Switzerland

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1 What types of transactions are classified as 'corporate reorganisations' in your jurisdiction?

In comparison with other jurisdictions, the term 'corporate reorganisation' is not consistently used in Swiss legal practice and does not presuppose specific legal qualifications (eg, tax-neutral transfers of assets or shares). In general, corporate reorganisations comprise transactions such as mergers, demergers or conversions of legal entities. However, the transfer of shares or assets and liabilities (business units or individual assets or liabilities) under the Merger Act or in the form of traditional share or asset deals within a group of companies, the change of a company's registered seat or domicile or the voluntary liquidation of a legal entity are also considered corporate reorganisations.

Restructuring transactions involving distressed entities and insolvency proceedings are not discussed in this chapter. The same is true for transactions with group external third parties (eg, strategic mergers).

2 Has the number of corporate reorganisations in your jurisdiction increased or decreased this year compared with previous years? If so, why?

While the number of (strategic) mergers has been stable over the last few years, internal group corporate reorganisations are increasing. Reasons for the increasing corporate reorganisation efforts may be foreign tax reforms (eg, in the US) which have an impact on the Swiss market, increasing post-acquisition reorganisations due to the high number of share and asset deals in the Swiss market or the change of the conversion rate of Swiss franc to the euro after the 'Swiss franc shock' in January 2015 when the Swiss National Bank ceased to defend the 1.20 franc peg against the euro. This measure heavily increased pressure on Swiss export companies to have efficient corporate structures in place.

However, the number of internal group corporate reorganisations could soon grow, as some (often multinational) company groups are currently deferring corporate reorganisation decisions because of the pending reform of the Swiss tax regime for corporate entities (the federal bill on corporate tax reform III (CTR III) was rejected on 12 February 2017 by Swiss voters in a popular vote and the Swiss Federal Council only presented its new 'Tax Proposal 17' on 6 September 2017).

3 Are there any jurisdiction-specific drivers for undertaking a corporate reorganisation?

As existing tax privileges such as the holding, domiciliary, mixed and principal privileges, as well as the Swiss finance branch regime, will have to be revoked in the upcoming tax reform in order to comply with OECD standards, tax-driven corporate reorganisations often introduce new tax-friendly structures, such as OECD-compliant Swiss IP boxes or R&D super deductions. These are expected to be available under Tax Proposal 17, on which consultation by the Swiss Federal Council began on 6 September 2017.

4 How are corporate reorganisations typically structured in your jurisdiction?

The main types of corporate reorganisations, such as mergers, demergers, conversions or simplified transfers of assets and liabilities, are governed by the Federal Act on Merger, Demerger, Conversion and Transfer of Assets and Liabilities of 3 October 2003 (the Merger Act) (see question 5). In contrast, internal group sales, and transfers of shares and assets (individually transferred), are governed by the Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: Code of Obligations), amended on 1 April 2017 (the Code of Obligations). 'Quasi-mergers' (ie, the combination of two entities without merging their legal forms or liquidating one of the entities), are also ruled by the Code of Obligations. In this scenario, the combination takes place by way of a share-for-share transaction or the formation of a new legal entity that assumes assets and liabilities of the two combined legal entities in exchange for its own shares. Finally, demergers can also be implemented under the Code of Obligations by way of a two-step transaction (ie, incorporation of a special purpose vehicle (SPV) and distribution of the shares in the SPV). From a tax perspective, corporate reorganisations are often structured as book value transactions, as Swiss tax law allows the implementation of corporate reorganisations, in many cases, in a tax-neutral manner if, inter alia, assets or liabilities are transferred at book value (see question 13).

5 What are the key laws and regulations to consider when undertaking a corporate reorganisation?

In Switzerland, the Merger Act governs the main parts of corporate reorganisations. The Merger Act has been partly revised and amended, the last time being in 2014. The Merger Act is supplemented by other federal and cantonal statutes and circulars, including:

- the Federal Act on the Swiss Civil Code of 10 December 1907, amended on 1 January 2018;
- the Code of Obligations;
- the Federal Act on Private International Law of 18 December 1987, amended on 1 April 2017;
- the Ordinance on the Commercial Register of 17 October 2007, amended on 1 February 2018;
- the Federal Act on Direct Federal Tax of 14 December 1990, amended on 1 January 2018;
- the Federal Act on Harmonisation of the Direct Cantonal and Communal Tax as of 14 December 1990, amended on 1 January 2018;
- the Federal Act on Withholding Tax of 13 October 1965, amended on 15 February 2017;
- the Federal Act on Stamp Duty of 27 June 1973, amended on 1 January 2017;
- the Federal Act on Value Added Tax of 12 June 2009, amended on 1 January 2018;
- the Cantonal Acts on Cantonal Taxes;
- Circular Letter No. 5 of the Swiss Federal Tax Administration of 1 June 2004;
- Circular Letter No. 27 of the Swiss Federal Tax Administration of 17 December 2009; and
- Circular Letter No. 29a of the Swiss Federal Tax Administration of 9 September 2015.

6 What are the key national authorities to be conscious of when undertaking a corporate reorganisation?

As many corporate reorganisations have an impact on tax, it is often recommended to apply for a tax ruling with the competent Swiss tax authorities, in particular with the Swiss Federal Tax Administration and the relevant cantonal tax authorities. Transactions involving the change of the legal entities' articles of association (eg, mergers,

demergers, conversions, capital increases, liquidations) will have to be approved by the competent cantonal register of commerce. Finally, in corporate reorganisations involving the transfer of employees, the competent cantonal social security authority and, in the case of foreign employees, the competent cantonal office for economy and labour might have to be informed.

7 What measures should be taken to best prepare for a corporate reorganisation?

While due diligence in internal group reorganisations may only be required to a certain extent (eg, with regard to change-of-control clauses in third-party agreements) the assessment of the legal and tax consequences of the contemplated final structure is essential. To be certain of the potential tax impact, it is often recommended to apply for a tax ruling with the competent tax authorities. In corporate reorganisation transactions that comprise the transfer of assets, the statutory auditors of the legal entities (if any) are often involved. Finally, more complex transactions that require a filing with the competent cantonal register of commerce can be filed for review and pre-approval.

8 What are the main issues relating to employees and employment contracts to consider in a corporate reorganisation?

If a seller transfers a company's business or a part thereof to a purchaser in an asset deal (irrespective of whether in a traditional asset deal or an asset deal under the Merger Act), the existing employment relationship with the seller, and all related rights and obligations automatically pass to the purchaser as of the day of the transfer, unless the employee objects to the transfer, in which case the employment relationship with the purchaser terminates at the end of the notice period provided by law.

The seller and the purchaser are jointly and severally liable for any claims of an employee that fall due before the transfer, or that fall due between the transfer and the date on which the employment relationship could normally be terminated or is terminated following refusal of the transfer.

The seller (as the employer) has to inform the employees' representatives or, if there are none, the employees directly, in good time before signing, of the reason for the transfer, and the legal and socio-economic consequences of the transfer for the employees. If, as a result of the transfer, measures affecting the employees are planned (such as a change of their usual place of work) the employees' representatives or, if there are none, the employees themselves have to be consulted in good time before a decision is made on these measures.

If such consultation and information rights are breached, the asset sale does not automatically become null and void. The employees' representatives or all employees concerned can, however, block the acquisition by injunctive relief. It is disputed whether they can have the acquisition prohibited until the rights have been complied with. They can in any case sue for damages.

If the asset sale occurs through an asset deal under the Merger Act, the employees' representatives, or all employees concerned, have the additional possibility of blocking the registration of the acquisition in the relevant registry of commerce.

Irrespective of whether the sale of assets has been implemented by way of a traditional asset deal or as an asset deal under the Merger Act, if the transferred relationship is governed by a collective employment contract, the purchaser must comply with it for at least one year, unless it expires or is terminated sooner. If the employee refuses the transfer, the employment relationship ends upon expiry of the statutory notice period; until then, the purchaser and the employee must perform the contract.

The principles of an asset deal, as outlined above, apply mutatis mutandis for a merger, demerger or conversion under the Merger Act.

9 What are the main issues relating to pensions and other benefits to consider in a corporate reorganisation?

Private pension schemes

Private pension schemes are mandatory. Thus, the employer has to conclude an accession agreement with a separate legal entity as the carrier of such private pension scheme. This legal entity, normally a foundation, is either set up by the employer itself or, more commonly, by an insurance company or another third party. The legal entity is the carrier of the private pension scheme, which is mainly financed by the employer and, normally, the employees. If the employer changes (eg, because of a transfer of a business unit), the employees have to be registered with the new employer's pension scheme.

Pensions on a business transfer

A reorganisation in the form of a share or asset purchase does not as such affect the separate legal entity that is the carrier of the private pension scheme. It may be, however, that the transaction affects the legal entity indirectly. In some instances, for example, the legal entity needs to be fully or partially liquidated and assets resulting from the liquidation passed on to the legal entity or entities newly in charge of the employees concerned. Such full or partial liquidation is heavily regulated and supervised by the state authorities entrusted with the supervision of the mentioned legal entities.

10 Is financial assistance prohibited or restricted in your jurisdiction?

Upstream or cross-stream financial assistance within a group of companies is a controversial topic in Switzerland. In the light of recent case law, the granting of an upstream or cross-stream (i) security (eg, granting of a guarantee) by a Swiss subsidiary to secure obligations of its parent company or any of its affiliates, other than 100 per cent direct or indirect subsidiaries, or (ii) loan (also in the form of cash pools) by a Swiss subsidiary to its (direct or indirect) parent company or to any of its affiliates must:

- be allowed by the Swiss subsidiary's articles of association, which shall include the purpose of group support and financial assistance;
- be in the interest of the Swiss subsidiary (ie, dealing at arm's length, service against consideration, review of importance of the loan compared to the other assets of the subsidiary, financial capacity of the parent company and the affiliates to repay the loan); and
- not constitute a repayment of the equity capital of the Swiss subsidiary or an unjustifiable repayment of benefits or contributions.

Otherwise, in case of any doubt (in particular with regard to whether the relevant case constitutes an arm's-length transaction), the amount of the security or loan shall be limited to the freely distributable funds of the Swiss subsidiary that needs to be blocked in the amount of the security or loan, and the subsidiary's shareholders' meeting shall resolve on and approve the granting of such security or loan.

Non-compliance

If an upstream or cross-stream transaction does not meet the financial assistance rules as outlined above, the transaction may be null and void (eg, because it violates the company's purpose clause or it infringes the protected equity capital of the company), can be challenged by the company or its shareholders, and may lead to directors' liability.

Tax

In case of a financial assistance issue from a corporate law perspective (eg, if an upstream loan exceeds the distributable reserves of the respective Swiss company), no Swiss tax consequences should be triggered. However, if a subsidiary has granted an upstream or cross-stream loan and the grant of the loan was not in the interest of the subsidiary, or did not meet the dealing at an arm's-length standard in another way (eg, in cases in which the repayment of the loan is unlikely from the beginning), Swiss tax authorities may, depending on the individual case, requalify such loan as a constructive dividend distribution, subject to Swiss withholding tax of 35 per cent (or 53.8 per cent grossed-up if the Swiss withholding tax has not been transferred to and is not borne by the recipient).

Further, to avoid any deemed dividend distribution subject to Swiss withholding tax, the safe-haven interest rates as annually published by the Swiss Federal Tax Administration need to be observed or, alternatively, evidence needs to be provided that the applied interest rate complies with the arm's-length principle (see question 16).

11 What are the most commonly overlooked issues or frequently asked questions in a corporate reorganisation?

Book value transactions

It is very likely that, in the case of an intra-group upstream or cross-stream sale of assets or shares by a Swiss company at book value (if it is lower than the fair market value), such transaction will be a financial assistance case and the financial assistance rules will have to be complied with (see question 10).

Factual liquidation

If a Swiss company sells all, substantially all or the material part of its assets without reinvesting the consideration, such transaction often qualifies as a factual modification of the company's purpose without the consent of the shareholders' meeting regarding its liquidation and, therefore, as a factual liquidation of the company. Such sale does not lie, as a matter of principle, in the competence of the board of directors of a Swiss company. Further, a sale of all, substantially all or the material part of assets of a company can hardly be justified by the company's interests. If a sale qualifies as factual liquidation, it will be null and void, and may lead to directors' liability. To address this issue, the company can be put into voluntary liquidation before the sale transaction takes place. In cases where it is doubtful whether the contemplated sale will qualify as factual liquidation and the initiation of voluntary liquidation proceedings is not feasible, it is recommended to have the shareholders decide on the planned transaction in order to reduce the risk of personal liability of the directors.

Transfer pricing

Although specific transfer pricing provisions are not known in Switzerland, Swiss tax authorities may add commercially unjustified expenses of legal entities to their taxable profit. To avoid such qualification, intra-group services and assets have to pass the arm's-length test and serve a business purpose of the entities involved (see question 16).

12 How will the corporate reorganisation be treated from an accounting perspective? How are target assets and businesses valued?

The Swiss statutory accounting principles also apply to corporate reorganisations. However, in order to benefit from a tax-neutral corporate reorganisation, assets and liabilities need to be transferred at book value (see question 13). Such book value transfers often trigger financial assistance issues if, for example, the book value of the transferred assets by a Swiss subsidiary to its parent company is lower than the fair market value of the assets (see question 10).

13 What tax issues need to be considered? What are the tax implications of carrying out a corporate reorganisation?

Corporate reorganisations (eg, mergers, demergers, share-for-share exchanges (quasi-mergers) or the transfer of assets and liabilities) may qualify as tax-neutral restructurings if certain preconditions are met. Such tax-neutral transaction requires, inter alia, that the assets and liabilities are transferred at book value and remain subject to unlimited taxation in Switzerland. Otherwise, corporate income tax, issuance stamp tax, securities transfer tax, withholding tax, value added tax, real estate capital gain or transfer taxes might be triggered. Therefore, corporate reorganisations are usually structured in a way to meet the requirements for a tax-neutral reorganisation. In order to obtain tax certainty about the contemplated new structure, it is often recommended to apply for a tax ruling with the competent tax authorities.

14 What external consents and approvals will be required for the corporate reorganisation?

If one or several legal entities change their legal structure or their articles of association, the approval of the cantonal register of commerce is required. As a general rule, no approvals are required from a tax perspective.

15 What internal corporate consents and approvals will be required for the corporate reorganisation?

Depending on the type of corporate reorganisation, only the approval by the board of directors (or managing officers in case of an LLC) or also the shareholders at a general meeting (eg, for financial assistance or factual liquidation transactions) will be required. The approval of the shareholders is always necessary if the legal entity changes its articles of association. No shareholders' approval but the information of the shareholders, either at the next shareholders' meeting or in the notes to the company's annual accounts, is required in the case of a transfer of assets and liabilities under the Merger Act.

Update and trends

Existing tax privileges, such as the holding, domiciliary, mixed and principal privileges, as well as the Swiss finance branch regime, will have to be revoked in the upcoming tax reform in order to comply with OECD standards. Thus, tax-driven corporate reorganisations often introduce new tax-friendly structures, such as OECD-compliant Swiss IP boxes or R&D super deductions, which are planned to be available under Tax Proposal 17, initiated for consultation by the Swiss Federal Council on 6 September 2017.

16 How are shared assets and services used by the target company or business typically treated?

Specific transfer pricing provisions are not known in Switzerland. Transactions (including intra-group shared assets and services) between related parties are accepted by the Swiss tax authorities as long as they comply with the arm's-length principle. Otherwise, such transactions may be re-qualified as deemed dividend distributions subject to corporate income and Swiss withholding tax of 35 per cent.

With regard to the arm's-length character of the interest rate applicable to intra-group loans, the safe-haven interest rates, as annually published by the Swiss Federal Tax Administration in its circular letters 'Safe Harbour Interest Rates for Intra-Group Loans in Swiss Francs' and 'Safe Harbour Interest Rates for Intra-Group Loans in Foreign Currencies', need to be observed. A higher interest rate might apply, provided that the interest rate is at arm's length and that evidence can be provided by the taxpayer.

17 Are there any restrictions on transferring assets to related companies?

According to Swiss law, a transfer of assets to a company within the same group of companies is generally permitted. However, as Swiss corporate law does not provide a full formal legal framework for groups of companies, each group company has to be considered separately as an independent entity. Consequently, the law requires that each legal entity pursue its own corporate scope independently of interests of its shareholders or affiliates. Therefore, even a company that is wholly controlled by another company has to act within its statutory limits and may not act in the interest of its shareholders only.

As a result of this principle, intra-group upstream and cross-stream transactions have to comply with the financial assistance rules (see question 10). In addition, transferring assets downstream to a subsidiary has to be covered by the articles of association and must be in the best interest of the contributing Swiss parent company. Finally, selling all, substantially all or the material part of the legal entity's assets without reinvesting the consideration, may qualify as factual liquidation. In such case, voluntary liquidation proceedings can be initiated before the sale in order to address this issue (see question 11).

18 Can assets be transferred for less than their market value?

Yes, shares and assets can be transferred for less than their (fair) market value, and in practice they are often transferred at book value because such transfer value is often more favourable from a tax perspective (see question 13). However, transferring the assets for less than the fair market value will generally not be considered an arm's-length transaction and may qualify as hidden distribution of assets (in the case of an upstream transfer) or hidden contribution without consideration (in case of downstream transfer). Thus, in case of upstream or cross-stream transfers, the financial assistance rules have to be observed.