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EMPLOYEE SHARE PLANS

Employee share plans in Switzerland: regulatory overview

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EMPLOYEE PARTICIPATION

1. Is it common for employees to be offered participation in an employee share plan?

Most listed companies in Switzerland offer one or more share plans to their employees. Many private companies also offer share plans. Some companies restrict participation in share plans to senior executives, or offer senior executives different plans from those offered to other employees.

2. Can employees be offered a share plan where the shares to be acquired are in a foreign parent company?

Employees working in Switzerland can participate in share plans offered by a foreign parent company. However, Swiss employment law may restrict multinational groups' freedom to determine the structure and terms of their share plans.

The extent to which Swiss employment law applies to foreign share plans is unclear. It does not apply if the employees concerned act as informed investors rather than as employees (*decision of the Swiss Federal Court (BGE 130 (2004) 495)*). However, that decision suggests that employees who are granted options or shares at a discount or for no consideration act as employees and not as informed investors, meaning that Swiss employment law would apply to these types of plans. The distinction is unclear, so share plans governed by foreign law should be modified to comply with Swiss employment law (for example, by incorporating an addendum governed by Swiss law for all Swiss employees).

SHARE OPTION PLANS

3. What types of share option plan are operated in your jurisdiction?

There are no specific legal types of share option plans. However, there are significant variations between plans adopted.

Grant

4. What rules apply to the grant of employee share options?

Share option plan

Main characteristics. In a typical share option plan, the employer grants an employee a free option to buy shares. The option normally has a vesting period, and once it vests, the employee can exercise it for a fixed price during a fixed exercise period. Typically, when an employee leaves the company:

- An option that has not yet vested lapses.
- The exercise period of an option that has already vested reduces dramatically under a truncation clause.

Types of company. Corporations (*Aktiengesellschaft* (AG)) (the most common form of company in Switzerland) and limited liability companies (*Gesellschaft mit beschränkter Haftung* (GmbH)) can offer share option plans.

Popularity. Generally, corporations and limited liability companies use share option plans. Option plans are generally more popular with big companies. However, they are also often used in start-up companies.

Discretionary/all-employee. It is generally accepted that employers can treat employees differently if this is based on reasonable and appropriate criteria. Therefore, when allocating and awarding share options, employers can treat different management levels differently, but must treat employees at the same level equally.

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants to avoid prospectus requirements (*see Question 29*).

Maximum value of shares. There are no restrictions on the maximum value of shares over which options can be granted under a share option plan. However, the employer must ensure that it can meet its obligations under the share option plan.

Market value. The exercise price can be above or below the shares' market value, but cannot be lower than the shares' nominal value where new shares are issued.

5. What are the tax and social security implications of the grant of the option?

Tax

Options are generally subject to income taxation at exercise (*see Question 8*).

As the only exception, unrestricted quoted options are taxed at grant. The taxable amount is calculated as the difference between the fair market value of the option (at grant) and the (lower) price, if any, paid by the employee for the option. If income tax is charged at grant, no income tax arises at vesting or exercise.

Taxes, if any, are levied at federal, cantonal and communal level (at rates varying from canton to canton and from community to community). Generally, employees must pay their own income tax. However, source tax (to be withheld by the employer) applies in some cases, most importantly with respect to foreign nationals without a permanent residence permit (C-permit) in Switzerland.

Social security

Social security treatment follows tax treatment and is charged when a taxable event takes place. The main social security charges

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amount to 12.5% (split equally between the employer and the employee). Social security contributions are always withheld at source (by the employer) and paid directly to the competent cantonal authority.

Reporting

According to the Ordinance on the Reporting Obligations for Equity-based Compensation Instruments of 27 June 2012 and the respective Circular Letter no. 37 of 22 July 2013, there is, in addition to the existing reporting obligations relating to the employees (mainly through the salary certificate), a general reporting obligation directly to the tax authorities by the employer (unless cantonal rules provide otherwise). However, in any case, direct reporting is required for the purposes of income tax withholding at source and social security, as well as for taxable benefits realised after termination of employment.

Employers must report (equity-based) employee benefits at grant and, if taxable at a later stage, at realisation of the taxable benefit. For example, in the case of options that are not quoted, reporting must occur at grant and at exercise.

Vesting

6. Can the company specify that the options are only exercisable if certain performance or time-based vesting conditions are met?

Employers can set performance or time-based vesting criteria for share plans. However, performance-based criteria must be capable of being objectively measured, and all vesting conditions must be clearly set out in the plan documentation.

7. What are the tax and social security implications when the performance or time-based vesting conditions are met?

Options are generally subject to income taxation (and social security contributions) at exercise (*see Question 5 and Question 8*), but not at vesting.

Exercise

8. What are the tax and social security implications of the exercise of the option?

Share option plan

Tax/social security on exercise. Options that are either not quoted or, if so, restricted are subject to income taxation and social security contributions at exercise on the difference between the shares' market value and the exercise price.

Reporting for tax/social security. See *Question 5*.

How liability is recovered from employee. Under most plans, the company is granted a right to withhold shares resulting from exercise and/or to sell the shares if tax and withholding obligations are not met. The participants usually grant the company the right to make deductions from other payments due to the participant (such as base salary) to cover withholding obligations.

Sale

9. What are the tax and social security implications when shares acquired on exercise of the option are sold?

Share option plan

Capital gains derived from the sale of shares by an individual are not usually subject to tax or social security contributions (tax-free capital gain).

Reporting for tax/social security. See *Question 5*.

How liability is recovered from employee. Under most plans, the company is granted a right to withhold shares resulting from exercise and/or to sell the shares if tax and withholding obligations are not met. The participants usually grant the company the right to make deductions from other payments due to the participant (such as base salary) to cover withholding obligations.

SHARE ACQUISITION OR PURCHASE PLANS

10. What types of share acquisition or share purchase plan are operated in your jurisdiction?

There are three main types of share acquisition or purchase plan:

- Employee share plans.
- Share incentive plans (SIPs).
- Share matching plans (SMPs).

Employee share plan

Main characteristics. The purpose of employee share plans is to strengthen the employees' relationship with, and commitment to, the employer. Usually, the employer offers shares to some or all employees at a discounted price.

Types of company. Corporations and limited liability companies can offer employee share plans.

Popularity. Employee share plans are very popular with companies of all sizes. They are most popular with corporations, but limited liability companies also implement employee share plans.

SIP and SMP

Main characteristics. An SIP is an employee share plan with additional incentives granted to the employee on acquisition of the shares. Usually, employers grant employees free shares according to the number of shares the employees purchase (matching element). Frequently, these free shares are blocked (that is, cannot be sold) for a defined period. Sometimes, the matching is subject to vesting conditions.

The SMP is a form of SIP where the employee first makes an investment with his/her own funds. This indicates that the employee acts as an informed investor, rather than as an employee. These plans have a matching element, although it is usually not fixed or blocked. Frequently, the matching element is subject to the employee and/or the company satisfying performance criteria.

Types of company. Corporations and limited liability companies can offer SIPs and SMPs.

Popularity. SIPs were not very common with Swiss companies and were mainly used by foreign companies with subsidiaries in Switzerland. However, SMPs have become increasingly popular because, among other reasons, they provide the investment element required by case law to show that the employee is acting as an informed investor (*see Question 2*), and therefore the

company may not be subject to the labour law restrictions (although this is disputed).

Acquisition or purchase

11. What rules apply to the initial acquisition or purchase of shares?

Employee share plan

Discretionary/all-employee. The same considerations apply as for share option plans (*see Question 4*).

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants to avoid prospectus requirements (*see Question 29*).

Maximum value of shares. There are no restrictions on the maximum value of shares that can be awarded.

Payment for shares and price. Employees usually pay the market price for the shares, although the shares can be awarded at a substantial reduction from market price or for free. If the shares are newly issued, the issue price must be at least equal to the shares' nominal value.

Share incentive plan and share matching plan

Discretionary/all-employee. The same considerations apply as for share option plans (*see Question 4*).

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants to avoid prospectus requirements (*see Question 29*).

Maximum value of shares. There are no restrictions on the maximum value of shares that can be awarded.

Payment for shares and price. Employees often do not have to pay for their matching or incentive shares, or receive them at a substantially reduced price. If the shares are newly issued, the issue price must be at least equal to the shares' nominal value.

12. What are the tax and social security implications of the acquisition or purchase of shares?

Shares are taxed at actual allocation (that is, at acquisition or purchase). The taxable amount is calculated as the difference between the fair market value of the shares and the price at which they are sold to the employee, and a discount of 6% per annum is granted for blocked shares (up to ten years with a maximum discount of 44.161%).

The valuation of the market value of non-listed shares must be done by the employer. The formula should not change from the acquisition to the sale of the shares. If the valuation formula is changed or other (fair market) prices are paid (for example, on a trade sale), the portion of the sales proceeds allocated to the such a change in the valuation method (*Übergewinn*) will not be treated as tax-free private capital gains, but as taxable (salary) income. In some of the cantons in Switzerland (such as Zurich), the taxation of the *Übergewinn* is however restricted to a disposal of the shares within a period of five years since the acquisition of the shares.

For social security purposes, the amount subject to income tax is also considered to form part of the salary and is therefore subject to social security contributions.

The employer's reporting and withholding obligations are the same as for share option plans (*see Question 5*).

Vesting

13. Can the company award the shares subject to performance or time-based vesting conditions?

Employee share plan

The same considerations apply as for share option plans (*see Question 6*).

Share incentive plan and share matching plan

The same considerations apply as for share option plans (*see Question 6*).

14. What are the tax and social security implications when any performance or time-based vesting conditions are met?

Employee share plan

Shares are taxed at actual allocation, that is, when the employee receives legal title to the shares (*see Question 12*). If there are time or performance-based vesting conditions deferring actual allocation of the shares, the employee only receives legal title to the shares when the vesting conditions are met. In this case, income tax and social security contributions are only due when the vesting conditions are met (rather than when the shares are awarded).

For employee share plans' tax and social security treatment, see *Question 12*.

Share incentive plan and share matching plan

See above, *Employee share plan*.

Sale

15. What are the tax and social security implications when the shares are sold?

Employee share plan

Capital gains derived from the sale of employee shares are generally exempt from income tax and social security contributions (*see Question 9*). For the taxation of the *Übergewinn*, see *Question 12*.

Share incentive plan and share matching plan

See above, *Employee share plan*.

PHANTOM OR CASH-SETTLED SHARE PLANS

16. What types of phantom or cash-settled share plan are operated in your jurisdiction?

There are two types of phantom or cash-settled share plan:

- Phantom share plans.
- Phantom share option plans.

Phantom share plan

Main characteristics. Employees buy, on a virtual basis, phantom shares that mirror the growth of the employer's shares (underlying shares). The phantom shares do not give the right to vote or receive dividends. Usually, when the employer's shareholders receive dividends, employees holding phantom shares receive an equivalent cash payment. When employees sell their phantom shares, the price they receive reflects the underlying shares' market

value. Phantom shares cannot be traded, only sold back to the employer.

Types of company. Phantom share plans are used in corporations, limited liability companies and any other kind of business (such as partnerships) where they will mirror the growth of the value of that business.

Popularity. Phantom share plans are not very common. However, employers sometimes use them to stop employees becoming shareholders in a group company (for example, a wholly owned subsidiary of an international group).

Phantom share option plan

Main characteristics. Employees are granted rights that mirror options to buy the employer's shares (underlying shares). In most cases, rights are granted for free with a fixed exercise price. Usually, the rights are subject to a vesting period. When employees exercise the rights, they receive a cash amount, which is the difference between:

- The market value of the underlying shares.
- The fixed exercise price.

In most cases, employees are not required to pay the exercise price, because only settlement of the appropriate figure occurs on exercise and the cash amount is then paid out to the employee.

Types of company. Any type of company can offer a phantom share option plan.

Popularity. The same considerations apply as for phantom share plans (*see above, Phantom share plan: Popularity*).

Grant

17. What rules apply to the grant of phantom or cash-settled awards?

Phantom share plan

Discretionary/all-employee. This is the same as for share option plans (see *Question 4*).

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants to avoid prospectus requirements (*see Question 29*).

Maximum value of awards. There are no restrictions on the maximum value of phantom share plan awards.

Phantom share option plan

Discretionary/all-employee. This is the same as for share option plans (see *Question 4*).

Non-employee participation. It is possible to include non-employees (such as contractors). However, the company needs to clearly limit the participants to avoid prospectus requirements (*see Question 29*).

Maximum value of award. There are no restrictions on the maximum value of shares over which phantom share option plans can be granted.

18. What are the tax and social security implications when the award is made?

Phantom share plan

No income tax or social security contributions are due at granting of cash-settled instruments.

Phantom share option plan

No income tax or social security contributions are due at granting of cash-settled instruments.

Vesting

19. Can phantom or cash-settled awards be made to vest only where performance or time-based vesting conditions are met?

Phantom share plan

The same considerations apply as for share option plans (*see Question 6*).

Phantom share option plan

The same considerations apply as for share option plans (*see Question 6*).

20. What are the tax and social security implications when performance or time-based vesting conditions are met?

Phantom share plan

No tax or social security contributions are due at vesting of cash-settled instruments.

Phantom share option plan

No tax or social security contributions are due at vesting of cash-settled instruments.

Payment

21. What are the tax and social security implications when the phantom or cash-settled award is paid out?

Phantom share plan

When the award is paid out (including dividend equivalents, if any), income tax and social security contributions are charged on the cash amount received.

For the employer's reporting and withholding obligations, see *Question 5*.

Phantom share option plan

When the award is paid out (including dividend equivalents, if any), income tax and social security contributions are charged on the cash amount received.

For the employer's reporting and withholding obligations, see *Question 5*.

CORPORATE GOVERNANCE GUIDELINES, MARKET OR OTHER GUIDELINES

22. Are there any corporate governance guidelines, market rules or other guidelines that apply to any employee share plan?

There are a number of guidelines and obligations that may apply to companies operating share plans in Switzerland. Some apply to all companies, and some only apply to listed companies.

Listed companies

Insider dealings. If the shares are listed or traded on a stock exchange (even in pre-market dealings (that is, trades in listed

securities that do not take place within official trading times)), all participants who have inside information are prohibited from dealing in options and shares during certain periods. Non-compliance can attract criminal sanctions under the Swiss Criminal Act. To comply with insider dealings rules, a plan must provide blocking periods during which participants cannot deal in the shares.

Disclosure requirements. If a company has shares that are listed or traded on a stock exchange, it must disclose the key elements of any employee share option plan in its annual report.

It must also disclose any share option or similar award to its board members and top management in the annex to its financial statements. In addition, listed securities are subject to general disclosure obligations, and special disclosure regulations apply to managers. For example, substantial transfers must be made subject to ad hoc publicity. Finally, companies holding their own shares must disclose this fact in the annexes to their financial statements.

The International Financial Reporting Standards (IFRS) reporting obligations generally apply to companies listed on the Swiss Stock Exchange.

Initiative "against rip-off salaries". As a consequence of Swiss voters accepting the popular initiative "against rip-off salaries" in March 2013, new rules and regulations regarding equity-based compensation came into effect on 1 January 2014. Most importantly, publicly listed Swiss corporations must submit all fixed and variable compensation for approval by the shareholders' meeting. This includes a prospective or retrospective binding vote by the general meeting of shareholders for equity-based compensation. In addition, the articles of association must specify the principles of any performance-based remuneration or employee share or share option plans.

All companies

The Swiss Code of Best Practice for Corporate Governance of *economiesuisse*, the umbrella organisation for Swiss employer organisations, provides recommendations. It recommends that the dilution effects on general shareholders created by option plans for senior managers should be minimal, and that once an employee holds an option, the conditions for exercising the option cannot be modified in favour of the employee. Generally, large Swiss companies comply with these recommendations on a voluntary basis.

EMPLOYMENT LAW

23. Is consultation or agreement with, or notification to, employee representative bodies required before an employee share plan can be launched?

Generally, employers do not have to consult or agree with employees or their representative bodies before launching a share plan. However, if an employer intends to offer a plan to a substantial number of employees, it may have to inform them or their representative bodies of its terms.

24. Do participants in employee share plans have rights to compensation for loss of options or awards on termination of employment?

There are no exchange control regulations that stop employees sending money from Switzerland to another jurisdiction to buy shares in a share plan, unless the government has barred dealings with that jurisdiction (for example, bans are issued from time to time on trading with countries at war).

EXCHANGE CONTROL

25. How do exchange control regulations affect employees sending money from your jurisdiction to another to purchase shares under an employee share plan?

There are no exchange control regulations that stop employees repatriating proceeds derived from selling shares in another jurisdiction, unless dealings with that jurisdiction have been banned.

26. Do exchange control regulations permit or require employees to repatriate proceeds derived from selling shares in another jurisdiction?

There are no exchange control regulations that stop employees repatriating proceeds derived from selling shares in another jurisdiction, unless dealings with that jurisdiction have been banned.

INTERNATIONALLY MOBILE EMPLOYEES

27. What is the tax position when an employee who is tax resident in your jurisdiction at the time of grant of a share option or award leaves your jurisdiction before any taxable event affecting the option or award takes place?

In cases of internationally mobile employees, share awards, non-quoted and/or restricted options, phantom and other cash-settled instruments (which are not subject to taxation at grant), are (partially) subject to Swiss income taxation and social security contributions (when a taxable event occurs) based on the time (of the vesting period) spent in Switzerland (pro rata approach).

28. What is the tax position when an employee becomes tax resident in your jurisdiction while holding share options or awards granted abroad and a taxable event occurs when the employee is resident in your jurisdiction?

See *Question 27*.

SECURITIES LAWS

29. What are the requirements under securities laws or regulations for the offer of and participation in shares under, and participation in, an employee share plan?

Prospectus needed for employee share plan offer

If a company issues new shares to the public, it must publish a prospectus (*Swiss Code of Obligations*). The prospectus must disclose at least the following information:

- Information on the company (for example, the company name, address, registration number, purpose and so on).
- The amount and composition of share capital.
- Any preferential rights.
- Any authorised or conditional share capital.
- The number and content of profit-sharing certificates.
- Dividends paid during the last five years.
- The latest annual financial statements and auditor's report.

- Interim financial statements if the closing balance sheet is more than six months old.
- The resolution of the shareholders authorising the issue of new shares.

An offer is public if it is deemed to be an offer to an unlimited number of addressees. Employee share plans are therefore unlikely to fall under this prospectus requirement, as they are offered to a limited number of addressees. However, a prospectus may be necessary for either:

- Negotiable options.
- Share plans offered to a very large number of employees, especially if the issuing company does not actually employ these employees (for example, through group issuings, or where service providers or contractors can participate).

In addition, a prospectus is required for the issue of any new listed shares on the Swiss Stock Exchange (SIX), according to the SIX's listing rules, unless an exemption applies. The main exemption is where the new issue is less than 10% of the market capitalisation of the company's previously listed securities.

To determine whether these thresholds have been reached, capital increases during the preceding 12-month period are added together. These tests are applied on a rolling basis, including the shares proposed to be issued under the share plan, meaning that a share option requires a prospectus when the decision for the capital increase is made, not when options are allocated or when they vest.

A prospectus is not (and will never be) required where equity securities are proposed to be allocated to employees and equity securities of the same class are already listed.

Consents or filings

No prospectus or securities law consents or filings are required.

30. Are there any exemptions from securities laws or regulations for employee share plans? If so, what are the conditions for the exemption(s) to apply?

There are no specific exemptions for employee share plan offers. However, in most cases employee share plan offers are not subject to prospectus requirements.

OTHER REGULATORY CONSENTS OR FILINGS

31. Are there any other regulatory consents and filing requirements and/or other administrative obligations for an offer of shares under, and participation in, an employee share plan?

Government approval is not generally required to set up a share plan. However, any increase in the issuing company's share capital must be registered in the commercial register.

32. Are there any data protection requirements or obligations for an offer of shares under, and participation in, an employee share plan?

The data protection laws apply as for any other compensation plans. However, it may be argued that the relation between the company providing the shares (very often a company outside of Switzerland, for example, the ultimate holding company of a group) and the employee is a direct relationship. Therefore, rather than the data protection laws at the place of the issuing company applying generally, the predominant view is that Swiss data protection laws must be complied with in respect of Swiss employees. Swiss law requires that only data necessary for the administration of a share plan is collected and that the employee is fully informed of what is done with such data. Further, if the foreign jurisdiction to which the data is sent does not provide for the same data protection standards as Switzerland, the Swiss employer must ensure that the data is sufficiently protected.

FORMALITIES

33. What are the applicable legal formalities?

Translation requirements

There is no statutory requirement to translate a plan into one or several of the official Swiss languages. However, there is a risk that participants may argue that they did not understand the terms of the agreement and that consequently there is a lack of agreement in regard to some or all of the provisions. Therefore, it is good practice to provide translations (or at least summaries of the major terms) in the local language if there is some doubt with regard to the language capabilities of the participants.

E-mail or online agreements

Online agreements are normally enforceable. However, there are some clauses that need a written agreement (such as a non-competition undertaking), in which case an online procedure is not sufficient.

Witnesses/notarisation requirements

There are no such requirements.

Employee consent

The employee's consent is necessary to make the terms of the plan enforceable. The employee's consent is also necessary for actions to administer the options or awards and to make deductions from salary. The general requirements under the data protection laws apply to the transfer of personal data to overseas companies.

DEVELOPMENTS AND REFORM

34. Are there any current trends, developments and reform proposals that have or will affect the operation of employee share plans?

Trends and developments

During the last few years, there has been a shift away from share option plans and towards employee share plans. Phantom share plans and phantom share option plans are also becoming more popular, in particular in the start-up industry. There is also a trend towards plans with an investment element for the employees, such as share matching plans (*see Question 10*). This may partly be because of a decision of the Swiss Federal Court (*see Question 9*). It may also be because these plans require more commitment from the employees than if they were to receive free bonuses.

As a result of the financial crisis, there is a tendency for longer vesting periods and risk-based vesting conditions.

Reform proposals

There are currently no reform proposals.

ONLINE RESOURCES

The Swiss government

W *www.admin.ch/ch/d/sr/sr.html*

Description. This is the official website of the Swiss government on which all federal laws are available in the official Swiss languages (German, French and Italian). Some of the laws are also available in a non-binding English translation.

Practical Law Contributor profiles



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Qualified. Switzerland, 1995

Areas of practice. Employment; labour and benefits; pensions, tax.

Recent transactions

- Advised on the various share and option incentive schemes for top management and board of a listed SWX company.
- Advised on co-investment scheme for private equity fund.
- Advised on complex leveraged-financed participation scheme for top management of a large fashion house.
- Advised on long-term participation and succession plan for owner/managers of a medium-size company.
- Advised on many incentive schemes of all forms for start-up companies.
- Advised on the set up of a phantom stock plan for an international reinsurance company.
- Advised on the set up of an incentive share scheme for board and top management of a listed company in the industrial production sector.
- Advised on the set up of a share matching plan for top level management of a SIX-listed company with international operations, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.
- Advised on the set up of a long-term incentive structure for management of an investment fund, including international tax arrangements.
- Advised on the set up of a stock option plan for top level management of a SWX IPO candidate, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.
- Advised on the set up of a participation plan for managers of an international private equity house, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.
- Advised on the set up of carried interest structure for executives of an international fund structure, the applications for tax rulings, and the international co-ordination of the plan adoption and roll-out.



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Qualified. Switzerland, 1997

Areas of practice. Taxation; labour and benefits; private equity and venture capital.

Recent transactions

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