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* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. ("Wenfei"), a Swiss law firm with its seat in Zurich, which has gained extensive experience in providing services in Greater China (with Offices in Beijing and Shanghai).

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

Of course, the Swiss Investment Report is also addressed to any other person who is interested in obtaining background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor's perspective.

M&A Transactions in Switzerland

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M&A Transactions in Switzerland

I. Introduction

Mainly large Chinese state-owned enterprises have been expanding their businesses towards Europe through M&A transactions. Medium sized state-owned enterprises as well as privately owned enterprises, which have focused on foreign investments in Europe, have predominantly decided to first establish a branch or subsidiary for sales or representative purposes in order to collect first experiences in the respective foreign markets.

However, in recent years, also small and medium sized Chinese enterprises have been looking for potential targets for acquisitions in Europe.

Acquisitions of European companies by Chinese enterprises can be a win-win situation for both the Chinese investor and the acquired company, as long as both parties have a clear understanding of each others' aims and businesses. For the Chinese investor it is not only important to understand the target's business but also its cultural background and legal surrounding conditions.

Swiss law provides a sound and clear basis for the generally known forms of domestic and cross-border M&A transactions. This Swiss Investment Report's issue intends to give potential Chinese investors an overview of the basic options for M&A transactions in Switzerland.

II. Overview: M&A Structuring Options

Swiss law provides a variety of M&A transactions:

- Share deals
- Mergers (by absorption or by combination)
- Spin offs and split ups
- Acquisition of the full or partial business of a company
- Traditional asset deals

This SIR will mostly focus on the share deal as it is the most common form of acquiring a Swiss company.

III. Share Deal

In a share deal, the purchaser acquires from the shareholder the shares of a company. Object of the purchase are the shares of the company. As in most jurisdictions, the acquisition of the shares is divided into the conclusion of the share purchase agreement (signing) and the execution of the transfer of the shares (closing).

Under Swiss law, the share purchase agreement does not have to meet formal requirements, and, therefore, could theoretically also be orally concluded. Though, in most cases a comprehensive written sales purchase agreement is standard and from both parties' perspective, seller and purchaser, highly recommended. On the purchaser's side, it is essential that the share purchase agreement lists the representations and warranties given by the seller on the company's assets (real estate, intellectual property, tax, etc), rights and liabilities.

How the transfer of the shares is effectively executed depends on the legal form of the acquired company, the type of shares as well as the by-laws of the acquired company. In particular, the by-laws may provide for a restriction of the transfer of shares (see below).

Generally, the transfer of shares is not subject to approval from a governmental body. However, under some circumstances and in certain industries, approval from a governmental body is required (i.e. real estate, banking, insurance, or anti-monopoly related issues).

Under anti-monopoly law, a transfer of shares must be reported to and approved by the Swiss Competition Commission if the following thresholds are exceeded in the year preceding the concentration: (i) the enterprises concerned together reported a turnover of at least 2 billion Swiss francs, or a turnover in Switzerland of at least 500 million Swiss francs, and (ii) at least two of the enterprises concerned each reported a turnover in Switzerland of at least 100 million Swiss francs.

The most commonly used legal forms for enterprises in Switzerland are the Corporation ("Ltd.") and the Limited Liability Company ("LLC"). In the following an overview of transfer of the different kind of shares shall be presented, whereas the transfer of shares of a Corporation is divided into listed and non-listed Corporations.

IV. How to acquire a non-listed corporation (Ltd.) through a Share Deal?

A Swiss corporation can either issue bearer shares (a), or registered shares (b and c), or have both kind of shares issued in parallel.

A. Bearer Shares

As the name indicates, the bearer of a share is deemed to be shareholder of the corporation. If bearer shares of a corporation shall be transferred, a share purchase agreement is required.

In order to transfer the ownership of the bearer shares, the possession of the bearer shares (share certificates) has to be transferred to the acquirer. There are also substitutes to that rule. If for instance the bearer shares are deposited with a bank, the transfer may also be completed by instructing the bank to hold the bearer shares for the acquirer.

B. Registered Shares

For the transfer of registered shares, the same pre-requisites as with the transfer of bearer shares shall be met. Furthermore, the transfer has to be endorsed on the document. It is also possible to transfer the ownership by written assignment and handing over of the shares.

Only upon the registration in the company's register of shares, the new shareholder can execute its rights towards the company. The registration is, however, not required for the transfer of ownership.

C. Registered Shares with restricted transfer

The transfer of registered shares can be made subject to approval of the corporation by means of an express provision in the articles of association. Though, such approval can only be refused, if a reason provided in the law or the articles of association of the company is given. Since the board of directors acts for the company, such refusal has to be provided by the board of directors.

The reason(s) provided in the articles of association cannot be freely determined, but have to be important. Furthermore, the board of directors can refuse the approval if it offers the seller to buy the shares on account of the company, or on account of other shareholders, or on account of a third party at the real shares value at the moment of submitting the application for approval. The board of directors may also refuse its approval if the acquirer does not expressly confirm to acquire the shares on his own behalf and on his own account. The ownership of the registered shares stays with the transferor until the approval has been given.

D. Practical advice

In a friendly take-over, the restrictions of transfer of registered shares generally do not cause any problems. The acquirer however shall assure in a clause of the share purchase agreement that the consent from the board of directors of the acquired company will be given.

V. How to acquire a listed corporation through a Share Deal?

A. Registered shares with restrictions

The board of directors can refuse an acquirer of listed registered shares if the articles of association state that in case of the reaching of a certain threshold (e.g. 10% of all shares) by any shareholder, the transfer of shares is subject to the approval of the board of directors.

In case the listed shares are acquired through a stock exchange transaction, the ownership is transferred upon the credit of the shares in the deposit account of the acquirer. In case the listed shares are acquired through an off-market transaction, the ownership to the shares is transferred at the time of filing the application for registration as shareholder with the company. Until the share transfer is registered in the shareholder register, the acquirer obtains the status of a "shareholder without voting rights".

Apart from the quota restriction, the board of directors may also refuse the entry in the shareholders register if the acquirer refuses to expressly declare that he acquires the shares on his own behalf and on his own account.

In a friendly take-over of listed companies, the acquirer must assure that it obtains the consent of the board of director and, if a maximum quota is provided in the articles of association, the maximum quota is eliminated in the articles of association.

B. Ad-hoc publicity

The issuer of shares listed at SIX Swiss Exchange has an obligation to disclose potentially price-sensitive facts. Amongst others, takeovers or takeover offers are such price-sensitive facts which have to be disclosed to the public.

Details are provided in the Directive on Ad hoc Publicity of the Swiss Stock Exchange dated October 29, 2008.

C. Mandatory Tender Offer

According to the Swiss Federal Act on Stock Exchanges and Securities Trading (Stock Exchange Act "SESTA"), when purchasing the shares of a Swiss company which is at least partly listed at a Swiss stock exchange, and such purchase would result in holding, directly or indirectly, more than 33 1/3 percent of the target company's voting rights, exercisable or not, the buyer is obliged to make a public tender offer to purchase the remaining shares.

However, the target company may in its articles of association increase the threshold up to 49 percent of the voting rights (opting-up) or even exclude it completely (opting-out).

D. Notification Thresholds

There is an obligation to notify in case certain thresholds of shareholdings are attained, exceeded or fallen below.

The SESTA provides that whosoever directly, indirectly or in concert with third parties acquires or sells for their own account shares, or purchase or sale rights relating to shares in a company incorporated in Switzerland, whose equity securities are listed in whole or in part in Switzerland and thereby attains, falls below or exceeds threshold percentages of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔ of voting rights, whether or not such rights may be exercised, must notify the company and the stock exchanges on which the equity securities in question are listed.

VI. How to acquire a Limited Liability Company ("LLC") through a Share Deal?

Both the share purchase agreement and assignment agreement (transfer) have to be concluded in writing. They can be concluded in the same document.

The assignment agreement must include the notice about the obligation to further payments, ancillary obligations, non-competition obligations of the shareholders, pre-emptive rights, and penalty clauses, if such provisions are contained in the articles of association.

The law provides that the assignment of shares is subject to the approval of the shareholder's meeting. The approval can be rejected without giving any reason, which is an essential difference with the rules concerning the corporation.

However, the articles of association of the company may deviate from such provision in different ways: (i) No approval is required, (ii) the approval may only be refused for particular reasons, (iii) the approval may be rejected if the company offers to the seller to take over the shares at the actual price, (iv) the assignment of shares is excluded altogether, (v) the assignment may be rejected if it is doubtful that the obligation to further payments or ancillary

obligations will be performed by the acquirer and security requested by the company is not provided.

The shareholders resolution requires a qualified quorum of at least two third of the present voting rights and an absolute majority of the present stock par value, unless the articles of association provide for a higher quorum.

VII. What forms of Mergers exist under Swiss Law?

In principle, Swiss Law knows two forms of mergers, the "merger by absorption" and the "merger by combination".

A. Absorption

Absorption is given if a target company is taken over by the acquiring company. With the entry of the merger in the commercial registry the acquiring company takes over all assets and assumes all liabilities of the target company by operation of law and the target company is dissolved. In principle, the shareholders/members of the target company become shareholders/members of the acquiring entity.

The law, however, also provides that the shareholders/members may choose between membership and compensation (cash-out). In case a supermajority of 90 percent of the target company's shareholders agree, the companies involved may also provide for a compensation of the target companies shareholders/members only, thus forcing minority shareholders out of the company (squeeze-out).

B. Combination

The merger of two or more companies into a newly established entity is called Combination. The new entity acquires the two (or more) merging companies.

C. Cross-border Merger

Swiss International Private Law allows the merger of a Swiss company into a foreign company (emigration absorption) as well as the merger of a Swiss company together with a foreign company into a newly established foreign company (emigration combination).

However, since Chinese laws and regulations on outbound investment do not encourage the conversion of foreign companies into – technically – overseas branches of Chinese investor, a cross-boarder merger of a Swiss company into a Chinese company does not seem to be feasible at the moment.

VIII. What other forms of M&A options are known under Swiss Law?

A company can split up all of its assets and liabilities and transfer to other companies (acquiring companies). The company's shareholders/members become shareholders/members of the acquiring companies. The transferring company is dissolved.

A company can also spin off one or several parts of its assets and liabilities and transfer to one or more companies (acquiring companies). The transferring company's shareholders/members become shareholders/members of the acquiring companies.

A company can also transfer all or parts of its business with assets and liabilities to another private law entity (legal or natural person). The members of the transferring company do not obtain any shareholders' or membership rights of the acquiring company. With the entry of the transfer in the commercial registry the acquiring entity takes over all assets and assumes all liabilities of the target company (including contractual relationships) by operation of law.

According to the prevailing doctrine, besides the above mentioned M&A forms provided in the Swiss Merger Act, the acquisition of a business based on a traditional asset deal is also feasible under Swiss law.

IX Conclusion

The Swiss legal framework for M&A transactions is flexible and based on the principle of legal certainty. The parties to a share deal are very free to determine the parties' rights and obligations of the share purchase agreement, whereas the Swiss Merger Act clearly provides for the minimum content of the mandatorily required respective contracts or reports.

Therefore, the Swiss legal M&A framework should not provide any major hurdles in the acquisition of Swiss companies by foreign investors, but presents a set of fairly clear rules.

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