



Current M&A and private equity practice in Switzerland

Andreas Rötheli and Stefan Eberhard from Lenz & Staehelin believe that 2007 was an extremely strong year in terms of M&A activity in Switzerland. Though the current uncertainties on the world capital markets will also have their impact on the Swiss economy, strategic investors in particular will find good investments in Switzerland as the Swiss economy is still showing an impressive dynamism by European standards

» The number of M&A deals for the year 2007, according to one deal count, soared from an average for 2006 below 300 deals to almost 400 deals. It is interesting to note, however, that the aggregate value of deals is at similar levels compared to previous years. This may be explained by the fact that strategic as well as private equity buyers have proceeded to numerous smaller acquisitions by purchasing Swiss high added value entities in order to optimise their portfolio of investments. Moreover, a certain number of deals can be accounted for as secondary buy-outs with private equity funds selling their stakes to other private equity funds, in most cases keeping the management in place. A notable transaction of that nature was the sale of the cable machinery group Maillefer by Argos Soditic (advised by Lenz & Staehelin) to Group Alpha. If these secondary buy-outs were made with the firm intention of going public on short or mid-term, it remains to be seen whether such plans can still be implemented in the current economic context.

Most recently, the US subprime crisis and its consequences on the international capital markets have certainly made it more difficult to obtain reasonable financing for contemplated deals. This situation is particularly felt by private equity investors, although small and medium size transactions, which form the bulk of the M&A work, will not be greatly affected in all likelihood. Conversely, this situation could benefit strategic investors with a full war chest who now can contemplate acquisitions of Swiss companies at prices that are not so highly driven by competing private equity investors.

One of the biggest private purchases of last year was Medi-Clinic's acquisition of the hospital group Hirslanden from the private equity fund BC Partners Ltd for an amount of almost \$3bn. Lenz & Staehelin advised the purchaser.

It should be remembered that for each Swiss company acquired by a foreign purchaser, a Swiss company bought two foreign

companies. In 2007, this would include transactions such as Swisscom's purchase of the Italian broadband telecommunications company Fastweb SpA for a value of \$6.35bn or Hoffmann-La Roche's acquisition of the US manufacturer of medical diagnostic instruments Ventana Medical for an amount of \$3.4bn.

New draft bill regarding the law of corporations

In the very last few weeks of 2007 the Department of Justice published a new draft bill regarding amendments to the law of corporations (Aktiengesellschaft, société anonyme). However, it does not include any spectacular changes and it appears that doing business in Switzerland will benefit from the usual stable legal environment for more years to come. Yet, there are some interesting features of the draft legislation, particularly those which will enhance counsels' tool box when it comes to structuring private equity deals. First and foremost the new concept of the 'capital band' must be mentioned. This concept will replace the well-known concept of the authorised capital and will be completed by its corollary, an authorised capital reduction which up until now has not been possible under Swiss law. Once this becomes law, the board of directors will have the power, for a period of a maximum of three years, to increase or decrease the corporation's capital (within some global limits provided by the law) depending on the corporation's needs. This concept has been widely welcomed by the legal community.

There has been, from the outset, more criticism in respect of some surprising proposals, such as the possibility for the shareholders to impose a duty on the board of directors to submit certain business decisions to the approval of the general assembly. This mechanism is at odds with the basic structure of the corporation. The design of the corporation aims at a clear separation of ownership and control, and the shareholders are supposed to have no duties other than making their capital contribution to the corporation and should not have any management or monitoring duties. Put in a broader context, by borrowing heavily from the regime actually applicable to the LLC (GmbH in German/Sarl in French) the Bill blurs the distinction between the two company forms.

Another proposal which appears to violate basic principles of the capitalistic corporation is the possibility of creating non-voting stock without limitation (the law currently provides for a limitation of a maximum of twice the company capital). This would imply that a corporation could be controlled by a shareholder holding just one voting share whereas all the other capital providers would have no saying in the governance of the corporation (but still bear same risks of a shareholder with respect to their investment).

Further amendments deal with issues such as the flexibility of the general assembly (electronic general assembly), proxy voting and the election of the board members. Currently, it is too early to predict how the parliamentary debates will impact the bill and when it could enter into force.

Amendments to law of LLCs

The long awaited amendments to the law concerning LLCs (GmbH/Sarl) eventually came into force on January 1, 2008. At the same time, various amendments to the laws relating to corporations, the commercial registry and corporate names have come into force.

The main features of the amendments to the law concerning LLCs is that (i) LLCs of a certain importance must appoint auditors to carry out either an ordinary audit or a restricted review, (ii) transfer of LLC shares has become easier as a written form is now sufficient (as opposed to the notarized form which was required under the old law), and (iii) the LLCs' share capital is no longer capped at CHF 2m.

The LLC has hence become an appropriate legal form for firms having significant need for equity, and it may well become the predominant legal form for companies in Switzerland belonging to a group. Opting for the LLC has the advantage of allowing multinational groups to draft the subsidiary's articles of incorporation to maximise the power of the parent company to take the management decisions for the LLC.

Certain amendments to the law concerning corporations are



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of interest from an international view point, in particular the amendment to the provision relating to the composition of the board of directors. Previously, the majority of the members of the board of directors of a Swiss corporation had to be domiciled in Switzerland and be Swiss, EU or EFTA nationals. The new provision now provides that only one person authorised to represent the corporation must be domiciled in Switzerland – such authorised representative being a board member or an officer of the corporation.

The amendment to the law concerning LLCs did not include any changes to Swiss tax laws. As in the past, LLCs will be taxed as a corporation regarding direct taxes, withholding taxes, stamp duty and VAT. From an American law perspective, one can speculate as to whether the amendments to the law concerning LLCs may have consequences for the American tax classification of Swiss LLCs held by American groups as a partnership of persons or as companies with capital (check-the-box regulations). The choice offered by American tax laws between a partnership of persons and a company with its own capital is excluded only for companies known as "per se corporations". Only Swiss corporations are considered to be such per se corporations. We anticipate that with respect to the choice of American companies to classify a Swiss subsidiary that is an LLC as a transparent partnership of persons or a non transparent company with its own capital, nothing will change as a result of the new law on LLCs. ♣

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