

## SWISS MERGER ACT

On July 1<sup>st</sup>, 2004, the new Swiss Merger Act came into force. By means of a codification of recent practice, supplemented by quite detailed procedural provisions, this law makes available certain important new transactional tools for facilitating reorganisations. Its main focus is on provisions relating to reorganisations of share corporations and limited liability companies. The law also

applies, however, to all other types of companies, including general and limited partnerships, as well as to associations and foundations; areas in which up to now there was no codified law. Furthermore, and importantly, the revision of the relevant tax laws has removed certain hindrances to reorganisations and eliminated some legal uncertainties.

### I. OVERVIEW

#### 1. Scope

The Merger Law regulates in detail all types of reorganisations of entities under private law. The main focus is on provisions relating to reorganizations of

- corporations (Aktiengesellschaften, AG) and
- limited liability companies (Gesellschaften mit beschränkter Haftung, GmbH).

Articles 3 to 77 mainly apply to these two (references to articles are to articles of the Merger Act applying for corporations and limited liability companies).

The law also applies to

- general partnerships (Kollektivgesellschaften);
- limited partnerships (Kommanditgesellschaften);
- cooperatives (Genossenschaften);
- cooperations with unlimited partners (Kommanditaktiengesellschaften);
- associations (Vereine);
- foundations (Stiftungen);
- welfare institutions (Vorsorgeeinrichtungen) and, finally,
- institutions under public law (Institute des öffentlichen Rechts) (in civil law transactions).

In general, except for the provisions on the transfer of assets and liabilities, the law does not apply to simple partnerships (articles 530 et seq. CO). Furthermore, the law does not exclude in any way the permissibility of individual transfers of assets.

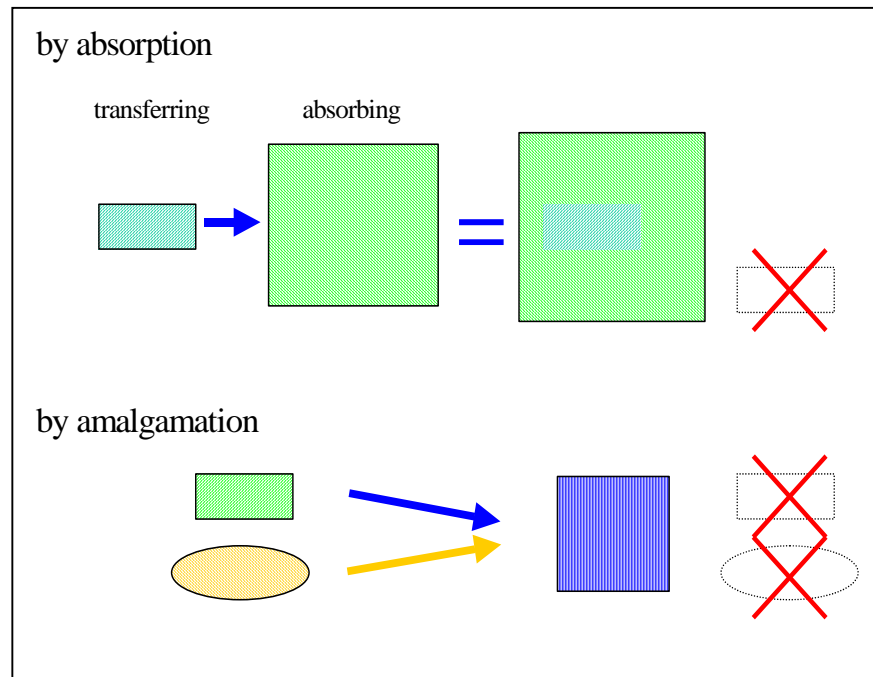
## 2. Transaction Structures

### 2.1 Mergers (Fusionen)

#### a. General

A merger combines two or more companies in a manner such that at least one initial company (absorption) or all of the initial companies (amalgamation) are dissolved. In principal all of the shareholders/members of the merging entities become shareholders/members of the merged entity.

(Articles 3 to 29)



#### b. Specifics

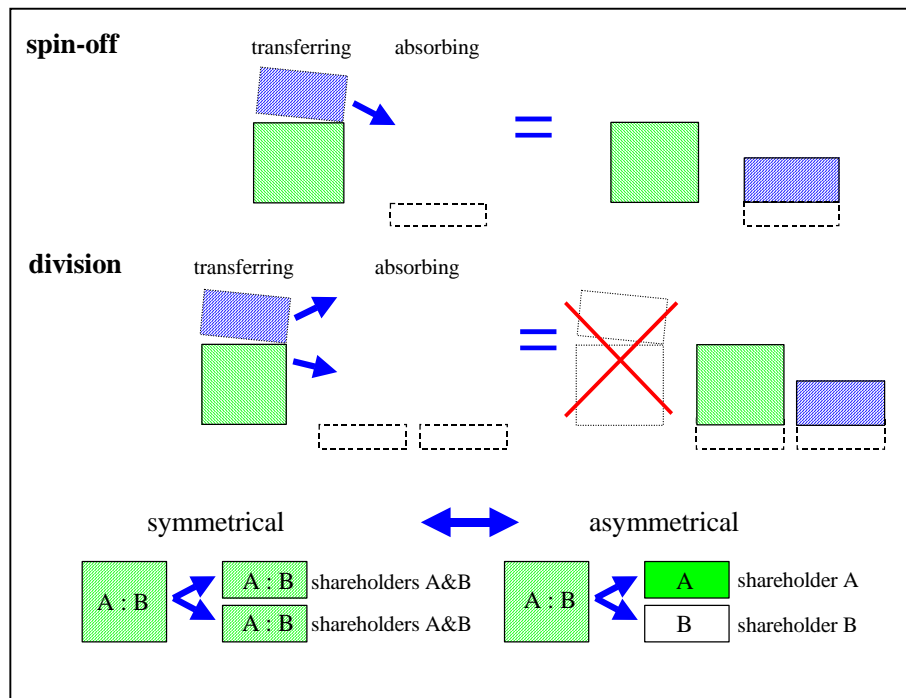
- Efficient and easy procedure for group internal mergers
- Simplified procedure for small or medium sized enterprises (SME)
- Transfer of all assets and liabilities by operation of law (including contracts without consent of third party)
- Possible to grant an right to opt for shares or cash to shareholders of transferring entity (article 8 section 1)
- Squeeze-out of shareholders of transferring entity possible (article 8 section 2)
- There are only few cases where no merger is permissible (i.e. no merging of a corporation into a partnership) (article 4)
- Lengthy ordinary procedure
- Creditors may request security for their claims (article 25)

## 2.2 Demergers (spin-offs, splitting) (Spaltungen)

### a. General

In a demerger, portions of the assets and liabilities are transferred to a newly founded or already-existing company in a manner such that the shareholders obtain – in addition to their shares in the initial company – either a pro rata (symmetrical) or non-pro-rata (asymmetrical) percentage of shares in the absorbing company.

(Articles 29 to 52)



### b. Specifics

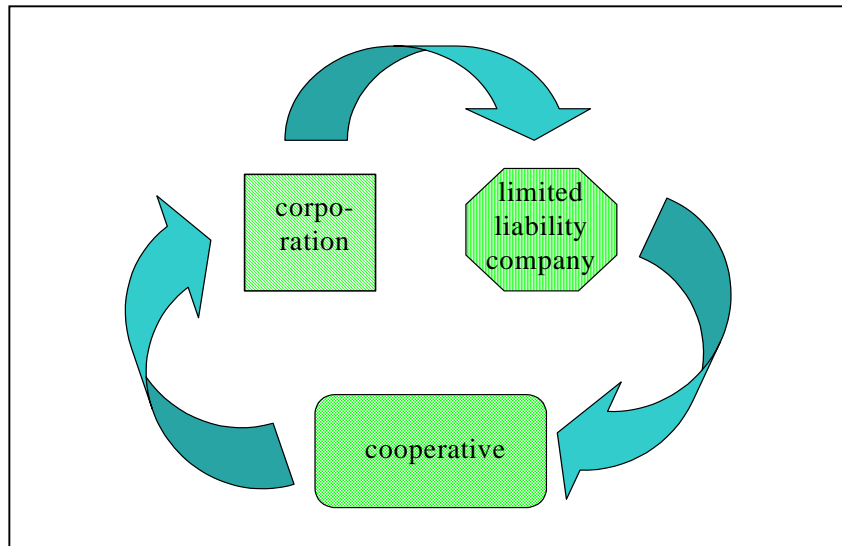
- Simplified procedure for small or medium sized enterprises (SME)
- Transfer of all assets and liabilities by operation of law (but unclear whether transfer of contracts requires consent of third party)
- Asymmetrical demerger (resulting in squeeze-out) possible (article 31 section 2)
- Only among corporations, limited liability companies and cooperatives (article 30)
- Lengthy ordinary procedure
- Inventory with a detailed list of all transferred assets and liabilities becomes accessible to public (article 37 litera b)
- Secondary liability for all of the liabilities of the transferring company (article 47)
- Creditors may request security for their claims (article 46)

## 2.3 Conversions (change of corporate form, transformation) (Umwandlungen)

### a. General

By means of a conversion, a company changes its form of organization and adapts its shareholders' rights to the new form of organization, meanwhile the composition of its shareholder constituency remains the same. There is no transfer of assets or liabilities.

(Articles 53 to 68)



### b. Specifics

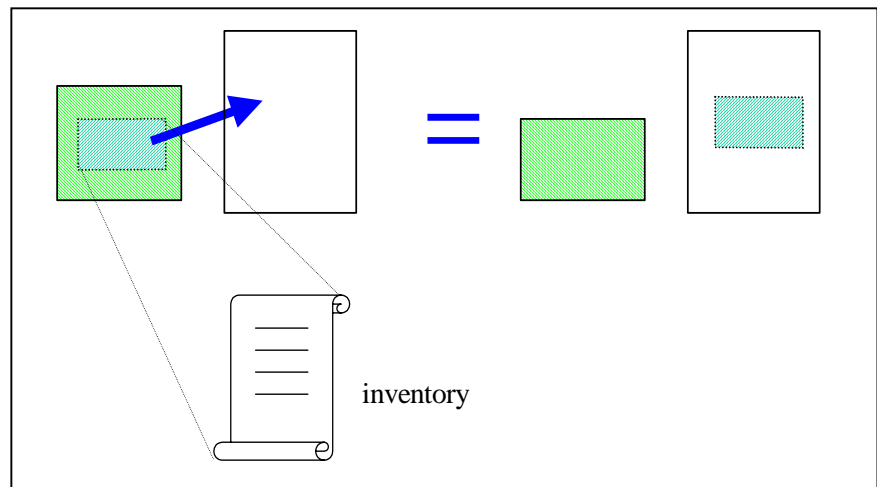
- No additional rights for creditors
- Selected cases of full compatibility where conversions are possible (article 54)

## 2.4 Transfers of Assets and Liabilities (Vermögensübertragungen)

### a. General

A transfer of assets and liabilities entails the transfer by law of a list of specified, hand-chosen assets and liabilities to the transferor. Such transfer does not affect the rights of the shareholders.

(Articles 69 to 77)



This tool is entirely new and offers a wide range of possible purposes, such as, for example, the transfer of hand-chosen groups of assets and liabilities to a third party or to a new subsidiary. It also serves as a “backup” transaction tool in instances in which none of the other transaction structures are feasible.

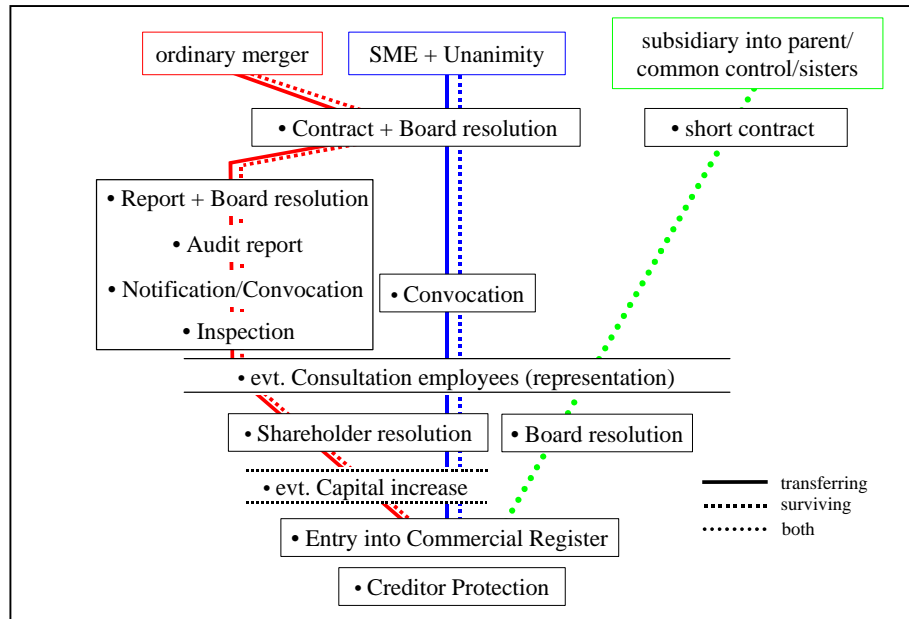
### b. Specifics

- May be used by any entity or any person registered in the Commercial Register
- Transfer of all assets and liabilities by operation of law (but unclear whether transfer of contracts requires consent of third party)
- No shareholder approval
- Normally transferring entity has to receive a consideration (article 71 section 1, litera d)
- Purchase price and inventory with a detailed list of all transferred assets and liabilities becomes accessible to public (article 71 section 1 litera b and c)
- Joint and several liability (Solidarhaftung) for transferred liabilities for three years (article 75)

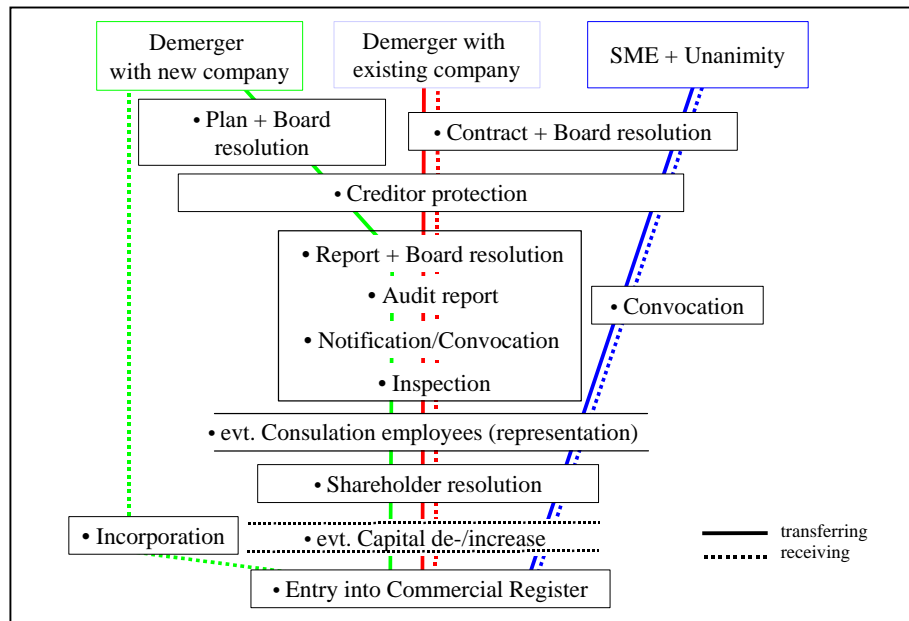
### 3. Procedure

#### 3.1 Overview

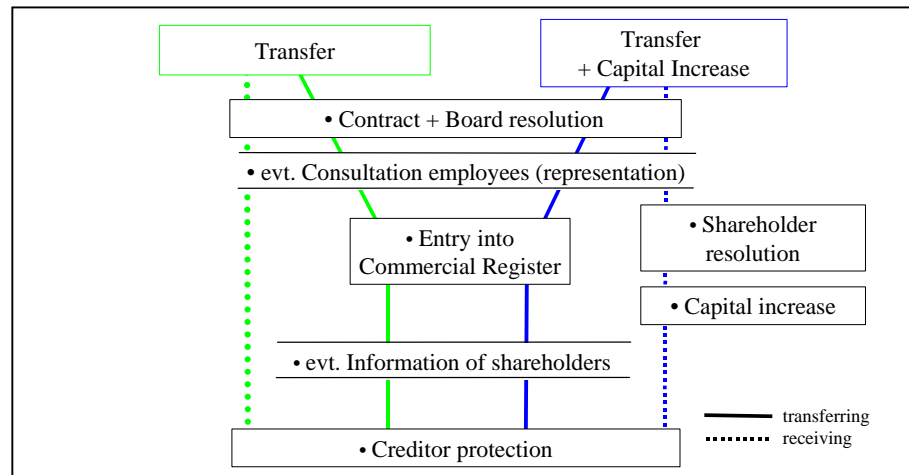
##### Mergers



##### Demergers



##### Transfers of Assets and Liabilities



## 3.2 In General

The procedure for mergers and demergers are very similar. For ordinary mergers and demergers the procedures are quite lengthy, involving – in addition to the board members – auditors and the shareholders.

### 3.2.1 Board of Directors

All of the transactions under the Swiss Merger Act require approval by the board of directors (or, as the case may be, the supreme managing or administrative body) (articles 12 section 1, 36 section 1, 59 section 1 and 70 section 1). This also applies to transfers of assets and liabilities irrespective of the size of the transaction.

### 3.2.2 Shareholders' Resolution

Shareholders' resolutions are required for almost all of the transactions. Exceptions are intra-group mergers and transfers of assets and liabilities. In case of transfers of assets and liabilities with a certain size, an obligation to inform the shareholders in an annex to the annual financial statements applies (article 74).

Generally, qualified majorities (i.e. for corporations 2/3 of the votes and ½ of the share capital) are required for mergers, demergers and conversions (articles 18, 43 section 2 and 64). In some case the approval by certain shareholders/member or unanimity is required. A threshold of 90% of the votes/shareholders is required for a squeeze-out merger and for asymmetrical demergers.

### 3.2.3 Employees

In any type of procedure for mergers employees have to be addressed (usually by informing the employees, in some cases by consulting the employees) (article 28). In demergers

procedures as well as in case of transfers of assets and liabilities employees have to be addressed if employees or a business unit (Betrieb oder Betriebsteil) are being transferred (article 50 and 76). The procedure for conversions does not include information or consultation obligations towards employees.

Any employee transferred to another entity by way of merger, demerger or transfer of assets and liabilities has the right to terminate the employment upon the termination notice provided for by law (and irrespective of any contractual notice period) (articles 27 section 1, 49 section 1 and 76 section 1).

### 3.2.4 Creditors

Creditors of merging entities have to be informed about the implemented merger (Schuldenruf) upon effectiveness of the merger and have a right to request security for their claims, unless the company proves that satisfaction of the claim is not jeopardized by the merger (article 25).

A demerger requires prior to the shareholders' resolution information of the creditors about the planned demerger (Schuldenruf) and granting security to creditors requesting for it, unless the company proves that satisfaction of the claim is not jeopardized by the demerger (articles 45 and 46). Importantly, the companies bear secondary liability for claims that either have been transferred by demerger or which remained with the transferring company (article 47).

In case of a transfer of assets and liabilities the transferring entity bears joint and several liability for the transferred claims during three years (article 75).

### 3.3 Procedural simplifications of practical significance

The ordinary procedure is time-consuming and rather costly, especially in the case of mergers and demergers. This is why the procedural simplifications available for mergers and demergers are important in practice.

Small and medium-sized enterprises may opt for a waiver of the report of the board, the audit report and the shareholders' right of inspection, provided that all shareholders agree to such waivers. This applies for mergers, demergers and conversions.

Further-reaching simplifications are available in the case of mergers between companies

with stated capital (share corporations and limited liability companies) that are wholly-owned (merger of sisters) or the merger of a wholly owned subsidiary into its parent.

The same simplified merger procedure is also available if such companies are 100%-controlled by a group of shareholders whose voting rights are pooled by means of a shareholders' agreement.

Additionally, some simplifications apply to a merger of a 90%-subsidiary into its parent.

### 3.4 Squeeze Out

Subject to approval by shareholders with at least 90% of the votes, shareholders holding 10% or less of the votes can be squeezed-out when their company merges into another. Similarly, shareholders with 10% or less of

the votes can also, by means of an asymmetrical demerger, be shunted off into a separate company while the remaining shareholders retain ownership of the remaining company.

## 4. Taxes

Already under prior law, Swiss tax law permitted conversions and demergers to be treated as tax-privileged reorganizations. Under the amended provisions of tax law, the basic requirements for a tax-privileged reorganisation (including, in particular, the assumption of the profit tax values and continuation of the duty of taxation in Switzerland) remain the same. In connection with the tax regulations for reorganizations introduced within the scope of the Merger Law, however, positive developments have occurred insofar as certain hindrances have been removed and certain legal uncertainties have been eliminated.

The following examples serve as illustrations: the prohibition on transfers will be eliminated with respect to the demerger ("vertical demerger") of legal entities. In the case of reorganizations, the transfer of taxable documents will no longer be subject to any turnover tax. The cantons are under an obligation to exempt the transfer of real estate in connection with reorganizations from the transfer tax by no later than five years after the effective date of the Merger Law. Further, the codification of the ability to transfer fixed assets within a group of companies in tax-neutral fashion represents an important step towards group tax law.

## II. WHAT ARE THE MOST IMPORTANT LEGAL ISSUES WHEN PLANNING A REORGANISATION?

### 1. Do all of the shareholders of *companies with stated capital* (in particular, corporations and limited liabilities companies) agree to the reorganisation?

- Cases:
- Wholly-owned subsidiaries; or
  - All shareholders are either already party to or are willing to enter into an agreement on the exercise of their votes.

If yes: → The simplified procedure for companies with stated capital (article 23 et seq.) applies, and there is no need for publicly recorded shareholders resolutions, merger reports or audit reports, nor is any right of inspection available to the shareholders.

In ordinary proceedings, a merger, demerger or conversion requires the approval of a qualified majority of shareholders, whereas transfers of assets and liabilities do not require any shareholder approval.

### 2. Do companies qualify as *small or medium sized enterprises (SME)*?

Criteria: During the two business years preceding the merger or the demerger, the company does not exceed two out of three criteria (balance sheet total > CHF 20 million, revenues > CHF 40 million, > 200 full-time employees), nor does it have any outstanding bonds or stock exchange listing.

- If yes:
- Mergers: the SME's shareholders can unanimously waive the requirement of a merger report, audit report and right of inspection.
  - Demergers: the SME's shareholders can unanimously waive the requirement of a demerger report, audit report and right of inspection.
  - Conversions: the SME's shareholders can unanimously waive the requirement of a conversion report, audit report and right of inspection.

### 3. Do any of the companies have *employees*?

If yes: → Employee protection regulations apply to mergers, demergers and transfers of assets and liabilities. In particular, consultation of the employees prior to the shareholders' resolution or the board resolution is mandatory.

### 4. Is more than *one-half of the stated capital of any of the reorganizing companies not covered by its assets (hälftiger Kapitalverlust)*?

Criteria: One-half of the stated capital (including mandatory reserves), valued on a going concern basis, is no longer covered by the assets (hälftiger Kapitalverlust); an over-indebtedness, alternatively, may be compensated for by declarations of subordination provided by creditors.

If yes: → A merger (Sanierungsfusion) is permissible only if the freely disposable equity of the other companies participating in the merger is greater than the underfunding.

**5. Is the Audited Balance Sheet not older than 6 months?**

If no: → In order to participate in a merger or demerger an interim balance sheet has to be established (articles 11 and 35). Usually, this balance sheet needs to be audited.

**6. Is Publicity of the Transferred Assets and Liabilities a concern?**

If yes: → In a demerger or transfer of assets and liabilities the inventory contains information about the transferred assets and liabilities which will be part of the publicly accessible documents at the Commercial Register. If this information about certain assets and liabilities should not become publicly accessible, these items should be transferred individually. In mergers there is no publicity about the transferred items other than the balance sheet.

**III. WHAT ARE THE MOST IMPORTANT EVENTS IN THE TIMETABLE FOR A REORGANISATION?**

<b>Transaction</b>	<b>Timetable</b>
Merger, ordinary procedure	30 days' right of the shareholders to inspect the merger agreement, merger report, audit report and the annual accounts and reports for the past three years
Merger, simplified procedures	No fixed deadlines
Demerger, ordinary procedure	Three publications requesting creditors to report their claims and a two-month deadline for creditors to request security prior to the adoption of the shareholders' resolution; and (in parallel fashion)  Two-month right of the shareholders to inspect the demerger agreement/plan, demerger report, audit report and the annual accounts and reports for the past 3 years
Demerger, simplified procedure for SMEs	Three publications requesting creditors to report their claims and a two-month deadline for creditors to request security prior to the adoption of the shareholders' resolution
All mergers, demergers, conversions	The balance sheet date cannot precede the date of signing of the agreement/plan by more than six months

Ulysses v. Salis, info@fusionsgesetz.ch