

# Private mergers and reorganisations

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## Introduction

Under Swiss law, the acquisition of a business may be structured as a mere share deal, a mere asset deal or – according to the Merger Act (MerA) – a statutory merger, demerger or bulk transfer. An additional special regulation applies to listed companies or companies conducting the business of a regulated industry (eg, finance, insurance, telecoms or pharmaceuticals). Further, anti-trust law (merger control) and international law must be observed.

Transactions according to the MerA effect universal succession (statutory merger) or partial universal succession (demerger and bulk transfer), whereas mere share or asset deals are based on the principle of singular succession, which requires additional actions to transfer the assets and liabilities (including contracts).

In practice, third parties often opt for share or asset deals as the first step in a two or multiple-step approach, whereas group entities often opt for transactions according to the MerA. While third-party buyers often prefer asset deals in order to limit their risks from the acquired business and to achieve a step-up in book value, third-party sellers often prefer share deals to the extent that they generate capital gains subject to privileged taxation.

Among group companies, the absorption of one or more entire entities by another or the combination of two or more entire group entities is often achieved by way of a statutory merger, whereas group companies often choose demergers or bulk transfers to transfer only parts of a business. In a demerger, the equity holder of the transferring entity receives the contribution for the transferred assets and liabilities (including contracts). In a bulk transfer, the transferring entity itself receives such contribution.

The following article outlines the private law aspects of private statutory mergers and distinguishes between domestic and cross-border statutory mergers.

## Domestic statutory mergers

A statutory merger may be considered domestic if all parties to the merger are Swiss; clearly, international law may also (and practically always does) apply in the context of a domestic statutory merger (eg, to international contracts or business relations between a merging entity and third parties).

From a private law perspective, domestic statutory mergers become effective as of their registration in the commercial register of the competent Swiss canton, which requires a respective application with accompanying documentation in proper form and language. As per the merger's effectiveness, all assets and liabilities (including contracts) of the transferring entities are acquired by the surviving entity by means of universal succession and the transferring entities are dissolved without liquidation and deleted from the commercial register of the competent Swiss canton. Other acts such as the registration of the acquiring surviving entity in the land register have a declaratory effect only as far as the acquisition of the assets and liabilities (including contracts) is concerned.

As another essential feature, mergers are based on the principle of membership continuity, under which:

- the rights and obligations of the members of the transferring entities in the surviving entity must, in principle, remain similar to those in the transferring entities; and

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- compensation payments to the members of the transferring entities (exit) may be forced on such members (squeeze-out) only with the consent of at least 90% of the members of the transferring entities.

The MerA provides for two standard types of domestic statutory merger:

- merger by absorption, whereby one entity (surviving entity) absorbs one or more other entities (transferring entities); and
- merger by combination, whereby two or more entities (transferring entities) are combined to form a new entity (new surviving entity).

The MerA (Articles 4, 78 *et seq*, 88 *et seq* and 99 *et seq*) determines which legal forms of entity (ie, capital companies, general and limited partnerships, cooperatives, associations, foundations, occupational pension funds and public law institutions) are eligible to merge with which legal forms of entity. Entities in liquidation (ie, dissolved but not liquidated) and entities with a capital loss or overindebtedness, foundations, occupational pension funds and public law institutions are eligible to merge only under restricted conditions.

The MerA provides for significant simplifications of the (ordinary) merger procedure for:

- small and medium-sized enterprises;
- wholly owned intra-group mergers (parent-subsidary mergers and sister-mergers); and
- parent-subsidary mergers with a 90% participation of the parent in the subsidiary (each form is referred to as a simplified statutory merger).

In practice, simplified statutory mergers by absorption are the most common form of statutory merger and an important alternative to (intra-group) share or asset deals (see above).

### **Cross-border statutory mergers**

The Code on Private International Law (CPII) includes special provisions on cross-border statutory mergers. Statutory mergers are considered cross-border if one party to the merger is non-Swiss.

The CIPL provides for two standard types of cross-border statutory merger:

- immigration (or inbound) statutory mergers, whereby a transferring entity is non-Swiss and the surviving entity is Swiss; and
- emigration (or outbound) statutory mergers, whereby a transferring entity is Swiss and the surviving entity is non-Swiss.

Often, the material merger requirements (applicable to domestic statutory mergers) of all jurisdictions involved must be complied with. In practice, both immigration and emigration statutory mergers represent a relatively small fraction of the high number of statutory mergers and, as a result, few relevant administrative and court precedents exist.

### **Immigration statutory mergers**

The CIPL provides for two standard types of immigration statutory merger:

- immigration statutory mergers by absorption, whereby a Swiss entity (surviving entity) absorbs one or more non-Swiss entities (transferring entities); and
- immigration statutory merger by combination, whereby one or more Swiss entities (transferring entities) are combined with one or more non-Swiss entities (transferring entities) to form a new Swiss entity (surviving entity).

The law applicable to the non-Swiss entity must permit the merger and all requirements of the applicable foreign law must be met. Apart from that, from a Swiss law perspective, immigration statutory mergers are subject to Swiss law.

The registration of an immigration statutory merger in the commercial register of the competent Swiss canton requires an application with full accompanying documentation (in particular, appropriate evidence that the applicable foreign law permits the immigration statutory merger in principle) in proper form and language.

### **Emigration statutory mergers**

The CIPL provides for two standard types of emigration statutory merger:

- emigration statutory mergers by absorption, whereby a non-Swiss entity (surviving entity) absorbs one or more Swiss entities (transferring entities); and
- emigration statutory mergers by combination, whereby one or more Swiss entities

(transferring entities) are combined with one or more non-Swiss entities (transferring entities) to form a new non-Swiss entity (surviving entity).

Emigration statutory mergers require the Swiss entity or entities to prove that the principles of universal succession and membership continuity (see above) are met. The Swiss entity or entities must comply with all of the provisions of Swiss law applicable to the transferring entity or entities and a pre-execution creditor call must be made in Switzerland. Apart from that, from a Swiss law perspective, the emigration statutory merger is subject to the law of the surviving non-Swiss entity.

The emigration statutory merger must have become effective according to the law applicable to the non-Swiss entity; otherwise, the transferring Swiss entity or entities cannot be deregistered from the commercial register of the competent Swiss canton. This deregistration process requires an application with accompanying documentation in proper form and language.

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