for the approval and the implementation of the transfer is equivalent to that for a merger between foundations[326]. With foundations, which are subject to governmental supervision, their supreme governing foundation bodies have to seek approval for the transfer of assets and liabilities from the supervisory authority for the divesting foundation. In case of several divesting foundations, each supervisory authority has to approve the transaction. If the conditions have been fulfilled, the supervisory authority grants its approval and applies for the registration of the transfer of assets and liabilities in the register of commerce once the order has taken legal effect. Again, the conditions of registration and the legal effect of the transfer are governed by Art. 73 MA[327].

A foundation may not only transfer assets and liabilities, it also can acquire assets and liabilities or parts thereof from another legal entity with a different legal form[328].

6. Merger, Conversion and Transfer of Assets and Liabilities of Occupational Old Age, Survivors and Disability Institutions

In Art. 2 lit. i MA, occupational old age, survivors and disability institutions are defined as institutions supervised under Art. 61 et seq. LOB and which are legal entities[329].

[324] See above II./ 5., p. 48.

[325] Art. 86 para. 2 MA refers to Art. 70 MA (conclusion of the transfer agreement), Art. 71 MA (content of the transfer agreement), Art. 72 MA (non-allocated asset items), Art. 75 MA (joint and several liability), Art. 76 MA (transfer of employment relationships and joint and several liability) and Art. 77 MA (consultation with employees' representation bodies). Concerning this, see above II./4., p. 42 et seq.

[326] See Art. 83 para. 1 – 3 MA; see above II./5.1., p. 48.

[327] See above II./4.3., p. 45. This means, the transfer of assets and liabilities becomes effective with the registration in the register of commerce. At this point in time, by operation of law (i.e. by partial universal succession), all assets and liabilities listed in the inventory are transferred on to the acquiring foundation.

[328] Art. 69 MA; such a transfer of assets and liabilities is governed by Art. 69 - 77 MA.

[329] See above I./2.2.i), p. 4.

Pursuant to Art. 48 para. 2 LOB, occupational old age, survivors and disability institutions must be constituted as a foundation, a cooperative or an institution under public law. Chapter 6 of the Merger Act governs mergers, conversions and transfers of assets and liabilities of occupational old age, survivors and disability institutions regardless of their legal form.

6.1 Merger

The provisions for a merger between occupational old age, survivors and disability institutions are basically equivalent to those of a merger between companies. Mergers are based on a merger agreement, a merger report and a verification report. Subsequently, the merger is submitted to the supervisory authority for approval and then entered into the register of commerce. Chapter 6 of the Merger Act, however, takes into account the special features of occupational old age, survivors and disability institutions, in particular with regard to the protection of the insured persons and supervision.

Pursuant to Art. 88 para. 1 MA, occupational old age, survivors and disability institutions may merge with each other regardless of their legal form. However, a merger with a legal entity which is not an occupational old age, survivors and disability institution under Art. 2 lit. i MA is excluded. Art. 88 para. 2 MA makes a merger between occupational old age, survivors and disability institutions subject to qualifying conditions, which apply to both the acquired institution as well as the acquiring one:

- The welfare purpose must be maintained. The merger must not have the effect of changing the purpose of the merging institutions.
- The rights and claims of the insured persons must remain protected.

Art. 88 para. 3 MA states that the provisions of the law on foundations (Art. 80 et seq. CC) and the Federal Law on Occupational Old Age, Survivors and Disability Benefit Plan of June 25, 1982 remain unaffected by the Merger Act.

A merger between occupational old age, survivors and disability institutions is to be based on a merger balance sheet[330]. If the last balance sheet produced is no longer current, an interim balance sheet must be prepared[331].

According to Art. 90 para. 1 MA, the merger agreement must be in writing and concluded by the supreme management bodies of the merging occupational old age, sur-

[330] Art. 89 MA. See also Art. 11 MA for the merger of companies (see above II./1.3, p. 11 et seq.) and Art. 80 MA for the merger of foundations (see above II./5.1, p. 49).

[331] In respect of the interim balance sheet, the provisions of Art. 11 apply; see above II./1.3., p. 11.

vivors and disability institutions[332]. If the institution is a cooperative, the merger also must be approved by a resolution adopted at the general meeting[333]. Art. 90 para. 2 MA states the objectively essential elements of the merger agreement:

- name, registered office and legal form of the merging occupational old age, survivors and disability institutions and, in case of a combination merger, the same information for the new occupational old age, survivors and disability institution as well[334];
- details about the rights and claims of the insured persons against the acquiring occupational old age, survivors and disability institution[335]; and
- the point in time when the activities of the acquired occupational old age, survivors and disability institution are regarded as being carried out for the account of the acquiring occupational old age, survivors and disability institution[336].

A merger can be effected retroactively, but this has validity as an internal matter between the contractual partners only[337].

As with a merger between companies[338], the supreme management bodies of the merging occupational old age, survivors and disability institutions must, pursuant to Art. 91 MA, prepare an individual or joint written merger report in which the merger is to be explained and substantiated to the insured persons:

- the purpose and the consequences of the merger[339];
- the merger agreement including the content of the agreement and the planned conditions of the merger[340]; and
- the consequences of the merger on the rights and claims of the insured persons[341].

The merger agreement, the merger report and the merger balance sheet are to be verified twice. Under Art. 92 MA, these documents are to be verified by the auditors (as defined in Art. 53 para. 1 LOB) of the merging occupational old age, survivors and disability institutions and by a recognised expert for employee welfare (as defined in Art. 53 para. 4 LOB). To simplify matters, a joint expert can be appointed. All relevant information and documentation must be provided to the auditors and the experts. The auditor and the expert are to provide a written report which includes the results of their verifications and explains whether the rights and claims of the insured persons are protected.

Art. 93 MA requires that the insured persons be informed by the occupational old age, survivors and disability institutions about the planned merger and its effects on their rights and claims and to be made aware of their document inspection right. Thereafter, at the registered offices of the merging occupational old age, survivors and disability institutions, the insured persons are to be permitted to inspect the merger agreement and the merger report for a period of 30 days before the application for approval of the merger can be submitted to the supervisory authority.

Under Art. 94 MA, the body authorized to adopt a resolution approving the merger depends on the legal form of the occupational old age, survivors and disability institution. For foundations, the supreme management body is responsible, while for cooperatives, in addition to the approval of the supreme management body, the resolution must be adopted at the general meeting[342]. For occupational old age, survivors and disability institutions under public law, the resolution is governed by the relevant statutory regulations of the federation, the cantons and the municipalities, as indicated by the reference to Art. 100 para. 3 MA.

Pursuant to Art. 95 para. 1 MA, the supreme management bodies of the occupational old age, survivors and disability institutions must apply to the relevant supervisory authority for the approval of the merger. The exclusively responsible supervisory authority is the one for the acquired occupational old age, survivors and disability institution. Art. 95 para. 3 MA permits the responsible supervisory authority to request further necessary documentation from the merging occupational old age, survivors and disability institutions to determine whether the prerequisites for a merger have been met. After its order of approval has taken legal effect, the supervisory authority applies for registration of the merger in the register of commerce[343]. The merger takes legal effect only after this registration has been made[344].

The protection of creditors is guaranteed in Art. 96 MA which follows the corresponding provisions for a merger between companies[345]. Prior to issuing its order, the supervi-

[332] See Art. 90 para. 3 MA.

[333] Art. 94 para. 1 MA.

[334] Art. 90 para. 2 lit. a MA.

[335] Art. 90 para. 2 lit. b MA.

[336] Art. 90 para. 2 lit. c MA.

[337] See Art. 95 para. 5 MA.

[338] Art. 14 MA.

[339] Art. 91 para. 2 lit. a MA.

[340] Art. 91 para. 2 lit. b MA.

[341] Art. 91 para. 2 lit. c MA.

[342] The required majority in the general meeting is determined pursuant to Art. 94 para. 1 MA according to Art. 18 para. 1 lit. d MA.

[343] Against the resolutions of the supervisory authority, the normal remedies of the LOB are available.

[344] Art. 95 para. 5 MA in conjunction with Art. 22 para. 1 MA.

[345] Art. 25 MA; see above II./1.6., p. 21 et seq.

sory authority has to give notice to the creditors by publication three times in the Swiss Official Gazette of Commerce that they may demand security for their claims from the acquiring institution during a period of two months after the publication of the last notice. The insured persons, who are protected by other provisions, are not entitled to security for their claims and entitlements arising from the insurance relationship[346]. There is no need for the public notification of creditors if all known or expected claims can be satisfied out of the disposable assets of the merging occupational old age, survivors and disability institutions. Art. 96 para. 4 MA permits the occupational old age, survivors and disability institutions to refuse security if it can prove that the merger does not jeopardise the payment of a submitted claim. It also can settle the claim if the other creditors are not harmed thereby[347]. In case of disputes, the supervisory authority decides whether security must be provided. Art. 96 MA also applies Art. 27 et seq. MA to ensure the protection of employees.

[346] See in particular Art. 88 para. 2 MA, Art. 92 para. 3 MA, Art. 93 MA and Art. 95 para. 3 MA.

[347] Art. 96 para. 4 MA declares Art. 25 para. 4 MA as applicable.

6.2 Conversion

In principle, the conversion of an occupational old age, survivors and disability institution into an occupational old age, survivors and disability institution with another legal form presents the same questions as a merger between such institutions. Thus, the rules for both are the same.

Art. 97 para. 1 MA states that occupational old age, survivors and disability institutions may convert into foundations or cooperatives. Accordingly, an occupational old age, survivors and disability cooperative can convert into a foundation and vice versa. The conversion into a cooperative or into a foundation is also available to an occupational old age, survivors and disability institution under public law. What is not possible, however, is the conversion of a cooperative or a foundation into an institution under public law. But a corresponding restructuring through a transfer of assets and liabilities is an option. In any case, just as for a merger of occupational old age, survivors and disability institutions[348], a conversion is permissible only on the basis that the welfare purpose, as well as the rights and claims of the insured persons remain protected. The provisions for the conversion of occupational old age, survivors and disability institutions are otherwise the same as those for a merger between such institutions. Art. 97 para. 3 MA applies Art. 89 - 95 MA by analogy[349]. A difference exists to the extent that, with a conversion as merely a unilateral legal act, a conversion plan takes the place of a merger agreement[350] in which, however, basically the same details have to be given.

6.3 Transfer of Assets and Liabilities

In principle, there is nothing special about the transfer of assets and liabilities of occupational old age, survivors and disability institutions in comparison to the transfer of assets and liabilities of other legal entities. Consequently, Art. 98 MA states that occupational old age, survivors and disability institutions may transfer all their assets and liabilities or parts thereof not only to other occupational old age, survivors and disability institutions, but also to other legal entities[351]. Thus, for example, an occupational old age, survivors and disability institution may transfer a part of its assets and liabilities to a corporation or a limited liability company. Under Art. 98 para. 2 MA, the implementation of such a transfer of assets and liabilities is basically governed by Art. 70 – 77

[348] Art. 88 para. 2 MA.

[349] See above II./6.1., 53.

[350] Art. 90 MA.

[351] Concerning the term 'legal entity' see above I./2.2.b), p. 3.

MA[352], which provide uniform rules for the transfer of assets and liabilities regardless of the legal form of the legal entities involved.

If provided for by the law governing employee welfare, transfers of assets and liabilities in connection with a partial or total liquidation require the approval of the supervisory authority.

7. Merger, Conversion and Transfer of Assets and Liabilities Involving Institutions under Public Law

7.1 Permissible Transactions

The Merger Act determines the requirements in private law under which institutions under public law[353] can be converted into certain legal entities under private law, can merge with legal entities under private law or can participate in transfers of assets and liabilities[354]. Mergers, conversions or transfers of assets and liabilities are only available to independent institutions under public law[355] which are registered in the register of commerce. Art. 99 MA permits such institutions to:

- transfer their assets and liabilities by merging with corporate entities, cooperatives, associations or foundations[356];
- convert into corporate entities, cooperatives, associations or foundations[357]; or
- transfer all their assets and liabilities or parts thereof to other legal entities or acquire assets and liabilities or parts thereof from other legal entities [358].

The Merger Act does not deal with the demerger of institutions under public law because it is not a transaction under company law, but rather one under public law. The same applies to the acquisition of a legal entity under private law by an institution under public law and the conversion of a legal entity under private law into an institution under public law. However, for all these transactions, the transfer of assets and liabilities in accordance with the Merger Act is possible.

352 See above II./4., p. 42 et seq.

353 Concerning the term institutions under pubic law see above I./2.2., p. 3.

354 Art. 1 para. 3 MA. For the acquisition of the assets of a corporation or a cooperative by a corporation under public law, Art. 751 and 915 CO are to be observed as well.

355 See Art. 2 lit. d MA.

356 Art. 99 para. 1 lit. a MA.

357 Art. 99 para. 1 lit. b MA.

358 Art. 99 para. 2 MA.

7.2 Applicable Law

The Merger Act applies by analogy to the merger of an institution under public law with a legal entity under private law, the conversion of legal entities under public law into institutions under private law and the transfer of assets and liabilities with the participation of an institution under public law[359]. This makes it possible to deviate from the provisions of the Merger Act to the extent necessary because of the differences between the legal entities under private and public law. Furthermore, Art. 100 para. 1 MA states that public law may introduce different provisions for mergers and conversions of institutions under public law. For a transfer of assets and liabilities, the provisions of the Merger Act are applicable in any case.

Institutions under public law frequently do not follow the same accounting practices as legal entities under private law. Therefore, Art. 100 para. 2 MA provides that institutions under public law must prepare an inventory of those assets and liabilities which are affected by a merger, a conversion, or a transfer of assets, and liabilities. The inventory must not only identify the relevant assets and liabilities, but also value them. A specially qualified auditor must verify the inventory.

The provisions for a resolution approving a merger, demerger or conversion by institutions under public law are governed by the statutory regulations of the federal government, the cantons and the municipalities. Thus, public law determines under which conditions an institution under public law may participate in a transaction pursuant to the Merger Act. In practice, a relevant legal basis is normally required for this.

7.3 Responsibilities and Liability

The relationships between institutions under public law and their creditors often have special characteristics (e.g. the governmental guarantee of a cantonal bank). Art. 101 para. 1 MA requires that mergers, conversions and transfers of assets and liabilities carried out by institutions under public law do not adversely affect creditors. In addition, the federation, cantons and municipalities must guarantee that potential liability claims pursuant to Art. 26 MA, Art. 68 para. 1 MA and Art. 75 MA can be fulfilled.

If the precautions taken do not fulfil the requirements set out in Art. 101 para. 1 MA, then the federation (or the cantons or the municipalities) are liable for the resulting damage according to the legal provisions regarding responsibility[360]. The responsibility

359 Art. 100 para. 1 MA.

360 Art. 101 para. 2 MA.

of persons acting on behalf of an institution under public law also is governed by applicable public law[361].

8. Common Provisions and Transitional Provisions

8.1 Implementing Provisions

Mergers[362], demergers[363], conversions[364] and transfers of assets and liabilities[365] take legal effect with their registration in the register of commerce[366]. Various technical questions arise for the registration in the register of commerce. Art. 102 MA delegates to the Federal Council the task of specifying the details of the registration in the register of commerce and the documents to be submitted. These will need to be incorporated into the ordinance governing the register of commerce[367]. The Federal Council also must specify the details of the entries in the land register and the documentation to be submitted.

8.2 Levy on Change of Ownership

Art. 103 MA precludes the cantons and municipalities from imposing levies on changes of ownership through restructurings otherwise imposed pursuant to Article 8 para. 3 and Article 24 para. 3 and 3^{quater} of the Federal Act on the Harmonisation of the Direct Taxes of the Cantons and Municipalities of 14 December 1990.

8.3 Application for Entry into the Land Register

Under Art. 22 MA, Art. 52 MA and Art. 73 para. 2 MA, the registration of a merger, demerger or transfer of assets and liabilities in the register of commerce leads to the legal transfer of all relevant assets and liabilities. Thus, the ownership of real estate is transferred without an entry in the land register. In other words, in case of a merger, demerger or transfer of assets and liabilities, the entry in the land register is not required in order to acquire title to the real estate. However, the land register must be updated to reflect changes in ownership resulting from the merger, demerger, conversion or transfer of assets and liabilities[368]. Although in case of a merger and a demerger, the acquired or divesting legal entity which is registered in the land register as the owner is dissolved and deleted in the register of commerce[369] and, in case of a conversion, a change of the legal form takes place without a change in legal relationships[370], it is true to say that, in these situations, improper transfers by the legal entity registered as the owner are excluded. However, in order to guarantee legal certainty and the integrity of the land register, Art. 104 para. 1 MA states that the land register must show the transfer within three months after these transactions have taken legal effect.

For reasons of legal certainty, shorter periods apply in case of a merger between associations or of foundations if the acquired legal entity is not registered in the register of commerce and if, according to the inventory, the real estate has been transferred to the acquiring legal entity through a spin-off or a transfer of assets and liabilities. In these cases, Art. 104 para. 2 MA requires that the transfer of ownership of real estate to be entered in the land register immediately after the transfer has become effective.

In addition, Art. 104 para. 3 MA states that, in cases falling under Art. 104 para. 2 MA[371], the transfer of assets to the acquiring legal entity must be accompanied by a notarial certification recording the transfer of real estate to the acquiring legal entity. This notarial certification refers to the valid transfer of assets and contains a list of the affected real properties. A single notarial certification is sufficient for all parcels of real estate located in Switzerland.

Pursuant to Art. 102 lit. b MA, it is the responsibility of the Federal Council to regulate the details of the entry in the land register and the documentation required to be submitted to the land register and to impose them in the ordinance governing the land register[372].

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361 Art. 108 para. 4 MA.

362 See Art. 21 and 22 MA.

363 See Art. 51 and 52 MA.

364 See Art. 66 and 67 MA.

365 See Art. 73 para. 2 MA.

366 The same applies for the merger of foundations pursuant to Art. 83 para. 3 and 4 MA in conjunction with Art. 22 para. 1 MA, and the transfer of assets and liabilities amongst foundations pursuant to Art. 87 para. 3 and 4 MA in conjunction with Art. 73 MA.

367 Register of commerce ordinance of June 7, 1937, SR 221.411.

368 Pursuant to Art. 656 para. 2 last sentence CC, the acquiror only can dispose of real estate after it has been registered. The previous registered owner could still dispose of the real estate because, according to Art. 963 para. 1 CC, such owner has the formal right to dispose of it and, according to Art. 973 para. 1 CC, the owner who is still registered, can still transfer rights to a third party without knowledge of the transfer.

369 See Art. 21 para. 3 MA and 51 para. 3 MA.

370 See Art. 53 MA.

371 This refers to the merger of associations and foundations if the acquired legal entity is not entered in the register of commerce or if a parcel of real estate has been transferred to the acquiring legal entity as a result of spin-off or transfer of assets and liabilities in accordance with an inventory.

372 Ordinance regarding the Land Register of February 22, 1910 (Land Register Ordinance), SR 211.432.1.

8.4 Examination of the Participation and Membership Rights

As noted, under Art. 7 MA, Art. 31 MA in conjunction with Art. 7 MA and Art. 56 MA, the continuity of membership in the relevant legal entities must be protected in a merger, demerger or conversion. In principle, partners must not be excluded from the participation or membership rights in the acquired legal entity and their participation and membership rights must be protected in an appropriate manner.[373] If this is not done, the partners may demand, under Art. 105 para. 1 MA that a court determines an appropriate compensation payment for the loss of their participation and membership rights. The court in this situation is not limited by Art. 7 para. 2 MA[374]. The right to demand judicial review of the participation and membership rights allocated to the partners must be exercised within a period of two months following the publication of the notice of the merger, demerger or conversion in the Swiss Official Gazette of Commerce.

Because, for a transfer of assets and liabilities under Art. 69 et seq. MA, the divesting legal entity itself is the beneficiary of a possible consideration, the participation and membership rights of the partners of the divesting legal entity are not affected. Thus an examination of the participation and membership rights is not provided for in connection with such a transfer.

Because the status of the participation and membership rights is to be detailed in the merger report[375], demerger report[376] or conversion report[377] and verified by a specially qualified auditor[378], a court challenge to the participation and membership rights likely will be rare in practice.

Although the right to seek judicial review is an individual right, the judgment, pursuant to Art. 105 para. 2 MA, binds all partners of the relevant legal entity who are in the same legal position as the plaintiff.

Pursuant to Art. 105 para. 3 MA, the costs of the judicial review are generally to be borne by the acquiring legal entity. However, the court can award costs in full or in part

[373] See Art. 8 MA, which permits an exception to the principle of continuity of membership.

[374] Art. 7 para. 2 MA states that, as part of the determination of the exchange ratio, a compensation payment can be provided for participation rights, with this payment not exceeding one tenth part of the real value of the participation rights granted in exchange. See above II./1.2., p. 10.

[375] See Art. 14 MA.

[376] See Art. 39 MA.

[377] See Art. 61 MA.

[378] See in principle Art. 15 MA, Art. 40 MA and Art. 62 MA; the verification does, however, not apply for a small and medium-sized enterprise if all partners agree (concerning this, see Art. 15 para. 2 MA, Art. 40 MA and Art. 62 para. 2 MA).

to the plaintiffs if this is justified by particular circumstances. Art. 105 para. 4 MA provides that the judicial review does not impair the legal validity of the merger, demerger or conversion resolution. Thus, the court can only order an appropriate compensation payment to compensate the members for the violation of their participation and membership rights.

8.5 Challenge of Merger, Demerger, Conversion and Asset and Liabilities Transfer Resolutions

According to Art. 106 para. 1 MA, each partner has the right to challenge in court a merger, demerger, conversion or transfer of assets and liabilities resolution that does not comply with the provisions of the Merger Act. This right is available to all partners of each of the legal entities involved in the merger, demerger, conversion or the transfer of assets and liabilities if they did not vote for the merger, demerger or conversion. The action must be initiated within a period of two months following the publication of the notice of the merger, demerger, conversion or transfer of assets and liabilities in the Swiss Official Gazette of Commerce. If publication of notice is not required, this period will commence with the adoption of the resolution approving the transaction at the general meeting or by the partners.

Art. 105 para. 2 MA provides that the partners can challenge a transaction even if it only required approval of the supreme management or administrative body[379].

The Merger Act does not extend the right to seek judicial review to foundations and occupational old age, survivors and disability institutions. Separate provisions regarding judicial review are provided in the foundations law and, in case of mergers, conversions and transfers of assets and liabilities of occupational old age, survivors and disability institutions, the provisions of the LOB apply.

The consequences of a violation of the Merger Act differ depending on whether the deficiencies are capable of being remedied. If the deficiency can be remedied, the court in accordance with Art. 107 para. 1 MA will grant the legal entities a time period for remedying the deficiency rather than block a resolution approving the merger, demerger, conversion or transfer of assets and liabilities. If, however, the deficiency cannot be remedied or if the legal entities have not remedied it within the set period, the court will nullify the resolution approving the transaction and impose further measures required to restore the parties to their positions before the resolution was adopted[380].

[379] For example, the resolution regarding a simplified merger in terms of Art. 23 et seq. MA or regarding a transfer of assets and liabilities according to Art. 69 et seq. MA.

[380] See Art. 107 para. 2 MA.

8.6 Responsibility

Mergers, demergers, conversions or transfers of assets and liabilities carry with them considerable responsibilities for the persons involved. Following the provisions in the corporation laws[381], Art. 108 MA sets out the prerequisites for personal liability of the persons involved. Under Art. 108 para. 1 MA, all persons involved in any way in a merger, demerger, conversion or transfer of assets and liabilities are liable with respect to the legal entities, the individual partners, as well as the creditors for the damage caused by an intentional or negligent violation of their duties. If a new legal entity is formed in the relevant transaction, the provisions for the relevant legal form are applicable in relation to a liability arising from the formation of that entity. Art. 108 para. 2 MA sets the standard for determining the liability of persons involved in a verification required by the Merger Act[382].

Art. 108 para. 3 MA incorporates the following liability provisions from the Swiss Code of Obligations which are applicable to all legal entities involved in a merger, demerger, conversion or transfer of assets and liabilities, regardless of their legal form:

- claims arising from bankruptcy pursuant to Art. 756 CO[383];
- claims in the legal entity's bankruptcy[384];
- joint and several liability and recourse[385]; and
- the statute of limitations for claims arising from breaches of statutory duties by persons involved in the transaction[386].

Pursuant to Art. 29a SFAJ, actions can be initiated against any of the responsible persons with the court at the same geographic location as the registered office of a legal entity involved. If a foreign company is acquiring a Swiss company, the creditors as well as the partners may, in any case, initiate an action at the same location as the registered office of the Swiss company.

Finally, Art. 108 para. 4 MA states that the liability of persons employed by an institution under public law is governed by public law.

381 See Art. 752 et seq. CO.

382 See Art. 15 MA, Art. 40 MA , Art. 62 MA , Art. 81 MA and Art. 92 MA.

383 The legal entity itself, its owners and creditors are entitled to sue the relevant persons under Art. 108 para. 1 and 2 MA for damages suffered by the legal entity as a result of either intentional conduct or negligence.

384 Art. 757 CO, Art. 764 para. 2 CO, Art. 827 CO and Art. 920 CO apply to the claims of the creditors as well as the partners.

385 Art. 759 CO.

386 Art. 760 CO.

8.7 Transitional Provisions

According to Art. 110 MA, the Merger Act is applicable for mergers, demergers, conversions or transfers of assets and liabilities, which are submitted for registration in the register of commerce after the Merger Act entered into force.

9. Amendments of Current Law

As a consequence of the Merger Act, various provisions of current law had to be amended. The following overview explains some of the most important amendments to current law.

9.1 Swiss Code of Obligations

Under Art. 181 CO, only liabilities associated with assets or a business are transferred by operation of law. Assets must be transferred individually in accordance with the usual requirements for such transfers. For the protection of creditors, Art. 181 para. 2 CO imposes joint and several liability on the previous debtor. In the new Art. 181 para. 2 CO, the period for joint and several liability has been increased from two to three years. Thus, the protection of creditors is improved and the provisions of Art. 181 CO are harmonised with those of the Merger Act[387].

The new Art. 181 para. 4 CO differentiates between transfers of assets and liabilities pursuant to Art. 69 et seq. MA and the acquisition of assets and liabilities or a business pursuant to Art. 181 CO. Pursuant to Art. 181 para. 4 CO, the acquisition of assets and liabilities or a business from legal entities under private law registered in the register of commerce is governed solely by the provisions of the Merger Act without regard to the legal form of the acquiring legal entity. Therefore, Art. 181 CO is no longer applicable to general partnerships, limited partnerships, corporations, corporations including partners with unlimited partners, limited liability companies, cooperatives, associations, and sole proprietorships if these legal entities are registered in the register of commerce.

Art. 182 CO deals with the mutual acquisition of assets and liabilities as well as the continuation of a sole proprietorship as a general or a limited partnership. Due to the introduction of provisions relating to the transfer of assets and liabilities by the Merger Act[388], Art. 182 CO was repealed.

387 See Art. 26 para. 2 MA, Art. 48 MA in conjunction with Art. 26 para. 2 MA, Art. 68 para. 1 MA in conjunction with Art. 26 para. 2 MA, Art. 75 para. 1 MA.

388 See Art. 69 et seq. MA.

Because the Merger Act now conclusively lays down the legal concepts for mergers, demergers, conversions or transfers of assets and liabilities, various provisions of the prior law also could be repealed[389].

Finally, a few further adaptations of the Swiss Code of Obligations resulted from the Merger Act. In order to take account of all dissolutions of a corporation without liquidation, Art. 738 CO has been amended. A new reference is made to divisions as well. In addition, the conversion of a corporation into a limited liability company could be deleted in Art. 738 CO because, pursuant to the Merger Act, a conversion no longer requires the dissolution of the transforming corporation. Now that the required majorities for a merger resolution by the partners of cooperatives have been laid down by the Merger Act[390], the new Art. 888 para. 2 CO limits itself to those cases where the dissolution of a cooperative results in a subsequent liquidation. Art. 893 CO permits licensed insurance companies to transfer, wholly or partially, the powers of the general meeting to their administration bodies but not the introduction or the extension of an obligation to make a supplementary capital contribution, the dissolution and the merger of a cooperative. This list of the non-transferable powers set forth in Art. 893 para. 2 CO has been amended by the demerger and the conversion of a cooperative.

9.2 Federal Act on International Private Law of 18 December 1987

The Merger Act deals with mergers, demergers, conversions or transfers of assets and liabilities. With the exception of a conversion, these transactions also may take place across national borders. The Merger Act provides an opportunity to create a set of rules regarding jurisdiction and applicable law for all restructuring transactions based on uniform principles. It is the task of the Swiss International Private Law[391] to allocate factual circumstances involving foreign states, which in principle could be assessed under different laws, to the law of that state to which they have the closest factual connection. The new provisions of the Swiss International Private Law set out the prerequisites and legal consequences to be taken into account by a transnational restructuring with the participation of a Swiss company and, by keeping references general in their nature, leave room for the foreign law where it claims validity. However, companies willing to restructure still have the problem that a restructuring plan permissible under the law of one state may fail because of barriers encountered under the law of another state.

[389] The provisions regarding mergers for corporations (Art. 748 - 750 CO), mergers for corporations including partners with unlimited liability (Art. 770 para. 3 CO), mergers for cooperatives (Art. 914 CO), majority requirements for the merger resolution of a corporation (Art. 704 para. 1 Chif. 8 CO) and the conversion of a corporation into a limited liability company (Art. 824 - 826 CO).

[390] See Art. 18 MA.

[391] Swiss Federal Act on International Private Law of 18 December 1987 (PIL), SR 291.

a) Transnational Relocation of a Company

Art. 161 et seq. PIL deal with the relocation of a company to Switzerland from abroad. Art. 162 para. 3 PIL, which required a foreign corporate entity relocating to Switzerland to prove it has sufficient equity in accordance with Swiss law, has now been amended to the effect that, consistent with corporate law, the existence of equity cover must be confirmed by the report of a specially qualified auditor defined under Art. 727b CO.

Art. 163 PIL already dealt with the relocation of a company from Switzerland to another country. It provided that a Swiss company may submit to foreign law without being liquidated or re-formed if the requirements of Swiss law have been fulfilled and it continues to exist under foreign law. The new Art. 163 para. 2 PIL not only requires a public notice for the notification of claims in order to protect the interests of the creditors, but also provides a reference to Art. 46 MA (requiring claims to be secured if the creditors demand this within two months following the publication of such notice). Apart from that, the provisions dealing with the deletion of the legal entity from the register of commerce, the place of jurisdiction (*Gerichtsstand*) and the place of prosecution (*Betreibungsort*) have been amended pursuant to Art. 164 and Art. 164a PIL[392].

b) Transnational Mergers

Art. 163a PIL specifies the conditions under which a Swiss company can acquire a foreign company (immigration absorption) or merge to a new Swiss company (immigration combination). Art. 163a PIL also determines the governing law for mergers, which is the law of the state that is applicable to the acquiring company. Because, in the case of an immigration merger (immigration absorption or immigration combination), the Swiss legal system is most closely connected with the merger, Swiss law is applicable to an immigration merger[393]. However, because interests of the jurisdiction of the acquired foreign company must be considered as well, it also is required that the law of the state where the acquired foreign company's existence ends permits the merger. Therefore, Art. 163a para. 1 PIL states that an immigration merger is permissible only if, apart from Swiss law, the law applicable to the acquired foreign company expressly or tacitly permits the merger and if the conditions for it have been fulfilled. This is also the rule if two or more companies incorporated in different foreign states want to merge into a new Swiss company by way of a combination merger. All foreign governing laws applicable to the foreign companies involved must permit the merger and their requirements must

[392] See below II./9.2.d, p. 71 et seq.

[393] Art. 163a para. 2 PIL.

be fulfilled. In all other respects, the transaction is governed by Swiss law - the law applicable to the company resulting from the combination merger.

Art. 163b PIL deals with mergers of Swiss companies into foreign companies, so-called emigration merger. Art. 163b para. 1 PIL permits a foreign company to acquire a Swiss company (emigration absorption) or merge with it into a new foreign company (emigration combination) if the elements of a merger are fulfilled:

- ownership of the assets and liabilities of the acquired Swiss company are transferred to the foreign company by operation of law without having to comply with the usual requirements for such transfers[394], and
- the participation and membership rights of the partners of the Swiss company are appropriately protected in the foreign company[395].

Art. 163b para. 2 PIL states that the Swiss company merging with a foreign company must fulfil all requirements of Swiss law that would be mandatory for an acquired company if the merger took place in Switzerland: the provisions with respect to the merger report of the supreme management or administrative body[396], the verification of the merger agreement and the merger report by a specially qualified auditor[397], the inspection right of the partners regarding the merger agreement, the merger report and the verification report[398], the provisions applicable to the adoption of the merger resolution, the requirement for a notarial certification and the registration in the register of commerce[399], as well as the provisions for employee protection[400]. Because, in the case of a transnational merger with a foreign company, there is a risk of the security for claims being transferred abroad, Art. 163b para. 3 PIL requires that public notice of the merger be given in Switzerland to the creditors of the Swiss company indicating that they may notify their claims and request the provision of security for the payment of such claims[401]. This ensures that the notice for the timely notification of claims and the provision of security for claims occurs before the merger resolution is published and the acquired company is deleted from the register of commerce, i.e. before the security for claims passes on to the acquiring foreign company. It also should be mentioned that

394 Art. 163b para. 1 lit. a PIL.

395 Art. 163b para. 1 lit. b PIL also includes a compensation payment in order to reach the exchange ratio pursuant to Art. 7 para. 2 MA.

396 See Art. 14 MA; see above II./1.4., p. 12 et seq.

397 See Art. 15 MA; see above II./1.4., p. 12 et seq.

398 See Art. 16 et seq. MA; see above II./1.4., p. 12 et seq.

399 See Art. 18 et seq. MA; see above II./.1.5., p. 19 et seq.

400 See Art. 27 et seq. MA; see above II./.1.6., p. 21 et seq.

401 Art. 163b para. 3 Pil refers to Art. 46 MA. As to this, see above II./2.6., p. 32.

Swiss provisions not applicable to the acquired Swiss company, but to the acquiring foreign company, are applicable pursuant to Art. 18 PIL if they are also of a mandatory nature regardless of the otherwise applicable law[402]. Finally, in case of a merger of a Swiss company with a foreign company, Art. 164 PIL and Art. 164a PIL are to be observed. These articles deal with the deletion of the legal entities from the register of commerce, the place of prosecution and the place of jurisdiction[403].

Art. 163c para. 1 PIL provides that the mandatory provisions of the company laws including formal requirements of the laws applicable to the companies involved are to be observed. Therefore, Art. 163c para. 1 PIL requires the cumulative application of the formal requirements of the governing laws for the involved companies. Otherwise, the parties may, under Art. 163c para. 2 PIL, choose the applicable law, whereby, according to Art. 163c para. 1 PIL, the mandatory provisions of company law of the relevant national laws involved must be observed. If the parties do not choose a governing national law, the merger agreement is subject to the law of the state with which it is most closely connected[404]. It is assumed that the closest connection exists with the law of the state to which the acquiring company is subject[405].

c) *Transnational Demergers and Transnational Transfers of Assets and Liabilities*

A transnational demerger occurs if assets and liabilities of a Swiss company (divesting company) are transferred to one or more foreign companies (acquiring companies) or vice versa. Participation and membership rights are granted to the partners of the divesting company and the legal transfer of the assets and liabilities affected by the demerger occurs by operation of law without having to comply with the usual requirements for such transfers.

Art. 163d PIL largely refers to the provisions of the Swiss Private International Law relating to transnational mergers, which apply by analogy. This leads to the application of the mandatory provisions of compulsory law of the governing laws of the companies involved[406]. For emigration demergers, the protective provisions for partners of the

402 E.g. the Federal Act on the Acquisition of Real Estate by Persons Abroad of 16 December 1983, SR 211.412.41, according to which a foreign company can only acquire certain real estate in Switzerland after obtaining a permit from the competent authorities.

403 See below II./9.2.d), p. 71.

404 Art. 163c para. 2 second sentence PIL.

405 Art. 163c para. 2. third sentence PIL.

406 See Art. 163a PIL and Art. 163b PIL.

Merger Act are explicitly incorporated[407]: the mandatory provisions of Swiss law[408], in particular the provisions regarding creditors' and employees' protection[409], requirements of form, notice publication requirements[410], and the provisions of the Federal Act on the Acquisition of Real Estate by Persons Abroad of 16 December 1983[411]. However, it follows from Art. 163d para. 2 PIL that, in contrast to mergers, the governing law for demergers is not the law applicable to the acquiring company but the one applicable to the divesting company because it has the closest connection with the demerger. For those parts of the demerger agreement where the legal systems involved do not prescribe mandatory requirements, the parties may choose the applicable law. If the parties do not choose a law, the law applicable to the divesting company will apply[412].

Art. 163d PIL also deals with the transfer of assets and liabilities between a Swiss and a foreign company, as well as the transfer of rights and obligations by partial universal succession. Due to the analogous application of the provisions regarding transnational mergers, all mandatory provisions of the governing laws involved are applicable. The mandatory provisions of Swiss law in relation to a transfer of assets and liabilities to a foreign country[413] comprise, in particular, the provisions for creditor and employee protection[414], as well as the prescribed formal requirements, the provisions regarding the publication of a notice of the transaction[415], and the provisions of the Federal Act on the Acquisition of Real Estate by Persons Abroad of 16 December 1983. In case of a transfer of assets and liabilities, the protective provisions for partners under the Merger Act[416] are limited to the supreme management or administrative body's obligation to inform the partners about the transaction[417]. Because, in an emigration of assets and liabilities, the Swiss company has to adhere to the provisions regarding capital protection and liquidation[418], the provisions regarding the protection of creditors' rights under Art. 46 MA are not applicable to transfer of assets and liabilities. Just as with a

[407] Art. 163d para. 2 PIL in conjunction with Art. 163b para. 1 PIL.

[408] Art. 163d para. 2 PIL in conjunction with Art. 163b para. 2 PIL.

[409] Art. 45 et seq. MA.

[410] Art. 36 MA and Art. 51 et seq. MA.

[411] See Art. 18 PIL.

[412] Art. 163d para. 3 PIL.

[413] Art. 163d para. 2 in conjunction with Art. 163b para. 2 PIL.

[414] Art. 75 et seq. MA; see above II./4.5., p. 46 et seq.

[415] Art. 70 para. 2 MA and Art. 73 MA; see above II./4.2, p. 43 and II./4.3, p. 45.

[416] Art. 163d para. 2 PIL in conjunction with Art. 163b para. 1 PIL.

[417] Art. 74 MA; see above II./4.4, p. 45.

[418] Art. 69 para. 2 MA in conjunction with Art. 163d para. 1 PIL and Art. 163b para. 2 PIL.

demerger, the law applicable to the acquired company has the closest connection of the transnational transfers of assets and liabilities. Under Art. 163d para. 2 PIL, that law is the governing law for a transfer of assets and liabilities. For the non-mandatory parts of the transfer agreement, the parties may choose the applicable law. Otherwise, the law applicable to the company acquires assets and assumes liabilities will be used[419].

d) Common Provisions for the Transfer of Companies, Mergers and Demergers

Art. 164 PIL has amended the requirements applicable to a Swiss company which is being transferred to a foreign state and, as a result of a merger or demerger, will be deleted from the register of commerce. In this respect, the report of a specially qualified auditor is required to confirm that the claims of creditors have been secured or fulfilled in accordance with Art. 46 MA or that the creditors agree with the deletion of the company from the register of commerce. If, however, a Swiss company is deleted from the register of commerce following its merger with a foreign company into a new Swiss company, then Art. 164 para. 1 PIL is not applicable. It can be concluded from Art. 163a para. 2 PIL that, in such case, the requirements of Art. 15 MA should be considered with regard to the verification by a specially qualified auditor.

Furthermore, for a merger or demerger of a Swiss company into a company incorporated in a foreign state, the provisions pursuant to Art. 164 para. 2 lit. a und b PIL must be observed. Proof is required that the merger or demerger has taken legal effect in accordance with the law applicable to the foreign company[420] and a specially qualified auditor must confirm that the foreign company either has granted participation and membership rights to the partners of the Swiss company or will pay them cash or other compensation[421].

Just as with a merger or demerger taking place in Switzerland[422], it must be possible in the case of a merger or demerger by a Swiss company with a foreign acquiring company to seek judicial review of the transaction. The acquiring company is usually the defendant in a legal action seeking judicial review in respect of a merger, demerger, or transfer of assets and liabilities. Thus, in an out-bound transaction, the foreign acquiring company would be the expected defendant in such an action and a court in the defendant's country would have jurisdiction to decide the case. But, because of fairness to the partners of the acquired Swiss company, Art. 164a para. 1 PIL provides that the competent court for a legal action against a foreign company is a court at the same geographic locations as the registered office of the acquired Swiss company. But

[419] See Art. 163d para. 3 PIL.

[420] Art. 164 para. 2 lit. a PIL.

[421] Art. 164 para. 2 lit. b PIL.

[422] See Art. 105 MA; see above II./.8.3, p. 60.

under Art. 1 para. 2 PIL, it is not the Private International Law that determines jurisdiction in euro-international cases, but the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (Lugano Convention). Legal actions for judicial review governed by Art. 105 MA are actions for specific performance against the acquiring foreign company which means that, for euro-international cases, the relevant court at the location of the registered office of the acquiring company is the one having jurisdiction[423].

Finally, the place of prosecution and the normal place of jurisdiction in Switzerland are perpetuated pursuant to Art. 164a para. 2 PIL. This provision specifies that, in the case of a relocation of a company, a merger or a demerger with a Swiss company and a foreign company, the current place of prosecution and jurisdiction remains in Switzerland until the claims of creditors or partners have been secured or satisfied. Because a merger or a demerger takes legal effect with its registration in the register of commerce and the assets and liabilities are transferred to the acquiring company upon such registration[424], Art. 164a para. 2 PIL establishes a place of prosecution and a place of jurisdiction in Switzerland for actions against the acquiring foreign company.

Prior law did not contain provisions governing the recognition of the restructuring of companies from foreign countries. Such transactions may involve Swiss law even without a participating Swiss company[425]. Therefore, Art. 164b PIL provides a merger, demerger and transfer of assets and liabilities between foreign companies will be recognised as valid in Switzerland if they are valid according to the legal systems involved.

9.3 Tax Law

a) General

In tax law, before the new Merger Act came into effect, corporate reorganizations were already primarily evaluated according to the economic character of the steps taken and not according to the transaction steps taken under principles of corporate law. Mergers, demergers and conversions already could be completed to a large extent in a tax-neutral manner under the previous law. However, in some respects, such as securities transfer tax and in cantonal and municipal real estate transfer taxes, there were tax impediments which unnecessarily hindered economically sensible reorganizations or made tax-neutral reorganizations partly impossible for cost reasons.

[423] Possibly, based on Art. 16 Chif. 2 Lugano Convention, the courts of the state in which the acquired company has at its registered office could have exclusive jurisdiction if one assumed that such litigation questions the merger or the demerger resolution of the acquired company.

[424] See Art. 22 MA for mergers and Art. 52 MA for demergers.

[425] For example because of an entitlement to assets located in Switzerland.

With the revision of the Federal Direct Tax Act[426], the Federal Act on the Harmonisation of Direct Taxes[427], the Federal Act on Withholding Taxes[428] and the Federal Act on Stamp Duty[429], the wording of the tax provisions regarding corporate reorganizations became more open and it was adapted in accordance with the modified corporate law. The revision of the tax provisions ensures that the transactions newly recognized under corporate law are not restricted by tax issues. Further, the new tax provisions should close gaps in the previous law and provide legal predictability. In particular, it is the objective of the amended tax laws to make a clear distinction between a tax-neutral corporate reorganization and an actual taxable disposal of assets and liabilities.

Tax-neutral corporate reorganizations are not permitted if taxable or income-generating assets are removed from taxation, be it by transferring undisclosed reserves to a foreign state, to a company with tax privileges, to a legal entity exempt from taxation (tax systematic realisation), or if profits are realised by a disclosure of untaxed reserves through a disposal or a revaluation of the related assets. Emigration mergers make it clear[430] that, due to the different objectives of corporate and tax law, the tax law cannot merely rely on the transactions under corporate law governed by the Merger Act. Not every corporate reorganization transaction, permissible without question under principles of corporate law, should be capable of being carried out in a tax-neutral way.

Significant changes to tax law are the abolition of the restriction period for demergers, as well as a step towards a uniform system of taxation for corporate groups. As a new rule, directly or indirectly held (qualified) shareholdings, business units or parts of business units, as well as single operational assets can be transferred in a tax-neutral manner to other group companies (roll over of tax basis). In addition, in the case of a replacement of qualified shareholdings, the undisclosed reserves can be transferred to a new participation provided that certain requirements are met (roll over of tax basis)[431]. After the expiry of a five-year restriction period, a further obstacle of the current corporate reorganization law - the levy of real estate transfer duties by cantons and municipalities - will be removed[432]. After the expiration of the introductory period, the cantons are permitted only to impose land register fees and notarial fees on an at-cost basis.

[426] Federal Direct Tax Act of 14 December 1990 (FDTA), SR 621.14.

[427] Federal Act on the Harmonisation of the Direct Taxes of the Cantons and Municipalities Taxes of 14 December 1990 (FAHDT), SR 642.14.

[428] Federal Act on Withholding Taxes of 13 October 1965 (FAWT), SR 642.21.

[429] Federal Act on Stamp Duty of 27 June 1973 (Stamp Duty Act; SDA), SR 641.10.

[430] See above II/.9.2., p.

[431] Art. 64 para. 1bis FDTA as well as Art. 24 para. 4bis FAHDT.

[432] Art. 103 MA.

b) *Federal Act on Stamp Duty* of 27 June 1973

Already under the previous Art. 6 para. 1 lit. a[bis] SDA and subject to certain limitations, no stamp issuance tax was levied on the issue of, or increase in, the nominal value of shares as a result of mergers, merger-like transactions, conversions and demergers of corporate entities or cooperatives. However, under the new Merger Act, the reorganization of sole proprietorships[433], general and limited partnerships, associations, foundations and institutions under public law also is partly exempted from stamp issuance tax. This is a significant change from the previous law, which imposed a stamp issuance tax of 1% on the fair market value of a contribution-in-kind. Under the Merger Act, a 1% issuance tax is instead only levied on the nominal value of the newly created participation or membership rights (cf. Art. 9 para. 1 lit. e SDA). However, this privilege applies only if the legal entity subject to a corporate reorganization has been in existence for at least five years. Moreover, the untaxed surplus (i.e. the difference between the fair market value and the nominal value) is retroactively subject to 1% stamp issuance tax if the participation or membership rights are disposed of within the five-year restriction period.

Under the revised Art. 14 para. 1 lit. b SDA, the contribution of Swiss or foreign shareholding or membership rights by a contributions-in-kind in exchange for newly issued Swiss or foreign shareholding or membership rights is exempted from the securities transfer tax.

Another problem - the imposition of securities transfer tax in respect of a partial consideration - is solved in Art. 14 para. 1 lit. i SDA, by explicitly exempting the transfer of taxable securities in a transaction qualifying as a corporate reorganization (i.e. a merger, demerger or conversion) from the securities transfer tax. This abolishes the prior practice of the tax administration under the so-called "doctrine of partial consideration". This doctrine assumed a partial consideration if third party liabilities were transferred through a corporate reorganization such as a merger, demerger or conversion. The securities transfer tax was levied on the taxable securities transferred to the extent that the transferee assumed third party liabilities.

Further, under the new Art. 14 para. 1 lit. j SDA, the purchase or sale of taxable securities in the context of corporate reorganizations as defined in Art. 61 para. 3 FDTA (transfer of taxable securities as a result of a tax neutral intra-group transaction) and Art. 64 para. 1[bis] FDTA (replacement of qualified investments), as well as the transfer of 20% shareholdings to domestic or foreign group companies qualify as tax-neutral reorganizations as well.

[433] Even though the conversion of a sole proprietorship into a corporation has been excluded by the Merger Act.

c) *Federal Act on Direct Federal Taxes* of 14 December 1990 / Federal Act on the Harmonisation of the Direct Taxes of the Cantons and Municipalities of 14 December 1990

(i) Mergers

Prior law allowed combinations of companies to be carried out on a tax neutral basis, but the Merger Act addresses mergers involving more than one legal form, and added provisions for sole proprietorships[434], general and limited partnerships, foundations and associations had to be covered as well.

Art. 19 para. 1 lit. a and b FDTA as well as Art. 61 para. 1 FDTA[435], now permit a merger to be carried out in a tax-neutral way[436] if a tax liability remains in Switzerland and the assets are transferred at the relevant values for income tax purposes (roll over of tax basis). In the case of a merger of a sole proprietorship[437], general and limited partnership, into a corporate entity there is an additional requirement that a business unit or a part of a business unit must be transferred.

Not every transfer of assets to foreign legal entities, however, triggers the taxation of undisclosed reserves. This is not the case, if the acquiring foreign company continues to operate a business in Switzerland qualifying as a permanent establishment. It must nevertheless be noted that the emigration merger of a Swiss corporate entity or cooperative into a foreign entity will be treated, from a Swiss withholding tax perspective, as a total liquidation of the Swiss corporation. In practice, the adverse withholding tax consequences will, in the majority of cases, prevent the execution of such emigration mergers.

Although merger-like combinations[438] are not covered under the corporate law provisions of the Merger Act, for tax purposes the exchange of participation and membership rights is governed by Art. 19 para. 1 lit. c and Art. 61 para. 1 lit. c

[434] Here, the revised income tax legislation goes further than the Merger Act by including sole proprietorships.

[435] Art. 8 para. 3 lit. a and b FAHDT as well as Art. 8 para. 3[bis] FAHDT and Art. 24 para. 3 FAHDT.

[436] I.e. the undisclosed reserves associated with the assets transferred on the merger are not taxed.

[437] Here, the revised income tax legislation goes further than the Merger Act by including sole proprietorships.

[438] Following the EU merger guideline, a merger-like combination is understood to be an exchange of participation rights if a company acquires a majority shareholding in another company by giving up its own participation rights (see Art. 2 lit. d of the directive 90/434/EWG of 23 July 1990). In this case, it merely leads to a close economic and participation interconnection, but not to a legal merger of the companies involved in the combination.

FDTA[439]. On the owner level, the exchange of participation or membership rights as a result of a merger or a merger-like combination is now explicitly governed by Art. 19 para. 1 lit. c and Art. 61 para. 1 lit. c FDTA. This has the consequence that tax neutrality at the owner level is recognised even if tax neutrality at the corporate level, partially or completely, is not. This does not apply to partners who hold their participation or membership rights as a private (non business) asset.

(ii) Demergers

Under prior law, demergers could not always be distinguished without difficulty from the sale of a business unit. As a result, the tax neutrality of a demerger was only possible if additional requirements at the owner level were met. According to the previous practice, the participation or membership rights received as a result of a demerger could not be sold during a restriction period of five years.

The Merger Act includes specific provisions for two types of demergers, a legal entity can divide all of its assets and the related liabilities and transfer them to two or more entities in a transaction which results in the dissolution of the divesting entity or it can transfer only a part of its assets and liabilities to another legal entity and the transferring entity remains in existence. According to Art. 19 para. 1 lit. b FDTA as well as Art. 61 para. 1 lit. b FDTA, both types of demergers can be carried out in a tax neutral manner to the extent that (1) the tax liability remains in Switzerland, (2) the assets are transferred at the values applicable for income tax purposes (roll over of tax basis), (3) the transferred assets represent a business unit or a part of a business unit and (4) will constitute a business unit or a part of a business unit in the acquiring entity[440]. The most significant change in comparison to prior law will be the abolition of the five-year restriction period, which will apply to the cantons, at the latest, after the lapse of a three year introductory period (cf. Art 72e FAHDT). Thus, if the partners sell shares immediately after the completion of a demerger, no retroactive tax consequences will arise. As a result of this, the terms "business unit" and "part of a business unit" will become the decisive criteria for achieving tax neutrality. A "part of a business unit" exists if all of the assets and liabilities of the business unit within an entity can function as an independent business in reliance on its own resources. No concessions have been granted for the demerger of holding companies and real estate companies in applying this strict requirement.

Furthermore, on the cantonal level, it is not clear whether unexpired restriction periods (which began to run under prior law) will still apply after the Merger Act has come into force. On the federal level, unexpired (old) restriction periods were abolished when the Merger Act came into force.

(iii) Conversions

Art. 19 para. 1 lit. b and para. 2 FDTA permits the conversion of sole proprietorship[441], general or limited liability partnership into a corporate entity on a tax-neutral basis to the extent that (1) the tax liability continues in Switzerland, (2) the assets are transferred at the relevant values for income tax purposes (roll over of tax basis), (3) the previous partner continues his engagement during the five-year restriction period and (4) if a business unit or a part of a business unit is transferred to the corporate entity[442]. The five-year restriction period under Art. 19 para. 2 FDTA represents the codification of the former administrative practice[443]. If a shareholder disposes of his participation or membership rights within the five-year restriction period at a price in excess of the tax basis of the transferred equity, then under Art. 19 para. 2 FDTA the excess amount (undisclosed reserves) will be subject to retroactive taxation[444]. In this case, the corporate entity will be entitled to recognise the related taxed, undisclosed reserves (step up of tax basis).

In contrast, the five-year restriction period and the "business unit requirement" do not apply to the conversion of a corporate entity or a cooperative into another corporate entity or cooperative (cf. Art. 61 para. 1 lit. a FDTA and Art. 24 para. 3 lit. a FAHDT).

(iv) Transfers of Assets and Liabilities

According to Art. 61 para. 1 lit. d and para. 2 FDTA, the transfer of a business unit or a part of a business unit, as well as the transfer of operational assets to a subsidiary, is possible on a tax-neutral basis (i.e. without recognition of the undisclosed reserves) to the extent that (1) the tax liability continues in Switzerland, (2) the assets are transferred at the relevant values for income tax purposes (roll over of tax basis), (3) to a domestic subsidiary, (4) the divesting corporate entity or cooperative holds at least 20% of the subsidiary's equity capital and (5) the transferred assets are not sold during the five-year restriction period[445]. The transfer of operational assets to a subsidiary should promote the tax-neutral establishment of

[439] Art. 8 para. 3 lit. c and Art. 24 para. 3 lit. c FAHDT.

[440] Art. 8 para. 3 lit. b FAHDT and Art. 24 para. 3 lit. b FAHDT.

[441] The revised income tax legislation goes further than the Merger Act by including sole proprietorships.

[442] Art. 8 para. 3 lit. b and para. 3^{bis} FAHDT.

[443] Art. 8 para. 3^{bis} FAHDT.

[444] Art 8 para. 3^{bis} FAHDT.

[445] Art. 24 para. 3 lit. d and para. 3^{ter} FAHDT.

joint ventures with third parties. The undisclosed reserves related to the transferred assets are, pursuant to Art. 61 para. 2 FDTA, subject to retroactive taxation if the transferred assets are sold within the five-year restriction period[446]. In this case, the subsidiary is entitled to recognise the corresponding taxed, undisclosed reserves (step up of tax basis).

The greatest achievement of the revised tax provisions under the Merger Act is without doubt the step in the direction of corporate group tax law. Under Art. 61 para. 3 and 4 FDTA, qualified shareholdings of at least 20%, as well as business units or parts of business units and certain operational assets may be transferred to other group companies without recognition of the undisclosed reserves (roll over of tax basis) to the extent that (1) the tax liability continues in Switzerland, (2) the assets are transferred at the relevant values for income tax purposes, (3) the assets are transferred within domestic corporate groups, (4) the transferred assets are not sold during the five-year restriction period and (5) uniform control is maintained (control by holding of a majority of votes or by other means contemplated by Art. 663e CO)[447]. The corporate group relationship required for tax neutrality exists when the involved Swiss companies are under common control, whether through voting rights or otherwise. This simplifies corporate reorganizations and allows the tax-neutral transfer of operational assets (and therewith, the transfer of undisclosed reserves) within a group of domestic companies (roll over of tax basis). It should be noted that all of the member companies of the group are jointly liable for potential retroactive taxes.

Art. 64 para. 1bis FDTA permits qualified participations to be replaced on a tax-neutral (roll over of tax basis) if (1) the participation amounts to at least 20% of the other company's equity capital and (2) the replaced participation was owned by the company for a period of at least one year[448].

d) Federal Act on Withholding Taxes of 13 October 1965

The revised Art. 5 para. 1 lit. a FAWT provides that reserves and profits of a domestic corporate entity or cooperative are exempt from withholding tax to the extent that such reserves are as a result of a restructuring pursuant to Art. 61 FDTA to the full extent transferred into the reserves of the acquiring or converted domestic corporate entity or cooperative.

[446] Art. 24 para. 3ter FAHDT.

[447] Art. 24 para. 3^{quarter} and 3^{quinquies} FAHDT.

[448] Art. 24 para. 4bis FAHDT.

FEDERAL ACT REGARDING MERGER, DEMERGER, CONVERSION AND TRANSFER OF ASSETS AND LIABILITIES (MERGER ACT; MA)

Federal Act

Regarding Merger, Demerger, Conversion and Transfer of Assets and Liabilities

(Merger Act, MA)

of 3 October 2003

The Federal Assembly of the Swiss Federation,

based on Article 122 para. 1 of the Federal Constitution,

and after review of the message of the Federal Council dated 13 June 2000[449]

decides:

1. Chapter: Scope and Definitions

Art. 1 Scope

[1] This Act regulates the adaptation of the legal structures of corporate entities, general and limited commercial partnerships, cooperatives, associations, foundations and sole proprietorships in connection with mergers, demergers, conversions of the legal form and transfers of assets and liabilities.

[2] It shall thereby guarantee legal certainty and transparency, and protect creditors, employees as well as persons with minority ownership interests.

[3] Furthermore, it establishes the prerequisites in private law by which institutions under public law can merge with private legal entities, convert into private legal entities or transfer or accept transfers of assets and liabilities.

[449] BBl **2000** 4337

[4] The provisions of the Federal Act on Cartels and Restraints of Competition of 6 October 1995 relating to the assessment of mergers of companies remain unaffected.

Art. 2 Definitions

In this Act, the following definitions are applied:

a. Legal entities: Companies, foundations, sole proprietorships registered in the register of commerce and institutions under public law;

b. Companies: Corporate entities, general and limited partnerships, associations and cooperatives except old age, survivors and disability institutions under letter i;

c. Corporate entities: Corporations, corporations including partners with unlimited liability and limited liability companies;

d. Institutions under public law: Independent institutions under federal, cantonal or municipal public law registered in the register of commerce, regardless of whether or not they are legal entities;

e. Small and medium-sized enterprises: Companies with no debt securities outstanding, whose shares are not listed on the stock exchange, and that, in addition, have not exceeded two of the following thresholds in the two business years preceding the merger, demerger, or conversion resolution:

   1. total assets of 20 million Swiss francs,

   2. turnover of 40 million Swiss francs,

   3. an annual average of 200 full-time employment positions;

f. Partners: Shareholders, partners of general and limited partnerships, members of cooperatives without participation certificates, members of associations;

g. Shareholders: Holders of shares, participation or profit sharing certificates, partners of limited liability companies, members of cooperatives with participation certificates;

h. General meeting: the general shareholders' meeting of a corporation, a corporation including partners with unlimited liability and a cooperative; the partners' meeting of a limited liability company, the meeting of the members of an association; the meeting of the delegates of an association or cooperative to the extent authorized in its articles of incorporation;

i. Employee welfare institutions: Organisations subject to supervision according to Article 61 et seq. of the Federal Act concerning Occupational Old Age, Survivors and Disability Benefit Plan of 25 June 1982 and that have been established as legal entities.

2. Chapter: Merger of Companies

1. Section: General Provisions

Art. 3 Principle

[1] Companies can merge by

a. one company acquiring another (absorption merger);

b. combining to form a new company (combination merger).

[2] As a result of the merger, the acquired company is dissolved and deleted from the register of commerce.

Art. 4 Permissible Mergers

[1] Corporate entities can merge:

a. with corporate entities;

b. with cooperatives;

c. as acquiring companies, with general and limited partnerships;

d. as acquiring companies, with associations which are registered in the register of commerce.

[2] General and limited partnerships can merge:

a. with general and limited partnerships;

b. as acquired companies, with corporate entities;

c. as acquired companies, with cooperatives;

[3] Cooperatives can merge:

a. with cooperatives;

b. with corporate entities;

c. as acquiring companies, with general and limited partnerships;

d. as acquiring companies, with associations which are registered in the register of commerce;

e. if no participation certificates exist, as acquired companies, with associations which are registered in the register of commerce.

[4] Associations can merge with associations. Associations registered in the register of commerce can also merge:

a. as acquired companies, with corporate entities;

b. as acquired companies, with cooperatives;

c. as acquiring companies, with cooperatives without participation certificates.

Art. 5 Merger of a Company in Liquidation

[1] A company in liquidation can participate in a merger as an acquired company, if the distribution of assets has not yet commenced.

[2] The supreme management or administrative body must confirm to the register of commerce that the prerequisite in paragraph 1 has been met.

Art. 6 Merger of Companies in Case of Loss of Capital or if Liabilities Exceed Assets

[1] A company which no longer has assets equal to at least one half of the amount of its paid-in capital and legal reserves or for which its liabilities exceed its assets, can only merge with another company if that company has unrestricted disposable equity capital in an amount equal to the shortfall or, if required, equal to the liabilities in excess of the assets. This prerequisite does not apply to the extent creditors of the merging companies agree that their claims shall be subordinated to any other claims of other creditors.

[2] The supreme management or administrative body has to submit to the register of commerce a confirmation of a specially qualified auditor stating that the prerequisite in paragraph 1 has been met.

2. Section: Participation and Membership Rights

Art. 7 Protection of Participation and Membership Rights

[1] Partners of the acquired company are entitled to participation and membership rights in the acquiring company, which are equivalent to their current participation and membership rights, taking into account the assets and liabilities of the merging companies, the allocation of voting rights as well as all other relevant elements.

[2] When determining the exchange ratio for participation rights, a compensation payment can be provided which must not exceed one tenth of the real value of the participation rights provided in exchange.

[3] Partners without participation certificates are entitled to at least one participation right when their company is acquired by a corporate entity.

[4] The acquiring company must provide participation rights of equal value or participation rights with voting rights for participation rights without voting rights in the acquired company.

[5] The acquiring company must provide equivalent rights or appropriate compensation to the holders of special rights, which are connected with participation, or membership rights in the acquired company.

[6] The acquiring company must provide the holders of profit sharing certificates of the acquired company with equivalent rights or repurchase their profit sharing certificates at their real value at the time the merger agreement is concluded.

Art. 8 Cash or Other Compensation

[1] The merging companies can provide in the merger agreement, that the partners may choose between participation and membership rights on the one hand and cash or other compensation on the other hand.

[2] The merging companies can provide in the merger agreement, that only a cash or other compensation will be paid.

3. Section: Capital Increase, Formation of a New Company, and Interim Balance Sheet

Art. 9 Capital Increase in case of an Absorption Merger

[1] In case of an absorption merger, the acquiring company must increase the share capital to the extent necessary to protect the rights of the partners of the acquired company.

[2] The provisions of the Code of Obligations concerning contributions-in-kind as well as Article 651 paragraph 2 of the Code of Obligations shall not apply to mergers.

Art. 10 Formation of a New Company in case of a Combination Merger

For the formation of a new company in a combination merger, the provisions of the Civil Code and the Code of Obligation pertaining to the formation of a new company shall apply. Not applicable are the provisions about the number of founders of corporate entities, as well as the provisions about contributions-in-kind.

Art. 11 Interim Balance Sheet

[1] If, on the date the merger agreement is concluded, the balance sheet date is more than six months earlier or if, since the last such balance sheet date, important changes have occurred in the assets and liabilites of the merging companies, the companies shall prepare an interim balance sheet.

[2] The preparation of an interim balance sheet is governed by the regulations and principles regarding annual financial statements, subject to the following provisions:

a. a physical inventory is not necessary.

b. the valuation contained in the last balance sheet need only to be changed in accordance with movements in the company books. Depreciation, revaluations and provisions for the interim period, as well as substantial unrecorded changes in asset values, must be reflected in the interim balance sheet.

4. Section: Merger Agreement, Merger Report, and Verification

Art. 12 Conclusion of the Merger Agreement

[1] The merger agreement shall be concluded by the supreme management or administrative bodies of the merging companies.

[2] It shall be in written form and requires the approval of the general meeting or of the partners of the companies involved, as applicable (Art. 18).

Art. 13 Content of the Merger Agreement

[1] The merger agreement shall contain:

a. the name or registered name, the registered office and the legal form of the companies involved, in case of a combination merger also the name or the registered name, the registered office and the legal form of the new company;

b. the exchange ratio for participation rights and, if applicable, the amount of compensation, or details about the membership of partners of the acquired company in the acquiring company;

c. the rights granted by the acquiring company to the holders of special rights, shares without voting rights or profit sharing certificates;

d. the manner in which the exchange of participation rights will be made;

e. the point in time when the participation or membership rights confer an entitlement to a share in the profits, as well as all details of this entitlement;

f. the amount of the cash or other compensation pursuant to Article 8, if any;

g. when the activities of the acquired company are regarded as being carried out on account of the acquiring company;

h. each special advantage being granted to the members of a management or administrative body or to managing partners;

i. the identification of the partners with unlimited liability, if any.

[2] In case of a merger between associations, paragraph 1 subparagraphs c-f shall not apply.

Art. 14 Merger Report

[1] The supreme management or administrative bodies of each of the companies involved shall prepare a written report about the merger. They can also prepare a joint report.

[2] Small and medium-sized companies need not prepare a merger report if all partners agree.

[3] In the report, the following shall be explained and substantiated in legal and business terms:

a. the purpose and the consequences of the merger;

b. the merger agreement;

c. the exchange ratio for participation rights, and, if applicable, the amount of the compensation payment, or the membership rights of partners of the acquired company in the acquiring company;

d. if applicable, the amount of the cash or other compensation, and the reasons why only compensation should be provided instead of participation or membership rights;

e. special considerations regarding the valuation of participation rights in view of the determination of the exchange ratio;

f. the amount of the capital increase of the acquiring company, if any;

g. the obligation to make a supplementary capital contribution, other personal obligations and the personal liability which result from the merger for the partners of the acquired company, if any;

h. in case of mergers of companies with different legal forms, the duties that may be imposed on the partners in the new legal form;

i. the consequences of the merger on the employees of the merging companies as well as reference to the content of a redundancy program, if any;

j. the consequences of the merger on the creditors of the merging companies;

k. references to administrative permits granted or still pending, if any.

[4] In case of a combination merger, the draft articles of incorporation of the new company are to be attached to the merger report.

[5] In case of a merger between associations, this provision shall not apply.

Art. 15 Verification of the Merger Agreement and the Merger Report

[1] The merging companies must have the merger agreement, the merger report and the balance sheet that the merger was based on, verified by a specially qualified auditor if the acquiring company is a corporate entity or a cooperative with participation certificates. They can jointly appoint an auditor.

[2] Small and medium-sized companies need not carry out this verification if all partners agree.

[3] The companies involved shall provide the auditor with all relevant information and documentation.

[4] The auditor shall set out in a written verification report:

a. whether the planned capital increase of the acquiring company is sufficient for the protection of the rights of the partners of the acquired company;

b. whether the exchange ratio for the participation rights or the compensation payment is reasonable;

c. how the exchange ratio has been determined and why the method applied is considered appropriate;

d. the relative importance, if any, of the various methods applied for the determination of the exchange ratio;

e. which special considerations had to be taken into account in respect of the determination of the exchange ratio when valuing the participation rights.

Art. 16 Inspection Right

[1] Each of the merging companies shall, at its registered office and 30 days before the resolution is adopted, allow the partners to inspect the following documents of all merging companies:

a. the merger agreement;

b. the merger report;

c. the verification report;

d. the annual financial statements and annual reports of the last three business years as well as the interim balance sheet, if any.

[2] Small and medium-sized companies need not adhere to the inspection requirements of paragraph 1 if all partners agree.

[3] The partners may ask the merging companies for copies of the documents referred to in paragraph 1. These copies shall be provided to them free of charge.

[4] Each of the merging companies shall inform the partners in an appropriate manner about the opportunity to inspect such documents.

Art. 17 Changes in Assets and Liabilites

[1] If significant changes occur in the assets or liabilities of one of the merging companies, between the conclusion of the merger agreement and the approval by the general meeting, then the supreme management or administrative body of such company shall inform the supreme management or administrative bodies of the other companies involved.

[2] The supreme management or administrative bodies of all merging companies shall examine whether the merger agreement must be modified or if the merger must be abandoned. If so, they shall withdraw their proposal for approval or justify in the general meeting why the merger agreement does not need modification.

5. Section: Merger Resolution and Registration in the Register of Commerce

Art. 18 Merger Resolution

[1] In case of corporate entities, cooperatives and associations, the supreme management or administrative body must submit the merger agreement for approval through a resolution at a general meeting. The following majorities shall be required:

a. for corporations and corporations including partners with unlimited liability, at least two thirds of the votes represented at the general shareholders' meeting and the absolute majority of the nominal value of the shares represented by them;

b. for a corporate entity which is being taken over by a cooperative, the approval of all shareholders and, if such corporate entity is a limited liability company, all partners;

c. for limited liability companies, at least three quarters of all partners which also shall represent at least three quarters of the company capital;

d. for cooperatives, at least two thirds of the votes cast or, if an obligation to make a supplementary capital contribution, other personal obligations or a personal liability will be introduced or extended, at least three quarters of all members of the cooperative;

e. for associations, at least three quarters of the members present at the general meeting.

[2] In case of general and limited partnerships, the merger agreement requires the approval of all partners. However, the partnership agreement may provide that the approval of at least three quarters of the partners is sufficient.

[3] If a corporation including partners with unlimited liability acquires another company, in addition to the majorities mentioned in paragraph 1 subparagraph a, it is necessary that all partners with unlimited liability give their written approval.

[4] If a corporation or a corporation including partners with unlimited liability is acquired by a limited liability company, and if as a result, an obligation to make a supplementary capital contribution or another personal obligation is introduced, the approval of all affected shareholders is required.

[5] If the merger agreement provides only for a cash or other compensation payment, the merger resolution requires the approval of at least 90 percent of the partners with voting rights in the acquired company.

[6] If, for the partners of the acquired company, a modification of the purpose of the company results from the merger and if, based on requirements by law or the articles of incorporation, different majority for the adoption of the merger resolution is required, then both majority requirements apply to the merger resolution.

Art. 19 Right to Resign in the Case of the Merger of Associations

[1] Members of associations can resign from the association, without any obligations, within two months following the merger resolution.

[2] The resignation is effective retroactively as of the date of the merger resolution.

Art. 20 Notarial Certification

[1] The merger resolution must be certified by a notary.

[2] In case of a merger between associations, this provision shall not apply.

Art. 21 Registration in the Register of Commerce

[1] As soon as the merger resolution has been adopted by all merging companies, their supreme management or administrative bodies must apply for registration of the merger with the register of commerce.

[2] If the acquiring company must increase its share capital as a result of the merger, then the amended articles of incorporation and the ascertainment concerning the capital increase (Art. 652g CO) also shall be submitted to the register of commerce.

[3] The acquired company will be deleted from the register of commerce once the merger has been registered.

[4] This provision shall not apply to associations that are not registered in the register of commerce.

Art. 22 Legal Effect

[1] Upon registration in the register of commerce, the merger becomes legally effective. At this point in time, all assets and liabilities of the acquired company are transferred by operation of law to the acquiring company. Article 34 of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 remains unaffected.

[2] The merger of associations which are not registered in the register of commerce becomes legally effective once the merger resolutions have been adopted by all associations involved.

6. Section: Simplified Merger of Corporate Entities

Art. 23 Requirements

[1] Corporate entities may merge under simplified requirements if:

a. the acquiring corporate entity owns all of the shares with voting rights of the acquired corporate entity; or

b. a legal entity, a natural person or a legally or contractually connected group of persons own all of the shares with voting rights of the merging corporate entities.

[2] If the acquiring corporate entity does not own all, but at least 90 percent of the shares with voting rights of the acquired corporate entity, the merger may take place under simplified conditions if:

a. the minority shareholders are offered, in addition to the participation rights in the acquiring corporate entity, a cash or other compensation payment in accordance with Article 8, which is equivalent to the real value of the participation rights; and

b. for the minority shareholders, the merger does not result in a supplementary capital contribution, another personal obligation, or a personal liability.

Art. 24 Facilitations

[1] Merging corporate entities which fulfil the requirements of Article 23 paragraph 1 must only include in the merger agreement the information specified in Article 13 paragraph 1 subparagraphs a and f-i. They must neither prepare a merger report (Art. 14), nor have the merger agreement verified (Art. 15), nor provide the inspection right (Art. 16), nor submit the agreement for approval by a resolution at the general meeting (Art. 18).

[2] Merging corporate entities which fulfil the requirements of Article 23 paragraph 2, must only include in the merger agreement the information specified in Article 13 paragraph 1 subparagraphs a, b and f-i. They must neither prepare a merger report (Art. 14) nor submit

the agreement for approval by a resolution at the general meeting (Art. 18). The inspection right pursuant to Article 16 shall be granted for a period of at least 30 days prior to the application for entry of the merger in the register of commerce.

7. Section: Protection of Creditors and Employees

Art. 25 Security for Claims

[1] The acquiring company shall secure the claims of creditors of the merging companies if the creditors demand this within three months after the merger has become legally effective.

[2] The merging companies must notify their creditors about their rights three times by publication in the Swiss Official Gazette of Commerce. They are not required to publish this notice if a specially qualified auditor confirms that no claims are known or to be expected that could not be satisfied through the disposable assets of the companies involved.

[3] The obligation to secure claims shall not apply if the company demonstrates that the fulifillment of the claims is not jeopardized by the merger.

[4] Instead of providing security, the company may satisfy the claims to the extent other creditors are not harmed.

Art. 26 Personal Liability of Partners

[1] Partners of the acquired company who, prior to the merger, were liable for the company's obligations incurred remain liable for those obligations if they were established prior to the publication of the merger resolution or if they were incurred prior to that point in time.

[2] The claims arising from the personal liability of partners for the liabilities of the the acquired company are barred by the statute of limitations at the latest three years after the merger has become legally effective. If a claim is due only after the publication of the merger resolution, the statute of limitations begins to run at that point in time. This restriction of personal liability does not apply to partners who are also personally liable for the obligations incurred by the acquiring company.

[3] For bonds and other debt instruments which were issued publicly, the liability remains until they have been repaid unless the relevant prospectus provides otherwise. The provisions about the bond holders association established pursuant to Article 1157 et seq. of the Code of Obligations remain unafected.

Art. 27 Transfer of Employment Relationships, Security for Claims and Personal Liability

[1] For the transfer of employment relationships to the acquiring company, Article 333 of the Code of Obligations shall apply.

[2] The employees of the merging companies may, according to Article 25, demand the security for their claims arising from the employment agreement, which are due up to the point in time when the employment relationship legally could be terminated or, if the transfer of the employment relationship is rejected, when it is terminated by the employee.

[3] Partners of the acquired company who, prior to the merger, were liable for its liabilities, remain liable for all liabilities arising from employment agreements, which are due up to the point in time when the employment agreement legally could be terminated or, if the transfer of the employment relationship is rejected, when it is terminated by the employee.

Art. 28 Consultation with the Employeees' Representation Body

[1] For the consultation with the employees' representation body, Article 333a of the Code of Obligations shall apply for the acquired company as well as the acquiring company.

[2] The consultation must occur prior to the merger resolution in accordance with Article 18. Prior to the merger resolution, the supreme management or administrative body must inform the general meeting about the result of the consultation.

[3] If the provisions of paragraphs 1 and 2 are not observed, the employees' representation body may seek a court order that prohibits the registration of the merger in the register of commerce.

[4] This provision is also applicable for acquiring companies with registered offices abroad.

3. Chapter: Demerger of Companies

1. Section: General Provisions

Art. 29 Principle

A company can demerge by:

a. dividing all of its assets and liabilities and transferring them to other companies. Its partners receive participation or membership rights in the acquiring company. The divesting company will be dissolved and deleted from the register of commerce (division); or

b. transferring one or more parts of its assets and liabilities to other companies. In return, its partners receive participation or membership rights in the acquiring companies (spin-off).

Art. 30 Permissible Demergers

Corporate entities and cooperatives can demerge into corporate entities and cooperatives.

2. Section: Participation and Membership Rights

Art. 31

[1] In case of a demerger, the participation and membership rights must be protected in accordance with Article 7.

[2] The partners of the divesting company may be allocated:

a. participation and membership rights in all companies involved in the demerger, in proportion to their previous participations (symmetrical demerger);

b. participation and membership rights in individual or all companies involved in the demerger, but not in proportion to their previous participations (asymmetrical demerger).

3. Section: Capital Decrease, Capital Increase, Formation of a New Company, and Interim Balance Sheet

Art. 32 Decreasing the Capital in Case of a Spin-off

If, in connection with the spin-off, the capital of the divesting company is decreased, Articles 733, 734, 788 paragraph 2 and 874 paragraph 2 of the Code of Obligations shall not apply.

Art. 33 Capital Increase

[1] The acquiring company must increase the capital to the extent necessary to protect the rights of the partners of the divesting company.

[2] The provisions of the Code of Obligations concerning contributions-in-kind as well as Article 651 paragraph 2 of the Code of Obligation shall not apply to demergers.

Art. 34 Formation of a New Company

For the formation of a new company in the context of a demerger, the provisions of the Code of Obligations pertaining to the formation of a new company shall apply. Not applicable are the provisions about the number of founders of corporate entities, as well as the provisions about contributions-in-kind.

Art. 35 Interim Balance Sheet

[1] If, on the date the demerger agreement is concluded or the demerger plan prepared, the balance sheet date is more than six months earlier or if, since the last such balance sheet date, important changes have occurred in the assets and liabilites of the demerging companies, the companies shall prepare an interim balance sheet.

[2] The preparation of an interim balance sheet is governed by the regulations and principles regarding annual financial statements, subject to the following provisions:

a. a physical inventory is not necessary.

b. the valuation contained in the last balance sheet need only to be changed in accordance with movements in the company books. Depreciation, revaluations and provisions for the interim period, as well as substantial unrecorded changes in asset values must be reflected in the interim balance sheet.

4. Section: Demerger Agreement, Demerger Plan, Demerger Report and Verification

Art. 36 Demerger Agreement and Demerger Plan

[1] If a company, by way of a demerger, transfers parts of its assets and liabilites to existing companies, the supreme management or administrative bodies of the companies involved in the demerger shall conclude a demerger agreement.

[2] If, by way of a demerger, a company wants to transfer parts of its assets and liabilities to companies to be newly formed, the supreme management or administrative body of that company shall prepare a demerger plan.

[3] The demerger agreement and the demerger plan shall be in written form and requires the approval of the general meeting (Art. 43).

Art. 37 Content of the Demerger Agreement or the Demerger Plan

The demerger agreement or the demerger plan shall contain:

a. the registered name, the registered office and the legal form of the companies involved;

b. an inventory with an unambigueous identification, the division and the allocation of all items comprising the assets and liabilities, as well as the allocation of all parts of the physical assets; real estate, securities and intangible assets are to be identified individually;

c. the exchange ratio for participation rights and, if applicable, the amount of compensation, or details about the membership of the partners of the divested company in the acquiring company;

d. the rights granted by the acquiring company to the holders of special rights, shares without voting rights, or profit sharing certificates;

e. the manner in which the exchange of these participation rights will be made;

f. the point in time when the participation or membership rights confer an entitlement to a share in the profits, as well as all details of this entitlement;

g. when the activities of the divesting company are regarded as being carried out on account of the acquiring company;

h. each special advantage being granted to the members of a management or administrative body or to managing partners;

i. a list of the employment relationships, which are transferred by the demerger.

Art. 38 Non-allocated Assets and Liabilities

[1] An asset which cannot be allocated pursuant to the demerger agreement or the demerger plan:

a. becomes, in case of a division, the joint property of all acquiring companies in proportion to the net assets given to them by the demerger agreement or the demerger plan;

b. remains, in case of a spin-off, with the divesting company.

[2] Paragraph 1 applies by analogy for claims and intangible assets.

[3] The companies involved in a division are jointly and severally liable for liabilities incurred which, on the basis of the demerger agreement or the demerger plan, cannot be allocated.

Art. 39 Demerger Report

[1] The supreme management or administrative bodies of the companies involved shall prepare a written report about the demerger. They may also prepare a joint report.

[2] Small and medium-sized companies need not prepare a demerger report if all partners agree.

[3] In the report, the following shall be explained and substantiated in legal and business terms:

a. the purpose and the consequences of the demerger;

b. the demerger agreement or the demerger plan;

c. the exchange ratio for participation rights and, if applicable, the amount of the compensation payment, if any, or the membership rights of partners of the divesting company in the acquiring company;

d. special considerations regarding the valuation of participation rights in view of the determination of the exchange ratio;

e. the obligation to make a supplementary capital contribution, other personal obligations and the personal liability, which result from the demerger for the partners, if any;

f. in case of demergers of companies with different legal forms, the duties that may be imposed on the partners in the new legal form;

g. the consequences of the demerger on the employees of the demerging companies as well as references to the content of a redundancy program, if any;

h. the consequences of the demerger on the creditors of the companies involved in the merger;

[4] If, in the context of a demerger, a new company is formed, the draft articles of incorporation of the new company are to be attached to the demerger report.

Art. 40 Verification of the Demerger Agreement or the Demerger Plan and the Demerger Report

For the verification of the demerger agreement or the demerger plan and the demerger report, Article 15 applies by analogy.

Art. 41 Inspection Right

[1] Each of the companies involved in the demerger shall, at its registered office and during two months prior to the adoption of the demerger resolution, allow the partners to inspect the following documents of all companies involved in the demerger:

a. the demerger agreement or the demerger plan;

b. the demerger report;

c. the verification report;

d. the annual financial statements and annual reports of the last three business years as well as the interim balance sheet, if any.

[2] Small and medium-sized companies need not adhere to the inspection requirements of paragraph 1 if all partners agree.

[3] The partners may ask the companies involved for copies of the documents referred to in paragraph 1. These copies shall be provided to them free of charge.

[4] Each of the companies involved in the demerger shall inform the partners about the inspection right by publication in the Swiss Official Gazette of Commerce.

Art. 42 Information on Changes in Assets and Liabilities

For information on changes in assets and liabilites, Article 17 applies by analogy.

5. Section: Demerger Resolution and Notarial Certification

Art. 43 Demerger Resolution

[1] The supreme management or administrative bodies of the companies involved may only submit the demerger agreement or the demerger plan to the general meeting for approval if the claims have been secured in accordance with Article 46.

[2] For the adoption of the resolution, the required majorities according to Article 18 Paragraphs 1, 3, 4 and 6 apply.

[3] In case of an asymmetrical demerger, at least 90 percent of all partners of the divesting company who have voting rights must agree.

Art. 44 Notarial Certification

The demerger resolution must be certified by a notary.

6. Section: Protection of Creditors and Employees

Art. 45 Notice to the Creditors

The creditors of all companies involved in the demerger must be given notice three times in the Swiss Official Gazette of Commerce that they may demand the security for their claims by notifying them to such companies.

Art. 46 Security for Claims

[1] The companies involved in the demerger must secure the claims of the creditors if the creditors demand this within two months after the notice to the creditors.

[2] The obligation to secure claims shall not apply if the company demonstrates that the fulfilment of the claims is not jeopardized by the demerger.

[3] Instead of providing security, the company may satisfy the claims to the extent other creditors are not harmed.

Art. 47 Secondary Liability of the Companies Involved in the Demerger

[1] If the claims of a creditor are not satisfied by the company to which the liabilities have been allocated pursuant to the demerger agreement or the demerger plan (company with primary liability), then the other companies involved in the demerger are jointly and severally liable (companies with secondary liability).

[2] Companies with secondary liability can only be sued if a claim has not been secured and the company with primary liability:

a. has become bankrupt;

b. has been granted a composition moratorium or a postponement of bankruptcy;

c. has been subject to debt enforcement resulting in the issuance of a final certificate of loss;

d. has transferred its registered office to a foreign state and thus can no longer be sued in Switzerland;

e. has transferred its registered office from one foreign state to another and, as a result, a considerable impediment to legal enforcement has accrued.

Art. 48 Personal Liability of Partners

For the personal liability of partners, Article 26 shall apply by analogy.

Art. 49 Transfer of Employment Relationships, Security for Claims and Personal Liability

[1] For the transfer of employment relationships, Article 333 of the Code of Obligations shall apply.

[2] The employees of the companies involved in the demerger may, according to Article 46, demand the security for their claims arising from the employment agreement, which are due up to the point in time when the employment relationship legally could be terminated or, if the transfer of the employment relationship is rejected, when it is terminated by the employee.

[3] Article 27 paragraph 3 is applicable by analogy.

Art. 50 Consultation with the Employees' Representation Body

Consultation with the employees' representation body is governed by Article 28.

7. Section: Registration in the Register of Commerce and Legal Effect

Art. 51 Registration in the Register of Commerce

[1] As soon as the demerger resolution has been adopted, the supreme management or administrative body must apply for registration of the demerger with the register of commerce.

[2] If the divesting company must decrease its capital as a result of the spin-off, the amended articles of incorporation also shall be submitted to the register of commerce.

[3] In case of a division, the divesting company will be deleted from the register of commerce with the registration of the division.

Art. 52 Legal Effect

Upon registration into the register of commerce, the demerger becomes legally effective. At this point in time, all assets and liabilities listed in the inventory are transferred by operation of law to the acquiring companies. Article 34 of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 remains unaffected.

4. Chapter: Conversion of Companies

1. Section: General Provisions

Art. 53 Principle

A company can change its legal form (conversion). Its legal relationships are thereby not modified.

Art. 54 Permissible Conversions

[1] A corporate entity can convert into:

a. a corporate entity with a different legal form;

b. a cooperative.

[2] A general partnership can convert into:

a. a corporate entity;

b. a cooperative;

c. a limited partnership.

[3] A limited partnership can convert into:

a. a corporate entity;

b. a cooperative;

c. a general partnership.

[4] A cooperative can convert into:

a. a corporate entity;

b. an association if the cooperative has not issued participation certificates and the association will be registered in the register of commerce.

[5] An association, if it is registered in the register of commerce, can convert into a corporate entity or a cooperative.

Art. 55 Special Provisions for the Conversion of General and Limited Partnerships

[1] A general partnership can convert into a limited partnership by:

a. a limited partner joining the general partnership;

b. a general partner becoming a limited partner.

[2] A limited partnership can convert into a general partnership by:

a. all limited partners resigning;

b. all limited partners becoming general partners.

[3] The continuation of a general or limited partnership as a sole proprietorship according to Article 579 of the Code of Obligation remains unaffected.

[4] The provisions of this chapter are not applicable to the conversion dealt with in this article.

2. Section: Participation and Membership Rights

Art. 56 Protection of Participation and Membership Rights

[1] In case of a conversion, the participation and membership rights of the partners must be protected.

[2] Partners without participation certificates are entitled to receive at least one participation right in case of a conversion of their company into a corporate entity.

[3] For shares without voting rights, equivalent participation rights or participation rights with voting right must be granted.

[4] For special rights associated with the participation and membership rights, equivalent rights or an appropriate compensation must be granted.

[5] For profit sharing certificates, equivalent rights must be granted or they have to be repurchased for their real value at the the point in time when the conversion plan is being prepared.

3. Section: Formation and Interim Balance Sheet

Art. 57 Provisions Regarding the Formation of a Company

In case of a conversion, the provisons of the Civil Code and the Code of Obligations pertaining to the formation of the relevant company shall apply. Not applicable are the provisions about the number of founders of corporate entities, as well as the provisions about contributions-in-kind.

Art. 58 Interim Balance Sheet

[1] If, on the date the conversion report is prepared, the balance sheet date is more than six months earlier or if, since the last such balance sheet date, important changes have occurred in the assets and liabilites of the company, the company shall prepare an interim balance sheet.

[2] The preparation of an interim balance sheet is governed by the regulations and principles regarding annual financial statements, subject to the following provisions:

a. a physical inventory is not necessary.

b. the valuation contained in the last balance sheet need only to be changed in accordance with movements in the company books. Depreciation, revaluations and provisions for the interim period, as well as substantial unrecorded changes in asset values, must be reflected in the interim balance sheet.

4. Section: Conversion Plan, Conversion Report and Verification

Art. 59 Preparation of the Conversion Plan

[1] The supreme management or administrative body shall prepare a conversion plan.

[2] The conversion plan shall be in written form and requires the approval of the general meeting or of the partners in accordance with Article 64.

Art. 60 Content of the Conversion Plan

The conversion plan shall contain:

a. the name or registered name, the registered office and the legal form prior to and after the conversion;

b. the new articles of incorporation;

c. the number, kind and amount of the participation rights which are received by the partners after the conversion, or details about the membership rights of partners after the conversion.

Art. 61 Conversion Report

[1] The supreme management or administrative body must prepare a written report about the conversion.

[2] Small and medium-sized companies need not prepare a conversion report if all partners agree.

[3] In the report, the following shall be explained and substantiated in legal and business terms:

a. the purpose and consequences of the conversion;

b. the compliance with the regulations governing the formation of the new legal form;

c. the new articles of incorporation;

d. the exchange ratio for participation rights or the membership rights of the partners after the conversion;

e. the obligation to make a supplementary capital contribution, other personal obligations and the personal liability which result from the conversion for the partners, if any;

f. the duties that may be imposed on the partners as a result of the new legal form.

Art. 62 Verification of the Conversion Plan and the Conversion Report

[1] The company must have the conversion plan, the conversion report and the balance sheet that the conversion was based on verified by a specially qualified auditor.

[2] Small and medium-sized companies need not carry out this verification if all partners agree.

[3] The company must provide the auditor with all relevant information and documentation.

[4] The auditor must verify whether the prerequisites for the conversion have been met and, in particular, whether the rights of the partners remain protected after the conversion.

Art. 63 Inspection Right

[1] The company shall, at its registered office and 30 days before the resolution is adopted, allow the partners to inspect the following documents:

a. the conversion plan;

b. the conversion report;

c. the verification report;

d. the annual financial statements and annual reports of the last three business years as well as the interim balance sheet, if any.

[2] Small and medium-sized enterprises need not adhere to the inspection requirements of paragraph 1 if all partners agree.

[3] The partners may ask the company for copies of the documents referred to in Paragraph 1. These copies shall be provided to them free of charge.

[4] The company shall inform the partners in an appropriate manner about the opportunity to inspect such documents.

5. Section: Conversion Resolution and Registration in the Register of Commerce

Art. 64 Conversion Resolution

[1] In case of corporate entities, cooperatives and associations, the supreme management or administrative body shall submit the conversion plan for approval through a resolution at a general meeting. The following majorities shall be required:

a. for corporations and corporations including partners with unlimited liability, at least two thirds of the votes represented at the general shareholders' meeting and the absolute majority of the nominal value of the shares represented by them; if, in case of the conversion into a limited liability company, an obligation to make a supplementary capital contribution or other personal obligations have been introduced, the approval of all shareholders who are affected by it;

b. in case of the conversion of a corporate entity into a cooperative, the approval of all partners;

c. for limited liability companies, at least three quarters of all partners which also shall represent at least three quarters of the company capital;

d. for cooperatives, at least two thirds of the votes cast or, if an obligation to make a supplementary capital contribution, other personal obligations or a personal liability will be introduced or extended, at least three quarters of all members of the cooperative;

e. for associations, at least three quarters of the members present at the general meeting.

[2] In case of general and limited partnerships, the conversion plan requires the approval of all partners. However, the partnership agreement may provide that the approval of three quarters of the partners is sufficient.

Art. 65 Notarial Certification

The conversion resolution must be certified by a notary.

Art. 66 Registration in the Register of Commerce

The supreme management or administrative body shall apply for registration of the conversion with the register of commerce.

Art. 67 Legal Effect

Upon registration in the register of commerce, the conversion becomes legally effective.

6. Section: Protection of Creditors and Employees

Art. 68

[1] In respect of personal liability of partners, Article 26 shall apply by analogy.

[2] As far as the liability for obligations arising from an employment agreement is concerned, Article 27 paragraph 3 shall apply by analogy.

5. Chapter: Transfer of Assets and Liabilities

1. Section: General provisions

Art. 69

[1] Companies registered in the register of commerce and sole proprietorships registered in the register of commerce may transfer all their assets and liabilities or parts thereof to other legal entities under private law. If the partners of the divesting company receive participation or membership rights in the acquiring company, Chapter 3 applies.

[2] The provisions required by law or the articles of incorporation about capital protection and liquidation remain unaffected.

2. Section: Transfer Agreement

Art. 70 Conclusion of the Transfer Agreement

[1] The transfer agreement shall be concluded by the supreme management or administrative bodies of the legal entities involved in the transfer of assets and liabilities.

[2] The transfer agreement shall be in written form. If real estate is transferred, the relevant parts of the agreement must be certified by a notary. A single notarial certification is sufficient, even if parcels of real estate are located in different cantons. The notarial certification shall be prepared by a notary at the same location as the registered office of the divesting legal entity.

Art. 71 Content of the Transfer Agreement

[1] The transfer agreement shall contain:

a. the registered name or the name, the registered office and the legal form of the legal entities involved;

b. an inventory with an unambiguous identification of all items to be transferred, comprising the assets and liabilities; real estate, securities and intangible assets shall be identified individually;

c. the total value of the assets and liabilities to be transferred;

d. the consideration, if any;

e. a list of the employment relationships, which are transferred through the transfer of the assets and liabilities.

[2] The transfer of assets and liabilities is permissible only if the inventory shows a surplus of assets.

Art. 72 Non-allocated Asset Items

Asset items as well as accounts receivables and intangible assets which cannot be allocated based on the inventory, remain with the divesting legal entity.

3. Section: Registration in the Register of Commerce and Legal Effect

Art. 73

[1] The supreme management or administrative body of the divesting legal entity shall apply for registration of the transfer of assets and liabilities in the register of commerce.

[2] Upon registration in the register of commerce, the transfer of assets and liabilites becomes legally effective. At this point in time, all assets and liabilities listed in the inventory are transferred by operation of law to the acquiring legal entity. Article 34 of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 remains unaffected.

4. Section: Information of the Partners

Art. 74

[1] The supreme management or administrative body of the divesting company must inform the partners about the transfer of assets and liabilities in an appendix to the annual financial statements. If no annual financial statements have to be prepared, information about the transfer of assets and liabilities shall be presented at the next general meeting.

[2] In the appendix or at the general meeting, the following shall be explained and substantiated in legal and business terms:

a. the purpose and consequences of the transfer of assets and liabilities;

b. the transfer agreement;

c. the consideration for the transfer;

d. the consequences on the employees and references to the content of a redundancy program, if any.

[3] This duty to inform shall not apply if the assets transferred represent less than five percent of the total assets of the divesting company.

5. Section: Protection of Creditors and Employees

Art. 75 Joint and Several Liability

[1] The previous debtors are jointly and severally liable with the new debtor for debts incurred prior to the transfer of assets and liabilities for three years.

[2] The claims against the divesting legal entity are barred by the statute of limitations three years after the publication of the transfer of assets and liabilities. If a claim becomes due only after this publication, the statute of limitations begins to run from its due date.

[3] The legal entities involved in the transfer of assets and liabilities must secure the claims if:

a. the joint and several liability no longer applies before the period of three years has expired; or

b. the creditors make a credible case that the joint and several liability does not provide sufficient protection.

[4] Instead of providing security, the legal entities involved in the transfer of assets and liabilities may satisfy the claims to the extent other creditors are not harmed.

Art. 76 Transfer of Employment Relationsips and Joint and Several Liability

[1] For the transfer of employment relationships to the acquiring legal entity, Article 333 of the Code of Obligations applies.

[2] Article 75 applies for all liabilities arising from an employment agreement, which are due up to the point in time when the employment agreement legally could be terminated or, if the transfer of the employment relationship is rejected, when it is terminated by the employee.

Art. 77 Consultation with the Employees' Representation Body

[1] For the consultation with the employees' representation body, Article 333a of the Code of Obligations applies for the divesting legal entity as well as the acquiring legal entity.

[2] If the provisions of paragraph 1 are not observed, the employees' representation body may seek a court order that prohibits the registration of the transfer of assets and liabilities in the register of commerce.

[34] This provision shall also apply to an acquiring legal entity with a registered office abroad.

6. Chapter: Merger and Transfer of Assets and Liabilities of Foundations

1. Section: Merger

Art. 78 Principle

[1] Foundations can merge with each other.

[2] The merger is permissible only if it is objectivly justified and, in particular, serves the protection and implementation of the purpose of the foundation. All potential legal claims of the beneficiaries of the foundations involved must be protected. If, in view of the merger, a change of the purpose is required, Article 86 of the Civil Code applies.

Art. 79 Merger Agreement

[1] The merger agreement must be concluded by the supreme governing bodies of the foundations.

[2] The agreement shall contain:

a. the name, the registered office and the purpose of the foundations involved, and in case of a combination merger also the name, the registered office and the purpose of the new foundation;

b. details about the position of beneficiaries with legal claims against the acquiring foundation;

c. when the activities of the acquired foundation are regarded as being carried out on account of the acquiring foundation.

[3] The merger agreement shall be in written form. For family foundations and ecclesiastical foundations, the merger agreement must be certified by a notary.

Art. 80 Balance Sheet

The foundations must prepare a balance sheet and, if the conditions of Article 11 are met, an interim balance sheet.

Art. 81 Verification of the Merger Agreement

[1] The foundations must have the merger agreement as well as the balance sheets verified by an auditor.

[2] They shall provide the auditor with all relevant information and documentation.

[3] The auditor shall prepare a report in which particular emphasis shall be placed on whether the potential legal claims of the beneficiaries have been protected and whether claims from

creditors are known or to be expected which could not be satisfied out of the assets of the merging foundations.

Art. 82 Duty to Inform

The supreme governing body of the acquired foundation shall inform the beneficiaries with legal claims, prior to the submission of the application to the supervisory authority, about the planned merger and its consequences on their legal position. For family foundations and ecclesiastical foundations, this information shall be given before the merger resolution is adopted.

Art. 83 Approval and Implementation of the Merger

[1] In case of foundations subject to governmental supervision, the supreme governing bodies of the foundation shall file an application with the competent supervisory authority for approval of the merger. The application shall set out in writing that the prerequisites for the merger have been fulfilled. The balance sheets of the merging foundations, which have been verified by an auditor, as well as the verification report are to be submitted to the supervisory authority together with the application.

[2] The responsible supervisory authority is the one for the acquired foundation. In case of more than one acquired foundations, each supervisory authority has to approve the merger.

[3] After examining the application, the supervisory authority shall issue the relevant order and, if the approval is granted, apply for registration of the merger in the register of commerce.

[4] With respect to the legal effect of the merger, Article 22 paragraph 1 applies.

Art. 84 Resolution and Implementation of the Merger in case of Family Foundations and Ecclesiastical Foundations

[1] For family foundations and ecclesiastical foundations, the merger becomes legally effective upon the approval of the merger agreement by the supreme governing bodies of the merging foundations. In case of ecclesiastical foundations, which pursuant to public law are subject to governmental supervision, Article 83 applies by analogy.

[2] Each beneficiary with a legal claim and each member of the supreme governing body of the foundation who has not voted for the merger, may challenge the merger resolution in court within three months after the adoption of the resolution if the prerequisites have not been fulfilled.

Art. 85 Protection of Creditors and Employees

[1] Prior to the order being issued or prior to the resolution, the supervisory authority or, for family foundations and ecclesiastical foundations, the supreme governing body of the acquired foundation shall notify the creditors of the merging foundations by publication of the notice three times in the Swiss Official Gazette of Commerce that they may, upon giving notice of their claims, demand security for their claims. The beneficiaries with legal claims have no entitlement to security for claims.

[2] The supervisory authority or, for family foundations and ecclesiastical foundations, the supreme governing body of the foundation may depart from the obligations to notify the creditors if, based on the auditor's report, no claims are known or to be expected which could not be satisfied out of the assets of the merging foundations.

[3] In case of a notification of the creditors, Article 25 applies.

[4] The protection of employees is governed by Articles 27 and 28.

2. Section: Transfer of Assets and Liabilities

Art. 86 Principle

[1] Foundations registered in the register of commerce may transfer all their assets and liabilities or parts thereof to other legal entities.

[2] Article 78 paragraph 2 applies by analogy. The transfer agreement is governed by the Articles 70-72, the protection of creditors and employees by the Articles 75-77.

Art. 87 Approval and Implementation of the Transfer of Assets and Liabilities

[1] In case of foundations subject to governmental supervision, the supreme governing bodies of the foundations shall file an application with the competent supervisory authority for approval of the transfer of assets and liabilities. The application shall set out in writing that the prerequisites for the transfer of assets and liabilities have been fulfilled.

[2] The responsible supervisory authority is the one for the acquired foundation.

[3] After examining the application, the supervisory authority shall issue the relevant order. After the approval order has become legally effective, the supervisory authority shall apply for registration of the transfer of assets and liabilities in the register of commerce.

[4] The registration in the register of commerce and the legal effect shall be governed by Article 73.

7. Chapter: Merger, Conversion and Transfer of Assets and Liabilities of Employee Welfare Institutions

1. Section: Merger

Art. 88 Principle

[1] Employee welfare institutions can merge with each other.

[2] The merger of employee welfare institutions is permissible only if the purpose of employee welfare and the rights and claims of the insured persons remain protected.

[3] The provisions of the law on foundations (Art. 80 et seq. of the Civil Code) and the Federal Law on Occupational Old Age, Survivors and Disability Benefit Plan of 25 June 1982 remain unaffected.

Art. 89 Balance sheet

The merging employee welfare institutions must prepare a balance sheet and, if the conditions of Article 11 are met, an interim balance sheet.

Art. 90 Merger Agreement

[1] The merger agreement must be concluded by the supreme management bodies of the merging employee welfare institutions.

[2] The agreement shall contain:

a. the name or the registered name, the registered office and the legal form of the employee welfare institutions involved, and in case of a combination merger also the name or the registered name, the registered office and the legal form of the new employee welfare institution;

b. details about the rights and claims of the insured persons against the acquiring employee welfare institution;

c. when the activities of the acquired employee welfare institution are regarded as being carried out on account of the acquiring employee welfare institution.

[3] The merger agreement shall be in written form.

Art. 91 Merger Report

[1] The supreme management bodies of the employee welfare institutions shall prepare a written report about the merger. They can also prepare a joint report.

[2] The following matters shall be explained and substantiated in the report:

a. the purpose and consequences of the merger;

b. the merger agreement;

c. the consequences of the merger on the rights and claims of the insured persons.

Art. 92 Verification of the Merger Agreement

[1] The merging employee welfare institutions must have the merger agreement, the merger report and the balance sheet verified by their auditors as well as by a recognised expert for employee welfare. They may appoint a joint expert.

[2] The merging employee welfare institutions must provide the persons charged with the verification with all relevant information and documentation.

[3] The auditors as well as the expert for employee welfare shall prepare a report outlining whether the rights and claims of the insured persons have been protected.

Art. 93 Duty to Inform and Inspection Right

[1] No later than the point in time when the inspection right is granted according to paragraph 2, the responsible bodies of the employee welfare institution have to inform the insured persons about the planned merger and its consequences. They have to inform the insured persons in an appropriate manner about the inspection right.

[2] During a period of 30 days prior to the filing of the application with the supervisory authority, the merging employee welfare institutions must, at their registered office, allow the insured persons to inspect the merger agreement and the merger report.

Art. 94 Merger Resolution

[1] The merger requires the approval of the supreme management body and, in case of a cooperative, also of the general meeting. As far as the required majorities are concerned, Article 18 paragraph 1 subparagraph d applies.

[2] For employee welfare institutions under public law, Article 100 paragraph 3 remains unaffected.

Art. 95 Approval and Implementation of the Merger

[1] The supreme management bodies of the employee welfare institutions must apply to the responsible supervisory authority for approval of the merger.

[2] The responsible supervisory authority is the one for the acquired employee welfare institution.

[3] The supervisory authority shall examine whether the prerequisites for a merger are fulfilled and shall issue an order. The supervisory authority may demand further documentation required for the examination of the prerequisites.

[4] After the approval order has become legally effective, the supervisory authority shall apply for registration of the merger in the register of commerce.

[5] With respect to the legal effect of the merger, Article 22 paragraph 1 applies.

Art. 96 Protection of Creditors and Employees

[1] Prior to the order being issued, the supervisory authority shall three times notify the creditors of the merging employee welfare institutions, in the Swiss Official Gazette of Commerce, that they may, upon application, demand security for their claims.

[2] The supervisory authority may depart form the obligation to notify the creditors if no claims are known or to be expected that could not be satisfied by the disposable assets of the merging employee welfare institutions.

[3] In case creditors are notified, they may, within two months after the publication in the Swiss Official Gazette of Commerce, demand security for their claims from the acquiring employee welfare institution. The insured persons have no entitlement to security for claims.

[4] The duty to provide security does not apply if the employee welfare institution proves that the satisfaction of the notified claim is not jeopardized by the merger. Article 25 Paragraph 4 shall apply. The supervisory authority shall decide in case of a dispute.

[4] The protection of employees is governed by Articles 27 and 28.

2. Section: Conversion

Art. 97

[1] Employee welfare institutions can convert into a foundation or a cooperative.

[2] The conversion of employee welfare institutions shall be permissible only if the purpose of employee welfare and the rights and claims of the insured persons remain protected.

[3] Articles 89-95 apply by analogy.

3. Section: Transfer of Assets and Liabilities

Art. 98

[1] Employee welfare institutions can transfer all their assests and liabilities or parts thereof to other employee welfare institutions or other legal entities.

[2] Article 88 paragraph 2 applies by analogy. Articles 70-77 apply.

[3] Transfers of assets and liabilities in connection with a partial or total liquidation require the approval of the supervisory authority if this is provided for by the law governing the occupational old age, survivors and disability benefit plans.

8. Chapter: Merger, Conversion and Transfer of Assets and Liabilities with the Participation of Institutions under Public Law

Art. 99 Permissible Mergers, Conversions and Transfers of Assets and Liabilities

[1] Institutions under public law can:

a. transfer their assets and liabilities by merging with corporate entities, cooperatives, associations or foundations;

b. convert into corporate entities, cooperatives, associations or foundations.

[2] Institutions under public law can by a transfer of assets and liabilities, transfer their assets and liabilities or parts thereof to other legal entities or take over assets and liabilities or parts thereof from other legal entities.

Art. 100 Applicable Law

[1] In the case of mergers of legal entities under private law with institutions under public law, or the conversion of such an institution into an entity under private law or the transfer of assets and liabilities with the participation of institutions under public law, the provisions of this law apply by analogy. In case of a merger and a conversion according to Article 99 paragraph 1, public law may provide for deviating provisions for institutions under public law. Articles 99-101 apply in any case.

[2] Institutions under public law must, in an inventory of the assets and liabilities, which are affected by the merger, conversion, or transfer of assets and liabilities, unambiguously identify and value them. Real estate, securities and intangible assets are to be listed individually. The inventory must be verified by a specially qualified auditor to the extent it was not other-

wise ensured that the preparation and valuation of the inventory is in conformity with recognised accounting principles.

[3] The adoption of a resolution for the merger, conversion or a transfer of assets and liabilities of an institution under public law is governed by the public law regulations and principles of the Federation, the Cantons and the municipalities.

Art. 101 Liability of the Federation, Cantons and Municipalities

[1] No creditors shall be harmed by mergers, conversions or asset transfers of institutions under public law. The Federation, cantons and municipalities shall take precautions so that claims in terms of Articles 26, 68 paragraph 1 and 75 can be fulfilled.

[2] The Federation, cantons and municipalities are liable, in accordance with the applicable laws, for any damage that can be traced back to insufficient precautions.

9. Chapter: Common Provisions

1. Section: Implementing Provisions

Art. 102

The Federal Council shall issue regulations on:

a. the details about the registration in the register of commerce and the documents to be submitted;

b. the details about the entry into the land register and the documents to be submitted.

2. Section: Levy on Change of Ownership

Art. 103

Imposing cantonal and municipal levies on change of ownership is precluded in the case of restructurings according to the Articles 8 paragraph 3 and 24 paragraphs 3 and 3^{quater} of the Federal Act on the Harmonisation of the Direct Taxes of the Cantons and Municipalities of 14 December 1990. Fees based on actual costs remain unaffected.

3. Section: Application for Entry into the Land Register

Art. 104

[1] The acquiring legal entity or, in case of a conversion, the legal entity converting its legal form shall apply for entry into the land register all changes resulting for the land register from the merger, the demerger or the conversion, within three months of those changes having legal effect unless the shorter deadline according to paragraph 2 applies.

[2] The acquring legal entity must apply for the entry of the transfer of ownership of real estate in the land register immediately after this transfer becomes legally effective if:

a. in case of a merger of associations or foundations, the acquired legal entity is not registered in the register of commerce;

b. the real estate has been transferred to it through a spin-off;

c. the real estate has been transferred to it through a transfer of assets and liabilities.

[3] In cases under paragraph 2, letters a and b, a notarial certification concerning the fact that the ownership of the real estate has been transferred to the acquiring legal entity is needed as proof of the transfer of ownership for the land register.

[4] The notary establishing an evidential deed according to paragraph 3 or a notarial certification according to Article 70 paragraph 3 is entitled to apply for entry into the land registers on behalf of the acquiring legal entity.

4. Section: Examination of the Participation and Membership Rights

Art. 105

[1] If, in case of a merger, demerger or conversion, the participation and membership rights have not been protected appropriately, or if the cash or other compensation is not appropriate, each partner may, within two months after the publication of the merger, demerger or conversion resolution, apply to the court for a determination of an appropriate compensation payment. For the determination of the compensation payment, Article 7 paragraph 2 shall not apply.

[2] The judgment shall be effective for all partners of the legal entity involved if they are in the same legal position as the plaintiff.

[3] The acquiring legal entity shall bear the costs of the action. If special circumstances justify it, the court may award costs in full or in part to the plaintiff.

[2] The action for examining whether the participation and membership rights have been protected shall not hinder the legal effect of the merger, demerger or conversion resolution.

5. Section: Challenge of Merger, Demerger, Conversion and Transfer of Assets and Liabilities Resolutions by the Partners

Art. 106 Principle

[1] If the provisions of this Act have been violated, the partners of the legal entities involved who did not vote for the merger, demerger or conversion resolution, may challenge the resolution within two months after the publication of the relevant notice in the Swiss Official Gazette of Commerce. If publication is not required, the time period begins to run with the adoption of the resolution.

[2] Partners may also challenge the resolution if the supreme management or administrative body adopted it.

Art. 107 Consequences of a Deficiency

[1] If a deficiency can be remedied, the court shall set a deadline for the legal entities involved to do so.

[2] If a deficiency is not remedied within this deadline or cannot be remedied at all, the court shall suspend the resolution and order the necessary measures.

6. Section: Responsibility

Art. 108

[1] All persons involved in a merger, demerger, conversion or transfer of assets and liabilities shall be responsible to the legal entities, individual partners as well as the creditors for any damage they cause by intentional or negligent violation of their duties. The responsibility of the founders remains unaffected.

[2] All persons involved in the verification of a merger, demerger or conversion shall be responsible to the legal entities, individual partners as well as the creditors for any damage they cause by intentional or negligent violation of their duties.

[3] Articles 756, 759 and 760 of the Code of Obligations apply. In case of bankruptcy of a corporate entity or a cooperative, Articles 757, 764 Paragraph 2, 827 and 920 of the Code of Obligations apply by analogy.

[4] The responsibility of persons employed by an institution under public law are governed by public law.

10. Chapter: Final Provisions

Art. 109 Modification of Existing Laws

The modification of existing law is regulated in the appendix.

Art. 110 Transitional Provisions

This Act shall be applicable to mergers, demergers, conversions and transfers of assets and liabilities, which, after the Act comes into force, are submitted for registration with the register of commerce.

Art. 111 Referendum and Entry into Force

[1] This Act is subject to an optional public referendum.

[2] The Federal Council shall determine when it enters into force.

[3] Article 103 shall enter into force five years after the entering into force of the other provisions of this Act.

Amendments to Existing Law

The following laws shall be amended as follows:

1. Federal Act on the Agricultural Land Rights of 4 October 1991

Art. 62 Letter g

An acquisition does not require an approval:

g. in case of a transfer of ownership by merger or demerger according to the Merger Act of 3 October 2003 if the assets of the acquired or acquiring legal entity do not mainly consist of one agricultural business or agricultural real estate.

2. Code of Obligations

Art. 181 Paragraph 2 and 4

[2] The previous debtor shall be jointly and severally liable together with the new debtor for three years in respect of due claims starting with the notification or the publication, and in respect of claims becoming due later, starting with the due date of the claim.

[4] The acquisition of assets and liabilities or the business of business corporations, cooperatives, associations, foundations and sole proprietorships which are registered in the register of commerce, shall be governed by the provisions of the Merger Act of 3 October 2003.

Art. 182

Repealed

Art. 704 Paragraph 1 Clause 8

Repealed

Art. 727c Paragraph 1

[1] Auditors must be independent from the board of directors and from any shareholder who has a majority vote. In particular, they may neither be employees of the company to be audited nor may they perform work for it incompatible with the auditing mandate. They shall not accept any special benefits.

Art. 738

III. Consequences

The dissolved company enters into liquidation, except in case of the merger, or division, or transfer of its assets and liabilites to an institution under public law.

Art. 748-750

Repealed

Art. 770 Paragraph 3

Repealed

Art. 824-826

Repealed

Art. 888 Paragraph 2

[2] The dissolution of the cooperative as well as the amendment of the articles of incorporation, require a majority of two-thirds of the votes cast. The articles of incorporation may impose more restrictive rules for such resolutions.

Art. 893 Paragraph 2

[2] The powers of the general meeting to create or increase an obligation to make a supplementary capital contribution, to dissolve, merge, demerge and convert the legal form of the cooperative may not be so delegated.

Art. 914

Repealed

Art. 936a

Identification Number

[1] The sole proprietorships, general and limited partnerships, corporate entities, cooperatives, associations, foundations and institutions under public law, which are registered in the register of commerce, shall receive an identification number.

[2] During the existence of the legal entity, the identification number shall remain unchanged, in particular in case of a relocation of the registered office, a conversion or a change of the name or the registered name.

[3] The Federal Council shall issue the implementing provisions. It can require that the identification number is to be given next to the company's name on letterheads, order forms and invoices.

Final and Transitional Provisions to the Titles 24-33

Art. 4

Repealed

3. Federal Act on the Place of Jurisdiction in Civil Matters of 24 March 2000

Art. 29a Mergers, Demergers, Conversions and Transfers of Assets and Liabilities

For legal actions which are based on the Merger Act of 3 October 2003, the court at the registered office of one of the involved legal entities shall have jurisdiction.

4. Federal Act on International Private Law of 18 December 1987

Art. 161 Text in margin

VI. Relocation of a Company, Merger, Demerger and Transfer of Assets and Liabilities.

I. Relocation of a Company to Switzerland from Abroad

a. Principle

Art. 162 Text in margin and Paragraph 3

b. Relevant Time

[3] A corporate entity, before registration, has to prove through the report of a specially qualified auditor pursuant to Article *727b* of the Code of Obligation that its minumum capital is in existence and available pursuant to Swiss Law.

Art. 163

2. Relocation of a Company from Switzerland Abroad

[1] A Swiss company may submit to foreign law without being liquidated and newly formed if the requirements under Swiss law have been fulfilled and it continues to exist under foreign law.

[2] The creditors, with a notice to the forthcoming change of the corporate law applicable to the entity, are to be given public notice that they may notify their claims. Article 46 of the Merger Act of 3 October 2003 applies by analogy.

[3] The provisions concerning precautionary protective measures in case of international conflicts within the meaning of Article 61 of the Federal Act conerning the Economic Provisioning of the Country of 8 October 1982 remain unaffected.

Art. 163a

2. Merger
a. Merger in Switzerland with a Foreign Company

[1] A Swiss company may take over a foreign company (immigration absorption) or merge along with in a new Swiss company (immigration combination) if the law applicable to the foreign company permits this and its requirements have been fulfilled.

[2] In all other respects, the merger is subject to Swiss law.

Art. 163b

b. Merger Abroad by a Swiss Company with a Foreign Company

[1] A foreign company may take over a Swiss company (emigration absorption) or merge along with in a new foreign company (emigration combination) if the Swiss company proves that:

a. with the merger, its assets and liabilities transfer to the foreign company; and

b. the participation and membership rights in the foreign company remain appropriately protected.

[2] The Swiss company shall observe all requirements of Swiss law which apply to an acquired company.

[3] The creditors, with a notice to the forthcoming merger, are to be given public notice in Switzerland that they may notify their claims. Article 46 of the Merger Act of 3 October 2003 applies by analogy.

[4] In all other respects, the merger is subject to the law of the acquiring foreign company.

Art. 163c

c. Merger Agreement

[1] The merger agreement has to comply with the mandatory provisions of the company laws applicable to the companies involved, including the requirements of form.

[2] In all other respects, the merger agreement shall be subject to the law chosen by the parties. In the absence of a choice of law, the merger agreement shall be subject to the law of the state with which it is most closely connected. It shall be assumed that the closest connection is with the legal system of that state to which the acquiring company is subject.

Art. 163d

c. Demerger and Transfer of Assets and Liabilities

[1] The provisions of this Act concerning mergers shall apply by analogy to the demerger and the transfer of assets and liabilities in which a Swiss and a foreign company participate. Article *163b* paragraph 3 shall not apply to the transfer of assets and liabilities.

[2] In all other respects, the demerger and the transfer of assets and liabilities shall be subject to the law of the divesting company or the company transferring its assets and liabilities to a different legal entity.

[3] In accordance with the requirements of Article *163c* paragraph 2, the law of the divesting company shall presumptively apply to the demerger agreement. This also shall apply to the transfer agreement by analogy.

Art. 164

Common Provisions
a. Deletion from the Register of Commerce

[1] A company which is registered in the Swiss register of commerce may only be deleted if it is confirmed by a report of a specially qualified auditor that the creditors' claims within the meaning of Article 46 of the Merger Act of 3 October 2003 have been secured or satisfied, or the creditors consent with the deletion.

[2] If a foreign company takes over a Swiss company, if it merges along with a Swiss company in a new foreign company or if a Swiss company is divided into foreign companies, it must in addition be:

a. proven that the merger or the demerger has become legally effective according to the law applicable to the foreign company; and

b. confirmed by a specially qualified auditor that the foreign company has granted participation and membership rights to the partners of the Swiss company entitled thereto, or a cash or other compensation payment has been made or secured.

Art. 164a

b. Place of Prosection and Place of Jurisdiction

[1] If a foreign company takes over a Swiss company, merges along with it in a new foreign company or if a Swiss company is divided into foreign companies, a legal action for the examination of the participation and membership rights pursuant to Article 105 of the Merger Act of 3 October 2003 can also be initiated in the same location as the registered office of the acquired Swiss legal entity.

[2] The previous place of debt enforcement and place of jurisdiction in Switzerland shall remain in effect until the claims of the creditors or partners have been secured or satisfied.

Art. 164b

c. Transfer, Merger, Demerger and Transfer of Assets and Liabilities Abroad

[1] The submission of a foreign company to the laws of a different foreign jurisdiction and the merger, demerger and transfer of assets and liabilities between foreign companies are recognised in Switzerland as valid if they are valid under the legal systems involved.

Art. 165 Text in margin

VII. Foreign Decisions

5. Swiss Criminal Code

Art. 326ter

Infringement of Company Law Provisions

Whoever in respect to an enterprise registered in the register of commerce uses a name, which is not identical to the one registered in the register of commerce and which may be misleading,

whoever in respect of an enterprise not registered in the register of commerce uses a misleading name,

whoever in respect of a foreign enterprise not registered in the register of commerce, gives the impression that the registered office of the enterprise or a branch thereof is located in Switzerland,

will be punished with imprisonment or a fine.

6. Federal Act on Stamp Duty of 27 June 1973

Art. 6 Paragraph 1 Letter abis

[1] Exempted from the tax are:

abis. the issue of or increase in the nominal value of participation rights pursuant to resolutions for mergers, merger-like transactions, conversions and demergers of corporations, corporations including partners with unlimited liability, limited liability companies or cooperatives;

Art. 9 Paragraph 1 Letter e

[1] The tax amounts to:

e. on the issue of or increase in the nominal value of participation rights pursuant to resolutions for mergers, demergers or conversions of sole proprietorships, non-corporate general and limited partnerships, associations, foundations as well as institutions under public law, provided that the previous legal entity exsisted for at least five years: 1 percent of the nominal value, subject to exceptions under Article 6 paragraph 1 letter h. The surplus is retroactively subject to taxation if, during the five years following the restructure, the participation rights are sold.

Art. 14 Paragraph 1 Letters b, i and j

[1] Exempt from tax shall be:

b. the contribution-in-kind of securities as consideration for the subscription for domestic or foreign shares, capital contributions to companies with limited liability, participation certificates in cooperatives, participation certificates and interests in investment funds;

i. the transfer of taxable securities in connection with a corporate reorganization, in particular a merger, demerger or conversion of the enterprise being merged, demerged or converted to the receiving or converted enterprise.

j. the purchase or sale of taxable securities in the context of a corporate reorganization in accordance with Art. 61 Paragraph 3 and 64 Paragraph 1bis of the Federal Direct Tax Act of 14 December 1990 as well as the transfer of participations of at least 20 percent of equity capital of other companies to a domestic or foreign group companies.

7. Federal Direct Tax Act of 14 December 1990

Art. 19 Superscription as well as Paragraphs 1 and 2

Corporate Reorganizations

[1] Undisclosed reserves of a person-based enterprises (sole proprietorship, partnership) shall not be taxed as a result of corporate reorganizations, in particular in case of a merger, demerger or conversion, to the extent that an obligation to pay taxes in Switzerland continues and the asset value previously used for income tax purposes are retained (roll over of tax basis):

a. in case of a transfer of assets to another person-based enterprise;

b. in case of a transfer of a business unit or part of a business unit to a legal entity;

c. in case of the exchange of participation or membership rights as a result of corporate reorganizations in accordance with Article 61 paragraph 1, or merger-like combinations.

[2] In case of corporate reorganization according to paragraph 1 letter b, the transferred undisclosed reserves will be taxed retroactively in accordance with Articles 151-153 if, during the five years following the corporate reorganization, the participation or membership rights are sold at a price in excess of the equity capital-based tax basis; in this case, the legal entity can accordingly treat the undisclosed reserves as taxed for income tax purposes (step up of tax basis).

Art. 61 Reorganizations

[1] Undisclosed reserves of a legal entity shall not be taxed as a result of a corporate reorganization, in particular in case of a merger, demerger or conversion, to the extent that an obligation to pay taxes in Switzerland continues and the asset value previously used for income tax purposes is retained (roll over of tax basis):

a. in case of a conversion to a person-based enterprise or to another legal entity;

b. in case of a division or spin-off of a legal entity, if one or more business units or a part of a business unit is transferred and so far as the acquiring legal entities continue to operate the business unit or part of a business unit;

c. in case of the exchange of participation or membership rights as a result of corporate reorganizations or merger-like combinations;

d. in case of a transfer of business units or parts of business units as well as the transfer of operational assets to a domestic subsidiary. A corporate entity or cooperative qualifies as a subsidiary if the transferring corporate entity or cooperative holds at least 20 percent of its equity capital.

[2] In case of a transfer to a subsidiary according to paragraph 1 letter d, the transferred undisclosed reserves will be taxed retroactively in accordance with Articles 151-153 if, during the five years following the corporate reorganization, the participation or membership rights of the subsidiary are sold; in this case, the subsidiary can accordingly treat the undisclosed reserves as taxed for income tax purposes (step up of tax basis).

[3] Between domestic corporate entities and cooperatives which under the totality of the factual circumstances are subject to uniform control of a corporate entity or a cooperative, either by a majority of votes or by other means, shareholdings of at least 20% of the company's equity capital, business units or parts of business units as well as operational assets can be

transferred at the value previoulsy used for income tax purposes (roll over of tax basis). The transfer of a subsidiary under Article 61 paragraph 1 letter d remains unaffected.

[4] If, in the case of a transfer under paragraph 3, the transferred assets are sold or if the uniform control ends, the transferred undisclosed reserves will be retroactively taxed in accordance with Articles 151-153. The benefiting legal entity can treat the undisclosed reserves as taxed for income tax purposes (step up of tax basis). The domestic corporate entities and cooperatives, which are under uniform control at the time of breach of the restriction period, shall be jointly and severally liable for the retroactive tax.

[5] If, a loss of book value results from the acquisition of the assets and liabilities of a corporate entity or a cooperative, the participation rights of which belong to the acquiring company, this cannot be deducted; a gain in book value will be taxed.

Art. 64 Paragraph 1bis

[1bis] In case of a replacement of participations, the undisclosed reserves can be transferred to a new participation, so far as the sold participation is equal to at least 20% of the other company's equity capital and was held as such for a period of at least one year.

8. Federal Act on the Harmonisation of the Direct Taxes of the Cantons and Municipalities of 14 December 1990

Art. 8 Paragraph 3, and 3bis

[3] Undisclosed reserves of a person-based enterprise (sole proprietorship, partnership) shall not be taxed as a result of a corporate reorganization, in particular in case of a merger, demerger or conversion, to the extent that an obligation to pay taxes in Switzerland continues and the tax basis relevant so far for income tax purposes are retained:

a. in case of a transfer of assets to another person-based enterprise;

b. in case of a transfer of a business unit or a part of a business unit to a legal entity;

c. in case of an exchange of participation or membership rights as a result of a corporate reorganization under Article 24 paragraph 3, or merger-like combinations.

[3bis] In case of a corporate reorganization according to paragraph 3 letter b, the transferred undisclosed reserves shall be taxed retroactively in accordance with Article 53 if, during the five years following the restructuring, the participation or membership rights are sold at a price in excess of the equity capital-based tax basis of the transferred equity; in this case, the

legal entity can treat the undisclosed reserves as taxed for income tax purposes (step up of tax basis).

Art. 12 Paragraph 4 Letter a

[4] The cantons are entitled to levy a real estate capital gains tax on gains resulting from the sale of real estate which forms part of the tax payers business assets so far as these gains are exempted from income taxation or credit the real estate gains tax against the income tax. In both cases, the following applies:

a. the events referred to in Article 8 paragraph 3 and 4 and Article 24 paragraph 3 and 3[quarter] must be treated for real estate capital gains tax purposes as a tax deferred sale;

Art. 24 Paragraph 3, 3[ter], Paragraph 3[quarter],3[quinquies] and 4[bis]

[3] Undisclosed reserves of a legal entity or a cooperative shall not be taxed as a result of a corporate reorganization, in particular in case of a merger, demerger or conversion, to the extent that an obligation to pay taxes in Switzerland continues and asset values previously used for income tax purposes are retained (roll over of tax basis):

a. in case of a conversion into a person-based enterprise or into another legal entity;

b. in case of a division or spin-off of a legal entity or a cooperative, if one or more business units or a part of a business unit is transferred and so far as the acquiring legal entities continue to operate such business unit or part of a business unit;

c. in case of the exchange of participation or membership rights as a result of corporate reorganizations or merger-like combinations;

d. in case of a transfer of a business unit or a part of a business unit as well as the transfer of operational assets to a domestic subsidiary. A corporate entity or cooperative qualifies as a subsidiary if the acquired entity holds at least 20 percent of the capital.

[3ter] In case of a transfer to a subsidiary according to paragraph 3 letter d, the transferred undisclosed reserves will be taxed retroactively in accordance with Article 53 if, during the five years following the restructuring, the participation or membership rights of the subsidiary are sold; in this case, the subsidiary can accordingly treat the undisclosed reserves as taxed for income tax purposes (step up of tax basis).

[3quarter] Between domestic corporate entities and cooperatives which under the totality of the factual circumstances are subject to the uniform control of a corporate entity or a cooperative, either by a majority of votes or by other means, shareholdings of at least 20% of the company's equity capital, business units or parts of business units as well as operational assets can be transferred at values previously used for inomce tax purposes (roll over of tax basis). Unaffected are:

a. the transfer of a subsidiary according to Article 24 paragraph 3 letter d;

b. the transfer of operational assets to a company which is taxed pursuant to Article 28 paragraph 2-4.

[3quinquies] If, in the case of a transfer under paragraph 3[quarter], the transferred assets are sold or if the uniform control ends, the transferred undisclosed reserves will be retroactively taxed in accordance with Article 53. The benefiting legal entity can treat the undisclosed reserves as taxed for income tax purposes (step up of tax basis). The domestic corporate entities and cooperatives, which are under uniform control at the time of breach of the restriction period, shall be jointly and severally liable for the retroactive tax.

[4bis] In case of a replacement of participations, the undisclosed reserves can be transferred to a new participation, so far as the sold participation is equal to at least 20% of the other company's equity capital and was held as such for a period of at least one year.

Art. 72e Adaptation of the Cantons' Legislation to the Changes

[1] The cantons shall adapt their legislation to the changed provisions of the second and third titles within three years after the amended laws of 3 October 2003 have come into force.

[2] After expiration of this deadline, the provisions according to Article 72 paragraph 2 shall apply.

9. Federal Act on Withholding Taxes of 13 October 1965

Art. 5 Paragraph 1 Letter a

[1] Exempted from the tax are:

a. the reserves and profits of a corporate entity pursuant to Article 49 paragraph 1 letter a of the Federal Direct Tax Act of 14 December 1990 (FDTA), which are transferred as a result of a corporate reorganization according to Article 61 FDTA to the reserves of the acquiring or converted domestic corporate entity or cooperative;

10. Federal Act on the Occupational Old Age, Survivors and Disability Benefit Plan of 25 June 1982

Art. 62 Paragraph 3 (new)

[1] The Federal Council may issue regulations concerning the approval by a supervisory authority of mergers and conversions as well as concerning carrying out a supervision in case of liquidations and partial liquidations of employee welfare schemes.

11. Federal Act on the Banks and Savings Banks of 8 November 1934

Art. 14

Repealed

12. Federal Act regarding the Supervision of Private Insurance Institutions of 23 June 1978

Art. 9a Merger, Demerger and Conversion

Mergers, demergers and conversions of insurance institutions require the approval of the supervisory authority.

Art. 42 Paragraph 1 Letter a Clause 1

[1] The Federal Council shall issue:

a. supplementary provisions:

1. with regard to the Articles 3 paragraph 1, 5 paragraph 3, 9a, 12, 13 paragraph 3, 14 paragraph 3, 15, 21 paragraph 3, 24, 38a paragraphs 4 and 5, 39 paragraph 5 and 44 of this Law.

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