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Swiss corporate law reform: new instruments for structuring M&A transactions

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- Introduction
- Interim dividends
- Elimination of provisions on acquisitions in kind
- Capital band

Introduction

A major corporate law reform will enter into force in Switzerland on 1 January 2023. A key aim of the new law is to provide additional flexibility regarding the legal requirements for the incorporation of new companies and the legal framework on capital protection. In addition, the new legal provisions also provide numerous opportunities to structure M&A transactions in a more flexible manner. Some of these new instruments are presented below.

Interim dividends

Interim dividends are distributions from the profits of the current fiscal year. Their permissibility under current law is controversial, as the law does not yet provide a respective legal basis.

Interim dividends will be expressly permitted under article 675a of the revised Swiss Code of Obligations (CO). The prerequisite is that a distributable profit exists based on an interim balance sheet. The interim balance sheet must be audited. The latter requirement does, however, not apply if either an opting-out has been made or all shareholders waive the audit and that the claims of the creditors are not jeopardised by the interim dividend.

An interim dividend can be used to solve the excess cash issue that is frequently encountered in M&A transactions. If the target company has financial resources that are not necessary for its current operations, the buyer often insists that the seller withdraw them before the transaction closes. This way, the buyer avoids paying "cash for cash". First, this lowers the purchase price. Second, the buyer improves its liquidity management after the acquisition: transferring excess financial resources from the new subsidiary to the entity in the group where they are most needed can involve administrative effort (eg, drafting appropriate contracts if the financial flows are structured as loans) or have adverse tax consequences (eg, dividend taxation for the parent company).

However, the legal legitimisation of the interim dividend does not solve the seller's issue that a dividend is generally taxed, whereas the sale of shares at a higher price may constitute a tax-free capital gain in the case of private individuals residing in Switzerland.

Elimination of provisions on acquisitions in kind

The current law contains rather cumbersome provisions on acquisitions in kind. Under Swiss law, an acquisition in kind is a transaction consummated soon after the incorporation of the company or after a capital increase, when funds injected in the company are used to acquire assets from certain related parties.

These provisions(1) will be struck out in their entirety. Thus, the related report which had to be issued at incorporation and in the event of a capital increase(2) as well as the corresponding audit statement(3) will no longer be necessary. In addition, the legal certainty of transactions after formation and capital increases is increased: the often-delicate differentiation under current law as to whether a planned transaction qualifies as an acquisition in kind becomes obsolete.

Furthermore, transactions carried out after the incorporation or capital increase are no longer disclosed in the articles of association. They can, thus, no longer be traced via public commercial register documents. This eliminates an often-undesirable publicity.

Restructurings are often part of more complex M&A transactions, be it before closing (to prepare the transaction) or after (to integrate the target company into the buyer's group). Carve-out transactions, for example, can be structured in such a way that assets from various companies in the seller's group are transferred to a newly formed company, which is then acquired by the buyer.

The advantages of the streamlined legal provisions come into their own here: the elimination of formalities saves valuable time and consultancy costs, so that transactions can be completed more quickly and efficiently. In addition, the logistical effort is reduced, as with the auditor, there is one less service provider to coordinate.

Capital band

A further flexibilisation of the corporate law is achieved by the newly created institute of the capital band. This allows the general meeting of shareholders to authorise the board, by amending the articles of association accordingly, to increase or decrease the share capital within a specified range (the so-called "capital band") for a period of up to five years(4).

The capital band may not exceed a maximum of 50% of the share capital existing at the time of its introduction, both upwards and downwards. The general meeting of shareholders may further limit the discretion of the board and determine, for example, that the board may only reduce the share capital but not increase it or vice versa. In this case, the capital band corresponds to an authorised capital reduction, which the current law does not know.

The capital band opens several new options for action. For example, in the context of a threatened unfriendly takeover, the board can carry out an ad-hoc capital reduction to make the target company less attractive due to the capital outflow. The board can also create

new shares during a relatively long period of five (instead of only two, as was previously the case) years – for example, to pay the purchase price for a company takeover.

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Endnotes

(1) Article 628(2) and 650(2(5)) of the CO.

(2) Article 635(1) and 652e(1) of the CO.

(3) Article 635a or 652f(1) of the CO.

(4) Article 653s et seq of the new CO.