

Cross-border mergers after Brexit with Switzerland

Christoph Neeracher, Beda Kaufmann and Raphael Annasohn
Bär & Karrer Ltd

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BREXIT: CROSS-BORDER MERGERS

1. Do you think UK companies would still be able to carry out cross-border mergers with companies in your jurisdiction after the UK leaves the EU?

Switzerland is not part of the EEA and Directive (EU) 2017/1132 relating to certain aspects of company law (codification) does not apply in Switzerland.

Assuming UK laws remain unchanged in this respect, it is not anticipated that Brexit will affect the status quo with regard to cross-border mergers between Swiss and UK companies.

Switzerland's statutory cross-border merger regime does not differentiate between jurisdictions. Whether a merger between a Swiss entity and a foreign entity is permitted must be assessed individually in each case.

2. Does your jurisdiction allow for cross-border mergers with non-EEA companies?

Switzerland's statutory cross-border merger regime is codified in the Swiss Private International Law Act (*Bundesgesetz über das internationale Privatrecht*) and the Swiss Merger Act (*Fusionsgesetz*). The regime does not differentiate between jurisdictions, instead, it lays down general requirements under which Swiss law allows domestic companies to merge with foreign companies, both inbound and outbound. Mergers between Swiss companies and EEA companies are therefore subject to the same rules as mergers with non-EEA companies from a Swiss law perspective.

Whether or not the requirements can be met must be carefully assessed on a case-by-case basis for each jurisdiction and entity. Due to the generality of the legal framework, there is considerable discretion to be exercised by the competent Swiss commercial register authorities.

Broadly, from a Swiss law perspective, an inbound cross-border merger must be permitted not only by Swiss law, but also by the law of the relevant foreign jurisdiction, and the requirements imposed by the relevant foreign jurisdiction's law must be complied with. In addition, the application of Swiss law to the merged company going forward must be compatible with the relevant foreign jurisdiction's law.

For an outbound cross-border merger, the Swiss company in particular must evidence that its assets and liabilities are transferred to the foreign company through the merger, and that the foreign company sufficiently maintains the membership rights of the Swiss company's members going forward. Moreover, the Swiss company must adhere to all Swiss law requirements applicable to a transferring company in a merger and the relevant foreign jurisdiction's legal requirements must be met.

Both for inbound and outbound cross-border mergers, evidence that the relevant foreign jurisdiction's law permits the merger must be filed with the competent Swiss commercial register authorities, along with the rest of the merger documentation. This can be provided by way of confirmation issued by a competent authority or institute, or an independent expert's opinion (such as a barrister's opinion in the UK).

In practice, while Swiss companies participate as parties to inbound and outbound cross-border mergers (with EEA companies as well as with companies from non-EEA jurisdictions), these transactions are still relatively rare.

3. If a cross-border merger is structured using the usual rules applicable in your jurisdiction to mergers with non-EEA companies, what would the likely effect be on the merger timetable?

Swiss cross-border mergers, whether involving EEA companies or non-EEA companies, typically take several months to complete. Timetables depend both on the relevant foreign jurisdiction's legal requirements and on the competent Swiss authorities' experience in handling similar cases.

As an example of a potential gating item for outbound cross-border mergers, Swiss law requires that the transferring Swiss company's creditors are notified of the upcoming merger and given two months to request that their claims are secured.

Any anticipated cross-border merger involving a Swiss company must be thoroughly planned in co-operation with the competent authorities to avoid any surprises arising along the way. In particular, if a cross-border merger involving a Swiss company is pursued as part of a broader cross-border reorganisation or an initial public offering, it is crucial for the parties involved to consider potential structuring alternatives to a statutory cross-border merger.

4. If a cross-border merger is structured using the usual rules applicable in your jurisdiction to mergers with non-EEA companies, are there any other considerations that may be relevant?

Employee protection is an important topic with regard to outbound cross-border mergers. Additional regulatory requirements may also apply, for example, in connection with Swiss law restrictions on foreign ownership of real estate.

In general, tax considerations are always a deciding factor and competition law restrictions must also be taken into account.

5. Has there been any indication in your jurisdiction as to whether cross-border mergers involving a UK company that commence prior to the Brexit deadline of 29 March 2019 would be unable to complete if the deadline for completion is due to fall after the UK leaves the EU?

Since it is not anticipated that Brexit will affect the status quo with regard to cross-border mergers between Swiss and UK companies, there is no reason why completion of an ongoing cross-border merger should be prevented as a result of Brexit.

Practical Law Contributor profiles

Christoph Neeracher

Bär & Karrer Ltd

T +41 58 261 52 64
F +41 58 263 52 64
E christoph.neeracher@baerkarrer.ch
W www.baerkarrer.ch

Beda Kaufmann

Bär & Karrer Ltd

T +41 58 261 52 63
F +41 58 263 52 63
E beda.kaufmann@baerkarrer.ch
W www.baerkarrer.ch

Professional qualifications. Lawyer, Switzerland

Areas of practice. Mergers and acquisitions; corporate and commercial, reorganisation and insolvency.

Recent transactions

- Acquisition of Clinic Group Paracelsus by Porterhouse.
- Acquisition of a majority stake in Bauwerk Boen by EGSB.
- Sale of AWK Group to Deutsche Private Equity.
- Follow-on investment in GetYourGuide by KKR.

Publications

- *M&A in Switzerland*, Christoph Neeracher/Philippe Seiler, *Getting the Deal Through: Market Intelligence*, M&A 2017.
- *Private Equity 2017 – Switzerland*, Christoph Neeracher/Luca Jagmetti, *International Comparative Legal Guides* 2017.
- *Private Equity in Switzerland*, Christoph Neeracher/Philippe Seiler, *Getting the Deal Through: Market Intelligence*, Private Equity 2016.
- *Reporting beneficial ownership*, Christoph Neeracher/Luca Jagmetti, *IFLR Magazine* March 2016.

Professional qualifications. Lawyer, Switzerland

Areas of practice. Mergers and acquisitions; corporate and commercial; reorganisation and insolvency.

Raphael Annasohn

Bär & Karrer Ltd

T +41 58 261 52 65

F +41 58 263 52 65

E raphael.annasohn@baerkarrer.ch

W www.baerkarrer.ch

Professional qualifications. Lawyer, Switzerland

Areas of practice. Mergers and acquisitions; corporate and commercial; reorganisation and insolvency.