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CORPORATE FINANCE/M&A - SWITZERLAND

Bulk transfers

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AUTHORS

Alexander Vogel

Remo Müller

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 (for further details please see "Private mergers and reorganisations"). Special rules apply to listed companies where the acquisition of shares triggers notification obligations and, as a general rule, where it exceeds 33.3% a mandatory offer must be submitted to all shareholders of such targets. Additional regulations must be considered for targets conducting business in a regulated industry (eg, finance, insurance, telecoms or pharmaceuticals). Further, anti-trust law (ie, merger control rules) and international law must be observed.

Transactions according to the MerA lead to a transfer of all assets, liabilities and agreements by operation of law, so-called 'universal succession' in the case of a statutory merger or 'partial universal succession' in the case of a demerger or bulk transfer. Share or asset deals are based on the 'singular succession' principle, which requires additional actions and consent to transfer the assets, liabilities and contracts.

In practice, in third-party transactions, a share or asset deal as the main step in a two or multiple-step transaction structure is sometimes preferred. As part of a preparatory carve-out for a subsequent share deal of the pre-packaged business unit to be sold, a bulk transfer of the assets, employees and agreements to be transferred to the buyer is often applied. Group internal restructurings are primarily structured as transactions according to the MerA. While third-party buyers often prefer asset deals in order to limit the assumption of potential legacy risks relating to the entity holding the business to be acquired and to achieve a step up in book value, sellers often prefer share deals as they generally allow them to generate capital gains subject to no or 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 business units or specific parts of a business to a new or other group entity. In a demerger, the equity holder of the transferring entity receives the consideration for the transferred business. In a bulk transfer, the transferring entity itself receives such consideration.

This article outlines the corporate law aspects of bulk transfer and distinguishes between domestic and cross-border bulk transfers.

Domestic bulk transfers

A merger or bulk transfer is considered domestic if all parties to the bulk transfer or merger have their registered seat in Switzerland; notwithstanding the fact that some of the assets to be transferred might be located outside Switzerland or certain transferred agreements might be subject to laws other than Swiss law. In those cases, the effects of the domestic bulk transfer or statutory merger must be analysed (ie, whether the foreign jurisdiction accepts that, from a Swiss law perspective, Swiss law as the statute of reorganisation governs the transfer of ownership of the specific asset located abroad or the automatic transfer of an agreement to the receiving Swiss entity).

The MerA determines which legal forms of entity or legal organisation (eg, corporations, limited liability companies, general and limited partnerships, cooperatives, associations, foundations,

limited partnerships for collective investments and investment companies with variable capital) are eligible to transfer their assets, agreements and liabilities by way of a domestic bulk transfer and to which receiving entities. Foundations, occupational pension funds and public law institutions can transfer their assets, agreements and liabilities using a domestic bulk transfer only under restricted conditions.

Unlike statutory mergers and demergers, domestic bulk transfers – save for contradicting provisions in the articles of association or organisational rules – generally fall under the authority of the management. However, if the bulk transfer results in the transferring or receiving company's purpose becoming obsolete or too narrow or amounts to a *de facto* liquidation of the transferring entity, it may require the approval of the shareholders or members. Further, in certain cases, an approval of the supervisory authority may be required (eg, for a foundation or pension fund).

From a corporate law perspective, domestic bulk transfers become effective as of their registration in the competent commercial register, which requires an application with accompanying documentation in proper form and language. The main document is the written bulk transfer agreement, which must include:

- the company or name, registered office and legal form of the entities involved;
- an inventory clearly identifying the assets and liabilities to be transferred (land, securities and intangible assets must be listed separately);
- the total value of the assets and liabilities to be transferred;
- the consideration, if any; and
- a list of the employment relationships that are transferred with the transfer of assets, if any.

If real estate is transferred, the corresponding parts of the bulk transfer agreement must be drawn up as a public deed and notarised by a notary public. A single public deed is sufficient even if the real estate is located in different cantons. The public deed must be issued by a notary public licensed at the registered office of the transferring entity.

If employment relationships are transferred, special requirements as to information and consultation must be observed. Employees may refuse the transfer of their employment relationships.

As per the registration and thus effectiveness of the domestic bulk transfer, all assets, agreements and liabilities of the transferring entity listed in the bulk transfer agreement and its annexes – particularly the bulk transfer inventory – are transferred by operation of law to the acquiring entity (ie, partial universal succession). For example, the registration of the acquiring entity in the land register has only a declaratory effect. All assets, agreements and liabilities that cannot be allocated based on the bulk transfer agreement and its annexes remain with the transferring entity.

The assets and liabilities (including contracts) to be transferred pursuant to a domestic bulk transfer must show a surplus of assets; a unit or business with a negative net asset amount cannot be transferred by way of a bulk transfer without adding additional tangible or intangible assets that can be activated (ie, have a book value).

Unlike a statutory merger, the domestic bulk transfer as such neither dissolves the transferring entity nor leads to the transferring entity being deleted from the commercial register. However, if the bulk transfer leads to a *de facto* liquidation of the transferring entity or to a significant reduction in its equity base, the creditor protection provisions must be observed.

As a significant (other) measure of creditor protection, similar to a demerger, the transferring entity is jointly and severally liable with the acquiring entity for the liabilities transferred (ie, established prior to such transfer) for three years, but not vice versa. Joint and several liability also applies to all liabilities arising from employment contracts, which fall due up to the point at which the employment relationship could ordinarily be terminated.

Unlike in case of a merger, a creditor call is not required. Theoretically, the entities involved in the domestic bulk transfer must secure the claims (on respective request) if:

- joint and several liability ceases before the expiry of the three-year period; or
- the creditors establish that joint and several liability offers insufficient protection.

Instead of providing security, the entities involved in the domestic bulk transfer may satisfy the claim provided that such accelerated payment does not affect the position of other creditors to their detriment. However, in practice, few trade creditors request the posting of security.

Cross-border bulk transfers

The Code on Private International Law (CPIL) includes special provisions on cross-border bulk

transfers. A bulk transfer according to the MerA and CPIL qualifies as a cross-border transaction if one party of the bulk transfer is not headquartered in Switzerland.

The CIPL provides for two standard types of cross-border bulk transfer from a Swiss law perspective:

- inbound bulk transfers, where the transferring entity is not Swiss and the acquiring entity is Swiss; and
- outbound bulk transfers, where the transferring entity is Swiss and the acquiring entity is not Swiss.

The material bulk transfer requirements (applicable to domestic bulk transfer) of all jurisdictions involved often must be complied with. In practice, since few jurisdictions (eg, Luxembourg) recognise the concept of a bulk transfer, both inbound and outbound bulk transfer represent only a small fraction of the high number of bulk transfers and, as a result, there are few relevant administrative and court precedents. Evidently, as a result, all cross-border bulk transfers registered in a Swiss commercial register relate to counterparties in Luxembourg.

Inbound bulk transfers

According to the CPIL, its provisions on immigration mergers and inbound demergers apply to the extent applicable and *mutatis mutandis* to inbound bulk transfers. Thereby, the law applicable to the non-Swiss entity must permit such an inbound bulk transfer (ie, a cross-border transfer of assets and liabilities pursuant to an inventory by operation of law, in principle, on the date of the registration of the bulk transfer in the commercial register, whereby the consideration for the transferred assets and liabilities is due to the transferring entity itself) and all requirements of such foreign law must be met.

As regards bulk transfer agreements – including formal requirements – the mandatory corporate law provisions under all jurisdictions of the parties must be complied with. Regarding merely contractual provisions, from a Swiss perspectice, the parties may choose the applicable law. If they refrain from doing so, the bulk transfer agreement is subject to the law applicable to the receiving entity and consequently to Swiss (substantive) law in the case of the inbound bulk transfer, unless there is a closer connection to a different jurisdiction. In the latter case, mandatory Swiss law must be observed as a rule.

According to the practice of the federal commercial register authority (which, evidently, remains unchallenged in court), the inbound bulk transfer must be registered in the competent Swiss commercial register only if Swiss law requires such registration pursuant to a special provision (eg, inbound bulk transfers that serve to pay up the share capital for the incorporation or for a capital increase of the Swiss acquiring entity); otherwise, the transaction need not be registered in the Swiss commercial register.

Outbound bulk transfers

According to the CPIL, its provisions on emigration mergers and outbound demergers apply to the extent applicable and *mutatis mutandis* to outbound bulk transfers, excluding the requirement to publicly request creditors to file their claims pre-execution according to Article 163b(3) of the CPIL. Therefore, the law applicable to the non-Swiss entity must permit such outbound bulk transfer (ie, a cross-border transfer of assets and liabilities pursuant to an inventory by operation of law, in principle, on the date of the registration of the outbound bulk transfer in the commercial register, whereby the consideration for the transferred assets and liabilities is due to the transferring entity itself).

According to the practice of the federal commercial register authority, the Swiss (transferring) entity must comply with all provisions of Swiss law applicable to the transferring entity, whereas foreign law applicable to the acquiring non-Swiss entity must apply to the extent that the acquiring entity is concerned.

As regards bulk transfer agreements – including formal requirements – the mandatory corporate law provisions under all jurisdictions of the parties must be complied with. Regarding merely contractual provisions, from a Swiss perspective, the parties may choose the applicable law. If they refrain from doing so, the bulk transfer agreement is subject to the law applicable to the receiving entity and to foreign (substantive) law in the case of the outbound bulk transfer, unless there is a closer connection to a different jurisdiction.

The registration of an outbound bulk transfer in the competent Swiss commercial register requires an application with accompanying documentation in the proper form and language (particularly the outbound bulk transfer agreement) and appropriate evidence that:

- the acquiring entity legally exists; and
- the applicable foreign law permits such outbound bulk transfer in principle.

According to the practice of the federal commercial register authority (which, evidently, remains unchallenged), the transferring entity must also prove the permissibility of the outbound bulk transfer not only in principle, but also concretely by way of an excerpt from the foreign commercial register competent for the acquiring entity, whereby the outbound bulk transfer will become effective only on registration in the competent Swiss commercial register.

For further information on this topic please contact Alexander Vogel or Remo Müller at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91) or email (alexander.vogel@mll-legal.com or remo.mueller@mll-legal.com). The Meyerlustenberger Lachenal website can be accessed at www.mll-legal.com.

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