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Doing Business in Switzerland – A Practical Guide (second edition)

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Introduction

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Even though Switzerland is a comparatively small country it offers many advantages which make it attractive for foreign companies to do business in or from Switzerland as a hub to its European operations. First of all, its political stability and the strong currency make Switzerland a reliable and attractive destination for foreign investments. As a result of the high purchasing power of consumers, it is also an attractive target market. Furthermore, Switzerland is located in the heart of Europe and well connected to the world. Switzerland's legal system combines the best of both, the French and German legal influences and has proved to be stable over time. Switzerland's tax system and tax rates are still comparatively attractive. Last but not least, Switzerland has coped reasonably well with the COVID-19 pandemic and has been able to avoid a complete lock down. These reasons have led foreign companies to consider investing in Switzerland or selling their products and services in Switzerland. Also, Switzerland has become an important arbitration hub and foreign parties increasingly choose Swiss law to govern their contracts and – ultimately – disputes.

This publication shall provide a first overview on the various aspects of investing in Switzerland and entering the Swiss market. It is aimed at practitioners seeking first hand legal advice on key considerations and restrictions under Swiss law but also shall provide general counsels and foreign lawyers a first overview on selected aspects of doing business in Switzerland. Naturally, such an overview cannot be exhaustive. In particular, the booklet does not address regulatory topics (such as banking and insurance laws or pharmaceutical and medical devices regulation). Since the publication of the first edition in 2020, there have been numerous changes in Swiss law. In particular, Swiss law on corporations has been revised (*Aktienrechtsrevision*) with the new law entering into legal force as of 1 January 2023.

The guide has been prepared by lawyers of Walder Wyss who are experts in their respective fields. It would not have been possible without the support of Meike Pauletzki, Johannes Stamm (first edition), Marina Beeler and Milos Karic (second edition) who have edited and streamlined the text, for which we would like to thank them very much.

Urs Gnos and Theodor Härtsch (editors)

List of Abbreviations

AFMP .... Agreement on the Free Movement of Persons
APA .... Asset Purchase Agreement
approx. .... approximative(ly)
Art. .... Article
B2B .... Business to Business
BilA .... Bilateral Agreement between Switzerland and the EU on Certain Aspects of Government Procurement
BX .... BX Swiss
CartA .... Federal Act on Cartels and other Restraints of Competition
CHF .... Swiss Francs
CO .... Swiss Code of Obligations
COMCO .... Swiss Competition Commission
ConsumIA .... Federal Act on Consumer Information
CPC .... Swiss Civil Procedure Code
D&O .... Directors and Officers
DCBA .... Federal Act on Debt Collection and Bankruptcy
DI .... Disability Insurance
DTT .... Double Tax Treaty
e.g. .... exempli gratia
EBITDA .... Earnings Before Interest, Taxes, Depreciation and Amortisation
EEA .... European Economic Area
EFTA .... European Free Trade Association
ESG .... Environmental, Social and Governance
et seq. .... et sequens
etc. .... et cetera
EU .... European Union
FAFNI .... Federal Act on Foreign Nationals and Immigration
FAPP .... Federal Act on Public Procurement
FATF .... Financial Action Task Force
FDPA .... Federal Data Protection Act
FER .... Fachempfehlungen zur Rechnungslegung
FinIO .... Federal Financial Institution Ordinance
FINMA .... Swiss Financial Market Supervisory Authority
FINMASA .... Federal Act on the Swiss Financial Market Supervisory Authority
FinSA .... Federal Financial Services Act

FMIA.....Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading
FMIO .... Federal Financial Market Infrastructure Ordinance
FPWA........ Federal Posted Workers Act
GAAP .... Generally Accepted Accounting Principles
GDPR .... General Data Protection Regulation, Regulation (EU) 2016/679
GPA .... World Trade Organization's Agreement on Government Procurement
i.e. .... id est
IAPP .... Intercantonal Agreement on Public Procurement
IBA .... International Bar Association
ICC .... International Chamber of Commerce
incl. .... including
IFRS .... International Financial Reporting Standards
IP .... Intellectual Property
IPI .... Swiss Federal Institute of Intellectual Property
IPO .... Initial Public Offering
JV .... Joint Venture
Labour Act .... Federal Act on Employment in Business, Trade and Industry
Ltd. .... Limited Liability
LEI .... Federal Law on Foreigners and Integration
Lex Koller .... Federal Act on the Acquistion of Real Estate by Persons abroad
LLC .... Limited Liability Company
LoE .... Fund for Loss of Earnings
M&A .... Mergers and Acquisitions
Merger Act .... Federal Law on Merger, Demerger, Conversion and Transfer of Assets and Liabilities
Money Laundering Act .... Federal Act on Combating Money Laundering and the Financing of Terrorism
OASI .... Old Age and Survivors' Insurance
OECD .... Organisation for Economic Co-Operation and Development
OPP .... Ordinance on Public Procurement
Para. .... Paragraph
PILA .... Federal Act on Private International Law
PPA .... Federal Act on Public Procurement
PPO .... Ordinance on Public Procurement
PTOs .... Public Takeover Offers
R&D .... Research and Development
SCC .... Swiss Criminal Code
SCPC .... Swiss Criminal Procedure Code
SDX .... Six Digital Exchange

SFTA .... Swiss Federal Tax Administration
SIEC .... Significant Impediment of Effective Competition
SIX .... SIX Swiss Exchange
SME .... Small and Medium Enterprises
SPA .... Share Purchase Agreement
SPV .... Special Purpose Vehicle
Swiss GAAP FER....... Swiss General Accepted Accounting Principles Professional Recommendations on Accounting
TAL .... Trading at Last
TOB .... Swiss Takeover Board
TRAF .... Federal Act on Tax Reform and AHV Financing
UCA .... Federal Act against Unfair Competition
UK .... United Kingdom
US .... United States of America
US GAAP .... United States Generally Accepted Accounting Principles
VAT .... Swiss Value Added Tax
WHT .... Swiss Withholding Tax
WIPO .... World Intellectual Property Organization
WTO .... World Trade Organization

Commercial Law in Switzerland

I. Commercial Agreements, Distribution & Franchising

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1. Swiss Contract Law in General

1.1. The Swiss Code of Obligations

The CO is the main source of law for commercial contracts governed by substantive Swiss law. The CO contains, amongst other subjects, general provisions regarding contract law as well as provisions on special types of contracts, *e.g.* purchase contract, lease, contracts for work or services. These provisions also apply (by analogy) to types of contracts that are not explicitly addressed by the CO (so-called innominate contracts).

1.2. Formation and Validity of Commercial Contracts

The main requirement for contract formation is the exchange of an offer and corresponding acceptance by the contracting parties. Both offer and acceptance must contain the essential terms (*essentialia negotii*) of the contract.

As a general rule, contracts can be concluded without any formal requirements. The main exceptions to this rule are assignments, suretyships (*Bürgschaften*) and contracts for the sale of land. In practice, the parties usually introduce formal requirements into their contractual relationship in order to be able to prove the content of their agreement.

Furthermore, Swiss contract law is based on the fundamental principle of contractual freedom. It gives the parties the freedom, within the limits of mandatory law, to conclude a contract or not, to choose their contractual partner, to establish the contract's content and to terminate or alter a contract. Swiss contract law contains very few mandatory provisions; further limits may arise from laws other than contract law, such as competition law, unfair competition law, criminal law or tax law.

A contract (or the pertinent part thereof) is void if its terms are impossible, unlawful or immoral. Furthermore, where there is an obvious discrepancy between performance and counter-performance under a contract (as a result of one party's exploitation, inexperience or thoughtlessness), the injured party may declare within one year that it will not honour the contract and demand restitution of any performance already made. In addition, a party entering into a contract under (fundamental) error, fraud or duress may generally declare to the other party within one year that it intends not to honour the contract; such party may, however, become liable for damages.

1.3. Incorporation and Application of Standard Terms

In B2B relationships, the rules applicable to general terms and conditions are hardly different from those applicable to individual contracts, in particular with regard to the concept of offer and acceptance. According to the Federal Supreme Court, judicial control of standard terms in B2B relationships is restricted to their incorporation and does not include substantive control of their content (except for the application of mandatory law). Nevertheless, the control of incorporation of standard terms tends to partly operate as a tool to control the substance of such terms, in particular under the general rule that unusual standard terms do not become part of the contract. Furthermore, if the wording of a particular provision allows two different interpretations, the drafting party has to bear the risk of ambiguity.

1.4. Breach of Contract and Remedies

The set of remedies available to the aggrieved party if the obligor fails to perform its obligations depends on the type of breach: impossibility, improper performance (including delivery of non-conforming goods) or delay.

If performance of an obligation becomes objectively impossible after conclusion of the contract due to the obligor's fault, the other party may claim damages. Different rules apply for subsequent impossibility without fault.

In case of improper performance by the obligor the other party may – as a general rule – either claim specific performance or damages. In practice, damages (positive interest) are the general remedy. These must place the other party in the position it would have been had the contract been properly performed. Depending on the type of contract and breach, the other party may also have the right to terminate or rescind the contract, to enforce warranty rights (*e.g.* repair or subsequent delivery in case of non-conforming goods), or to seek injunctive or other relief.

If the obligor is in default, it must pay damages for any delayed performance and is in principle also liable for accidental damage. An obligor in default on payment of a pecuniary debt must pay default interest of at least 5% *per annum*, unless agreed otherwise between the parties. In bilateral contracts and subject to certain requirements, the other party additionally has the option to (i) insist on performance, (ii) waive performance and ask for compensation for damage arising out of non-performance (positive interest), or (iii) withdraw from the contract and ask for compensation for damages caused thereby (negative interest). However, special provisions, *e.g.* with regard to sales contracts, may apply.

Under statutory Swiss law, damages are compensatory, that is, they are limited to the amount actually suffered by the claiming party. Such party must prove the damages suffered in actual monetary terms. However, it is also possible to agree on liquidated damages (aiming at compensating anticipated damage) or contractual penalties (having a punitive function). Yet, a judge may, at his discretion, reduce the amount of liquidated damages or a contractual penalty if he considers such amount to be excessive.

1.5. Liability and Limitation of Liability

The obligor is generally liable for any fault attributable to it. The obligor bears the burden of proving that it was not at fault with respect to the improper or non-performance of the contract.

Swiss law permits limitation (and exclusion) of liability, for instance regarding certain kind of damages or financial caps. However, any agreement concluded in advance and purporting to limit liability for unlawful intent or gross negligence is void. Furthermore, if the limitation of liability arises in connection with commercial activities that are officially licensed by the state (*e.g.* banks), the advance limitation of liability for slight negligence may, at the court's discretion, also be void. Moreover, limitation of liability is not permitted for death or personal injury, under specific provisions of the CO (*e.g.* regarding purchase contracts or contracts for work) or certain special laws such as the Product Liability Act.

1.6. Term and Termination

In principle, a contract may be entered into for a fixed term or an indefinite term. A fixed-term contract ends without notice. In contrast, a contract with an indefinite term may be terminated by either party by giving notice of termination in accordance with the termination provisions agreed between the parties or, if a contract does not contain any termination provisions or if mandatory termination provisions apply (*e.g.* lease or services), in accordance with the statutory provisions of the CO.

In particular, in case of continuing obligations, each party may terminate a contract with immediate effect at any time for valid reasons. Valid reasons are circumstances which render the continuation of the contract unacceptable for the terminating party. Such termination must be declared without undue delay.

2. Supply Contracts

2.1. In General

Depending on the type of materials, goods or services procured, supply side contracts are typically structured as purchase contract, contract for work or service contract or a combination thereof.

The characteristic element of a purchase contract is the exchange of an object of purchase (which may also consist of groups of assets, rights and claims of all kinds, forces of nature such as electricity and water or economic advantages such as goodwill and knowhow, to name a few) against money.

Meanwhile, both contracts for work and service contracts are characterised by an obligation to perform a certain work or service. The main distinction between these two types of contracts lies in the verifiability of success. In a contract for work, the service provider undertakes to perform work in order to provide a (tangible or intangible) work result meeting the agreed (or implied) specifications. The service provider hence owes an objectively verifiable effect or result. Classic examples are construction, manufacturing and maintenance contracts.

In contrast, under a service contract, the result of the service provider's efforts typically cannot be measured against an objective standard. Hence the service provider does not necessarily have to achieve the desired result in order to fulfil the contract but is merely obliged to perform the agreed services in a diligent manner. Services typically provided under a service agreement include consultancy or management services.

2.2. Drafting Considerations

For each of the abovementioned types of contract, the CO provides for a specific set of rules which supplement and, in case of conflict, precede the provisions of the general part of the CO (see section 1 above). However, since the vast majority of the provisions of the CO are non-mandatory, parties often opt to substitute a larger part of these provisions with their specific contractual agreement. Spelling out parties' obligations and available remedies in more detail is particularly recommendable in case of contracts that combine various types of services and deliverables and that do not clearly match one of the abovementioned contract types.

Whilst the specification of the deliverables and services and corresponding remuneration form the centrepiece of any supply agreement, the following aspects are a frequent cause of controversy and worth addressing, particularly in mixed-type contracts:

- Involvement of and liability for subcontractors: By default, the service provider under a contract for work is generally free to appoint subcontractors but remains fully liable for the end result. In contrast, by default the service provider under a service agreement is more restricted in appointing subcontractors but has limited liability in cases where such restrictions do not apply.
- Acceptance procedure, warranties and remedies: For purchase contracts and contracts for work the CO provides for specific (albeit not identical) default acceptance procedure as well as remedies in case of non-conformity of goods or deliverables. These often do not match parties' needs, particularly in case of more complex projects, and are therefore frequently modified.
- Termination: By default, the CO provides the customer under a contract for work with a number of termination options which are often modified or excluded. For service contracts, the CO provides that either party can terminate the contract at any time at its discretion (subject to liability for damages in case of untimely termination). The Federal Supreme Court has held several times that this termination right is mandatory and that the parties are hence not bound by the agreed contract duration or notice periods.

3. Distribution Agreements

3.1. In General

There are different ways for a manufacturer to get its goods to market. While some manufacturers take the decision to sell their goods directly to consumers through their own retail shops and web shops, most prefer to cooperate with intermediaries based on so-called distribution agreements. The most common types of distribution agreements in Switzerland are:

- Agency agreement: The agent serves as an extended arm of the manufacturer. The agent facilitates sales of goods or concludes sales agreements on behalf and for the account of the manufacturer.
- Distribution agreement in a narrow sense: The distributor is an independent dealer. The distributor purchases the goods from the manufacturer and resells them in its own name and for its own account. The distributor bears the sales risk.
- Franchise agreement: The franchisee is also an independent dealer but is distributing goods and services according to a uniform distribution and marketing concept as provided by the franchisor.

The parties are free to determine the terms within the limits of law. Important limits are set by competition law (see chapter on Competition Law section 2). Whilst an agency agreement has to comply with various mandatory provisions of contract law, the parties to the two other types benefit from considerable freedom to draft their contracts.

3.2. Agency Agreements

The agent's remuneration is performance-based. It is entitled to the agreed commission on all transactions which it facilitated or concluded during the agency relationship. Unless otherwise agreed in writing, the agent is also entitled to a commission on transactions concluded by the principal without the agent's active involvement, provided that the agent solicited the respective customer for transactions of that kind. If a particular territory or customer group is allocated exclusively to the agent, the agent is entitled to a commission on all transactions concluded with customers of that territory or customer group even if the agent did not contribute itself to the conclusion of the respective transaction. As disputes often arise at termination of the relationship, it is particularly advisable to agree on clear and convenient rules on the commissions which the principal owes at and after termination.

An agent may be mandatorily entitled to a reasonable compensation for clientele upon termination of the agency agreement if the following conditions are met: The agent, through its activities, has substantially increased the clientele of the principal; the principal benefits substantially from the business relationship with the clientele after termination of the agreement; the award of such compensation is not inequitable and the agreement has not been terminated for a reason attributable to the agent. The maximum compensation amount equals the agent's net annual earnings from the agency relationship calculated as the average for the last five years or, if shorter, the average over the duration of the agreement.

3.3. Distribution Agreements in a Narrow Sense

There are no specific provisions in Swiss contract law which apply to distribution agreements in a narrow sense. However, rules which are in principle designed for other types of agreements may apply to the individual distribution agreement by analogy. This may in particular hold for rules of agency law. The most important example of such an application by analogy is the compensation for clientele. The Federal Supreme Court outlined certain conditions under which a distributor might be exceptionally entitled to a compensation for clientele. In a nutshell, it requires that the situation of the distributor be similar to the one of an agent. The Federal Supreme Court examined the level of the distributor's autonomy: The more limited the distributor's autonomy and the stronger its integration in the seller's sales organisation, the higher the likelihood that the distributor might be entitled to compensation. This assessment has to be made on a case-by-case basis, taking the particular facts into consideration.

3.4. Franchise Agreements

Rules designed for other types of agreements may also apply to franchise agreements. Apart from sales agent law (*e.g.* the claim for compensation for clientele), individual rules of labour law may apply by analogy to protect franchisees, particularly in a subordination franchise agreement where the franchisee lacks autonomy for its business decisions (similar to an employee). The more the franchisee lacks autonomy, the more potential there is for labour law to be applicable by analogy. This risk can be mitigated by avoiding imposing restrictions and requirements on franchisees which would ordinarily be imposed on employees. It is also important to clearly state in the agreement that the franchisee will remain a legally independent entrepreneur with sufficient freedom to make its own business decisions. However, a judge may come to a different conclusion after having assessed the full agreement and the way that it was implemented. The application of labour law rules may have extensive consequences for the franchisor. For example, the franchisor may become responsible for the franchisee's social security contributions.

II. Consumer and Data Protection

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Switzerland has long been slightly more liberal than some other European countries in its approach to consumer protection as well as data protection regulation. However, Swiss law is heavily influenced by EU law. A large part of Swiss consumer protection law is based on EU laws, and Swiss data protection law is currently updated to align with the European data protection law and maintain Switzerland's status of adequacy.

1. Consumer Protection

1.1. In General

Switzerland's approach to consumer protection is somewhat fragmented. There is no overarching consumer protection framework, but a number of laws aim to protect consumers, either expressly or by implication. Generally, consumers are protected against misinformation, unfair contractual terms and product safety risks, for example when purchasing certain products (such as food, clothes, household appliances, furnishing, drugs, *etc.*) or certain services (such as financial services, telecommunication services, electricity, education, housing, transport *etc.*). The relevant laws usually require that products and services are described in a transparent and accurate manner and that products are safe.

Due to the lack of uniform regulation, there is no general understanding of what constitutes a "consumer". "Consumer" generally means an individual who buys goods or services for his personal or family use, but some laws, such as the PILA, have a more restrictive approach and apply only to goods or services of usual consumption.

1.2. Information Obligations

As mentioned above, a number of laws require that information about products and services is not misleading and allows consumers to understand and compare offers. For example, the UCA generally (including B2B settings) prohibits false or misleading information, which may include failure to provide information that is required for consumers to make an informed decision. Moreover, the ConsumIA states principles on the declaration of products and services, and the Ordinance on Price Indication contains detailed regulations on price indications to ensure that prices for products and services are clear, not misleading and comparable.

Many laws set forth specific obligations to inform consumers or ban certain statements, for example the Consumer Credit Act, the FinSA, the Act on Foodstuffs and Utility Articles, the Act on Medicinal Products and Medical Devices and the Ordinance on Medicinal Products Advertising and the Act on Package Travel.

1.3. Restricted Withdrawal Rights

Different from the EU Consumer Rights Directive, Swiss law does not grant a right for consumers to withdraw from distance and off-premises contracts. However, the Code of Ethics of the Swiss Association of Distance Selling (HANDELSVERBAND.swiss) provides for a fourteen-days withdrawal right. The code is not binding except for members, but it is customary for online sellers to accept withdrawals within the fourteen days following a purchase. In addition, there is a statutory withdrawal right for certain types of contracts, such as contracts for door-to-door sales, marriage or partnership brokerage and consumer credits.

1.4. Consumer Credit

An important piece of consumer protection legislation is the Consumer Credit Act, which had been introduced to implement EU legislation and which is intended to protect consumers against over-indebtedness. It regulates commercial consumer credit loans to private individuals. "Consumer credit" means consumer loans, consumer leasing agreements and certain credit cards for private use but excludes loans with an amount of less than CHF 500 or more than CHF 80,000, which run longer than three months and are not secured by collateral. Under the Consumer Credit Act, for example, consumer credit agreements must be in writing and include minimum information, and borrowers have a mandatory right to withdraw from the contract and accelerate repayment. Moreover, lenders must carry out a credit assessment and cap interest to a maximum rate.

1.5. Unfair Contract Terms

Under the UCA, general terms and conditions in consumer agreements are null and void if they are unfair. However, there is no definition of "consumer" in the UCA, and there is a lack of precedent and little guidance in the law as to what makes a clause "unfair". Moreover, there is no official list of clauses presumed to be unfair, different from the EU Directive on Unfair Terms in Consumer Contracts. However, by way of example a clause that allows a provider to update consumer agreements by providing notice and a right to object are very unlikely to be considered unfair.

1.6. Product Regulation

Different from consumer protection law in general, two main bodies of regulation govern Swiss product regulation. The Product Safety Act requires commercial manufacturers, which may include importers, to ensure that products placed on the market do not present relevant risk to the safety and health of users and third parties and comply with applicable specific requirements (usually based on EU laws) or the state of the art. Under the Product Liability Act, manufacturers are liable for damages where a faulty product leads to a person's death or injury or damage to property used for private purposes.

Again, a number of other laws contain additional requirements specific to certain products. Examples include the Product Safety Ordinance, the Act on Foodstuffs and Utility Articles, the Act on Medicinal Products and Medical Devices, and many more.

2. Data Protection

2.1. Legal Framework

Data protection in Switzerland is principally regulated by the FDPA and its ordinances (in particular the Data Protection Ordinance). Additionally, several laws contain provisions related to data protection in their specific field of application. The FDPA applies to data processing by both private entities and federal bodies. Moreover, all Swiss cantons have their own laws regulating data processing by cantonal and municipal bodies.

The FDPA has been recently revised and will enter into force on 1 September 2023, along with the revised Data Protection Ordinance. The revised FDPA will to a significant extent align Swiss data protection to the European legislation and will amongst others implement the principle of data protection by design and by default, the obligation to perform an impact assessment under certain circumstances and the obligation to notify data breaches to the Federal Data Protection and Information Commissioner (Commissioner) or data subjects unless an exception applies. The revised Data Protection Ordinance will contain additional provisions about topics such as data security, disclosure of personal data abroad, controller obligations, data subject rights and information *etc.* and it will set forth some additional documentation obligations (*e.g.* with respect to data protection impact assessments and to the data breach notification obligations).

The GDPR does not apply directly in Switzerland, but a Swiss based data controller may be subject to the GDPR under article 3 GDPR, *i.e.* when offering goods or services to individuals in the EU or EEA (*e.g.* through its online store) or monitoring individuals' behaviour within the EU or EEA (*e.g.* by way of online tracking tools), or in some cases under Swiss conflict of law rules.

2.2. Definition of Personal Data

Personal data is defined as all information relating to an identified or identifiable person. The current FDPA applies to the information of both individuals and legal entities, such as corporations. The revised FDPA will limit its application to personal data of individuals only. Stronger legal protection is provided for sensitive personal data and personality profiles.

2.3. Data Protection Principles

Any data processor must observe the general principles established by the FDPA, which are summarised below. A breach that cannot reasonably be avoided may be justified by valid consent, an overriding private or public interest or by law.

Personal data must not without justification be processed in a way that violates any provision of Swiss law that intends directly or indirectly to protect personality (lawfulness). The processing of personal data must be made in good faith and must be proportionate (this includes the obligation to data minimisation and to storage limitation). Personal data may be used only for the purpose specified at the time of its collection (purpose limitation) and both the fact that personal data is collected and the purpose for processing must be apparent to the data subjects (transparency). The data must be accurate. Data security must be ensured. Under certain circumstances consent of the data subjects may be required for the processing of personal data. The revised FDPA includes clauses which shall increase the data processing transparency (amongst other a clause listing the information to be provided to data subjects).

2.4. Data Transfers Abroad and Processing

Personal data may not be transferred to countries whose legislation does not provide for an adequate level of data protection (as a rule the EU/EEA countries are deemed to provide for an adequate level of data protection). In the absence of an adequate level of data protection, the protection of the personal data must be ensured by other measures. One of these measures are the revised standard contractual clauses of the EU, which the Swiss data protection authority has accepted as sufficient, subject to a transfer impact assessment and potentially supplementary measures where the legislation applicable to the recipient is not consistent with fundamental rights. Under the current FDPA, in certain circumstances, the Commissioner needs to be informed before a transfer abroad takes place.

2.5. Processing by Third Parties

Data processing may be delegated to a third party under an agreement, provided that the third-party data processor processes data only to the same extent as the data controller was authorised to do and that no legal or contractual confidentiality obligation prohibits the outsourcing.

2.6. Registration of Data Files and Inventory of Data Processing Activities

Under the current FDPA, if a private person or legal entity regularly processes sensitive personal data or personality profiles or regularly discloses personal data to a third party, then the data files must be registered, before they are created, with the Commissioner. There are a number of exemptions from the registration requirement (*e.g.* registration is not required if data is processed under a requirement of Swiss law, such as employment or social security law). The revised FDPA will abolish the registration duty for private persons. However, the data controller and the data processor will have to keep a record of their processing activities, whereby exceptions will apply.

2.7. Appointment of a Data Protection Officer

The FDPA does not provide for the role of Data Protection Officer as known *e.g.* under the GDPR. Nevertheless, limited regulatory benefits apply to companies which have appointed a data protection responsible registered with the Commissioner (current FDPA) respectively a data protection counsellor (revised FDPA).

2.8. Data Subjects Rights

Data subjects have the right to access to their data and ask for rectification and deletion. Answers to access requests shall be provided in writing within 30 days and without charge. The revised FDPA will introduce a right of data portability.

2.9. Consequences in Case of Privacy Breach

Privacy breaches may trigger consequences under criminal, administrative and/or civil law.

- Criminal sanctions: Fines of up to CHF 10,000 may be imposed against the individuals responsible for the intentional infringement (including contingent intent) of certain provisions of the FDPA. The revised FDPA will introduce certain additional provisions where individuals responsible for a breach may be liable to a fine, and increase the maximum fine to CHF 250,000. Contrary to the GDPR, Swiss data protection law does not provide for the possibility to impose administrative fines except in case of fines of CHF 50,000 or less where an investigation into the responsible individuals would be disproportionate.
- Administrative measures: The Commissioner may open an investigation which may lead to negative publicity and may result in a binding instruction by the Federal Administrative Court to cease or alter the data processing. The revised FDPA will further extend the administrative powers of the Commissioner.
- Civil claims: Under current legislation a breach of privacy may lead to civil claims, including cease and desist claims and claims for compensation of monetary damages. However, in practice it is usually not possible for claimant to establish and quantify the economic loss suffered as a result of the breach. The data subjects can also enforce their rights of information, correction and opt-out, and request that a court decision be published.

2.10. Processing Employee Data

In addition to the provisions of the FDPA, the processing of employee data by an employer is governed by article 328*b* CO. This provision allows an employer to process data concerning its employees only to the extent that the data relate to the employee's suitability for employment or is necessary for the performance of the employment contract.

With respect to internet use and e-mail monitoring in the context of the employment relationship, Swiss labour law prohibits the use of control and monitoring devices for the purpose of monitoring the behaviour of employees at the workplace, but allows the use of control and monitoring devices for other purposes (legitimate interest), provided the health and liberty of the employees is not compromised. The Commissioner has issued specific guidelines on this topic. As a rule, it is recommendable for employers to have policies regulating the acceptable use of internet and e-mail and its monitoring.

III. Intellectual Property

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1. In General

As a worldwide leader in research and innovation, Switzerland provides for adequate legal protection of IP rights comparable to the protection in jurisdictions of other industrialised nations. Swiss IP law protects copyrights, trademarks, patents, designs, topographies of semiconductor products and plant varieties.

Swiss law also protects other intangible assets such as company names or domain names. Furthermore, the UCA prevents market players for example from taking measures that may cause confusion with goods, works, services or the business of others. Unlike the EU, a *sui generis* database protection right is unknown in Switzerland. However, databases that are creative and original in the selection and/or the arrangement of the contents can be protected under copyright law, and the UCA may also provide protection to some extent.

In the field of IP law, Switzerland is a member of all important international organisations, such as the World Intellectual Property Organisation or the European Patent Organisation. It has ratified all important international treaties which concern IP in general, and copyright, trademarks, patents, designs and plant varieties in particular. Moreover, Switzerland has signed and ratified several bilateral free trade agreements, *e.g.*, with the EU, China and Japan, and concluded a high number of treaties with other trade partners within the framework of the EFTA, which also include clauses regarding the protection and enforcement of IP rights.

This strong international legal network does not only support the effective protection of foreign IP in Switzerland, but also ensures that Swiss IP rights, in particular patents and trademarks, can be efficiently extended to an international level.

2. The Swiss Federal Institute of Intellectual Property

The federal government has mandated the IPI with the administration of IP rights in Switzerland. This includes the examination, granting and administration of the registrable industrial property rights such as patents, trademarks and designs. Patent protection for Switzerland is also available via the European Patent Office.

Patents are granted by the IPI for technical inventions and are valid for a maximum of 20 years. An extended protection is available for medicinal products under certain conditions. Unlike the European Patent Office, the IPI does currently not examine for novelty or inventive step. However, the ongoing revision of the Patents Act will likely introduce an option for applicants to request a full examination of patents granted by the IPI.

Trademarks are protected for an initial period of ten years, which then, for any number of times, can be extended for another ten years. The IPI's examination of trademark applications is limited to absolute grounds for refusal (*e.g.*, lack of individual character, misleading of the public). Compared to other jurisdictions, the examination by the IPI is rather strict. By contrast, the IPI does not examine relative grounds for refusal, *i.e.*, whether a trademark application may infringe prior trademark rights. It is therefore strongly recommended to conduct trademark searches before registering a new trademark in Switzerland.

The protection period for designs is five years and can be extended up to four times, leading to a total of 25 years of protection. The IPI does not examine designs for novelty or individual character.

The IPI keeps separate registers for patents, trademarks, designs, and topographies of semiconductor products (available at www.swissreg.ch). International trademarks that are protected in Switzerland are not shown in the register and must be searched via the trademark database "Madrid Monitor" of the WIPO (available at www.wipo.int/madrid/monitor/en/).

In Switzerland, copyright protection begins with the creation of the work and lasts fifty years after the death of the author for computer programs, fifty years after creation for photographs without individual character, and seventy years after the death of the author for all other works. Copyright vests in the individual who has created the work (no "work made for hire"). In order to benefit from copyright protection, it is neither necessary nor possible to register a copyright. Furthermore, it is not necessary to make references such as "copyright protected" or © on a product. It is, however, advisable to indicate authorship.

Since the introduction of the so-called "Swissness" legislation in 2017, the IPI has been increasingly active in the protection of Swiss geographical indications, in particular the "Swiss made" designation and the Swiss cross, both within Switzerland and internationally. It not only works together with governmental agencies, trade associations and businesses, but also with foreign trademark offices in order to enforce Swiss geographic indications. The IPI's practice is particularly strict with respect to trademarks containing any kind of geographical indication, but has been loosened to some extent recently.

3. Enforcement of IP Rights

An IP right has no value to an innovative company if it is not properly enforced. Companies should therefore act against individuals and companies that manufacture or sell counterfeit or imitated goods. Furthermore, patent owners should also take action if they believe that a patent has been unjustly granted (*i.e.* because the invention does not show novelty or an inventive step) or touches its own IP.

In order to become aware of such potential infringements, owners of IP should closely monitor licensees and competitors on the market as well as protective rights registers. This includes trademark and design monitoring in the relevant registers as well as technology monitoring of databases containing newly published patents and patent applications in the relevant technology sector. Companies may consider using third-party monitoring services.

3.1. Trademark Opposition and Cancellation Proceedings before the IPI

When approving or registering a trademark in Switzerland, the IPI does not examine whether the trademark may infringe prior trademark rights. In case an owner of a prior trademark believes that this is the case, an opposition may be filed with the IPI within three months after the publication of the registration of the trademark. The IPI will then decide whether there is likelihood of confusion between the trademarks, in which case it will cancel the registration. The opposition procedure before the IPI is a register-related procedure and intended to be simple, fast and cost-efficient.

It is possible to request cancellation of a third party's trademark on the grounds of non-use. The request may be filed with the IPI at the earliest five years following the expiry of the opposition period or, in the event of opposition proceedings, five years after the conclusion of opposition proceedings. Also, the cancellation proceedings are intended to be simple, fast and cost-efficient.

Decisions of the IPI in opposition and cancellation proceedings can be appealed to the Federal Administrative Court.

3.2. Actions before Swiss Courts

In Switzerland, especially in the field of IP, it is rather common to send a warning letter to the potential infringer prior to taking further legal action. This method not only gives the parties the chance to resolve the matter in a cost-efficient and non-litigant way, but the IP right owner may also benefit from a more favourable position in the litigation to follow. In particular, having been warned, the infringer can no longer claim to have acted in good faith, which may increase his liability towards the IP right owner.

However, in cases of urgency or where a warning letter is very unlikely to have an impact, the IP right owner, or potentially the exclusive licensee, may prefer to file an action for (preliminary) injunctive relief instead of going through the detour of sending a warning letter. In cases of urgency, preliminary legal protection has proven to be an effective tool. Interim measures, such as preliminary injunctions, can be obtained relatively quickly if certain conditions are met. This is the case if the owner of the IP right can provide prima facie evidence that (i) its right has been infringed or an infringement is imminent, (ii) this infringement threatens to cause not easily reparable harm, and (iii) there is urgency. If the requested measures are granted, the IP right owner will still have to file an infringement action in order for the interim measures to be upheld.

Pursuant to the CPC, a sole cantonal instance has jurisdiction over disputes in connection with IP rights (*i.e.*, copyrights, trademarks and designs), including concerning the nullity, ownership, licensing, transfer and infringement of such rights. The same applies inter alia to disputes under the UCA if the amount in dispute exceeds CHF 30,000 or to disputes on the use of a business name. For most cantons, this sole cantonal instance is the court that is also the highest instance in the canton, usually called High Court. In the cantons of Aargau, Berne, St. Gallen and Zurich, it is the Commercial Court, a court specifically created to be seized in commercial disputes. The decisions of the cantonal High Courts or Commercial Courts may be appealed to the Federal Supreme Court.

The Federal Patent Court has exclusive jurisdiction in civil matters concerning the validity and the infringement of patents as well as in ordering preliminary measures relating to such matters. Other civil actions relating to patents, in particular concerning the right to patents or their assignments or concerning disputes based on an agreement (*e.g.*, patent license agreement), can be brought either before the sole cantonal instance or before the Federal Patent Court. The advantage of the Federal Patent Court is that it is in general composed of qualified judges, trained in technical and/or legal aspects of patent law. The members of panel judging a specific case are assigned according to expertise criteria in order to ensure high quality decisions. The decisions of the Federal Patent Court may then be appealed to the Federal Supreme Court.

4. Intellectual Property Rights in Transactions

4.1. Assignment

Any IP right, in whole or in part, can in principle be assigned from the current owner to another person. In order for an assignment of a patent, trademark or design to be effective, it must be in writing (whereas there are no formal requirements for the underlying undertaking to assign the IP right). Although it is not required to enter the transfer in the respective register, it is still advisable to do so both in the interest of the assignor as well as of the assignee. As long as the assignment has not been entered into the register, any legal action can still be brought against the previous owner and the assignment is not effective in relation to third parties who are acting in good faith.

Also, copyrights are assignable, in whole or in part. Unlike patents, trademarks or designs, copyrights can be assigned without a written agreement, even though written evidence is advisable both with regard to further business relationships as well as potential litigations. By contrast, moral rights of the author, such as the right of paternity, the right of integrity, and the right of first publication, cannot be assigned at all. An author may however waive his moral rights to a certain extent.

The Swiss trademark law contains an assumption that, unless otherwise agreed between the parties, the assignment of a business (by means of an asset deal) also includes the assignment of its trademarks. This does not apply to other IP rights such as patents, designs and copyrights. It further does not apply to transactions under the Merger Act such as a demerger or a transfer of assets and liabilities. In those cases, the transferred IP rights must be individually itemised in the respective contract. It is thus advisable to individually list all IP rights to be transferred, including trademarks.

4.2. Licensing

IP rights can be licensed to third parties. There are no formal requirements. However, the registration of a license is often advisable since an unrecorded license cannot be held against a third party acquiring the patent, trademark or design in good faith.

Holders of an exclusive license to a patent, trademark, design or copyright, are also entitled to bring infringement actions, such as actions seeking injunctive relief or actions for damages, unless this right was excluded in the license agreement.

4.3. Pledge

IP rights may also be subject to a pledge. A pledge gives the pledgee the right to liquidate the pledged IP right in case of default on the part of the debtor. An agreement stipulating that the pledged IP right will become the property of the pledgee in the event of default is, however, invalid under Swiss law. Furthermore, the pledge is considered to be an accessory security interest and thus depends on the existence and validity of the secured claim.

In order for the pledge of a trademark, patent, design or copyright to be effective, it must be agreed in writing. Pledges do not have to be entered in the register. It is nevertheless advisable to record the pledge, since the pledge cannot be held against a third party acting in good faith.

IV. Competition Law

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1. In General

Swiss competition law is laid down mainly in the CartA and accompanying ordinances, such as the Ordinance on the Control of Concentrations of Undertakings.

Swiss competition law is closely aligned to EU competition law. The corresponding EU competition rules are regularly, although not consistently, used by the competent Swiss authorities and courts as a source of interpretation. Similar to the basic structure of EU and most national competition laws, Swiss competition law covers the three pillars consisting of (horizontal and vertical) anti-competitive agreements, abuses of dominant positions and merger control. However, differences to EU competition law remain and deviations thus do occur.

COMCO and its Secretariat are the competent bodies for enforcing Swiss competition law. While the Secretariat has broad investigative powers, COMCO has the competence to issue binding decisions and levy substantial administrative fines. One of the focuses of COMCO's practice lies in preventing direct or indirect restrictions of parallel imports into Switzerland with an aim to opening the Swiss market and combatting high price levels in Switzerland (see section 2 below). The CartA has a broad scope of application. Even agreements or practices of foreign entities fall within its scope if they have or may have an effect on the Swiss market.

2. Anti-Competitive Agreements

Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency as well as all agreements that eliminate effective competition are unlawful.

The notion of agreements affecting competition has a broad scope, covering not only written or oral agreements, but also non-binding gentlemen's agreements and concerted practices of undertakings. Decisions of associations and information exchanges among competitors relating to commercially sensitive information may also qualify as agreements affecting competition in the sense of the CartA and thus pose particular risks. In contrast, group-internal relationships do not fall within the scope of the CartA.

Horizontal agreements between competitors on prices or price elements (such as rebates), quantities, or the allocation of territories or customers are presumed to eliminate effective competition (so-called hardcore restrictions). Such hardcore restrictions can hardly ever be justified on economic efficiency grounds.

Similarly, vertical agreements between a supplier and a distributor on fixed or minimum resale prices and agreements on absolute territorial protection are presumed to eliminate effective competition and thus qualify as hardcore restrictions, irrespective of whether the agreement has actual effects on the relevant market. Absolute territorial protection clauses are *inter alia* bans of passive sales, *i.e.* bans to fulfil unsolicited customer orders. Combatting absolute territorial protection clauses is a key focus of COMCO's practice. Fostering parallel imports into Switzerland is largely viewed as a remedy against the allegedly high price levels in Switzerland. Hence, also indirect restrictions of parallel imports into Switzerland, such as an obligation of the distributor to source contractual products only in Switzerland, qualify as absolute territorial protection clauses.

Horizontal and vertical hardcore restrictions are null and void and are sanctioned with high fines if they have or may have an effect on the Swiss market. Hence, even agreements between parties abroad can be caught (*e.g.* an agreement between a German manufacturer and a German distributor on restrictions of passive sales into Switzerland). Fines are directed at the companies involved, not the management or individuals. Group companies in Switzerland may be fined for unlawful acts of group companies abroad. Fines can reach up to 10% of the undertakings' turnover in Switzerland in the preceding three financial years.

Other horizontal and vertical agreements (such as clauses in R&D cooperation agreements) which have or may have an effect in Switzerland, but which do not contain hardcore restrictions, need to be assessed on a case-by-case basis. Some guidance for the assessment of vertical agreements (such as, *inter alia*, selective distribution systems and online sales) and for agreements in specific sectors (such as in particular for the distribution of motor vehicles) is laid down in notices issued by COMCO. COMCO's Notice on the Competition Law Treatment of Vertical Agreements (Verticals Notice) and COMCO's Explanatory Notes thereto have been revised in light of the revised EU Vertical Block Exemption Regulation (Commission Regulation [EU] 2022/78 of 10 May 2022) and the accompanying revised Guidelines of the European Commission on vertical restraints. The revised Verticals Notice and COMCO's Explanatory Notes have entered into force on 1 January 2023.

3. Unlawful Practices by Dominant Undertakings

Dominant undertakings may not abuse their market dominance by hindering other undertakings from entering the market or from continuing to compete (*e.g.* by pricing below cost), or by disadvantaging trading partners (*e.g.* by imposing excessive prices or unfair trading terms). Undertakings have a dominant position on a specific market if they are able to behave to an appreciable extent independently of the other market participants (*i.e.* competitors, suppliers or consumers).

According to Swiss case law, a dominant position is presumed for companies with a market share of 50% or more. However, companies with lower market shares of approx. 40% can also be found being dominant.

As of 1 January 2022, the concept of relative market power has been introduced into the CartA. An undertaking has relative market power if another undertaking is dependent on it for the demand or supply of a product or service in such a manner that it does not have adequate and reasonable opportunities for switching to other undertakings. Relative market power does not relate to a general market position, but rather merely to a specific bilateral relationship between undertakings.

Both dominant undertakings and undertakings with relative market power may not abuse their position. The CartA contains a non-exhaustive list of abusive behaviour. In particular, the following practices by dominant undertakings and undertakings with relative market power are unlawful:

- Refusals to deal (*e.g.* refusal to supply or to purchase goods);
- Discrimination between trading partners in relation to prices or other conditions of trade;
- Imposition of unfair prices or other unfair conditions of trade;
- Predatory pricing or other conditions directed against a specific competitor;
- Limitation of production, supply or technical development;
- Tying and bundling practices; and
- Restriction of the ability for buyers to purchase goods or services which are offered both in Switzerland and abroad at the customary local foreign market prices and conditions. This exemplary abusive behaviour was introduced as of 1 January 2022. It obliges companies with relative market power and dominant companies to supply goods and services to Swiss buyers at the same, typically more favourable, conditions as offered abroad.

A dominant undertaking which abuses its dominant position is charged with a fine of up to 10% of the turnover that it achieved in Switzerland in the preceding three financial years. In contrast, no direct sanctions in the form of fines are imposed for abuses of relative market power. However, fines are due in case of violation of a decision or amicable settlement by which an abuse of relative market power has been established by the competent authorities.

4. Merger Control

4.1. Notifiable Concentrations

Mergers, acquisitions of sole or joint control over a previously independent undertaking as well as the setting up of full-function joint ventures (concentrations) must be notified to COMCO prior to their implementation if the following turnover thresholds are reached in the financial year preceding the concentration:

- The undertakings concerned together reported a turnover of at least CHF 2 billion, or a turnover in Switzerland of at least CHF 500 million; and

- At least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF 100 million.

Irrespective of whether the above turnover thresholds are reached, a concentration must be notified in any case if one of the undertakings concerned has been held to be dominant in a market in Switzerland in a binding decision and the concentration pertains to either the same market or a neighbouring, upstream or downstream market.

4.2. Merger Control Procedure and Assessment

COMCO has a one-month period for a preliminary assessment of a notified transaction (Phase I). Thereafter, the concentration may be implemented, unless COMCO notifies the respective undertakings of the opening of a Phase II investigation, which must be conducted within an additional four months. concentrations may not be implemented before Phase I and, if relevant, Phase II is completed.

The test for assessing notified concentrations is whether they lead to the creation or strengthening of a dominant position on the relevant market that is likely to eliminate effective competition. The threshold for intervention is thus comparatively high. So far, only three concentrations were prohibited. A few concentrations were cleared subject to conditions and/or remedies.

The CartA is currently being revised. One of the core elements of the ongoing revision is to change the current test for assessing mergers to the more commonly used SIEC test. The revision is currently being discussed in the Federal Parliament. The outcome of the revision is still uncertain. Any possible changes are not expected to enter into force before 2024.

Failure to comply with the current merger control regime (*i.e.* failure to notify a notifiable concentration, failure to observe the suspension obligation, failure to comply with a condition attached to an authorisation, implementation of a concentration despite prohibition to do so, and failure to implement a measure intended to restore effective competition) is charged with a fine of up to CHF 1 million (fines can be even higher in case of repeated failure to comply with conditions attached to the authorisation of a concentration).

5. Administrative Procedure and Enforcement

5.1. Investigative Powers and Dawn Raids

The Secretariat of COMCO has the competence to conduct informal market observations, to open preliminary investigations and (in consultation with a member of the presiding body of COMCO or if ordered to do so by COMCO or by the competent Federal Department) to open formal investigations.

The Secretariat has the competence to collect evidence and hold hearings. It may also conduct dawn raids (based on an approval to do so by a member of the presiding body of COMCO) at companies' premises as well as *e.g.* in private homes and vehicles in case of a reasonable suspicion of anti-competitive conduct and likelihood of finding relevant evidence at the premises which are being searched. In the course of a dawn raid, documents may be seized, including communications with in-house counsels. In contrast, communications between the company concerned and its external counsel are covered by the attorney-client privilege and may thus not be searched.

Switzerland and the EU have entered into a cooperation agreement which allows for closer coordination of enforcement activities in the area of competition law and sets a basis for mutual information exchanges between the competition authorities even without the consent of the undertakings involved. A similar cooperation agreement was signed between Switzerland and Germany on 1 November 2022. The agreement will allow COMCO and the German Federal Cartel Office to cooperate more closely in the future. In Switzerland, the agreement still has to be approved by the Federal Assembly.

5.2. Decision-Making, Sanctions and Appeals Procedure

COMCO has the competence to issue binding decisions and impose fines based on the investigations conducted by its Secretariat. As mentioned above, fines may be levied for the most severe forms of horizontal and vertical anti-competitive agreements, for abuses of a dominant position and for failures to comply with the merger control regime.

Decisions of COMCO can be appealed to the Federal Administrative Court for a full review of the facts and legal grounds. The appeals decision may be further appealed to the Federal Supreme Court for a review which is limited to the legal assessment of the case.

Amicable settlements between COMCO and the undertakings involved in an administrative procedure are common and typically contain binding commitments by the undertakings.

The CartA contains a leniency regime in order to facilitate detection of anti-competitive agreements. The first company which files a leniency application in relation to an agreement which qualifies as a hardcore restriction benefits from full immunity from administrative sanctions under certain conditions. Leniency applicants which file subsequently may still benefit from a reduction of the fine of up to 50%. In addition, undertakings which provide information or evidence of a further hardcore restriction may benefit from a reduction of the fine of up to 80%.

6. Civil Procedure

Civil competition litigation is rare in Switzerland, although civil actions are possible. Claimants affected by a restraint of competition (*i.e.* by an unlawful agreement or an abuse of relative market power or of a dominant position) can bring civil competition actions before the competent cantonal civil courts. Consumers are not authorised to file civil claims based on the current CartA. The hurdles for claimants are high, as they largely bear the burden to obtain evidence in support of their claims. One of the main aims of the mentioned ongoing revision of the CartA is to facilitate civil enforcement of competition law in Switzerland. In particular, the right to bring civil competition actions shall be expanded to all parties affected by an unlawful restriction of competition, including consumers and public bodies, such as public contracting authorities.

The adverse party to a civil claim is, in case of an unlawful agreement, one of the undertakings involved in such agreement. In case of abuse of a dominant position, the adverse party is the dominant undertaking.

Neither collective actions nor actions by associations currently exist under Swiss competition law. The introduction of collective actions and actions by associations has been debated controversially for several years. A new proposal in this respect is currently being discussed in the Federal Parliament. Under the current regime, several claimants can bring a claim as a simple dispute association or can assign their claims to a third party which then brings the assigned claims as a claimant in its own name.

As a remedy, the court can award damages equal to the incurred loss which the claimant was able to prove. Further remedies such as punitive damages do not exist under Swiss law.

V. Public Procurement

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1. In General

In Switzerland, the public sector acquires goods and services in order to perform a public function in an estimated amount of more than CHF 40 billion each year. This so-called public procurement not only requires efficient and effective management of public resources, but also is of important economic significance.

2. Relevant Legislation

Swiss public procurement law is essentially characterised by international treaties according to which Switzerland has undertaken to open up its public markets to providers from abroad in order to facilitate Swiss providers' access to foreign markets in return. Switzerland's international obligations in the field of public procurement are namely incorporated in the GPA 1994 and the revised GPA 2012 and the BilA.

These international legal requirements have been implemented in Swiss domestic legislation. As a consequence of Switzerland's federal structure, public procurement law is highly fragmented. There are public procurement provisions at federal level (the PPA and the corresponding PPO), at intercantonal level (IAPP 2001 and the revised IAPP 2019), at cantonal level and to a certain extent at municipal level.

The GPA 1994 has been revised and was replaced by the GPA 2012. Together with the ratification of the GPA 2012, the entire legislation on Swiss public procurement law underwent revision in order to implement the GPA 2012 into Swiss domestic law. In June 2019, Swiss Parliament enacted the total revision of the PPA which transposes the provisions of the GPA 2012 into national law (PPA). The revised PPA, together with the corresponding ordinance (PPO), entered into force on 1 January 2021.

The legislative revision process also involved the cantons with a view to harmonise Swiss public procurement law. On 15 November 2019, the revised provisions of the intercantonal regulation (IAPP 2019) that are, *mutatis mutandis* and subject only to few exceptions, identical with the provisions of the PPA , were approved. On 1 July 2021 the IAPP 2019 entered into force after being ratified by two cantons. It can be expected that the cantons will incorporate the IAPP 2019 into cantonal law. Meanwhile, most cantons have started to enact the IAPP 2019 into its cantonal law, but only few have already completed the process. Until a canton has acceded to the IAPP 2019, it remains subject to the IAPP 2001.

3. Main Goals of Swiss Public Procurement Law

In accordance with the GPA 2012, Swiss public procurement law shall ensure open, fair and transparent conditions of competition in the public procurement markets.

The PPA and the IAPP 2001/IAPP 2019 summarise the main goals of Swiss public procurement law as follows:

- Economically, ecologically and socially sustainable use of public funds;
- Transparency of the award procedure;
- Equal treatment and non-discrimination between suppliers; and
- Promotion of effective, fair competition among suppliers, in particular through measures against unlawful agreements on competition and corruption.

4. Applicability of Public Procurement Law in Switzerland

Basically, the applicability of public procurement law is determined by answering two questions:

- Which (public) entities are subject to public procurement law (subjective scope, see section 4.1)?; and

– What kind of goods and services must be acquired pursuant to the rules of public procurement law (objective scope, see section 4.2)?

4.1. The Subjective Scope: Entities Subject to Public Procurement Law

Pursuant to the above-mentioned international treaties (GPA 2012, BilA) and national legislation (PPA, PPO) the general federal administration and its departments, the cantonal administrations, – in exceptional cases – municipalities, other territorial and personnel bodies, *i.e.* public or private organisations under the decisive influence of the public sector, which are active in the water and energy supply sectors and in the transport supply sector, are subject to public procurement law. In relation to the EU, public procurement law also applies to further awarding authorities (providers of telecommunication, rail, energy and other public services) as well as municipalities and to private contracting authorities that perform public tasks.

For those areas not captured by Switzerland's international obligations, the PPA/IAPP 2001/IAPP 2019 designate further awarding authorities at federal level which are subject to Swiss public procurement law, *i.e.* private and public law organisations that perform public tasks, in the areas of infrastructure, telecommunications and the supply of transport services, water and electricity, which are either controlled by the Confederation or have been granted exclusive, special rights (*e.g.* concessions) by the responsible community, as well as the federal courts and the parliamentary services. For public contracts awarded at cantonal and municipal level, IAPP 2001/IAPP 2019 stipulate that all entities responsible for cantonal and municipal tasks and services in the field of supplies, services and construction subsidised with public funds exceeding 50 % of the total costs must tender their procurement in accordance with public procurement law (see section 5 below).

4.2. The Objective Scope: Type of Public Procurement Subject to Public Procurement Law

The objective scope of public procurement law is determined by the nature of the public contracts to be awarded. If the awarding authority falls within the subjective scope of public procurement law (see section 4.1 above), the award of the following public contracts must comply with the applicable provisions of public procurement law:

- Supply contracts, *i.e.* public contracts for the supply of movable goods, in particular by purchase, lease, rent or hire;
- Service contracts, *i.e.* public contracts for the rendering of services; and
- Construction contracts, *i.e.* public contracts for building and civil engineering work.

The PPA and the IAPP 2001/IAPP 2019 enumerate certain exceptions, *e.g.* services relating to national security. As a key change to the previous laws, the PPA/IAPP 2019 explicitly include the transfer of public tasks and the award of monopoly concessions into the objective scope of the revised legal provisions.

5. Award Procedure

5.1. Differentiation between Procurement Governed by the International Treaties and by National Procurement Law Only

It is the estimated value of the procurement that determines whether the provisions relating to the international treaties (GPA 2012, BilA) apply.

At federal level, the objective scope of the international agreements applies if the estimated value (excluding VAT) exceeds CHF 230,000 for supplies and services and CHF 8,700,000 for construction works, respectively. At cantonal level, the thresholds for supplies and services are slightly higher (CHF 350,000 excluding VAT respectively CHF 700,000 excluding VAT for authorities and public companies in the water, energy, transport and telecommunication sectors).

All public procurement with an estimated value below these thresholds are subject to the specific federal or cantonal public procurement provisions only.

5.2. Types of Award Procedures

Public procurement law provides for four different types of award procedures: (i) the open procedure, (ii) the selective procedure, (iii) the procedure on invitation and (iv) the direct award.

Basically, the open or selective procedure apply. In the open procedure a public call for tenders is launched and any interested supplier can participate and submit an offer. The selective procedure contains two stages: First, the awarding authority publicly invites suppliers to submit applications for participation. The awarding authority examines whether the applicants meet the requirements for participation in the awarding procedure. Secondly, suppliers qualified in the pre-selection process are accepted for submitting bids. Calls for tender and the award of public contracts must be published on www.simap.ch, a joint electronic platform of the federal government, the cantons and the municipalities.

Within the scope of the international treaties only the open or selective procedure apply, unless the restrictive conditions for a direct award are fulfilled (*e.g.* no suitable tenders are received in an open or selective procedure, artistic or technical specificity of the contract *etc.*).

Outside the scope of the international treaties and if the estimated value of the procurement does not exceed a certain threshold the procedure on invitation or the direct award may apply. In the procedure on invitation, the awarding authority invites (at least three) suppliers to submit bids without a prior public call for tender.

5.3. Tender Process and Conclusion of the Agreement

Public procurement procedures in Switzerland are characterised by public law governed tender procedure as first step and followed by the conclusion of the contract with the supplier of the awarded bid as second step. Typically, the contract is governed by private law.

The public law governed tender procedure is based on the general principles outlined in section 3 above and shall ensure that the most advantageous bid is awarded. To this effect, the awarding authority must define the relevant award criteria (price, quality aspects, environmental sustainability, customer service, expedience of the service, aesthetics and technical value) and disclose them to the bidders including the relative weighting given to each of these criteria in the tender documents.

Under Swiss procurement law the award is construed as an administrative act that is subject to appeal by the non-awarded bidders (see section 6 below). Typically, the contract must not be concluded before this administrative act has entered into legal force.

6. Remedies

The legal procedure under public procurement law is governed by federal law in federal procurement procedures and by cantonal and municipal law in cantonal or municipal procurement procedures. The IAPP 2001/IAPP 2019 set minimum standards for the cantonal and municipal legal procedure.

In the interest of procedural economy, not all procedural steps are subject to appeal. However, certain procedural deficiencies (*e.g.* unfair definition of the relevant award criteria) must be objected immediately and might be rejected as late if included in the appeal against the award.

The appeal against the unlawful award may result in an award of the contract to the appellant, if the contract has not been awarded based on the disputed award at the time of the court ruling. If, however, the contract between the contracting authority and the awarded bidder has been concluded during the appeal proceedings, the court will only conclude that the contested award was unlawful, but not cancel the contract. In this event, the awarding authority is liable for damages caused by its (unlawful) award. If the PPA/IAPP 2019 are applicable, the appeal court may also award compensation for damages.

Corporate Law in Switzerland

I. Legal Forms of Companies

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1. In General

A commercial activity in Switzerland may be carried out through commercial structures that focus either on personal commitment and liability (partnerships) or on share capital commitment (capital companies).

In this context, there are many different legal forms available in Switzerland to do business, such as sole proprietorship, general partnership, limited partnership, corporations, LLCs or cooperatives. In addition, the simple partnership is available as contractual arrangements among partners. It is, however, not a legal entity but a bare agreement.

The two most frequent forms for entrepreneurs who wish to develop a commercial activity in Switzerland are (i) corporations and (ii) LLCs.

This chapter shall therefore be limited to the review of the main aspects and particularities related to the incorporation of a Swiss corporation (see section 2 below) and LLC (see section 3 below).

2. Corporation

2.1. Constitution

Art. 620 CO provides that a corporation is a capital company formed by one or more persons, commercial companies or communities of law, whose share capital is determined in its articles of association and whose debts are covered only by the company's assets.

The corporation acquires legal personality upon its registration with the competent commercial register (available under www.zefix.ch) and the publication thereof in the Swiss Official Gazette of Commerce (available under www.shab.ch).

The minimum share capital required by law is CHF 100,000 divided into shares with a nominal value greater than zero. The share capital may be set in one of the approved foreign currency (*i.e.* currently only euros, pound sterling, dollars or yen) . Companies with share capital in a foreign currency will have to keep accounts and file financial reports in the same currency.

The minimum amount to be contributed upon incorporation must equal 20% of the nominal value of each share, but at least CHF 50,000 (if the share capital is set in a foreign currency, the contributions made must be equivalent to at least CHF 50,000 at the time of incorporation). The share capital may be contributed in cash or in kind. The articles of association may also provide for a capital fluctuation margin allowing the board of directors, for a maximum period of 5 years, to increase up to 50% the share capital registered with the commercial register and/or reduce it by half (but not less than the minimum amount). The articles of association may provide for specific conditions or restrictions.

The amount of the paid-in capital (in case of cash payment) must be deposited in escrow with a Swiss bank. The amount of the contributed share capital shall be released by the depository bank upon completion of the registration procedure of the company with the competent commercial register. In case of contribution in kind, the value retained for the assets contributed must be reviewed and confirmed by a licensed auditor.

2.2. Shares Issuance and Transfer

Shares of a corporation are issued as registered shares. Registered shares are, if issued, issued in the name of the (initial) shareholder and listed in a share register held by the company (Bearer shares are only admissible under restrictive conditions, *e.g.* for listed companies).

The articles of association of the corporation may provide for restrictions to the transferability of the registered shares, in which case an assignment, respectively acquisition of shares is subject to the approval of the company, *i.e.* its board of directors.

The company shall keep a list of the beneficial owners of the shares and such beneficial owner (necessarily being a natural person) of registered shares (not listed on a stock exchange) must in any case be disclosed to the company by the shareholder when the threshold of 25% of the share capital or votes is reached through the acquisition of shares, within one month following such acquisition.

The board of directors of the corporation must ensure that no shareholder exercises its rights while in breach of its obligations to give notice.

2.3. Organisation

With regard to the organisation of the corporation, the entity has necessarily two bodies, namely (i) the general meeting, which is the supreme authority of the corporation (regulated under Art. 698 *et seq.* CO), and (ii) the board of directors, which is the executive body of the corporation (regulated under Art. 707 *et seq.* CO). The third body of the corporation is the auditor of the company (regulated under Art. 727 *et seq.* CO), which is mainly responsible for the audit of the company's accounts. Under certain conditions, the company may limit its audit to a review of its accounts or even waive the audit requirement (for further details, see also Corporate Governance, section 2.5).

General meetings may be held virtually if so allowed by the articles of association and if the board of directors has designated an independent representative while calling the general meeting. Shareholders which are unable to attend the general meeting may vote electronically. General meetings may be held simultaneously in several locations (in Switzerland and/or abroad) provided that speeches are broadcast live, by audio-visual means, in each concurrent general meeting venue. If held abroad, the board of directors must designate an independent representative, whereas shareholders of non-listed companies may unanimously waive such a requirement. In addition, resolutions of the shareholders can also be adopted by way of circulation, unless an oral discussion is required by one of them (for further details, see also Corporate Governance, section 2.2.2).

Under certain conditions set by the CO, dividends may be paid from the balance sheet profit and reserves set aside for this purpose. Furthermore, interim dividends, *i.e.* distributions which the company pays from the profit of the current year, are permissible. The general meetings resolves on interim dividends and approves the interim financial statements. Unless the company has opted out from the requirement to perform a limited audit, the financial statements must be audited prior to the general meeting's resolution on interim dividends.

3. Limited Liability Company

The LLC has similar characteristics to the corporation. However, it constitutes a combination between (i) a company limited by shares since the rights and obligations of the partners are measured in principle according to their financial holdings, and (ii) a partnership as far as the management of the company is concerned.

Pursuant to Art. 772 and 773 CO, the LLC is a share capital company with separate legal personality formed by one or more persons or commercial enterprises. As the corporation, the LLC is liable for its obligations only to the extent of its assets.

The LLC's capital amounts to at least CHF 20,000 and must be fully paid-in. The capital amount may be set in a foreign currency (*i.e.* only in euros, pound sterling, dollars or yen). LLC's with capital amounts set in a foreign currency will have to keep accounts and file financial reports in the same currency. The nominal value of a share quota must be greater than zero. As for the corporation, the contribution can be made in cash or in kind. However, unlike the corporation, LLC's may not provide for a capital fluctuation margin mechanism.

The rules for the constitution and organisation of the LLC are substantially similar to those of the corporation described in sections 2.1 and 2.3 and, by express reference, certain provisions ruling the corporation apply to the LLC.

4. Corporations vs Limited Liability Companies

4.1. Main Differences between Corporations and Limited Liability Companies

Following the revision of the provisions of the CO on LLCs in 2008, the two forms of companies no longer present any material differences.

The most relevant differences between a corporation and an LLC we have retained are the following:

i. Publicity of participations: The register of shareholders of a corporation is neither publicly available nor disclosed with the commercial register. Instead, quota holders of an LLC have to be disclosed to and registered with the competent commercial register. As a consequence, a transfer of participation in an LLC has to be disclosed to and registered with the commercial register, thus adding transparency of the transfer of quota(s). Save where the articles of association provide for a restriction, shares in a corporation are freely (and anonymously towards third parties) transferable.
ii. Non-compete: The articles of association may impose a non-compete obligation to the quota holders of an LLC, which is not the case for shareholders of a corporation. However, such a non-compete undertaking for shareholders in a corporation may be set forth in a specific shareholders' agreement.
iii. Minimal nominal amount of capital: The minimum amount of the share capital of the corporation is of CHF 100,000 of which at least CHF 50,000 or 20% of the total nominal value of the issued capital must be paid-in. The minimum amount of the capital of the LLC is of CHF 20,000 and must be fully paid-in.
iv. Additional contributions: The articles of association may impose an obligation to the quota holders of an LLC to make additional contributions, which is not the case for shareholders of a corporation who only commit to paying the amount of their initial subscription.

Corporations are generally preferred to LLCs in the event of several shareholders and if the company carries out or contemplates to carry out numerous capital increases. In addition, corporations are usually preferred due to the higher amount of the minimum share capital required (*i.e.* CHF 100,000), which is intended to reassure counterparties as to the financial soundness of the company.

4.2. Change of Legal Form

The Merger Act allows a capital company to transform into another form of capital company, *e.g.* from an LLC to a corporation or vice versa. However, such a transformation will not modify the legal relationships of the company. Indeed, despite its change in legal form, the company retains its identity and personality. It is therefore not necessary to create a new company with the desired new legal form.

The conversion is performed under the responsibility of the supreme management or administrative body of the company, which shall establish the conversion plan and conversion report on the basis of a current balance sheet. The conversion balance sheet, conversion plan and conversion report must be audited by an expert auditor. The company must abide the steps necessary for the constitution of the contemplated legal form. In addition, the general meeting of shareholders or quota holders must approve the conversion in compliance with special quorums and the decision of conversion must be taken in the form of a public deed. The conversion becomes effective upon its registration with the competent commercial register, the application to which is the duty of the supreme management or administrative body.

II. Corporate Governance

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1. In General

This chapter focuses on corporations and the respective provisions of the CO. Apart from the mandatory set of corporate governance rules as provided for by the Swiss legal framework, corporations and self-regulating organisations (such as *i.a.* stock exchanges) are free to issue additional guidelines to further shape their organisation (or, in case of self-regulating organisations, the organisation of affiliated companies). The statutory corporate governance rules can be distinguished into corporate laws as set forth in the CO and financial market regulations. Additional guidelines may be implemented by corporations by way of introducing respective provisions into the articles of association, the organisational regulations and/or other internal regulations. Furthermore, corporate governance rules are commonly also set forth on a contractual level, *i.e.* in shareholders' agreements. This chapter gives a general overview of the corporate governance structure of non-listed corporations. For listed companies, special provisions apply in particular as to the compensation of the board of directors and the senior management, incl. mandatory approval of the compensation by the shareholders' meeting and the publication of a compensation report, and certain thresholds in connection with shareholders' rights.

2. Corporate Bodies

2.1. Governance Structure

The CO stipulates that corporations shall have the following corporate bodies: (i) the shareholders' meeting as the supreme governing body, (ii) the board of directors as the supreme managing body and (iii) the statutory auditor, provided that the shareholders did not, if applicable, unanimously opt-out of a limited audit (see section 2.5 below). In addition, the board of directors may delegate the day to day management of the company by virtue of organisational regulations to one or several officers appointed by the board (which do not need to be board members).

2.2. Shareholders' Meeting

2.2.1. Powers and Duties

The shareholders' meeting is the supreme governing body of a corporation. As a matter of mandatory law, it has *i.a.* the non-transferable and inalienable duty to:

- Determine and amend the articles of association;
- Elect the members of the board and the statutory auditor;
- Approve the management report, the consolidated accounts and the annual/interim accounts as well as to pass resolutions on the allocation of the disposable profit (in particular to resolve on dividend distributions, *incl.* interim dividends, and the shares of profits to be paid to of the board members);
- Pass resolutions on the repayment of statutory capital reserves;
- Grant discharge to the board members;
- Resolve on the delisting of equity securities; and
- Pass resolutions on the matters reserved to the shareholders' meeting by the articles of association.

Shareholders must have no other duties than paying-in the subscription amount for the shares subscribed by them and are in particular (as opposed to board members) not under any duty of loyalty and care. If required, such duties can, however, be implemented on a contractual level.

2.2.2. Meetings and Resolutions

As provided for by mandatory law, each corporation must hold ordinary (annual) shareholders' meetings within six months after the end of each financial year to *i.a.* approve the annual accounts and resolve on the appropriation of the balance sheet profit/loss. In addition, extraordinary shareholders' meetings may be held if the board of directors or shareholders, who hold alone or together at least 10% of the share capital or the votes, demand so. Shareholders representing alone or together at least 5% of the share capital or the votes may request that an agenda item be put on the agenda. Meetings must be convened by 20 days prior notice to all shareholders, unless 100% of the shares are represented at the meeting or the resolutions are passed by way of a written or electronic circular resolution and no shareholder requests oral deliberation (in which case the aforementioned formal requirement does not need to be observed). Shareholders' meetings do not have to be held in Switzerland, provided that the articles of association provide for the possibility to hold shareholders' meetings abroad, the choice of the meeting's place does not make it inappropriately difficult for any shareholder to exercise his rights in connection with such shareholders' meeting and the board of directors designates an independent proxy, unless such requirement is waived by all shareholders. If provided for by the board of directors, shareholders may also join a physical meeting by way of electronic means. The shareholders' meeting may also be held entirely by way of electronic means (video- and telephone conference or similar communication methods), provided that the articles of association of the corporation provide for such a possibility and, subject to any provisions in the articles of association to the contrary, the board of directors designates an independent proxy. Minutes of all meetings need to be drawn up in writing. Public certification (by a notary public) is only required for specific resolutions such as amendments of the articles of association.

At the shareholders' meeting, each share has typically one vote. By issuing shares with different nominal values, a share with a lower nominal value has more voting power per amount of nominal value than shares with a higher nominal value. However, the shares with the lowest nominal value must have a nominal value of at least 10% of the nominal value of the shares with the highest nominal value. Thus, the maximum leverage is 1 to 10. Unless provided otherwise by law or the articles of association, the shareholders' meeting passes resolutions and conducts elections by the majority of the voting rights represented at the shareholders' meeting. Art. 704 Para. 1 CO stipulates that for certain (particularly important) resolutions, such as any amendment of the company's objects, introduction of any restriction on transferability of registered shares and any restriction or cancellation of preferred subscription rights, a qualified majority of at least two-thirds (66 ⅔%) of the voting rights and the majority of the nominal value of the shares represented at the shareholders' meeting is required.

2.2.3. Shareholders' Control and Information Rights

Shareholders' voting rights are *i.a.* supplemented with the following important control rights:

- At the shareholders' meeting, shareholders are entitled to request information concerning the affairs of the company and on the methods and the results of the audit. Outside of a shareholders' meeting, shareholders representing alone or together at least 10% of the share capital or the votes may submit information request to the board of directors at any time. Such information, however, only needs to be provided by the board of directors/the statutory auditor if business secrets and/or other justified interests of the company are not jeopardised.
- Shareholders representing alone or together at least 5% of the share capital or the votes may inspect the business records and files of the corporation, provided business secrets and/or other justified interests of the company are not jeopardised.
- Any shareholder may request the shareholders' meeting (after having exercised his right for information and inspection) to have specific matters clarified by a special (external) auditor, provided such information is necessary for the proper exercise of shareholders' rights. If denied, shareholders representing alone or together at least 5% of the share capital or the votes may request that courts order such a special audit. The written report of the external auditor containing the audit results may be partly redacted in order to protect business secrets and other justified interests of the corporation.
- Shareholders may challenge resolutions of the board of directors in court proceedings, provided such resolutions either (i) withdraw shareholders' rights granted by mandatory law or (ii) disregard the fundamental principles of Swiss corporations or the provisions on capital protection.

2.3. Board of Directors

2.3.1. Powers and Duties

The board of directors is the supreme managing body of corporations. Art. 716 Para. 1 CO provides that the board of directors may take decisions on all matters which by law or by the articles of association are not allocated to the shareholders' meeting. Further, Art. 716 Para. 2 CO sets forth that the board of directors shall manage the business of the company insofar as the management has not been delegated by virtue of organisational regulations.

Art. 716a Para. 1 CO contains a list of particularly important duties which the board of directors may not transfer. These are *i.a.*:

- The supreme management of the company and the issuing of the necessary directives;
- The determination of the company's organisation and the organisation of accounting procedures, financial control and financial planning;
- The appointment and removal of the persons charged with management and representation duties;
- The ultimate supervision of the managing directors and/or officers (if the management has been delegated) in particular in view of compliance with the law, the articles of association, regulations, and directives;
- The preparation of the annual report as well as the preparation of the annual shareholders' meeting and implementation of its resolutions; and
- Notification of the bankruptcy court in the case of over-indebtedness and submission of requests for a debt moratorium.

The list mentioned in Art. 716a Para. 1 CO is not exhaustive. Further duties include i.a. the taking of appropriate restructuring measures in case half of the share capital remains uncovered by the assets of a corporation.

2.3.2. Meetings and Resolutions

Any board member may request that the chairman convenes a meeting without delay, but must state the reasons for such request. The CO does not provide for a certain number of board meetings to be held per year. However, depending on the size of the company, at least 4 board meetings should take place throughout the business year. The board of directors determines the place, time and notice period *etc.* of its meetings. The meetings are to be held at a place that is reasonably accessible for each board member. Usually, meetings are held at the company's registered office but they may also be held abroad. Resolutions may also be passed by written or electronic consent to a proposed motion, provided however that no board member requests an oral debate. Resolutions may also be passed using technical means such as *e.g.* telephone, video-conference *etc.* Nonetheless, the board of directors shall keep minutes of its discussions and resolutions.

Each board member has one vote at board meetings. The board of directors must have at least one member. The chairman of the board of directors has a casting vote, unless the articles of association provide otherwise. According to Art. 713 CO, the resolutions of the board of directors shall require the majority of votes cast. The board of directors is, however, free to determine another quorum in its organisational regulations.

2.3.3. Liability of Board Members

The duties of the persons entrusted with the administration and management are not set out in detail in corporate liability law. Art. 754 Para. 1 CO speaks generally of damage which such persons cause through an intentional or negligent breach of their duties and refers to duties set out elsewhere in a statute or in the articles of association. As highlighted before, board members are (other than shareholders) i.a. under a general duty of care and loyalty and must report and avoid conflicts of interest.

The Federal Supreme Court held that Swiss courts must refrain from judicially second-guessing actual business decisions by the board of directors to the extent the relevant business decision has been taken (i) following a proper decision-making process, (ii) based on adequate information and (iii) free from any conflicts of interest. The so-called "Swiss Business Judgement Rule" is deemed more like a procedural standard specifying the duty of care than a presumption. It is still up to the plaintiff to prove that he suffered damage, that the damage is the consequence of the act or omission of a director who is therefore the perpetrator of the damage, that the director has breached his duty, that the breach of duty and the damage have a causal connection.

2.4. Management

Apart from the non-transferable and inalienable duties of the board of directors, the management functions can be delegated by the board of directors to officers. Such officers (collectively referred to as the "management") may be members of the board at the same time. In case of larger companies, officers are typically non-board members.

In order to limit the liability of the board members, the board of directors must issue organisational regulations which organise the management, determine the positions required therefor, define the duties and regulate, in particular, the reporting. In any event, each board member has comprehensive information and inspection rights.

2.5. Statutory Auditor

The statutory auditor is elected by the shareholders' meeting. Companies are, regardless of their legal form, obliged to undergo either a regular audit, *i.e.* an ordinary audit, or a limited audit. A company must undergo an ordinary audit when two of the following thresholds are exceeded in two consecutive years: (i) balance sheet assets of CHF 20 million, (ii) turnover of CHF 40 million or (iii) an annual average of 250 full-time employee positions.

Only under certain circumstances it is possible to dispense with an audit altogether (so-called "opting-out"), *i.e*. if the company has, calculated over an annual year, no more than ten full-time employee positions and is not required to undergo an ordinary audit. Each shareholder, however, is entitled to ask for a limited audit, such request to be submitted at least ten days before the annual shareholders' meeting.

III. Corporate Reorganisations

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1. In General

In comparison with other jurisdictions, the term "corporate reorganisation" is not consistently used in Swiss legal practice and does not presuppose specific legal qualifications (*e.g.* tax-neutral transfers of assets or shares). In general, corporate reorganisations comprise transactions such as mergers, demergers or conversions of legal entities. However, the transfer of shares or assets and liabilities (business units or individual assets or liabilities) under the Merger Act or in the form of traditional share or asset deals within a group of companies, the change of a company's registered seat or domicile or the voluntary liquidation of a legal entity are also considered corporate reorganisations.

Restructuring transactions involving distressed entities and insolvency proceedings are not discussed in this chapter (see chapter on Restructuring and Insolvency). The same is true for transactions with group external third parties (see chapter on Mergers or chapter on Joint Ventures).

2. Typical Structuring

2.1. Statutory Regimes

The main types of corporate reorganisations, such as mergers, demergers, conversions or simplified transfers of assets and liabilities, are governed by the Merger Act. In contrast, internal group sales and transfers of shares and assets (individually transferred) are governed by the CO. "Quasi-mergers" (*i.e.* the combination of two entities without merging their legal forms or liquidating one of the entities) are also governed by the CO. In this scenario, the combination takes place by way of a share-for-share transaction or the formation of a new legal entity that assumes assets and liabilities of the two combined legal entities in exchange for its own shares. Finally, demergers can also be implemented under the CO by way of a two-step transaction (*i.e.* incorporation of a SPV and distribution of the shares in the SPV) which, in fact, is the most common form of demergers under Swiss law.

2.2. Book Value Transactions

From a tax perspective, corporate reorganisations are often structured as transactions carried out at book values as Swiss tax law allows the implementation of corporate reorganisations, in many cases, in a tax-neutral manner if, *inter alia*, assets or liabilities are transferred at book value (see also section 4 below).

2.3. Tax Law Reform as Additional Driver

On 1 January 2020, the TRAF entered into force, which can be seen as a driver for internal group corporate reorganisation. With this tax reform, Switzerland implements internationally accepted tax standards, which at the same time allows securing and enhancing Switzerland's overall attractiveness as a business location. With the new rules, previously existing tax privileges were abolished, such as privileges for finance branches, holding, domiciliary, mixed and principal companies, meaning that the same rules apply to all Swiss tax resident companies. In return, new rules, *inter alia*, for the promotion of research and development have been included in the TRAF: For example, a mandatory cantonal patent box in line with the standards of the OECD, according to which qualifying income from patents and equivalent rights is taxed with a reduction of maximal 90% or, also on a cantonal level, an additional (super) deduction of maximal 50% for R&D costs incurred in Switzerland. Furthermore, notional interest deduction and the tax-neutral disclosure of hidden reserves for companies immigrating to Switzerland have been introduced. With the new corporate tax rules entered into force at the beginning of 2020, companies have to review their structure and assess the effects.

3. Spotlight on Selected Issues

3.1. Employment Law Aspects

If a seller transfers a company's business or a part thereof to a buyer in an asset deal (irrespective of whether in a traditional asset deal or an asset deal under the Merger Act), the existing employment relationship with the seller, and all related rights and obligations, automatically pass to the buyer as of the day of the transfer, unless the employee objects to the transfer, in which case the employment relationship with the buyer terminates at the end of the notice period provided by law.

The seller and the buyer are jointly and severally liable for any claims of an employee that fall due before the transfer, or that fall due between the transfer and the date on which the employment relationship could normally be terminated or is terminated following refusal of the transfer.

The seller (as the employer) has to inform the employees' representatives or, if there are none, the employees directly in good time before signing of the reason for the transfer and the legal and socio-economic consequences of the transfer for the employees. If, as a result of the transfer, measures affecting the employees are planned (such as a change of their usual place of work), the employees' representatives or, if there are none, the employees themselves have to be consulted in good time before a decision is made on these measures.

If such consultation and information rights are breached, the asset sale does not automatically become null and void. The employees' representatives or all employees concerned can, however, block the acquisition by injunctive relief. It is disputed whether they can have the acquisition prohibited until the rights have been restored. In all cases, they can sue for damages.

If the asset sale occurs through an asset deal under the Merger Act, the employees' representatives or all employees concerned have the additional possibility of blocking the registration of the acquisition in the relevant register of commerce.

Irrespective of whether the sale of assets has been implemented by way of a traditional asset deal or as an asset deal under the Merger Act, if the transferred relationship is governed by a collective employment contract, the buyer must comply with it for at least one year, unless it expires or is terminated sooner. If the employee refuses the transfer, the employment relationship ends upon expiry of the statutory notice period; until then, the buyer and the employee must perform the employment agreement.

The principles of an asset deal, as outlined above, apply *mutatis mutandis* for a merger, demerger or conversion under the Merger Act.

3.2. Financial Assistance

Upstream or cross-stream financial assistance within a group of companies is a controversial topic in Switzerland. In light of recent case law, the granting of an upstream or cross-stream (1) security (*e.g.* guarantee) by a Swiss subsidiary to secure obligations of its parent company or any other group company (other than 100% direct or indirect subsidiaries) or (2) loan – also in the form of a cash pool – by a Swiss subsidiary to its parent company or to any other group company (other than 100% direct or indirect subsidiaries) must:

- be allowed by the Swiss subsidiary's articles of association, which should include the purpose of group support and financial assistance;
- be in the interest of the Swiss subsidiary (*i.e.*, dealing at arm's length, provision against consideration, review of the importance of the security or loan compared to the other assets of the companies involved and financial capacity of the recipient); and
- not constitute a repayment of the equity capital of the Swiss subsidiary or an unjustifiable contribution.

In case of any doubt (in particular with regard to whether the relevant case constitutes an arm's-length transaction), the amount of the security or loan should be limited to the freely distributable funds of the Swiss subsidiary, which needs to be blocked in the amount of the security or loan, and the subsidiary's shareholders' meeting should resolve on and approve the granting of such security or loan.

If an upstream or cross-stream transaction does not meet these financial assistance rules, the transaction may be null and void (*e.g.*, because it violates the company's purpose clause or it infringes the protected equity capital of the company) or can be challenged by the company or its shareholders and may lead to directors' liability.

3.3. Factual Liquidation

If a company sells all, substantially all or the material part of its assets without reinvesting the consideration, such transaction often qualifies as a factual modification of the company's purpose without the consent of the shareholders' meeting regarding its liquidation and, therefore, as a factual liquidation of the company. Such sale does not lie, as a matter of principle, in the competence of the company's board of directors. Further, a sale of all, substantially all or the material part of assets of a company can hardly be justified by the company's interests. If a sale qualifies as factual liquidation, it will be null and void, and may lead to directors' liability. To address this issue, the company can be put into voluntary liquidation before the sale transaction takes place. In cases where it is doubtful whether the contemplated sale will qualify as factual liquidation and the initiation of voluntary liquidation proceedings is not feasible, it is recommended to have the shareholders decide on the planned transaction in order to reduce the risk of personal liability of the directors. Such a shareholders' resolution should take place in the presence of a notary public and might include a change of the purpose clause in the articles of association.

3.4. Capital Band

The capital band is a new instrument which replaced the previous authorized capital increase as of 1 January 2023. Put simply, the capital band combines an authorized capital increase with an authorized capital reduction (which did not exist under previous law). The board of directors may statutorily be authorized to change the share capital of the corporation within a given range (the capital band) during a period of up to five years. If the board of directors resolves to do so, no further resolution by the shareholders' meeting is required. As a result, capital increases or decreases can be implemented more rapidly.

Companies wishing to make use of the capital band need to have their articles of association amended accordingly.

4. Corporate Reorganisations and Taxes

Corporate reorganisations (*e.g.* mergers, demergers, share-for-share exchanges (quasi-mergers) or the transfer of assets and liabilities) may qualify as tax-neutral restructurings if certain preconditions are met. Such tax-neutral transaction requires, *inter alia*, that the assets and liabilities are transferred at book value and remain subject to unlimited taxation in Switzerland. Otherwise, corporate income tax, one-time capital duty, securities transfer tax, WHT, VAT, real estate capital gains or transfer taxes might be triggered. Therefore, corporate reorganisations are usually structured in a way to meet the requirements for a tax-neutral reorganisation. In this context, it needs to be noted that Circular Letter No. 5 of the SFTA on corporate reorganisations was comprehensively revised on 1 February 2022 and adapted to account for numerous changes in legislation and case law and also introduce certain changes of practice (Circular Letter No. 5a). In order to obtain certainty about the tax consequences in connection with the contemplated corporate reorganisation and the new final structure, it is recommended to apply for a tax ruling with the competent tax authorities.

IV. Restructuring & Insolvency

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1. In General

In Switzerland, the DCBA does not only provide for measures for the enforcement of claims in the context of bankruptcy; in the case of companies in financial distress, it also provides for the possibility of successful restructuring within the framework of composition proceedings in order to preserve company values for the benefit of all parties involved.

Outside the scope of the DCBA, several and diverse restructuring measures are available for companies willing to undergo out of court restructuring and therefore avoiding initiation of insolvency proceedings.

2. Out of Court Restructuring

Out of court restructuring measures, *i.e.* measures outside of statutory insolvency proceedings, represent the mildest form of restructuring since these measures neither interrupt nor adversely affect the operative business of a company. Thus, this type of restructuring ideally preserves the value of the company. As such, out of court restructuring measures can be considered:

- By the company: operational measures to increase earnings, divestments and release of hidden reserves (re-evaluation of assets);
- By the shareholders: capital increases, capital reductions and contributions to the company without consideration;

– By the creditors: standstill agreements, bridging loans, subordination of debts, debt/asset swaps, debt/equity swaps and debt waivers (possibly together with the issuance of dividend rights certificates, debtor warrants or options).

Contractual restructuring measures cannot be imposed on creditors but must be agreed with each creditor individually. It is therefore important to ensure that the measures withstand potential claw-back claims in the event the company subsequently enters into insolvency proceedings.

3. Insolvency Proceedings

3.1. In General

Within the ambit of the DCBA two basic types of proceedings can be distinguished: (i) bankruptcy proceeding and (ii) proceeding to reach a creditors' composition. Additionally, there is a procedure under the CO that is intended to serve for a rehabilitation of a distressed company, the so-called corporate moratorium.

The relevant goal of a bankruptcy usually and generally spoken consists of the realisation and liquidation of all assets of a debtor. The focus is not on the survival of a business entity, but rather on the achievement of highest values for the benefit of the creditors. The proceeds generated will then be distributed amongst all the creditors, usually in accordance with their ranking.

Proceedings to reach a creditors' composition by initiating a debt moratorium aim at accomplishing the work-out, restructuring and survival of a business entity. As opposed to bankruptcy proceedings, creditors' composition proceedings and the corporate moratorium allow for a (limited) continuation of the debtor's business activities under the protection of the court and for a more flexible realisation of the debtor's assets. However, creditors' composition may also aim at the reduction of claims (cram down) or the efficient realisation of assets.

Creditors' composition proceedings under Swiss law can be somewhat similar to the Chapter 11 proceedings provided by U.S. law. Compared to U.S. Chapter 11 proceedings, however, Swiss law focuses more on the rights of the creditors rather than on the continuation of the debtor's business activities.

With effects as of 1 January 2023, the pre-existing “corporate moratorium” under the CO was abolished.

3.2. Bankruptcy Proceedings

3.2.1. In General

In essence, bankruptcy is declared either upon specific request of a creditor, who has advanced its (individual) debt collection to the stage it may file for an application for opening of the bankruptcy or upon deposition of the balance sheet by the debtor of an over-indebted registered company. Debt enforcement against legal entities registered in the register of commerce normally takes place at the debtor's registered seat.

Upon valid and enforceable declaration of bankruptcy the bankruptcy file will be handed over from the court to the public bankruptcy office – unless a special liquidator is appointed –, who in line with the respective procedural rules will marshal and liquidate all assets of the bankrupt estate and will distribute the proceeds to the creditors in line with their justified claims as fixed in the creditors' schedule in accordance with their ranking and secured rights. In effect, the right to dispose of the assets is automatically transferred to the bankruptcy office and the debtor is no longer entitled to take any decisions in this regard. The creditors of each rank are treated equally in the liquidation. Other enforcement proceedings in Switzerland related to the debtor's assets and liabilities are automatically stayed until further notice. Claims may be offset under limited circumstances (only pre-petition claims can be offset).

The bankruptcy office draws up an inventory of the assets belonging to the bankrupt estate and takes any measures necessary for their safeguarding immediately upon receipt of the bankruptcy order. It publishes a call for creditors and sets a deadline to submit the claims in the bankruptcy proceedings allowing the bankruptcy office, in a next step, to establish the “schedule of claims”. In the first meeting of creditors, the meeting decides whether the bankruptcy office or one or more persons to be appointed by the meeting shall form the bankruptcy administration. The bankruptcy administration, be it the ordinary administration or a private administration, takes the appropriate measures for the maintenance and realisation of the bankrupt estate and represents the estate in court proceedings.

A summary proceeding is available in case there are not enough financial means to carry out a full proceeding or in case the bankruptcy case is rather straightforward. In practice, most bankruptcy cases are closed for lack of any assets at all.

3.2.2. Ranking of Claims

All creditors that dispose of claims against the debtor may participate in the bankruptcy proceedings, provided their claims are admitted in the "schedule of claims". No restrictions exist as to nationality, jurisdiction or territory, but secured creditors enjoy priority over unsecured creditors.

The ranking of creditors and the distribution of proceeds (from the liquidation of the debtor's estate) are governed by the following principles:

- Secured claims are satisfied directly out of the proceeds of the collateral's realisation.
- Unsecured claims (including secured claims to the extent not covered by collateral) are ranked into classes.

The DCBA sets up three different classes of unsecured creditors for the distribution out of the proceeds of the entire remainder of the bankrupt estate. Essentially, the first class comprises claims of employees of the debtor and certain claims based on family law (alimony), the second class comprises unpaid social security contributions and certain claims of family law (*e.g.* assets of a child that were held by the debtor). All other claims fall into the third class.

Creditors ranked in the first class are paid in full before creditors in the second class receive any proceeds. Creditors in the second class have to be paid in full before ordinary creditors ranked in the third class receive any distribution. Creditors in the same class are treated equally and will receive a *pro rata* pay-out if the proceeds are not sufficient to cover all the claims in the same ranking class.

Above this, claims deriving from the administration of the estate and the conduct of the bankruptcy proceeding have priority over unsecured claims and will be satisfied at first. In case of a secured claim, the costs for the administration (including realisations) of this specific collateral will be deducted from the proceeds generated.

Secured and unsecured claims are dealt with in the so-called "schedule of claims procedure". The administrator decides on the admission or non-admission of claims by entering or refusing to enter claims in the "schedule of claims". The administrator's decisions are subject to appeal both by the affected creditor and by other creditors.

3.3. Composition Proceedings

3.3.3. In General

A composition proceeding is a measure to protect the debtor from the consequences of bankruptcy. It allows the debtor to postpone payment of the debts or to satisfy them in total or in part (cram down) according to a specific plan. It also allows in some cases an efficient realisation of the company's assets (or parts of them) which might lead to the liquidation of the company but might be a better option than bankruptcy.

The composition procedure is designed to rehabilitate the company under the auspices of the court or to reorganise unsecured and unprivileged claims. The proposed composition agreement must be ratified by the creditors and confirmed by the court.

3.3.4. Debt Moratorium

The revised DCBA was written to incentivise an early contact with the court and to allow a debtor sufficient time to reorganise and seek discussions with its creditors under protection of the court. Accordingly, the debtor in financial distress can apply for court protection without being insolvent or over-indebted.

Any debtor, whether subject to a bankruptcy proceeding or not, seeking to reach an agreement with its creditors, may initiate a debt moratorium proceeding by submitting to the court a reasoned application enclosing recent financial statements and a liquidity plan together with relevant documentation demonstrating the current and future financial status of the debtor as well as a provisional rehabilitation plan.

A temporary debt moratorium not exceeding four months may be granted by the court and may be extended under specific circumstances and upon request up to another four months. To protect the debtor's assets, the court will implement the necessary conservatory measures, while the debtor remains in possession of its assets. Should the court conclude that it is unlikely that rehabilitation or the conclusion of a composition agreement with creditors will be successful, the court will open bankruptcy proceedings ex officio. At the discretion of the court, one or several provisional commissioners for the temporary debt moratorium may be appointed for the purpose of assessing the viability of the debtor's proposal. Provided all third-party interests remain protected, the court may abstain from making a public notice of the temporary debt moratorium (in which case the appointment of a commissioner is mandatory). If the temporary debt moratorium shows that a rehabilitation of the debtor or conclusion of a composition agreement with its creditors can be expected, the court, acting ex officio, may grant a definitive debt moratorium for an additional four to six months and will appoint one or more commissioners.

3.3.5. The Commissioner/Creditors' Committee

The commissioner's primary duties are to supervise the debtor's activities and to perform the tasks set out in the DCBA. The actual powers of the commissioner will be determined case by case and can involve actual managerial powers. The commissioner has to present interim reports at the request of the composition court and has to inform the creditors of the progress of the moratorium. The definitive moratorium may be extended from the usual period (four to six months) to twelve months and, in complex cases, 24 months. Depending on the circumstances, the court can establish a creditors' committee, which will act as a supervisory body for the commissioners. The creditors' committee should be composed of representatives of the various classes of creditors. Once established, the creditors' committee will decide on the sale or charges of assets.

3.3.6. The Composition Agreement

In general, the composition proceeding allows the debtor to postpone payment of the debts or to satisfy them in total or in part (cram down), according to a specific plan. The general effects of a composition are (with some minor exceptions) the stay of pending execution proceedings, including bankruptcy, as opposed to civil proceedings. The specific effects of a composition agreement depend on the type of composition agreement.

The proposed composition agreement must be ratified by the creditors. Any composition agreement can only be confirmed by the court upon approval of either the majority of the admitted creditors representing two-thirds of the qualifying claims, or of one-quarter of the creditors with at least three-quarters of the total amount of the qualifying claims.

There are two main types of composition agreements:

(i) the *ordinary composition agreement*, which aims at either postponing the repayment of all claims (in which case the claims still exist) and/or at reducing the amount of all debts (with full or partial release of the claims), the primary goal being the company's restructuring and the continuation of the business

(ii) the *composition agreement with the assignment of assets*, which allows the commissioner of the debtor to liquidate the company's assets (or parts of them) by selling the company's assets (or parts of them) to third parties with an outcome that is expected to be a better outcome than bankruptcy proceedings; in this case, in a similar manner as in bankruptcy proceedings, the proceeds are distributed among the creditors in accordance with their rankings. A combination of both types of composition agreements is possible.

Mergers & Acquisitions in Switzerland

I. Private Share Deals

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1. In General

In Switzerland, private companies can either be acquired by way of purchasing the shares in the target company by concluding a SPA or by way of purchasing the target company's assets by entering into an APA. Put simply, if the transaction is structured as a share purchase, the buyer acquires the target company only indirectly by taking over the legal entity that owns the target company's assets. In contrast, in case of an asset deal the buyer acquires the target company (or a part thereof) directly by taking over its assets (such as cash, inventory, equipment, real estate, accounts receivable, intangible assets but also liabilities, legal positions, and employees). If the target company is a corporation or an LLC (see chapter on Legal Forms of Companies) a share purchase is the most common way to acquire.

It should be noted that a distinction must be drawn between the signing and the closing of a SPA. "Signing" means the execution of the SPA, *i.e.* the creation of a legal obligation. On the other hand, the term "closing" is understood as the consummation of the transactions contemplated by the SPA; only upon closing, the buyer becomes the new owner of the shares.

2. Share Purchase Agreement

2.1. In General

In private company share sales the SPA is executed at the signing. As the case may be, also other documents, such as the disclosure letter, are executed at the signing. The main substantive clauses in a SPA are:

- Definitions;
- Object of the sale: sale and purchase of the sold shares;
- Consideration (including purchase price adjustment, if applicable);
- Closing (including conditions precedent and closing mechanics);
- Representations and warranties;
- Remedies (including limitations);
- Further covenants (including non-compete, no leakage/actions between signing and closing, confidentiality and public announcement);
- Miscellaneous provisions (including taxes, costs, amendments, notices, governing law and jurisdiction/arbitration).

2.2. Form

Under Swiss law, the validity of a contract is not subject to any particular form, unless a particular form is prescribed by law. In principle, SPAs relating to the sale and purchase of shares in a corporation could be entered into without observing a specific form. In practice, however, in most cases SPAs are concluded in writing. In contrast, SPAs relating to the sale and purchase of shares in an LLC must be in writing unless the articles of association provide for stricter formal requirements.

2.3. Representations and Warranties

2.3.1. In General

Customarily, the parties explicitly agree in the SPA on the representations and warranties (commonly referred to as "Reps" or "R&W") relating to the target company and its subsidiaries (if any) and covering, *inter alia,* the following areas:

- Title to the shares;
- Organisation and good standing;
- Enforceability and authority, and no conflict;
- Financial statements;
- Condition and sufficiency of assets;
- Taxes;
- Employee and consultants as well as employee benefits;
- Compliance with legal requirements, and governmental authorisations;
- Legal proceedings and orders;
- Contracts;
- IP rights.

2.3.2. Limitations on Representations and Warranties

Usually, the parties agree to limit the representations/warranties given under the SPA. Common limitations are:

- Disclosure against representations/warranties;
- Knowledge qualifications in representations/warranties;
- Requirement of a notice of breach of representations/warranties;
- Time limits for bringing representation/warranty claims;
- *De minimis* rules (exclusion of smaller representation/warranty claims);
- Thresholds or deductibles;
- Statute of limitations;
- Caps on the seller's liability for representation/warranty claims.

2.3.3. Remedy

In a Swiss law governed SPA, the prevailing sole remedy in case of breaches of representations/warranties provided by the parties in the SPA is damages (normally irrespective of any fault of the seller), sometimes preceded by the right of the seller to remedy the defect in question. Less common is the right of the buyer to reduce the purchase price. The buyer's statutory right to rescind the acquisition agreement is normally contractually excluded.

2.3.4. Time Limits for Claims under Representations/Warranties

For most representations/warranties the time limit is usually between 12 and 24 months, most often 18 months. However, for certain representations/warranties the time limit is usually between five and ten years, such as relating to title to shares (for example, as part of the capitalisation of the company and subsidiaries), tax and environmental issues.

3. Closing

3.1. In General

At closing, the parties effect the transactions contemplated by the SPA. Put simply, the buyer pays the purchase price and the seller simultaneously transfers title to the shares to the buyer. Notably, the transfer of title to the shares in a corporation or an LLC always requires the written form (*i.e.* endorsement of share certificates or written declaration of assignment), unless the shares in a corporation qualify as a ledger-based securities (*Registerwertrechte* / *droit-valeurs inscrits*). Further, the parties, mainly the seller, hand over all other documents agreed in the SPA (*e.g.* resignation letters of the resigning board members of the target company or its subsidiaries). Usually, the parties record the completion of the closing in a closing memorandum.

3.2. Conditions Precedent

Typically, the parties agree in the SPA that the obligation of each party to effect the transactions contemplated by the SPA is subject to the satisfaction or waiver (to the extent a waiver is permitted by law) by each party of certain conditions precedent.

Conditions precedent can include, *inter alia*:

- Governmental approvals (for example, by competent competition authorities or banking or insurance regulators);
- Collection of tax rulings;
- Reorganisation of the target company (for example completion of carve-out transactions).

Normally, the parties include a covenant in the SPA to use best efforts to ascertain that the conditions precedent are fulfilled until a certain date (so-called "long-stop date", or "drop-dead date"). They normally also agree on the consequences if this date is not met, that is, by providing for withdrawal rights of the parties.

4. Restrictions on Share Transfer

4.1. Corporation

As a general principle, there are no transfer restrictions under corporation law on transferring shares in a private corporation. The most important exception to this principle is that the articles of association may stipulate that non-listed registered shares can only be transferred with the company's consent (that is, normally, the board of directors). However, such consent can only be refused if there is a valid reason stated in the articles of association, or if the company offers to acquire the shares from the party divesting them for the company's own account, for the account of other shareholders or for the account of third parties at their real value, at the time the request was made. Further, the company (that is, normally, the board of directors) can refuse entry into the share register, if the buyer fails to declare expressly that he has acquired the shares in his own name and for his own account.

4.2. LLC

Under Swiss law, an assignment of shares of an LLC requires the approval of the members' general meeting. The members' general meeting may refuse the approval without stating its reasons. However, the articles of association may deviate from this principle. For example, it is possible that the requirement of approval to the transfer of shares is waived or that the transfer of shares is generally prohibited.

5. Employees

It is not clear and has not been decided by the Federal Supreme Court yet whether the parties to a SPA are obligated (i) to inform and/or consult employees or their representatives or (ii) obtain employee consent to a share deal. The common view is that the provisions of article 333*a* CO do not apply to share deals (see chapter on Employment Law, section 5, and chapter on Corporate Reorganisations, section 3.1).

6. Regulatory Aspects of Share Deals

6.1. Competition Law

The CartA might apply to the acquisition of a private company in some cases (see chapter on Competition Law, section 4). If a planned concentration of undertakings reaches or exceeds certain turnover thresholds, it is subject to a pre-merger control, *i.e.* the parties (usually the buyer) must notify COMCO about it. In any event, pre-merger control must be obtained irrespective of any turnover thresholds if one of the involved undertakings has been held in a final decision to be dominant in a market in Switzerland, and the concentration concerns this market, an adjacent or an upstream or downstream market. Failure to comply with the notification duty triggers fines of up to CHF 1 million and the underlying agreements are void.

6.2. Foreign Investment Control

Under Swiss law, the notification or clearance of a governmental agency is not required when a foreign national or a foreign owned (or controlled) company acquires a private company with its registered seat in Switzerland. However, on 3 March 2020, the Swiss Parliament tasked the Swiss government with proposing a draft bill to introduce foreign direct investment controls, including setting-up a respective licensing authority. In an announcement on 25 August 2021, the Swiss Federal Council published the key features of a foreign direct investment control regime. The Swiss Government follows a rather investor-friendly approach. The proposed regime concentrates on notification and approval requirements for state-related foreign investors and foreign investors acquiring target companies in sensitive sectors. In 2022, the Swiss Government published a preliminary draft bill regarding the screening of foreign direct investments and initiated the consultation on this new piece of legislation. It is expected that the Swiss Government will publish a revised draft bill at the earliest in the first half of 2023. After that, the Swiss Parliament will debate the introduction of a new foreign investment control regime.

Importantly, already under current Swiss law and thus irrespective of the proposed foreign direct investment control regime, restrictions regarding the acquisition of companies in a certain business area (for example, residential real estate, national defence, banking, insurance, electricity, or other areas of national importance) may apply.

II. Asset Deals



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1. In General

In Switzerland, private companies can either be acquired by way of purchasing the target company's assets by entering into an APA or by way of purchasing the shares in the target company by concluding a SPA. Put simply, if the transaction is structured as an asset purchase, the buyer acquires the target company (or a part thereof) directly by taking over its assets (in a narrow sense, such as cash, inventory, equipment, real estate, accounts receivable, or intangible assets) but also liabilities, legal positions, and employees, together the assets (in a wider sense). In contrast, in case of a share deal the buyer acquires the target company only indirectly by taking over the legal entity that owns the target company's assets. Asset purchases can be conducted either the traditional way, that is, by individually transferring all assets to be transferred or through an instrument of transfer of assets under the Merger Act. Because these two legal instruments partially differ in terms of the content of the APA and the closing of the transactions contemplated by the APA, it is essential to distinguish them.

It should be noted that an additional distinction must be drawn between the signing and the closing of an APA. "Signing" means the execution of the APA, *i.e.* the creation of a legal obligation. On the other hand, the term "closing" is understood as the consummation of the transactions contemplated by the APA; only upon closing, the buyer becomes the new owner of the acquired assets.

2. Asset Purchase Agreement

2.1. In General

In private company asset purchases the APA is executed at the signing. As the case may be, also other documents, such as the disclosure letter, are executed at the signing. The main substantive clauses in an APA are:

- Definitions;
- Object of the sale: assets;
- Consideration (including purchase price adjustment, if applicable, and VAT treatment);
- Closing (including conditions precedent and closing mechanics);
- Representations and warranties;
- Remedies (including limitations);
- Employee and employee benefits matters;
- Further covenants (including transition arrangements, non-compete, no leakage/actions between signing and closing, confidentiality and public announcement);
- Miscellaneous provisions (including taxes, costs, amendments, notices, governing law and jurisdiction/arbitration).

2.2. Form

The validity of asset purchase agreements is, in principle, not subject to any particular form. However, in practice, most APAs are concluded in writing. Further, the legal formalities for an APA depend on the object of the sale (*e.g.* transfer of real estate or IP right; see chapter on Acquisition of Real Estate, section 2, and chapter on Intellectual Property, section 4).

2.3. Representations and Warranties

2.3.1. In General

Customarily, the parties explicitly agree in the APA on the representations and warranties (commonly referred to as "Reps" or "R&W") relating to the sold assets and covering, *inter alia*, the following areas:

- Title to the assets (in a narrow sense);
- Enforceability and authority, and no conflict;
- Spin-off balance sheet;
- Condition and sufficiency of assets;
- Taxes;
- Employee and consultants as well as employee benefits;
- Compliance with legal requirements, and governmental authorisations;
- Contracts.

2.3.2. Limitations on Representations and Warranties

Usually, the parties agree to limit the representations/warranties given under the APA. Common limitations are:

- Disclosure against representations/warranties;
- Knowledge qualifications in representations/warranties;
- Requirement of a notice of breach of representations/warranties;
- Time limits for bringing representation/warranty claims;
- *De minimis* rules (exclusion of smaller representation/warranty claims);
- Thresholds or deductibles;
- Statute of limitations;
- Caps on the seller's liability for representation/warranty claims.

2.3.3. Remedy

In a Swiss law governed APA the prevailing sole remedy in case of breaches of representations/warranties provided by the parties in the APA is damages (normally irrespective of any fault of the seller), sometimes preceded by the right of the seller to remedy the defect in question. Less common is the buyer's right to reduce the purchase price. The statutory right of the buyer to rescind the acquisition agreement is normally contractually excluded.

2.3.4. Time Limits for Claims under Representations/Warranties

For most representations/warranties the time limit is usually between 12 and 24 months, most often 18 months. However, for certain representations/warranties the time limit is usually between five and ten years, such as relating to title to assets, tax and environmental issues.

3. Closing

3.1. In General

At closing, the parties effect the transactions contemplated by the APA. Put simply, the buyer pays the purchase price and the seller simultaneously transfers the assets to the buyer. Further, the buyer assumes the assets. Usually, the parties record the completion of the closing in a closing memorandum.

3.2. Conditions Precedent

Typically, the parties agree in the APA that the obligation of each party to effect the transactions contemplated by the APA is subject to the satisfaction or waiver (to the extent a waiver is permitted by law) by each party of certain conditions precedent.

Conditions precedent can include, *inter alia*:

- Governmental approvals (for example, by competent competition authorities or banking or insurance regulators);
- Third party consents.

Normally, the parties include a covenant in the APA to use best efforts to ascertain that the conditions precedent are fulfilled until a certain date (so-called "long-stop date", or "drop-dead date"). They normally also agree on the consequences if this date is not met, that is, by providing for withdrawal rights of the parties.

3.3. Transfer of Assets in Particular

3.3.1. Traditional Asset Deal

If an asset purchase is performed the traditional way, assets are principally not automatically transferred to the buyer; however, exceptions may apply (*e.g.* in the field of labour law or tenancy law). This means that the parties must transfer each sold asset in accordance with the respective formalities laid down by Swiss law.

3.3.2. Transfer of Assets Pursuant to the Merger Act

If an asset purchase is performed through a transfer of assets as provided for by the Merger Act, all assets listed in an inventory attached to the transfer agreement are transferred by operation of law to the buyer upon registration of the agreement with the register of commerce. It is still disputed and therefore unclear whether this principle also applies to contracts to be transferred. The Merger Act further provides that both the seller and the buyer are jointly and severally liable for debts incurred before the transfer of assets for three years since the closing date.

4. Employees

Irrespective of whether an asset purchase is performed through a transfer of assets as provided for by the Merger Act or the traditional way, where the seller (as the employer) transfers in an asset deal the company or a part of it to a buyer, the seller is obligated to inform and/or consult employees or their representatives. However, the parties to an APA are not obligated to obtain employee consent to an asset deal (see also chapter on Corporate Restructuring, section 3.1).

5. Regulatory Aspects of Asset Deals

5.1. Competition Law

The CartA might apply to the acquisition of a private company's assets in some cases (see chapter on Competition Law, section 4). If a planned concentration of undertakings reaches or exceeds certain turnover thresholds, it is subject to pre-merger control, *i.e.* the parties (usually the buyer) must notify COMCO about it. In any event, pre-merger control must be obtained irrespective of any turnover thresholds if one of the involved undertakings has been held in a final decision to be dominant in a market in Switzerland, and the concentration concerns this market, an adjacent or an upstream or downstream market. Failure to comply with the notification duty triggers fines of up to CHF 1 million, and the underlying agreements are void.

5.2. Foreign Investment Control

Under Swiss law, the notification or clearance of a governmental agency is not required when a foreign owned (or foreign controlled) company acquires a private company's assets with its registered seat in Switzerland. However, on 3 March 2020, the Swiss Parliament tasked the Swiss government with proposing a draft bill to introduce foreign direct investment controls, including setting-up a respective licensing authority. In an announcement on 25 August 2021, the Swiss Federal Council published the key features of a foreign direct investment control regime. The Swiss Government follows a rather investor-friendly approach. The proposed regime concentrates on notification and approval requirements for state-related foreign investors and foreign investors acquiring target companies in sensitive sectors. In 2022, the Swiss Government published a preliminary draft bill regarding the screening of foreign direct investments and initiated the consultation on this new piece of legislation. It is expected that the Swiss Government will publish a revised draft bill at the earliest in the first half of 2023. After that, the Swiss Parliament will debate the introduction of a new foreign investment control regime.

Importantly, already under current Swiss law and thus irrespective of the proposed foreign direct investment control regime, restrictions regarding the acquisition of assets owned by companies in a certain business area (for example, residential real estate, national defence, banking, insurance, electricity, or other areas of national importance) may apply.

III. Public Takeovers

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1. Scope of Application of Swiss Takeover Law

1.1. Legal Framework

In Switzerland, PTOs are governed by the FMIA and the regulations promulgated thereunder, incl. the Ordinance on Public Takeover Offers of the TOB, which sets forth detailed rules on PTOs.

1.2. Companies Subject to Takeover Rules

Swiss public takeover rules are applicable to Swiss companies whose shares (or other equity securities) are listed on a Swiss stock exchange (*i.e.* SIX and BX). Swiss public takeover rules are not applicable to shares that are traded over the counter or on other private trading platforms. Foreign companies are subject to the Swiss public takeover rules only if their main listing is at a Swiss stock exchange.

1.3. Public Offering

The TOB applies the Swiss takeover rules to all public offers for the purchase of shares (or other equity securities) of listed companies. Public offers are offers addressed to a large number of equity securities holders, regardless of how such offer is communicated. Share buybacks of listed companies also fall within the scope of Swiss public takeover rules if the company announces the buyback program publicly. However, a simplified procedure, *i.e.* a procedure without the requirement to publish an offer prospectus, applies if the share buyback meets certain requirements.

2. Structuring of PTOs Pursuant to the FMIA

2.1. Mandatory PTO

Pursuant to the FMIA, anyone who directly, indirectly or acting in concert with third parties acquires equity securities which, added to the equity securities already owned by such person, exceed the threshold of 33⅓% of the voting rights of a listed company, must make an offer to acquire all listed equity securities of such company (mandatory PTO). The articles of association of a listed company may increase the threshold for a mandatory PTO to up to 49% (opting-up) or completely waive the obligation of a bidder to make a mandatory PTO (opting-out).

2.2. Extent of PTOs and Restrictions

Generally, PTOs are made for all issued and outstanding shares, but a bidder may also limit a PTO to a certain number of shares. In this case, the bidder must take tendered shares into account proportionally to comply with the principle of equal treatment of shareholders. No partial offer is possible if as a result of the PTO, the bidder exceeds the threshold for a mandatory PTO (so-called change of control PTO); in such case, the bidder must make a PTO for all the listed shares of the target. Despite the principle of equal treatment, the bidder may exclude shareholders domiciled abroad from the PTO to the extent the PTO is unlawful under applicable foreign law or if compliance with applicable foreign law represents an unreasonable burden for the bidder. Offer exclusions do generally not have a major impact on a PTO since shareholders can still sell their shares on the stock exchange at a small discount to the offer price. Exclusions based on foreign law are particularly common for shareholders domiciled in Anglo-Saxon jurisdictions.

2.3. Consideration

Swiss law allows cash offers as well as exchange offers. In an exchange offer, the bidder may offer any kind of listed or non-listed securities, incl. shares, bonds and derivatives. In mandatory PTOs the bidder must provide for a cash alternative if it is offering securities for exchange.

The bidder may determine the price it intends to offer in the PTO at its discretion, subject to the compliance with:

- the minimum price rule, pursuant to which in mandatory and change of control PTOs the offer price must not be lower than the higher of (i) the volume-weighted average price of the shares of the target during the 60 trading-day period preceding the offer and (ii) the highest price paid by the bidder for shares during the 12 months preceding the offer;
- the best price rule, pursuant to which the highest price paid by the bidder for shares during the period commencing on the day of the publication of the offer and ending six months after the end of the additional acceptance period of the PTO, must be paid to all shareholders.

Due to the minimum price rule, it is not possible to purchase a controlling stake in a listed company at a premium immediately prior to the launch of a PTO because such price would have to be offered to all shareholders in the PTO pursuant to the minimum price rule.

2.4. PTOs Subject to Conditions

The bidder may subject a PTO to conditions provided that the bidder can show a legitimate interest in the conditions, the satisfaction of such conditions can be assessed objectively, and cannot be influenced by the bidder itself in a material manner.

The most common conditions in PTOs include:

- approval from merger control authorities and further regulatory approvals necessary to complete the transaction;
- acceptance of the offer for a minimum number of shares (common is a 66⅔% acceptance rate);
- the absence of a material adverse change (which, however, must be narrowly defined as a material deviation from certain key performance indicators); and
- certain corporate approvals of the target such as the registration of the bidder in the share register of the target with full voting rights or the resolution of the target's shareholders' meeting to abolish transfer restrictions or voting right restrictions contained in the articles of association.

Financing conditions are not permitted in cash offers since certainty of funds is considered a key element in PTOs. In exchange offers, the bidder may include a condition regarding the issuance and listing of the securities offered for exchange.

Mandatory PTOs may only be subject to conditions relating to merger control and regulatory approvals as well as corporate actions of the target necessary for the bidder to obtain voting rights with respect to the shares acquired in the PTOs.

3. Offer Documentation

3.1. Transaction Agreement

In a friendly PTO, it is customary that the target company and the bidder enter into a transaction agreement prior to the launch of the PTO. Such agreement sets forth the details of the PTO and commonly contains a no-shop provision, which prohibits the target to actively seek competing bidders. Nonetheless, competing bidders cannot be completely excluded since the target's board has a fiduciary duty towards its shareholders to pursue more attractive third party offers. Consequently, no-shop provisions usually contain a "fiduciary-out" clause, which allows the target to enter into discussions with a third party that intends to submit a better offer. For the purpose of deal protection, the parties sometimes agree on a break-up fee, which the target has to pay to the bidder if a competing bidder is successful. Such break-up fees are permitted to the extent that they are proportionate and, in particular, reflect the costs incurred by the bidder in connection with the PTO.

3.2. Offer Prospectus

The bidder has to publish an offer prospectus in German and French. The content of the offer prospectus is prescribed in detail in the Ordinance on Public Takeover Offers of the TOB and includes a description of the bidder, the price offered and the conditions to which the offer is subject as well as the details on the financing of the PTO. Prior to the publication of the prospectus, the bidder has to designate an independent review body that examines whether the prospectus complies with applicable law and whether the statements the bidder makes in the prospectus are true. The independent review body's report is published as an annex to the prospectus. The independent review body also has to confirm the availability of the financing or, in case of an exchange offer, the availability of the securities offered for exchange. Further, in friendly PTOs, the report of the board of directors of the target company (see section 4.1 below) is regularly attached to the offer prospectus.

3.3. Pre-Announcement

The bidder may publish a pre-announcement prior to the publication of the offer prospectus, which contains details on the price offered and the conditions to which the offer is subject. If the bidder makes use of this option, it has to publish the offer prospectus within six weeks after publication of the pre-announcement. The bidder will be bound by the pre-announcement insofar as that the offer prospectus must not contain provisions that are less favourable to the target's shareholders than those stated in the pre-announcement. If the offer commences with a pre-announcement, the date of its release is decisive for the calculation of the minimum price period and triggers the application of the best-price rule and the application of the rules on defence measures of the target company described below. In friendly PTOs it is customary to make the pre-announcement on the trading day that follows the execution of the transaction agreement.

4. Obligations of the Target Company

4.1. Report of the Board of Directors

Within 15 trading days after the publication of the offer prospectus, the board of directors of the target company has to publish a report on the PTO. In friendly PTOs, the report is usually published together with the offer prospectus. The purpose of the report is to inform the investors of the pros and cons of the PTO and its impact on the target company. The report must contain all information which is necessary for the company's shareholders to take a decision and the board's recommendation (if any) to the target's shareholders whether or not to accept the PTO. Although not a requirement by law, it is customary that the board of directors only recommends an offer for acceptance on the basis of a fairness opinion provided by a neutral investment bank or an auditor.

4.2. Restrictions on Defence Measures

In hostile PTOs, the target company may take all defence measures available under corporate law, incl. the application of the transfer restrictions or voting restrictions stipulated in the target's articles of association. The target must notify the defence measures it intends to adopt to the TOB prior to implementation. Certain defence measures are prohibited, notably the issuance of shares, the sale of major assets or other actions that lead to a significant change in the target's asset or liability structure.

5. Offer Timeline, Offer Completion and Squeeze-out

5.1. Offer Period and Completion

A PTO can only be accepted by the target's shareholders after the expiry of ten trading days after the publication of the offer prospectus (cooling-off period). The PTO has to be available for acceptance during at least 20 trading days and at the maximum during 40 trading days. After the expiry of the acceptance period the bidder publishes the interim results stating the number of shares for which the offer has been accepted and whether the conditions to which the offer was subject have been fulfilled. In case the offer is successful the bidder has to grant an additional acceptance period of ten trading days to the target company's shareholders that have not yet accepted the offer. The PTO has to be completed and the consideration has to be paid within ten trading days after the expiry of the additional acceptance period. The closing of the transaction can be deferred if during the acceptance period the bidder could not obtain all regulatory approvals that are required for the closing of the PTO. The deferral, however, requires the consent of the TOB.

5.2. Cancellation of Remaining Shares and Squeeze-out

If the bidder holds more than 98% of the voting rights of the target company upon closing of the PTO, it can demand the cancellation of the remaining shares in a court procedure. The court proceedings have to be initiated within three months after the closing of the PTO. The court will only consider whether the bidder indeed holds 98% but will not review the adequacy of the consideration. Alternatively, if the bidder has not achieved a 98% threshold, but holds more than 90% of the target company shares, it may squeeze out the remaining shareholders against cash payment by way of a statutory merger with the target company. For a squeeze-out merger, the bidder is not bound by the three months deadline, but the target's shareholders have the possibility to challenge the adequacy of the consideration.

6. Competing Offers

It is possible that several bidders publish PTOs for the same company, leading to a competition between the bidders. In such case, the target must treat all bidders equally. The target must, in particular, furnish the same due diligence information to all the competing bidders and treat them equally with regard to the application of any transfer or voting rights restrictions that the target's articles of association may contain.

IV. Mergers


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1. In General

1.1. Merger Act

The conditions and consequences of mergers under Swiss law are mainly regulated by the Merger Act, which entered into force on 1 July 2004. Prior to the adoption of the Merger Act, mergers were governed by specific provisions of the CO (which only allowed a limited number of types of mergers). The main purpose of the Merger Act is to regulate the private law aspects of mergers, while ensuring adequate legal protection of third parties, such as employees, holders of minority participations or creditors.

The revision of Swiss Corporate Law, which fully entered into force on 1 January 2023, brought to the Merger Act a few minor modifications in order to align it with the latest version of the CO.

1.2. Types of Merger

The Merger Act provides for two main types of mergers: (i) the absorption merger and (ii) the combination merger. By way of an absorption merger, one legal entity takes over another entity (or several entities) whereas with the combination merger, two (or more) legal entities are merged together into a new legal entity set-up by the merger. In both scenarios, one or several legal entities (the transferring entity) are automatically dissolved by operation of law and deleted from the commercial register, without any liquidation procedure, whereas the other legal entity (the acquiring entity) survives with all pre-existing rights and obligations of the merging entities. These two types of mergers are subject to the same provisions of the Merger Act, with certain exceptions.

1.3. Entities which May Be Merged

Before the adoption of the Merger Act, the CO only permitted mergers of corporations, limited partnerships and cooperatives. The Merger Act introduced a wider range of possibilities of mergers between different types of legal entities and lists restrictively all possible mergers (*numerus clausus*). Mergers may be carried out between entities of the same or of different legal forms. For simplicity, this chapter will mainly cover mergers of two corporate entities as this is the most common type of mergers in practice.

1.4. Cross-Border Mergers

Swiss law recognises that mergers may be carried out across different jurisdictions. The conditions for a cross-border merger involving a Swiss company are set forth in the PILA. A Swiss company may take over or be combined with a foreign company (a so-called immigration merger) if the law governing such foreign entity allows it. If this condition is met, Swiss law will apply to all other aspects of such a merger. Mergers of Swiss companies into foreign entities (so-called emigration mergers) are also possible under certain (protective) conditions set forth by the PILA. If this is the case, then the law governing the foreign (acquiring) entity will apply to all other aspects of the merger.

2. Consequences of a Merger

As of the effective date of the merger, all assets and liabilities as well as all rights and obligations (even if they have not been recorded in the balance sheet of the transferring company and/or are known at the time of the merger) are passed by operation of law from the transferring entity to the acquiring entity, with certain exception such as rights which are intrinsically linked to the transferring entity (*intuitu personae* rights). No further (formal) action from the parties is required with respect to such transfer (subject to certain limited cases *e.g.* the update of real estate registers). The transferring entity (both entities in case of a combination merger) is automatically dissolved, without any liquidation process, and deleted from the register of commerce. All shares (or other participation rights) of the transferring entity are also cancelled by operation of law. The Merger Act guarantees the continuity of membership, *i.e.* the shareholders of the transferring entity have the right (subject to limited exceptions) to become shareholders of the acquiring entity. Further, the shareholders of both entities should maintain their economic interest after the merger (an adequate share exchange ratio is required).

3. Required Documentation and Other Formal Aspects

3.1. Merger Agreement

The board of directors of the merging companies must execute a merger agreement which sets forth the terms, conditions and consequences of the merger. The Merger Act provides for certain mandatory provisions and information to be included in the merger agreement, such as the identity of the merging entities, the share exchange ratio and modalities, any advantages granted to directors or managers and the internal effective date of the merger (*i.e.* when the parties wish the merger to become effective between themselves).

3.2. Merger Report

A written merger report must be drawn up by the board of directors of the merging entities (either for each entity or in common for both entities). This report must explain and justify certain aspects of the merger, such as the reasons and consequences of the merger, the share exchange ratio, the consequences of the merger on employment relationships. In case of a combination merger, the articles of association of the new legal entity must be attached to the report. Small and medium-sized enterprises may, subject to the agreement of all shareholders, waive the duty to establish the merger report.

3.2.1. Audit Confirmation

The merger agreement, the merger report as well as the merger balance sheet must be reviewed by a licensed expert auditor if the acquiring entity is a corporate entity or a cooperative with participation certificates. The auditor must issue an audit report and examine whether the planned capital increase (if any) is sufficient to secure the rights of the shareholders of the transferring entity, whether the exchange ratio for the participation rights or, as the case may be, the compensation payment to the shareholders is reasonable and whether this ratio has been determined correctly. Small and medium size enterprises may, subject to the agreement of all their shareholders, waive this duty to obtain an audit confirmation.

3.2.2. Consultation Rights

The shareholders of each merging entity have the right to review the documentation of the merger, *i.e.* the merger agreement, the merger report(s), the audit confirmation(s) and the annual accounts and reports of the last three business years (and, if applicable, the interim accounts) of each merging entity. The shareholders may further request copies of such documents. The merging entities must inform their shareholders of their right of consultation, which lasts 30 days prior to the shareholders' resolution approving the merger. In practice, this information to the shareholders is made in parallel to the invitation to the shareholders' meeting during which the merger is proposed for approval. Small and medium size enterprises may, if all shareholders agree to do so, renounce to the consultation right.

3.2.3. Balance Sheet

The balance sheets of the merging entities must be available at the time of the merger, in order to allow the acquiring company to draw up the (merged) opening accounts after completion of the merger. Such balance sheets also serve additional purposes, in particular as references with which to determine the financial situation of the merging entities and to establish the exchange ratio of the shares or other participation rights or the protection of creditors. Only the merger balance sheet of the transferring entity needs to be filed with the register of commerce. In principle, the balance sheet of the last annual accounts may be used for the merger. However, to ensure that the relevant balance sheets are relatively up-to-date at the effective time of the merger, the Merger Act requires that interim accounts be established when either the balance sheets or the last annual accounts have been closed more than six months prior to the conclusion of the merger agreement or significant changes in the situation of a merging entity have occurred since the closing of the balance sheet.

3.2.4. Corporate Approvals

Finally, the Merger Act sets forth the required corporate approvals for a merger to be adopted depending on the type of merging entities. For instance, the general meeting of a merging corporate entity must approve the merger with certain qualified majorities.

3.2.5. Registration with the Commercial Register and Effective Date

Once approved by the relevant corporate body, all merging entities must file an application with the register of commerce for the merger to become effective. In such filing, the acquiring entity shall declare that it will absorb the transferring entity (with all assets and liabilities), whereas the transferring entity shall declare that all of its assets and liabilities are transferred to the acquiring entity and that it will be struck off the register of commerce. The merger becomes effective as soon as it is recorded in the daily register of the register of commerce at the seat of the acquiring company. Towards third parties acting in good faith, a merger becomes legally effective on the business day following the (online) publication of the merger in the Swiss Official Gazette of Commerce. The merging entities may agree among themselves that the merger will be effective at another date (generally the date of the merger balance sheet). However, such contractually agreed date only binds the parties to the merger agreement and has no effect towards third parties, such as counterparties to the transferring company.

3.2.6. Simplified Merger Procedure

The Merger Act provides for a simplified merger procedure for corporate entities in certain specific cases. A simplified merger is possible when (i) the acquiring entity holds all shares with voting rights of the transferring entity (so-called upstream merger), or (ii) a legal entity, an individual or a connected group of persons controls all shares with voting rights of the merging entities (so-called side-stream merger). A simplified merger is also possible if the acquiring corporate entity only holds 90% of the voting rights in the transferring entity, if certain additional requirements are met. If the simplified merger procedure applies, the merging entities may enter into a simplified merger agreement which does not need to contain all usual mandatory provisions required by the Merger Act, waive the duty to establish a merger report, waive the requirement of an audit of the merger (except when the acquiring entity controls only 90% of the transferring entity), decide not to grant their shareholders consultation rights, and waive the requirement of an approval of the merger by the shareholders' meeting.

4. Impact on Employment Relationships

The transfer of employment relationships during a merger is mainly governed by the provisions of the CO generally applicable to a transfer of undertakings. The employees of all merging entities must be informed and consulted about the reasons and consequences of the merger and the transfer of their employment relationships (and their rights related to such transfer). The employees of the acquiring entity must be informed even though their employment relationships will in fact not be transferred. This consultation process must take place before the merger is approved by the general meeting. In case of non-compliance with such requirements, the employee representation of a merging entity may ask a judge to block the registration of the merger with the register of commerce. Also, employees may request specific guarantees for their claims arising out of their employment relationships (see chapter on Corporate Reorganisations, section 3.1).

5. Protection of Creditors

The Merger Act contains a protection mechanism for claims of creditors. The acquiring entity is obliged to secure the claims of the creditors (of each merging entity) who request a security, if the acquiring entity is not able to show that the merger will not compromise the due payment of the relevant claim. The entities involved in the merger must inform the creditors of their right to request security by way of an official publication. This publication requirement may be waived if a licensed expert auditor confirms that the disposable assets of the merging entities are sufficient to satisfy all claims (known or expected).

6. Specific Form of Merger - Squeeze out Merger

The Merger Act offers the possibility to exclude (or squeeze out) minority shareholders of the transferring entity by way of a merger (so-called squeeze-out merger). In principle, only minority shareholders holding a maximum of 10% of the voting rights (in total) may be excluded, since the squeeze-out merger must be approved by the shareholders holding at least 90% of the voting rights in the transferring entity. The excluded shareholders do not receive any shares or participation rights in the acquiring entity, but an adequate compensation. Such compensation may be paid out in cash or in other realisable assets, such as participation rights in the parent company of the acquiring entity (so-called triangular merger).

V. Joint Ventures

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1. Form of Joint Ventures

1.1. In General

In Switzerland, the "joint venture" is recognised as a legal concept, but there is no statutory definition of it or body of law specifically covering it. Most joint ventures are typically structured as either corporate joint ventures or contractual joint ventures, thus most applicable rules on their formation and operation are found in the CO.

Which form of a joint venture its partners choose depends largely on the JV partners' needs. For projects limited in time and scope, the JV partners often prefer the ease of formation and flexibility of a contractual joint venture, whereas the more formal structure of a corporate joint venture is typically chosen for long-term cooperation arrangements or where limited liability is a key concern.

1.2. Corporate Joint Venture

In a corporate joint venture, the JV partners act through a separate legal entity (in which they have ownership) established and managed in accordance with the terms of the joint venture agreement much like an investment and shareholders' agreement. This is mostly achieved by the JV partners incorporating a new company, by jointly acquiring a company or one JV partner investing in a company owned by the other JV partner. This joint venture vehicle can be organised in various legal forms provided by Swiss law. In practice, however, the corporate joint venture is primarily organised as a corporation or an LLC (see chapter on Legal Forms of Companies).

1.3. Contractual Joint Venture

The contractual joint venture is based on a mere contractual relationship between the JV partners, typically the so-called joint venture agreement plus a set of ancillary agreements. As no separate legal entity is established, the JV partners themselves are operating as a group directly in the market.

2. Joint Venture Agreement

2.1. In General

The joint venture agreement does not need to be drafted in a specific form. Even if the JV partners only orally agreed on the establishment of a joint venture, the agreement is binding. However, because joint venture agreements are often very complex, most JV partners will choose to enter into the agreement in written form.

Typically, the following topics are addressed in such agreement:

– Purpose;
– Contributions (financial or in kind) and further funding;
– Ownership in the joint venture's assets, in particular in the IP rights;
– Internal organisation of the joint venture, incl. decision making process with dispute resolution mechanisms (in particular deadlock situations) and minority protection provisions;
– Management and representation of the joint venture;
– Liability (vis-à-vis JV partner and third parties);
– Distribution of profits and losses;
– Non-compete obligations, fiduciary duties and confidentiality obligations;
– Term, termination and exit or winding up;
– Governing law and jurisdiction/arbitration.

Additionally, in case of corporate joint ventures the joint venture agreement should address:

– Legal form, domicile, capital structure, *etc.* of the joint venture vehicle;
– Transferability of shares, incl. restrictions such as pre-emptive rights, rights of first refusal, *etc.*;
– Corporate governance (board of directors, shareholders' meeting);

- Relationship between joint venture agreement and (potentially conflicting) corporate documents, in particular the articles of association.

2.2. Spotlight on a Few Select Issues in Joint Venture Agreements

2.2.1. Establishment of the Joint Venture Company in Case of a Corporate Joint Venture

When establishing a joint venture company, mandatory corporate law with regard to incorporation, operation and termination must be complied with. It should be noted that the joint venture company only comes into existence after it has been duly registered with the commercial register. Swiss law further requires that certain provisions of the joint venture agreement are incorporated into the (publicly available) articles of association in order to not only contractually bind the JV partners, but to also the joint venture company itself.

2.2.2. Liability of JV Partners

In a contractual joint venture, there is no limited liability for the JV partners, they may (in rare cases and depending on the structure of the joint venture agreement) even become liable for debts incurred by the other JV partner on behalf of the joint venture.

One of the main advantages of a corporate joint venture on the other hand is that the JV partners' liability towards third parties is limited to their respective equity participation as shareholders. Aside from the obligation to pay in the share capital, a shareholder in principle has no further duties to a company (be this fiduciary duties, further financing obligations, *etc.*). However, it should be noted that the JV partners in practice will sometimes not be able to benefit from such limited liability for reputational reasons or because of personal guarantees the JV partners were required to give to third parties.

It should further be noted that – in particular circumstances, especially where the joint venture company's interests conflict with those of the JV partners – the people engaged in the joint venture's management (*e.g.* members of the board of directors) could be held personally liable for breach of fiduciary duties owed to the joint venture company. With regard to fiduciary duties of nominee directors, it can be noted that in principle it is considered acceptable that a nominee director acts based on instructions of the appointing shareholder, as long as he or she can act with certain discretion to give priority to the joint venture company's interests. This liability does not apply only to the formally appointed directors of the joint venture company but also to so-called *de facto* directors. Under Swiss law, the term *de facto* director can include the main shareholders of a company (or such shareholder's directors) if they exercise *de facto* director functions in the company (either directly or through instructions to a nominee director).

2.2.3. 50:50 Joint Ventures: Deadlock Devices

Joint ventures are often formed with a 50:50 participation by the JV partners which has the immanent risk of deadlock situations. This risk can be mitigated by agreeing on certain devices to unlock deadlock situations in case the JV partners fail to reach an agreement. Such devices can include (i) agreeing on an internal escalation scheme or arbitrator, (ii) alternating the right to decide certain questions (*e.g.* by alternating each year the right to appoint the chairman with casting vote), (iii) appointing independent directors, (iv) reciprocal share call or put options at a pre-agreed price formula, (v) a submitting to a "Russian roulette" clause, a "Texas shoot-out" clause, or other buy-sell structures. The latter, more elaborate buy-sell devices have in our experience however the downside of subjecting important decisions (to a certain extent) to chance.

2.2.4. Minority Protection

Minority protection becomes an important point if one of the JV partners controls majority decisions, *i.e.* in case of corporate joint ventures by owning the majority of shares. It should be noted that minority shareholders in a corporation enjoy only limited statutory rights (such as the right to call a shareholders' meeting or to challenge the validity of resolutions violating statutory law or the articles of association). Swiss law provides for different statutory minority rights depending on the size of participation, *i.e.* some apply to the owner of a single share while other require that a certain percentage is owned.

Such minority protection can be achieved by (i) subjecting important decisions to the consent of a qualified majority (such as hiring of senior management, capital expenditures exceeding a certain threshold, changes to the capital structure, mergers or other restructurings, the sale of important assets, related party transactions, *etc.*) or (ii) by subjecting meetings of the deciding bodies (*i.e.* in case of a corporate joint venture: the meetings of the board of directors or the shareholders) to presence and majority quorums. Ideally, this is reflected both in the joint venture agreement as well as in the articles of association of the joint venture company so that is not only a contractual obligation but also binding the joint venture company on a corporate level.

2.2.5. Dispute Resolution of Joint Ventures

The dispute resolution mechanisms applied in agreements that are subject to Swiss law are those normally applied in international joint venture agreements, such as mediation, arbitration, and state court proceedings.

There are no limitations regarding the choice of applicable law and the method of dispute resolution. However, when applying the law of any jurisdiction, the courts in Switzerland may give effect to mandatory rules of another law (to the extent such law requires that it be applied), provided that the subject matter has a close connection to such law.

Arbitration is often used as a dispute-resolution mechanism. The rules of the Swiss Arbitration Centre (Swiss Rules) as well as the rules of the ICC Rules are regularly chosen.

3. Regulatory Aspects of the Joint Venture

3.1. Foreign JV Partners

There is currently no legislation of general application in Switzerland requiring notification to or clearance from a governmental agency when a foreign-owned (or foreign-controlled) company establishes a joint venture in Switzerland. Depending on the outcome of current political initiatives, Switzerland might implement a foreign investment control regime in the foreseeable future.

However, depending on the business area of the joint venture company, certain restrictions might apply already today:

- In certain regulated businesses (*e.g.* banking, insurance, electricity, health), a business licence or special permit may be required.
- As a general rule, there are no restrictions on capital transfers between Switzerland and other countries.
- The acquisition by foreigners (or companies controlled by foreigners) of real estate in Switzerland, either directly or indirectly through the purchase of shares in companies which own residential real estate, is restricted. Given certain circumstances, a so-called Lex Koller-ruling

may be obtained allowing such transaction (see chapter on Acquisition of Real Estate, section 4).

– There are strict rules on the employment of foreign nationals by a Swiss joint venture: In particular, residents of countries outside of the EU (and EFTA) are subject to an immigration regime under which only a limited number of work permits is granted (see chapter on Foreign Employees).

3.2. Competition Law Aspects

With regard to joint ventures, the CartA might be applicable in certain cases (see chapter on Competition Law): On the one hand, it is relevant in cases where the establishment of a joint venture constitutes a market concentration and therefore is subject to merger control. The parties may be required to file a notification with COMCO. On the other hand, the CartA must be taken into account in cases where the joint venture leads to "agreements affecting competition" without qualifying as concentration, in which case the CartA remains applicable even if no filing with COMCO is required.

VI. Equity Offerings

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1. Market and Recent Activity

Switzerland provides an attractive market for equity offerings, in particular due to its liquid equity market, its long-standing reputation as a financial centre, its stable and issuer-friendly regulatory framework and its state-of-the-art financial market infrastructure. While most issuers listed on a Swiss exchange have their domicile in Switzerland there are also a considerable number of foreign companies. Issuers listed on a Swiss exchange are active in a wide range of sectors, notably in the financial, industrial, retail, pharmaceutical and biotech industries. Only a few IPOs as well as a few initial listings are completed on SIX per year. In recent years, a variety of new regulations have been adopted resulting in a modern and versatile legal framework for equity offerings in Switzerland, including a revised Swiss corporate law that entered into force in 2023.

2. Exchanges and Trading Venues

The main equity exchange in Switzerland is SIX. A total of approximately 250 companies are listed on SIX. The total market capitalisation of all issuers listed on SIX amounts to about CHF 1.6 trillion. In addition, SIX launched the SDX Digital Exchange in 2021 for digital assets. The other equity exchange is BX with about 20 companies listed.

3. Regulatory Bodies

The main regulatory body is the FINMA, responsible for the supervision of the exchanges and the financial market in Switzerland.

Prospectuses regarding public equity offerings are subject to review and approval by a FINMA licensed approval authority. There are currently two approval authorities licensed by FINMA: SIX Exchange Regulation Ltd and BX Swiss Ltd.

In addition, based on the principle of self-regulation, the exchanges in Switzerland have enacted their own regulations and set up private self-regulatory bodies licensed and supervised by FINMA. For SIX these are the following ones (similar bodies exist for BX): SIX Regulatory Board (issuing the SIX regulations); SIX Exchange Regulation Ltd (monitoring and enforcing compliance with the SIX regulations); the judicial bodies; and the Disclosure Office (enforcement of the disclosure of qualified shareholdings).

Furthermore, the TOB, a federal commission, is responsible for the enforcement of the provisions applicable to public takeovers and share buyback programmes.

4. Main Legal Framework

The main legal sources for equity markets and exchanges in Switzerland are:

– The FinSA and its corresponding ordinance the FinIO, regulating the prospectus regime (including prospectus liability);
– The CO, in particular its rules regarding the annual reports and (with effect as of 1 January 2023) the compensation of board members and executive management (previously found in the Ordinance against Excessive Compensation);
– The FMIA and its corresponding ordinance, regarding the regulation of the financial market; and
– The FINMASA, regulating the supervision by FINMA.

In addition, the following regulations are applicable to listings on SIX:

- The Listing Rules, defining the main principles for the listing and maintaining of a listing on SIX, including the respective directives and
- The Directive on the Procedures for Equity Securities, regulating the listing of equity securities.

5. Kind of Equity Offerings

An issuer may create new shares by way of a capital increase, offer the new shares for subscription to the public or to designated investors and receive capital in return. In this case, the pre-emptive subscription rights of the existing shareholders provided by law must be respected or waived by the shareholders or withdrawn by a resolution of the shareholders' meeting. The offering is typically intermediated by an underwriting bank or group of banks.

An IPO may include an offering and listing of new shares as well as existing shares. Existing shares may be listed without being offered to the public (direct listing), in which case no underwriter and often no investment bank is involved. Following the listing, further new and existing shares may be offered to the public.

If in a secondary offering the pre-emptive rights are not waived or withdrawn, the shares are first offered to the existing shareholders in a rights offering. The subscription rights may be tradeable and have an intrinsic value if the new shares are offered below the market price.

A faster way for an issuer to receive capital is through an accelerated bookbuilding in which an investment bank places shares with pre-selected investors within a narrow time window of few hours or days. Furthermore, issuers may choose a primary listing only, without offering shares.

6. Listing

6.1. Segments

In addition to its main segment, SIX introduced in 2021 a new trading segment for SMEs, SPARKS, tailored to needs of companies with a lower capitalization. Besides more moderate listing requirements the SPARKS segment provides for a condensed trading window with opening auction at 3:00 pm, continuous trading until 5:20 pm, closing auction and Trading at Last (TAL) until 5:40 pm.

Also in 2021, SIX set the stage for the listing of special purpose acquisition companies (SPACs), followed by new rules for the listing of Global Depositary Receipts (GDRs) in 2022.

6.2. Requirements

For the main segment, issuers must in particular:

- Prepare their financial statements in accordance with an acknowledged accounting standard, namely IFRS, US GAAP or Swiss GAAP FER and have appointed admitted auditors;
- Be duly constituted and have securities duly issued under the applicable law;
- Show a minimal equity capital as disclosed in the balance sheet of at least CHF 25 million on the first trading day;
- Have a free float of 20% which must correspond to a market capitalisation of CHF 25 million (not applicable to secondary offerings);
- Be in existence for at least three years, including respective annual accounts (track record), the SIX Regulatory Board may grant exceptions; and
- In case of shares of a foreign company not listed in the domestic market: evidence that the non-listing in the domestic market is not due to a violation of rules protecting investors.

Depending on the reporting standard of the issuer and the financial instruments, SIX offers different trading standards, some of which have slightly reduced listing requirements.

For the SPARKS segment, issuers must:

- Have a market capitalization of less than CHF 500 million upon listing;
- Be in existence for at least two years;
- Feature a shareholder base of at least 50 investors;
- Have a minimum equity capital of CHF 12 million; and
- Undertake a capital increase of at least CHF 8 million.

In general, the SPARKS segment only allows for an IPO. A direct listing without an offering is not possible, unless an issuer's equity capital exceeds CHF 25 million.

6.3. Road to Listing and Timeline

Approximately Four to Six Months				
Planning/Preparation	**Drafting**	**Investor Education**	**Pre-Trading**	**Trading/Aftermarket**
– Contact Advisors, Engage Lead Bank – Kick-off Meeting – Develop Timetable – Research and Publicity Guidelines – Define Capital Structure – Review/Adjust Corporate Governance	– Due Diligence – D&O Questionnaire – Engagement with Auditor – Draft Prospectus – Draft Underwriting Agreement/Other Agreements/Disclosure and Technical Opinions – Draft Capital Increase Documentation – Draft Presentations/Other Marketing Material – Listing Application by a SIX Recognised Representative	– Pilot Fishing (if applicable) – Intention to Float – Investor Education – Roadshow – One-on-one Meetings	– Bookbuilding – Determine Price Range and Offering Price – Execution of Agreements and Opinions – Execution of Capital Increase – Subscription, Registration and Allocation of Shares	– First Day of Trading – Aftermarket Stabilisation – Greenshoe (if applicable) – Continuing Obligations

Five main phases of the listing process may be distinguished: (i) planning and preparation, (ii) drafting, (iii) investor education, (iv) pre-trading and (v) trading and aftermarket. Upon closing of the bookbuilding, shares are allocated in accordance with the allocation directives for the new issues market of the Swiss Bankers' Association. Aftermarket stabilization is possible within the limits of the safe harbour rules of the market abuse regime according to the FMIO.

7. Prospectus

Introduced in 2020, the FinSA provides for a detailed legal framework for equity offerings, according to which in principle any public equity offering or listing of equity requires a prospectus. No prospectus is required for offerings to investors who are qualifying as professional investors; are made to less than 500 investors; are made to investors who each invest no less than CHF 100,000; or for offerings not exceeding CHF 8 million within 12 months. The same holds for the listing of additional shares not exceeding 20% of the primary offering within 12 months since the primary offering, secondary listings of Swiss listed shares or shares listed on a foreign exchange deemed as being equivalently regulated. Further exemptions apply to specific circumstances such as exchange offerings in M&A contexts.

The prospectus has to include all information which is material for the investment decision of the investors, namely about the issuer and its business activities, the board of directors and management board, the auditors, significant shareholders, investments, capital structure and voting rights, audited consolidated annual (if applicable also interim) financial statements for the last three full financial years, risk factors, the offered securities and the rights attached, the placement and the expected proceeds and a standardised summary. Detailed minimal requirements are listed in the annexes to the Financial Services Ordinance. Reduced requirements apply for young companies and issuers below certain thresholds. Prospectuses regarding public equity offerings are to be reviewed and approved by an approval authority with respect to their completeness, coherence and comprehensibility prior to their publication. The content of the prospectus as well as accompanying information such as marketing material and research reports are subject to civil prospectus liability. Moreover, the intentional omission to publish a prospectus in time or false statements and omission of material facts in the prospectus is sanctioned by fines of up to CHF 500,000.

Furthermore, FinSA has introduced rules on advertisement for financial products requiring such advertisement to be recognisable as such as well as to refer and correspond to the prospectus, if any. The requirement to correspond to the prospectus extends beyond advertisement to any information on financial products addressed to investors.

8. New Swiss corporate law and ESG

The new Swiss corporate law, which for the most part has entered into force on 1 January 2023, brought a variety of significant changes for listed companies with domicile in Switzerland. *Inter alia*, Swiss stock corporations may adopt a so-called capital band, authorizing the board of directors to increase and/or decrease the share capital within a maximum range of ±50% of the registered share capital within a maximum period of five years. Thereby, the raising of capital is made significantly more flexible compared to the previous legislation (only allowing for increases of the capital and only within a limited period of two years). Other highlights include the more versatile forms of shareholders' meetings. Companies may hold shareholders' meetings abroad, simultaneously at various places or conduct in the form of a hybrid (with some shareholders attending by electronic means) or entirely virtual event (in each case to the extent provided for in the articles of association).

Since 1 January 2022, larger listed companies as well as supervised financial institutions are required to publish a sustainability report, following the model of the Non-financial Disclosure Directive 2014/95/EU of the European Union, covering ESG related matters. Such report is to be approved by the board of directors and the general shareholders' meeting. In addition to this, comply or explain rules regarding gender diversity were introduced in 2021 applying to larger Swiss stock corporations, whereby each gender needs to be represented at least 30% (board of directors) or 20% (executive management) respectively. Failure to meet the stated target values results in an obligation to disclose the reasons and measures to promote the less represented gender in the compensation report. The new law provides for substantial transition periods (until the financial year of 2026 for boards of directors and 2031 for executive managements) with many companies likely to opt for early implementation in view of heightened expectations from institutional investors and proxy advisors.

9. Tax

One-time capital duty at a rate of 1% applies to the issuance of new shares by and capital contributions to Swiss resident corporations (irrespective of whether such contributions are made in case or in form of other assets), whereby issuances up to the first CHF 1 million are exempt. Further, amongst others, restructuring, migration and recapitalisation reliefs are available.

Further, securities transfer tax of 0.15% for Swiss securities and 0.3% for foreign securities is levied on the transfer of said securities if at least one of the parties or intermediaries involved qualifies as a Swiss securities dealer. Certain transactions and certain parties are exempt.

10. Continuing Obligations and Rules against Market Abuse

Following an equity offering on SIX, issuers are subject to continuing obligations based on the SIX listing rules: publication of annual financial reports including a corporate governance report as well as semi-annual financial reports, regular reporting obligations of certain key information on the issuer and the shares, ad hoc publicity of material non-public information and disclosure of management-transactions. SIX may sanction breaches of the listing rules by issuing a reprimand, impose a fine of up to CHF 1 million (for negligence) or CHF 10 million (for intentional breaches), non-anonymized publication of the verdict, suspension of trading, de-listing or downgrading to another regulatory standard. In addition, holders and the issuer of listed shares have to comply with the obligation to disclose significant shareholdings reaching or crossing certain thresholds (3, 5, 10, 15, 20, 25, 33 ⅓, 50, 66 ⅔%), and transactions in listed shares are subject to the rules against insider trading, tipping and market manipulation, including specific rules on share buybacks. Non-disclosure of significant shareholdings and market abuse are persecuted by FINMA and the criminal prosecutors and may be sanctioned by publication of the verdict, clawback of profits and, in case of criminal proceedings, fines and imprisonment.

11. De-Listing

An issuer with equity securities listed on SIX may request the de-listing of its securities. The Regulatory Board determines the last trading day, usually lasting between three and twelve months after the announcement of the de-listing, which period may in certain cases be shortened (*e.g.* mergers, liquidations). In addition, the SIX Regulatory Board may de-list equity securities under certain conditions such as insolvency of the issuer, insufficient liquidity of the securities, continuing suspension of trading or failing to comply with listing requirements.

Financing Transactions in Switzerland

I. Working Capital Financings

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1. In General

In order for companies to finance their daily operations or increase their cash flow, various options are available to companies in Switzerland. Working capital financings range from plain vanilla short-term loans to highly structured single or multicurrency term and revolving loan facilities including fixed advances, overdraft facilities and ancillary facilities (to be used for letter of credit facilities and current account facilities). Other means include factoring and securitisation of receivables transactions.

Whereas smaller transactions are documented by banks' standard agreements, larger transactions are based on templates from the Loan Market Association, adjusted to Swiss law and to the transactions' specifics. Also, the granting of security interests is generally expected and can include a variety of forms, with the exception of floating charges or similar instruments as they do not comply with the principle applicable to pledges governed by Swiss law, namely that the pledgor must be deprived of the ability to dispose of the pledged assets (*Faustpfandprinzip*).

This chapter focuses on specific Swiss law considerations related to financings of Swiss companies, namely (i) the Non-Bank Lender Rules (see section 2 below) and (ii) securitisation transactions involving Swiss law governed receivables (see section 3 below).

2. Non-Bank Lender Rules

Under Swiss law, interest payments by Swiss borrowers under collective fundraising transactions are generally subject to a 35% WHT. The WHT can be recovered (with some delay only) in full by Swiss lenders and partially or in full by lenders that (i) are tax resident in a jurisdiction that has as a DTT in place with Switzerland and (ii) are qualifying to benefit from treaty protection. Thus, not all lenders are able to recover the WHT and even lenders that are able to do so will be refunded potentially only with a delay. Likewise, should a Swiss borrower be required to gross up interest payments under a credit facility, this would lead to serious constraints on cash flows, given that it would have to pay an additional 53.85% WHT to the SFTA.

Syndicated facilities agreements qualify as collective fundraising, if there are more than 10 non-bank lenders in the syndicate (the **10 Non-Bank Lender Rule**). Furthermore, WHT would also be triggered if the Swiss borrower had an aggregate of more than 20 non-bank lenders (the **20 Non-Bank Lender Rule** and, together with the 10-Non-Bank Lender Rule, the **Non-Bank Lender Rules**). Thus, it is market standard to structure a transaction to avoid that WHT will be incurred.

Accordingly, should the credit agreement be drafted to reflect that there are or could be Swiss borrowers, it has to be ensured that there will be not more than 10 non-bank lenders thereunder. Hence, the transfer provisions typically impose restrictions on transfers to non-bank lenders, which, as standard, do not apply following the occurrence of an event of default.

The respective transfer restrictions for lenders are rather unproblematic under revolving facilities, given that only banks will typically act as revolving lenders.

In the event that there is a Swiss guarantor in the structure (but no Swiss borrower), the issue needs to be addressed nevertheless, since tax concerns might arise if part of the financing is or may be lent on to a Swiss guarantor. Therefore, a structure involving (i) foreign borrowers, (ii) (potential) on-lending to a Swiss guarantor and (iii) security interest/guarantees (see chapter on Security Interests) provided by a Swiss guarantor could be regarded by the SFTA as circumvention of the 10 Non-Bank Lender Rule, which potentially triggers WHT. There are several ways to address this:

i. There is no flow of funds from the facilities to the Swiss guarantor. This ban on the flow of funds to the Swiss guarantor is to be reflected in the credit agreement – which might be critical in light of potential cash pooling arrangements within the borrowing group.

ii. A flow of funds to the Swiss guarantor is permissible, subject to the availability of a favourable tax ruling. This tax ruling can usually be obtained on short notice in case the guarantee/security interest is granted up-/cross-stream only and is subject to customary limitations, *i.e.* limited to the amount freely distributable to the shareholders of the Swiss guarantor (see chapter on Acquisition Financings, section 2.3). No tax ruling can be obtained in case of a downstream guarantee/security interest.

iii. A flow of funds to the Swiss guarantor is permissible, however, the number of non-bank lenders under the credit agreement is limited to ten – which is typically not accepted by lenders in the absence of Swiss borrower.

Also, intra-group financings are subject to (i) certain restrictions on the maximum interest rates (so-called safe haven rates) chargeable on loans granted to or by Swiss group entities and (ii) thin capitalisation rules, the breach of which could trigger WHT.

In April 2021, the Swiss Federal Council proposed the abolition of WHT on bond interest without any replacement and initiated a respective parliamentary process and was initially expected to come into force on 1 January 2023. However, a referendum had been successfully called and took place on 25 September 2022, whereby the proposal was rejected.

3. Securitisation of Swiss Law Governed Receivables

The following should be considered with respect to securitisation transactions involving receivables governed by Swiss law.

3.1. Swiss Conflict of Law Rules

From a Swiss conflict of law perspective, receivables must be assigned and transferred under the law governing a receivable (*e.g.* Swiss law governed receivables need to be assigned under Swiss law). In case the assignment shall be governed by a law other than the law governing the receivables, the consent of the underlying debtor of the receivable is required. Absent such consent, the choice of law is valid only between the seller and the buyer but may not be asserted against the underlying third-party debtor of the receivable.

Market practice for transactions involving Swiss law governed receivables is either to have the relevant receivables purchase agreement to be governed by Swiss law or, in cases involving multiple jurisdictions and/or a multitude of receivables governed by different laws (including by Swiss law), to provide for split law clauses in the respective receivables purchase agreement, so that the receivables governed by Swiss law are assigned under Swiss law (*i.e.* the transfer *in rem* is to be governed by Swiss law), whereas the contractual basis for the transfer itself (such as the purchase) may be governed by a law other than Swiss law.

3.2. Perfection Requirements in Relation to the Assignment of the Receivables

Under Swiss substantive law, the assignment of receivables must be made in writing (*i.e.* the written original of an assignment declaration, duly signed by the assignor, must be delivered to the assignee). In addition, the assigned receivables must be determined or determinable. Therefore, it is Swiss market practice that the assignor delivers to the assignee up-to-date and duly executed lists of assigned receivables. Such list should include information to sufficiently identify the receivables. Furthermore, the respective lists (which typically are updated periodically) will allow, as a matter of fact, the actual collection of the receivables by the secured party.

Against this background, the parties often take a two-tier approach with respect to the assignment of receivables governed by Swiss law in receivable financings:

3.2.1. Global Assignment

The sellers typically assign and transfer all current and future Swiss law governed receivables to the buyer. The purpose of such global assignment is to ensure that, in a first step, all current and future receivables are transferred to the assignee and may not be assigned otherwise by the assignor. Future claims and rights, which have been assigned but have come into existence only after opening of bankruptcy proceedings against the seller, would fall into the seller's (assignor's) estate and would not pass over to the buyer (the assignee). However, in a normal trade receivables securitisation, this is typically not an issue as no or little credit is provided against future receivables.

3.2.2. Delivery of Assignment Declaration by the Seller upon Acceptance of an Offer

In addition, upon each offer and acceptance of certain receivables, the relevant seller should deliver a duly signed original assignment declaration, together with a list of the purchased receivables (include information allowing for the receivables to be sufficiently identified/identifiable as required by Swiss law).

3.3. Right to Notify the Debtors

It is a requirement under Swiss law for an assignment to be valid that the assignee must have the right to notify the debtors of the receivables of the assignment at any time.

3.4. No Ban on Assignment in Underlying Contracts

A prohibition on the assignment of receivables in the underlying contract (or a consent requirement of the third-party debtor contained in the underlying contract) causes the assignment and transfer of such receivables to be null and void. Therefore, it should be ensured that the Swiss law governed receivables are freely assignable under the relevant underlying contracts.

3.5. Tax

Tax issues may arise in particular in relation to (i) VAT, should VAT loaded receivables be transferred and (ii) WHT.

3.5.3. Value-Added Tax

The transfer of receivables including an amount of VAT may have the following VAT implications:

- acceleration of tax point with respect of the underlying supply of the Swiss originator/seller (in particular, if future receivables are sold);
- effective loss of the right to claim bad debt relief for the Swiss originator/seller;
- potential secondary liability of the buyer if future receivables are sold.

3.5.4. Swiss Withholding Tax

In light of the Non-Bank Lender Rules (see section 2 above), special attention must be paid at the buyer of receivables originated by a Swiss seller, whenever it is not a bank, as the Swiss seller, when representing that it complies, and undertaking to comply with the Non-Bank Lender Rules, must be able to assess how said buyer is considered by the SFTA, namely whether (i) it is either a so-called permissible conduit (set up for a multitude of securitisation transactions with a multitude of originators in different jurisdictions and various asset classes subject to concentration limits and risk diversifications, *etc.*), thus counting as one single non-bank lender or (ii) it must be looked through and all investors are to be taken into account when calculating the numbers of non-bank lenders. Accordingly, it is standard to seek a tax ruling in that respect.

4. No Floating Charge under Swiss Law

Contrary to many Anglo-Saxon countries, Swiss law does not permit for the creation of so-called "floating charges", thereby limiting the possibilities to grant security over inventory and other assets required in day-to-day operations (see also chapter on Security Interests, section 2.2). This may limit the refinancing options of Swiss borrowers.

5. Financial Assistance

The granting by a Swiss company of a guarantee, indemnity or security interest for obligations of a Swiss company's (direct or indirect) shareholder (upstream) or affiliate or subsidiary of such (direct or indirect) shareholder (cross-stream) is subject to the following limitations:

i. It must be allowed by the company's articles of association, which shall include group support and financial assistance in the company's purpose;
ii. it must be in the interest of the company, *i.e.* dealing at arm's length, service against adequate consideration, significance of the security interest compared to the other assets of the subsidiary, financial capacity of the parent company or the affiliates to repay the loan *etc.*;
iii. it shall not constitute a repayment of the restricted equity, *i.e.* share capital and statutory reserves, of the company or an unjustifiable payment of benefits or contributions; and
iv. otherwise, in case of any doubt, the amount of the guarantee, indemnity or security interest shall be limited to the freely distributable equity, *i.e.* equity available for distribution of dividends, of the company and the granting of such guarantee, indemnity or security interest shall be approved by the company's shareholders' meeting.

For further information on the types of security interests available, please see chapter on Security Interests.

II. Debt Issuances

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1. In General

The Swiss debt market is more active than the size of Switzerland might indicate and has been attracting an increasing number of local and global issuers over the past couple of years. While debt capital markets have remained lightly regulated in Switzerland for quite a few years, the Swiss regulatory framework has recently undergone a major legislative overhaul aimed at aligning the Swiss regulatory framework to international regulations, particularly those of the EU. Consequently, the new FinSA entered into force on 1 January 2020 and introduced, amongst others, more stringent requirements on offerings of debt securities in Switzerland.

One of the core elements of the new regulatory framework is the establishment of a uniform prospectus regime that covers and harmonises disclosure requirements for different types of financial instruments. Moreover, issuers of debt securities that seek the admission of securities for trading on a trading venue in Switzerland will further need to comply with the requirements imposed by the relevant trading venue.

2. Prospectus Requirements

2.1. Scope

The FinSA requires that any person making a public offer for the acquisition of securities in Switzerland or any person seeking the admission of securities for trading on a trading venue in Switzerland must first publish a prospectus. Pursuant to the FinSA, an offering is to be understood as an invitation to acquire a financial instrument containing sufficient information about the terms and conditions of the offering and the financial instrument. The information provided in an offering must be suitable to induce and enable its recipient to accept an offer. An offering qualifies as public offering if it is directed to the public, that is, it does not exclusively target a pre-selected and limited group of investors. Ultimately, each offering should be evaluated on a case-by-case basis, weighing both qualitative and quantitative criteria.

Similarly to the EU Prospectus Regulation, the FinSA provides for numerous exemptions from the prospectus requirement mainly based on the type of offering and the type of securities. Further, certain limited exemptions are available in the context of a mere admission to trading.

Exemptions based on the type of offering include, amongst others, offerings to professional clients, offerings to less than 500 (retail) investors, offerings with minimum investments or minimum denomination of CHF 100,000 and offerings not exceeding an aggregate volume of CHF 8 million during a rolling twelve month period.

Exemptions based on the type of securities include, amongst others, certain equity securities, securities issued or guaranteed by sovereign issuers, debentures as well as money market instruments with a term of less than one year and derivatives not offered in the framework of an issuance.

Moreover, no prospectus is required in the context of an admission to trading of securities already admitted for trading at a trading venue outside of Switzerland which is considered to be equivalent in terms of regulation, supervision and transparency. Likewise, there is no prospectus requirement for securities to be admitted for trading on a trading segment only opened to professional clients.

2.2. Form and Contents of the Prospectus

Generally, prospectuses must be drawn up in either an official Swiss language or in English. Issuers of debt securities may either prepare a standalone prospectus for each issuance or issue debt securities on the basis of a base prospectus with the final terms being separately published.

In general, a prospectus must contain all information material for the investment decision of an investor. In addition, the implementing ordinance to the FinSA contains a comprehensive list of information to be included in the prospectus. A prospectus will further need to include a summary containing all information and a disclaimer explaining that such summary shall not form the basis for the investment decision and that the liability for the summary is limited to misleading or incorrect information or information that is contradictory to the entire prospectus. Finally, it should be noted that the FinSA explicitly permits issuers to incorporate information in the prospectus (except for the summary) by reference.

2.3. Approval of the Prospectus

A prospectus for the issuance of debt securities must generally be approved by an approval authority licensed by FINMA prior to a public offering or an admission of securities to trading in Switzerland. Such pre-approval process encompasses a review of the completeness, coherence and comprehensibility of the prospectus in line with the requirements set forth by the FinSA. For certain types of securities, most notably bonds and derivatives with a term exceeding 30 days, the prospectus may also be approved after a public offering or an admission of securities to trading in Switzerland, provided, however, that a licensed bank or securities dealer confirms that the essential information about the issuer and the relevant securities is available at the time the prospectus is published. This gives much greater flexibility to (Swiss and foreign) bond issuers when accessing the Swiss capital market.

2.4. Key Information Document

The FinSA requires that whenever financial instruments other than equity securities or debt securities with no derivative characteristics are offered to retail clients, a so-called key information document containing all information essential for the investment decision of the client in an easily comprehensible manner must be prepared. While issuers of bonds would typically be exempt from this requirement, each issuance of securities in Switzerland should be evaluated on a case-by-case basis to determine whether or not such securities have a derivative component.

3. Listing

3.1. Main Debt Capital Markets

If an issuer wishes to list debt securities on a Swiss stock exchange, it must do so on a stock exchange authorised by the FINMA. FINMA has so far authorised three Swiss stock exchanges: SIX, SDX (belonging to SIX) and BX. SIX serves as the main (debt) exchange in Switzerland and is significantly larger than BX. This chapter thus focuses on the listing requirements and procedures of SIX.

On SIX, debt securities are listed in three different segments (called standards), namely the "Standard for Bonds", "Standard for Derivatives" and "Standard for Exchange Traded Products". Additionally, international bonds, *i.e.* bonds issued by a non-Swiss issuer, denominated in a currency other than CHF and already listed on another exchange recognised by SIX may also be admitted to trading (but not listed).

3.2. Listing Requirements

Switzerland has enacted a unique regulatory framework placing a strong emphasis on self-regulation. Accordingly, regulatory supervision in Switzerland is undertaken by FINMA as the supervisory body established by law as well as a group of private self-regulatory bodies which in turn are licensed and supervised by FINMA. The most important licensed self-regulatory body with regard to debt markets and exchanges is SIX Exchange Regulation, which has adopted numerous rules, directives and guidelines in connection with the listing of debt securities. The main requirements are set out in the SIX Listing Rules and the additional implementing rules that are derived therefrom and which provide for specific rules depending on the type of debt securities. The SIX Listing Rules and the additional implementing rules impose detailed requirements for both the issuer and the debt securities, the most important of which are listed below.

3.2.1. Main Requirements in Respect of the Issuer

An issuer of debt securities must typically comply with the following requirements:

- Track record: An issuer must have been duly incorporated and existed for at least three years prior to the listing. Certain issuers may be eligible for an exemption (*e.g.* an issuer of asset-backed securities).
- Financial record: An issuer must have produced annual financial statements complying with the applicable financial standards for the two complete financial years preceding the listing.
- Capital requirements: An issuer's reported equity capital must be at least CHF 25 million, in accordance with the financial reporting standard used in the listing prospectus. If an issuer is the parent company of a group, the requirement refers to consolidated reported equity capital.

- Accounting standards: An issuer of debt securities must generally apply IFRS, US GAAP, Swiss GAAP FER or a standard under the Swiss Banking Act as its accounting standard. An issuer incorporated outside Switzerland may also apply the accounting standards of its home country, provided those are recognised by SIX.
- Auditors: An issuer must appoint auditors that fulfil the requirements set out in the Act on the Admission and Oversight of Auditors.

The requirements imposed on an issuer regarding track record, capital resources and annual accounts may be waived if instead of the issuer a third party that fulfils these requirements (guarantor) provides a guarantee commitment in respect of the obligations associated with the debt securities.

3.2.2. Main Requirements in Respect of the Debt Securities

Debt securities must typically comply with the following requirements:

- Applicable law and jurisdiction: Debt securities listed on SIX must be governed by Swiss law or a foreign law recognised by SIX (*i.e.* the laws of OECD member states). Investors must also be able to sue the issuer in a state court which must be (at least alternatively) located in the country whose legal system is governing the debt securities.
- Denominations: The denomination of a debt security must enable an exchange transaction to occur in one round lot.
- Minimum capitalisation: The aggregate nominal amount of bonds must be at least CHF 20 million, exchange traded products must have a minimum capitalisation of CHF 1 million.
- Convertible debt securities: Convertible securities may generally only be listed if the underlying equity securities have already been listed on SIX or another regulated market, or if they are being listed at the same time.
- Clearing and settlement: An issuer must ensure that the debt securities may be cleared and settled in the settlement systems recognised by SIX.
- Paying agent: An issuer of bonds or derivatives must ensure that services relating to interest and capital, as well as all other corporate actions, are provided in Switzerland. An issuer may assign these activities to a third party that has such capabilities (*i.e.* banks, securities dealers and other institutions subject supervision by FINMA or the Swiss National Bank).

SIX may grant exemptions from the above listing requirements if this is in the interest of the public or the exchange and provided that an issuer can demonstrate that the relevant requirement can be satisfied by other means.

3.3. Ongoing Obligations

An issuer (and the guarantor) of debt securities listed on SIX is subject to various ongoing obligations to maintain its listing, including the following:

- An issuer of bonds and derivatives must publish its annual reports (audited annual financial statements plus audit report) within four months after the end of the financial year on a website and provide a link to SIX. Reports must be freely accessible for at least five years.
- There are regular ongoing reporting obligations, depending on the type of debt securities (*e.g.* change of issuer's name, change of paying agent).
- Any potentially price-sensitive facts arising in the course of an issuer's business must be reported in a timely manner (*ad hoc* publicity).

III. Acquisition Financings

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1. General

In terms of Swiss M&A and acquisition finance activities, we look back at a strong first half of the year 2022 which was followed by a noticeable but – for the Swiss market – manageable downturn in the second half of the year. The Russo-Ukrainian war, the ongoing tensions between China and Taiwan as well as the Covid pandemic and the more and more apparent climate crisis, have significantly affected the markets. In the financial world further concerns were raised by the spike of inflation. Due to the turbulences, around June 2022 pricing of financing transactions became a challenge and financial institutions across Europe became more and more reluctant to provide financings for M&A projects (*e.g.* term loans B).

So far, there is no fear of a credit crunch in Switzerland and the willingness of Swiss banks to provide further funding for M&A transactions remains intact.

Although there is a notable and continuously growing interest of non-Swiss lenders in the Swiss market, as of 2023 the lending market is still predominantly in the hands of major Swiss banks (including the larger Swiss cantonal banks). Depending on the transaction size, financings are carried out by single lenders or as club deals and banks tend to hold their stakes on their balance sheets until maturity. Financing transactions are also often considered a means of strengthening the client-bank relationship. Unlike in many other economies, debt funds have not yet entered the market and do not play a significant role in acquisition finance transactions in Switzerland. Some debt fund activities have been noted (i) either in cooperation with individual banks with a pre-agreed division of responsibilities between the bank and the debt fund and (ii) in M&A transactions with a bidding process, where private equity funds which pulled out of the auction, could still benefit from the due diligence they had conducted previously and offer that their debt funds branch become part of the financing syndicate.

2. Structuring Considerations

2.1. Swiss Withholding Tax and Non-Bank Lender Rules

Pursuant to Swiss tax law and the practise of the SFTA, acquisition financings may trigger WHT if they are qualified as a collective fund raising. Such qualification is possible if the number of so called non-bank lenders is higher than 10. Similarly, pursuant to a different set of tax rules, WHT applies to interest paid by banks to their creditors. If the overall number of non-bank lenders of a borrower exceeds 20, the SFTA may qualify the transaction in the same way and apply WHT.

Against this background, in order to avoid WHT payments, the preferred approach is to include provisions in the loan documentation which ensure that at no time during the lifetime of the financing more than (i) 10 non-bank lenders participate (or sub-participate) in the financing on the level of the specific financing (to avoid a requalification of the financing as a bond), and (ii) 20 non-bank lenders provide funds to the Swiss obligor (to avoid that the Swiss obligor is qualified as a bank in the sense of the Withholding Tax Act).

WHT may also be triggered where there is no Swiss borrower, but only a Swiss guarantor or a Swiss security provider. This can be the case in structures in which a foreign vehicle raises funds and on-lends such funds to the Swiss guarantor/Swiss security provider. The SFTA could consider such setup as a circumvention of Swiss tax laws. In such cases and where a flow of funds to Switzerland cannot be blocked, it is usually still possible to structure the transaction in a way which would ensure that it does not become subject to WHT. Typically, the parties will address the issue by seeking a binding tax ruling from the SFTA confirming that the structure will not trigger WHT.

Further to that, it is noteworthy that under Swiss law the standard gross-up language will not provide sufficient comfort to the lenders. To address this risk, specific Swiss minimum interest rates provisions are included in the loan documentation.

2.2. Parallel Debt

The application of parallel debt structures has been widely discussed among Swiss legal scholars but remains untested in Swiss courts. Though there are arguments in favour of parallel debt structures (or equivalent solutions) under Swiss law, the overall consensus in the market is to avoid parallel debt provisions in Swiss law governed transactions and – in general – to make sure that the security agent is authorised to act as direct representative of the (existing and future) secured parties with respect to any security that is accessory in nature (requiring that the secured party is identical with the lender). This is usually accomplished by the inclusion of a specific Swiss security agent appointment language in the loan or intercreditor agreement. As a consequence, each secured party becomes a party to each accessory Swiss security agreement. With respect to non-accessory security interests (*e.g.* security assignment or security transfer of mortgage certificates), the security agent will enter into the relevant security documents in its own name, but for the benefit of the secured parties.

2.3. Upstream- and Cross-Stream Undertakings

Unless granted at arm's length terms, upstream- and cross-stream guarantees and corresponding security interests have to be limited to the amount distributable to the shareholders as a dividend at the time of enforcement. If such limitation is not in place, payments in excess of the distributable amount would qualify as an unlawful return of capital or an unlawful profit distribution.

Therefore, to mitigate the legal risks involved, a number of steps need to be taken: (i) the purpose clause of the articles of association of the Swiss security grantor/guarantor need to expressly allow upstream undertakings; (ii) further to that, it needs to be ensured that upstream- and cross-stream guarantees and corresponding security interests are properly approved by the relevant corporate bodies (shareholders' resolutions and board resolutions); (iii) furthermore, a Swiss limitation language (see section 3.2 below) is to be included in the facilities agreement and each security document.

The above-mentioned rules do not apply if the guarantee or security exclusively secures amounts that are channelled through to the Swiss obligor by way of an intra-group loan (on-lending) as this would be considered as own debt of the Swiss obligor. Similarly, downstream security is not subject to the above-mentioned provisions. However, such structures involving downstream-guarantees/security should be reviewed for tax implications and in light of the non-bank lender rules.

2.4. Loan Transfers

In general, Swiss law does not provide for any restrictions regarding the transfers of loans. Such transfers would be conducted by way of an assignment of the lender's rights under the facilities agreement or a transfer of contract, with the latter being the standard. However, due to WHT considerations the consent of the borrower to such transfers may be required to ensure compliance with the non-bank lender rules (see chapter on Working Capital Financings, section 2). Swiss law governed agreements typically provide for a transfer of contract (rights and obligations) and not for the mere assignments of rights.

3. Documentation Considerations

Like in most other jurisdictions, in Switzerland, too, the last decade has shown a shift of bargaining power from the lenders to the borrowers. Recent crises have halted this process and prompted hopes of the lenders for a tightening of the conditions of the loan documentation. However, as of today the terms and conditions of the documentation in Switzerland in general have remained fairly borrower friendly.

Swiss financings typically consist of a term loan A facility (amortising), a term loan B facility (bullet) and a revolving credit facility. The ratio between the term loan A tranche and the term loan B tranche has shifted in favour of term loan B tranche over the past years (currently being at a ratio of roughly 30% amortizing/ 70% non-amortizing). The interest rates are often adjusted in line with margin ratchets depending on the net leverage ratio of the borrower. Financial covenants are typically limited to one financial maintenance covenant (net leverage ratio).

3.1. Limitation Language

As indicated above, a standard limitation language has to be applied to upstream- and cross-stream guarantees and security interests granted by Swiss obligors. Leaving aside certain details (like the catalogue of steps a Swiss obligor might be required to take in order to increase the freely distributable capital), the standard provisions of such limitation language are widely agreed and accepted in the Swiss market. Therefore, extensive and lengthy negotiations, like in some other European jurisdictions, can usually be avoided.

3.2. Security Package

Swiss law does not allow the granting of "floating charges" or other global/unspecified security interests. A fundamental rule of Swiss property and collateral law requires the relevant collateral to be clearly specified. Another notable feature of Swiss security and collateral law is the so-called *Faustpfandprinzip*, *i.e.* the principle that the secured party needs to have actual possession of the assets subject to the security interest. According to that principle the pledge of moveable assets requires that the security provider be deprived of the legal and factual ability to transfer the property by physically delivering it to the lender or a third-party collateral agent.

In an acquisition financing context, the standard security package granted with respect to a Swiss obligor would include a share/quota pledge over the shares/quotas in the top Swiss group company (see section 3.2.1 below). Further, the security documentation would usually contain security over claims and rights (including receivables arising from the share purchase agreement, due diligence reports and M&A insurance should those be governed by Swiss law) (see section 3.2.2 below) and security over bank accounts (see section 3.2.3 below) (see also chapter on Security Interests, section 2).

3.2.1. Share/Quota Pledges

Under Swiss law the pledge of shares in a corporation or quotas in an LLC does not require to be notarised or registered. The pledge comes into existence by the execution of a written agreement and the delivery of share certificates (duly endorsed in blank). The delivery of share certificates is a perfection requirement which is usually fulfilled simultaneously with the execution of the share/quota pledge agreement.

According to Swiss market standards, any transfers restrictions of shares/quotas included in the articles of association are usually deleted (or, in case of an LLC, a provision allowing a free transfer of quotas without any consent is included) prior to the pledge being granted.

3.2.2. Assignment of Receivables for Security Purposes

The scope of this security is negotiated on a case by case basis and – in general – follows international standards (see chapter on Working Capital Financings, section 3). The assignment of claims and rights requires a written agreement, which specifies (future and existing) receivables in a way that allow their identification or would allow such identification once they have come into existence. It is noteworthy that claims arising after the insolvency/bankruptcy of the assignor would not be considered as having been validly assigned to the assignee, but rather fall into the assignor's bankruptcy estate.

For the assignment to be validly effected, it is crucial that the underlying agreements with third-party debtors do not contain any restrictions with respect to the assignability of such claims (or that relevant consents are granted). Claims arising under an underlying agreement not governed by Swiss law may – as a matter of Swiss law – still be assigned by way of a Swiss law governed security document. However, such choice of Swiss law may not be enforceable against third-party debtors of claims governed by laws other than Swiss law.

3.2.3. Pledge of Bank Accounts

In the past, security over bank accounts was usually taken by way of an assignment of bank receivables. This has changed mainly as a consequence of to the growing reluctance on the side of the account banks to accept security assignments (constituting a full transfer of rights) due to uncertainties regarding "know your customer" checks, beneficial owner identification and anti-money laundering regulations. While assignments of bank account claims are still seen in the market, today the vast majority of security taken over bank accounts is granted by way of bank account pledges.

The notification of the account bank of the pledge is a perfection requirement to the extent that there is a higher-ranking pledge over the same assets. Typically, this would be the case as the account bank and the account holder usually arrange for such first ranking security by way of agreeing on the account banks' general terms and conditions when opening the bank account. In practise, the (first ranking) pledge in favour of the account banks secures any claims which the account bank might be entitled to in connection with the bank account agreement (fees, interests), but the security is not limited and could therefore be used to secure claims which are not related to the bank account relationship.

3.2.4. Other Security

Security over IP is usually taken by way of a pledge agreement. Swiss law does not provide for an obligation to register pledges over IP in the relevant register(s). However, as long as such registration has not been made, the relevant IP right could be acquired by a *bona fide* third party. This would automatically terminate the security interest. Any security interest granted over foreign IP rights by way of a Swiss law governed security agreement is valid as a matter of Swiss law. However, to be on the safe side, it would be necessary for the security agent/the secured parties to double check the specific transfer and perfection (*e.g.* registration) requirements of each jurisdiction where such foreign IP rights exist.

Swiss law does not provide for simple and straightforward mechanics (such as the "floating charge" common in Anglo-Saxon countries) which would allow the granting of security over tangible assets (equipment, inventory, raw materials) with those assets remaining in the possession of the security grantor due to the above-mentioned *Faustpfandprinzip*. All attempts to nonetheless taking security over such assets would either materially impair the ordinary business activities of the security provider and/or involve costly and complex legal solutions (like involvement of a pledge holder or the set-up of SPV structures). For this reason, security over tangible assets is rarely seen in acquisition financings in Switzerland (see also chapter on Security Interests, section 2.2).

Security over real estate is not a standard security in acquisition financings. Nevertheless, it could be established by way of a transfer for security purposes of mortgage certificates (either paper mortgage certificates or register mortgage certificates).

3.3. Opinion Practice

The Swiss opinion practice, in general, follows international standards. Although this is not set in stone, more often than not lenders' counsel will provide a legal opinion on validity/enforceability, whereas obligors' counsel typically addresses the capacity of the obligors. The assumptions and qualifications reflect the specifics of Swiss law (*e.g.* WHT, written form requirements, upstream security). Statements on choice of law, jurisdiction and final judgements can usually be included in the legal opinion to the extent they do not refer to Swiss documents (where such statements would be seen as a duplication of the opinion issued on validity and enforceability). The wording of the reliance language and disclosure language follows international standards.

3.4. Governing Law and Jurisdiction

In general, under Swiss conflict of laws rules the parties are free to choose the law that should govern their loan documentation and have the flexibility to freely agree on a venue. This also applies to Swiss security documents. However, in the case of assets not being governed by Swiss law, such choice of law would apply *inter partes* and may be unenforceable against the asset holder (*e.g.* a third-party debtor holding non-Swiss receivables which are assigned under a Swiss security assignment agreement). For the sake of legal certainty, it is therefore market standard for assets located in Switzerland and rights governed by Swiss law that the relevant security documents are also governed by Swiss law with Swiss courts being the competent courts.

With respect to the enforcement of final foreign judgements of competent foreign courts for monetary claims, in general such decisions will be recognised either on the basis of international treaties (*e.g.* the Lugano Convention) or Swiss international private law. The recognition may, however, be denied if the judgement or the proceedings leading up to the decision were contrary to Swiss public policy or failed to comply with fundamental principles of due process.

4. Other Considerations

4.1. Stamp Duty and Documentary Taxes

There are no stamp duty or documentary tax schemes in place in Switzerland which could qualify as perfection requirements for the loan documents and/or the security agreements. Few cantons have cantonal stamp duties (*e.g.* Geneva, Ticino). Notary and filing fees may accrue in the context of an acquisition financing where notarial form is required (*e.g.* when amending articles of association or granting security over real estate).

4.2. Debt Push Down

Swiss tax law does not provide for fiscal unity schemes between independent private entities (*i.e.* group consolidation for tax purposes). This is why there is no straight forward way to set-off the interest expenses incurred at the level of the acquisition vehicle against the profits of the target entity for corporate income tax purposes. Traditional debt push downs (such as a merger between the acquisition vehicle and the target entity) are not accepted by the Swiss tax authorities. However, this problem can be overcome, *e.g.* in the form of a limited debt push down which is feasible to the extent existing substance (distributable reserves) of the target entity can be converted into debt through a dividend distribution by the target entity.

5. Outlook

In the past years, far-reaching attempts were made to fundamentally change the withholding tax system in Switzerland. Under the new law proposed by the Federal Council, the current deduction of 35% would no longer apply to interest payments of Swiss financings. It was expected that the change would have a stimulating effect on the Swiss bonds market and that it would help new players (*e.g.* debt funds) to gain market shares in Switzerland. The proposed amendments passed the parliamentary process, but were rejected in a referendum in September 2022. However, experts believe that the discussion regarding the economic sense of the Swiss withholding tax relating to Swiss bonds and credit financings will persist. Valid arguments have been produced in the wake of the discussion which are likely to gain further ground in the years to come.

IV. Security Interests

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1. In General

The creation of security interests in the context of corporate and structured financing is common in Switzerland. However, unlike in other jurisdictions, it is not possible under Swiss law to create one single security interest over all types of assets that an entity may hold (such as a floating charge under English law). Rather, only specific types of security interests are provided for by Swiss law for each type of collateral.

The main types of security interests under Swiss law consist of pledges, transfers of full legal title for security purposes, assignments for security purposes and mortgages over certain types of assets. Corporate guarantees are also often issued as collateral for financing transactions.

Whereby a pledge or mortgage constitutes a limited right *in rem* in favour of the pledgee, the secured party acquires full legal title in the relevant asset in case of a transfer of legal title for security purposes or an assignment for security purposes.

Pledges are considered to be accessory security interests with the consequence that, *inter alia*, the validity of the pledge depends on the continuing validity of the secured obligations and the creditor of the secured obligations must be identical to the holder of the security interests. By contrast, the transfer or assignment for security purposes is considered to be a non-accessory security interest, which means that the transfer or assignment is independent from the (continuing) validity of the secured obligations and the holder of the security interests does not necessarily have to be identical to the creditor of the secured obligation. As a consequence, a security agent will act as a direct representative in the name and for the account of the secured parties in case of accessory security interests governed by Swiss law and, in case of non-accessory security interests governed by Swiss law, as an indirect representative in its own name but for the account of the secured parties.

2. Collateral

Collateral over which security interests are typically created in Switzerland include: (i) shares and other financial instruments, (ii) movable property, (iii) real estate, (iv) bank accounts, (v) receivables or other claims and (vi) intellectual property.

2.1. Shares and Other Financial Instruments

Security interests over financial instruments such as shares, debt securities and units in collective investment schemes can generally be created under Swiss law in the form of a pledge, transfer for security purposes or an assignment for security purposes.

The creation of a security interest over a financial instrument requires a valid security agreement, whereby the perfection requirements depend on the type of financial instrument. In case of certified financial instruments, the possession of the certificates needs to be transferred, which in addition need to be duly endorsed in case of registered certificates. Financial instruments in uncertificated form need to be pledged, transferred or assigned in writing.

A security interest over financial instruments in the form of intermediated securities in the sense of the Intermediated Securities Act can be created either by way of transfer or by way of a control agreement. In case of a transfer, the intermediated securities are transferred to the securities account of the secured party by way of instruction to the bank and crediting the intermediated securities to the secured party's securities account. By contrast, in case of a control agreement, the intermediated securities remain in the account of the security provider. However, the security provider enters into an irrevocable account control agreement pursuant to which the relevant intermediary undertakes to comply with the instructions from the secured party.

2.2. Movable Property

Security interests over movable property can generally be created under Swiss law in the form of a pledge or a security transfer of full legal title.

The perfection of a pledge or a security transfer of legal title generally requires a valid security agreement. Furthermore, the physical possession of the relevant movable asset needs to be transferred to the secured party in order to perfect the security interest. Thus, as long as the security provider has (exclusive) possession over the relevant movable asset, no security interest is created. Therefore, the taking of security interests over movable assets that the security provider requires for its business operations (such as *e.g.* inventory or equipment) may usually not be feasible in Switzerland without special structuring.

Exceptions apply to certain types of movable asset which are governed by specific laws, such as *e.g.* aircrafts, ships and railroads. Security over those assets is perfected by way of entry of the security interests in public registers, which replaces the requirement to transfer possession.

2.3. Real Estate

Security interests over real estate are customarily created under Swiss law in the form of a security transfer or pledge of mortgage certificates and land charges.

Mortgage certificates represent a personal claim against the debtor, which is secured by a lien on real property. The mortgage certificate is a negotiable instrument and may be issued in paper form (as bearer or registered mortgage certificate) or as paperless mortgage certificate. In each case, the mortgage certificate may be pledged or full legal title may be transferred for security purposes. The mortgage certificate is created by way of a notarised deed and registration in the land register. The security interest over such mortgage certificate is then created by way of a security transfer agreement or pledge agreement and transfer of legal title of the mortgage certificate (*i.e.* in case of paper mortgage certificates, transfer of possession and endorsement for registered mortgage certificates and registration in the land register in case of paperless mortgage certificates).

By contrast, a land charge is a mortgage which is registered in the land register, securing any kind of claim. Other than the mortgage certificate, the secured claim is not registered in the land register and no negotiable instrument is issued. The creation of a security interest in the form of a land charge requires the conclusion of an agreement between the parties regarding the creation of the land charge (in the form of a notarial deed) and registration thereof in the land register. In practice, the land charge is less common than the mortgage certificates.

Additional rules may apply in the context of cross-border transactions, whereby the parties may be advised to obtain clearance from the appropriate authorities with respect to the so-called Lex Koller and with respect to special withholding taxes.

2.4. Receivables and Other Claims

Security interests over receivables (see also chapter on Working Capital Financings, section 3) and other claims can generally be created under Swiss law in the form of a pledge or an assignment for security purposes.

The contractual agreement to create a pledge over rights or receivables needs to be made in writing. In order to perfect an assignment for security purposes of a right or receivable, a valid security agreement is required and a written assignment declaration.

The assignment of future claims and receivables (*i.e.* claims that will only come into existence in the future) is permitted under Swiss law, whereby such assignment and transfer of future claims and receivables will, however, not be deemed to be bankruptcy remote pursuant to jurisprudence of the Federal Supreme Court. Furthermore, also the global assignment of claims and rights is accepted under Swiss law, subject to certain requirements.

In case the assigned or pledged claim is represented by an acknowledgement of debt, such a document must also be transferred to the secured party in order to perfect the security interests. However, it is not a perfection requirement under Swiss law to notify third-party debtors of the pledge or the assignment for security purposes (unless a second-ranking pledge is created). However, as long as the third party debtor has no knowledge of the transfer, it may continue to validly discharge its obligations to the assignor. Furthermore, it is deemed a perfection requirement for an unconditional assignment and transfer of receivables and other claims that the secured party has the right to notify the underlying debtor at any time. In practice, outright notification is typically requested for claims against intra-group debtors, banks and insurance companies, but not against debtors of trade receivables.

2.5. Bank Accounts

Security interests over bank accounts can generally be created under Swiss law in the form of a pledge or an assignment for security purposes.

Cash deposits held in bank accounts are treated as claims of the account holder against the bank. Therefore, the creation of security over cash deposits is based on the principles outlined under section 2.4 above.

A Swiss bank at which the bank accounts are held will typically have pre-existing rights of set-off and pledge or other preferential rights under its general terms and conditions. If an additional pledge is created over such bank account, the account bank will need to be notified thereof in order to perfect a valid security interest. Furthermore, the account banks are usually asked to waive their priority rights in favour of the secured parties. In practice, for reasons of the bank's compliance with regulatory requirements, pledges have become more common in Switzerland compared to assignments for security purposes.

2.6. Intellectual Property

Security interests over IP can generally be created under Swiss law in the form of a pledge or an assignment for security purposes.

IP over which security is commonly granted includes in particular patents, trademarks, copyrights, designs, domain names and pending applications for the aforementioned IP rights.

Both, pledge and assignment for security purposes are created by way of a written security agreement. Although registration is not required to validly perfect the security interest with respect to IP registered in Switzerland, it is usually recommended for the main IP rights in order for the security holder to enforce its security interest also against third parties which could otherwise rely, in good faith, on the information registered in the relevant public register.

3. Enforcement

In general, a secured party is permitted to enforce its security interests if the secured obligations are not paid when due. However, security agreements usually provide for the requirement of an enforcement event to occur in order to enforce the respective security interest, which may provide for additional events than only non-payment.

In principle, private and official enforcement proceedings are available under Swiss law in order to enforce security interest. However, in case of security interests created by way of a transfer of full legal title for security purposes, only private enforcement is available and in case of other types of security, the security provider needs to give its consent to private enforcement. Private enforcement is often considered to be favourable over official enforcement proceedings due to higher flexibility. The official enforcement proceedings are governed by the DCBA.

4. Release

The formalities required for the release of a security interest depend on the type of the security interest and are typically effected by way of a release agreement. The necessary release actions depend on the type of the security interest and collateral and include, *inter alia*: retransfer of mortgage certificates (in case of a pledge and transfer for security purposes of legal title) and re-registration of the security provider in the land register (in case of a transfer for security purposes of paperless mortgage certificates), retransfer of possession of movable assets and share certificates (in case of a pledge or outright transfer for security purposes), reassignment in writing of claims and other rights (in case of assignment for security purposes), retransfer of book-entry securities or termination of security control agreement in case of book-entry securities.

If third parties (such as *e.g.* debtors of assigned claims or account banks) have been notified about the security interest, it is also necessary to notify them about the release of the respective security. Furthermore, if security interests over IP rights have been registered, the release should also be registered accordingly.

5. Guarantees

Guarantees are a common form of personal security under Swiss law. A guarantee according to article 111 CO is a direct, independent and non-accessory payment obligation of the guarantor as opposed to a mere surety, which is accessory to the secured obligations and therefore less flexible than a guarantee.

6. Limitations

The provision of upstream security interests, guarantees and indemnities (*i.e.* security interests for obligations of direct or indirect shareholders of such security provider) and cross-stream security interests, guarantees and indemnities (*i.e.* security interests for obligations of sister companies of the security provider) are considered to be subject to a number of requirements and restrictions imposed by corporate and tax laws.

Pursuant to Swiss doctrine, such up- and cross-stream benefits should in principle be considered as the equivalent of a dividend distribution (see also chapter on Acquisition Financings, section 2.3), subject to the formal and substantive requirements and limitations imposed thereon. One of the main implications in connection therewith is that the upstream and cross-stream benefits are, in practice, limited to the amount that the provider of up- and cross-stream benefits could distribute to its shareholders as a dividend at the time when the security interests are enforced or when payment is demanded under the guarantee (*i.e.* the benefits are limited to the freely distributable equity). In addition, payments under upstream and cross-stream benefits may be subject to WHT.

By contrast, downstream guarantees, security interests and indemnities (*i.e.* security interests for obligations of subsidiaries of the security provider) are not generally subject to restrictions, unless exceptions apply (such as *e.g.* if the subsidiary is not a wholly owned subsidiary of the guarantor or in financial distress).

V. Cash Pools


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1. In General

Cash pooling is a treasury management tool used by many medium and large-sized corporate groups to centralise and optimise their cash and interest management for the group. In a cash pooling arrangement, all group companies participating in the cash pool (pool participants) hold their accounts with one bank and transfer (effectively or virtually) any positive balance at the end of each day to a master account held by the pool master, usually the holding or treasury entity of the group. In return, the pool master will transfer the cash needed to cover any negative balance on a pool participant's account.

The two most frequently used types of cash pooling are the zero or target balancing and the notional cash pooling:

i. The zero balancing implies an effective cash transfer at the end of each day of all positive balances from the pool participants' accounts to the master account until these accounts reach zero, whereas all negative balances on pool participants' accounts are compensated by a cash transfer from the master account until they also reach zero. From a legal perspective, these transfers are intra-group loans.

   The same applies to target balancing cash pooling, with the only difference that instead of reaching zero, the cash sweep is set not to go beyond a certain targeted limit that usually corresponds to the cash needs of the pool participants.

ii. For the notional pooling, the cash remains on the account of each pool participant, but the positive and negative balances are netted virtually at the end of each day without any transfer taking place effectively and the interests are calculated on a virtual balance. The virtual netting is often covered by guarantees or account pledge agreements granted by the pool participants to cover the netted amounts in favour of the bank.

Even though cash pooling is commonly used by groups, it is not specifically regulated under Swiss law and the rules used have been developed by practice and case law. There is no "group company law" in Switzerland and each company must pursue (and safeguard) its own interests, independently of the interests of the group – even though they are often aligned. Consequently, the implementation of cash pooling arrangements in Switzerland is subject to certain limitations and the agreement and risks must be reviewed carefully from the perspective of each involved Swiss company.

2. General Corporate Law and Case Law Limits

The zero balancing cash pooling may result in a Swiss company granting intra-group loans to one of its direct subsidiaries or affiliates (*i.e.* obligations of a Swiss company's direct or indirect parent companies (up-stream liabilities) or sister companies (cross-stream liabilities)) and such intra-group loans are then subject to certain limitations. The same applies to a Swiss company providing up- or cross-stream guarantees or security interests under a notional cash pool.

These transactions must in the first place be covered by the purpose clause in the articles of association of the pool participant acting as a lender and it must be in its interest.

Due to the absence of group company law in Switzerland, the duty of care and loyalty of the board of directors lies with the company itself and not the group as a whole. The board of the pool participant must therefore act in the interest of the pool participant, irrespective of the interests of the group.

If an intra-group loan is not granted at arm's length conditions (see section 3 below) it could be considered to constitute a prohibited repayment of capital, a violation of the legally protected reserves or the payment of a (constructive) dividend. Swiss law prohibits the repayment of capital and generally limits the distribution of assets such as dividends to the freely distributable reserves of a company, which comprises, *inter alia*, retained earnings and other unrestricted reserves such as additional paid in capital or "agio" (the freely distributable reserves). The company's restricted capital (the restricted capital) consists of its share capital and the legal reserves as well as any voluntary statutory reserves.

According to the case law developed by the Federal Supreme Court, the entry into a cash pool arrangement does not *per se* lead to a breach of corporate law. The Federal Supreme Court considers that (i) intra-group loans that affect the restricted capital are lawful, as long as they are done at arm's length conditions, and (ii) intra-group loans which are not granted at arm's length terms but are covered only by the freely distributable reserves are nevertheless lawful, generally speaking. In addition, the granting of an intra-group loan constitutes a distribution to the shareholders, unless such loan is granted at arm's length terms. The Federal Supreme Court further concluded that if such loans are not granted at arm's length, they "block" the amount available for distribution to the shareholders in an amount corresponding to the respective loan. Consequently, the lender is required to book a corresponding reserve in its balance sheet in the amount of the underlying loan. This reserve will become part of the restricted capital, thereby limiting future dividend distributions and upstream and cross-stream loans.

3. Arm's Length Conditions

The cash pooling and the intra-group loans granted thereunder are not problematic if they are granted at market or arm's length conditions, which means that an unrelated third party would be ready to participate in the cash pooling and provide such loans at the same conditions.

According to Swiss case law and legal doctrine, the following elements should be considered in assessing whether arm's length conditions are met: (i) written documentation; (ii) soundness and financial standing of the pool master and the pool participants; (iii) loan amount and applicable interest rates; (iv) term of the loan; (v) termination rights; (vi) regular verification; (vii) monitoring of the financial standing of the pool master and the pool participants; (viii) collateralisation of the loan; and (ix) safeguarding of group interests.

Even though the Federal Supreme Court has emphasised the importance of the collateral, it has failed to provide clear and practical limits to be followed within this catalogue. In practice, it is therefore not possible to demonstrate that a cash pool arrangement has been entered into at arm's length terms.

In the current state of Swiss case law, when intra-group loans resulting from a cash pooling system do not comply with the arm's length test, it has the following consequences:

- The Swiss pool participants should retain funds equal to their restricted capital;
- An amount equivalent to the intra-group loan granted needs to be blocked in the freely distributable reserves;
- If the restricted capital is affected as a result of loans granted by a Swiss pool participant to the pool master, Swiss legal doctrine takes the view that the respective loans might even be partially void in the amount exceeding the freely distributable reserves;
- Any previous dividend payments by the Swiss pool participants which exceed their freely distributable reserves could be reclaimed.

4. Tax Aspects

A Swiss pool participant must also respect the Swiss thin capitalisation rules. If a Swiss pool participant has debt from related or unrelated parties in excess of the maximum percentages provided according to the Swiss Thin Capitalisation Rules (*e.g.* 85% for accounts receivables) or for finance companies in excess of 6/7 of the total assets, the company is deemed to be thinly capitalised for tax purposes – if it cannot be demonstrated that the financing still meets the arm's length test. As a consequence, excess related party debt, if any, will be (i) considered as hidden equity for capital tax purposes, (ii) interest payments made on such related party debt in excess of the interest deduction capacity calculated according to the safe haven rules are not tax deductible and (iii) such interest payments would be re-qualified as constructive dividend distributions subject to 35% WHT.

Moreover, the interest rate on related party debt must be in line with the at arm's length principle for which the SFTA publishes safe-haven interest rates annually in its Circular Letters. If the applied interest rate is below (for intercompany receivables) or above (for intercompany payables) the safe-haven interest rates as published annually by the SFTA and if it cannot be demonstrated that the interest payments meet the at arm's length test (and no tax ruling confirming the interest methodology has been obtained), the difference between the applied interest rate and the safe haven interest rate will be re-qualified as constructive dividend distribution subject to WHT at a rate of 35%.

The WHT applies independently of whether the intra-group loan granted under the cash pool is made out of the pool participant's freely distributable reserves. For Swiss pool participants it is therefore advisable to seek to obtain a tax ruling from the SFTA to confirm the tax treatment of the cash pooling arrangement.

5. Mitigating Actions to Be Taken

When setting up a cash pooling arrangement with Swiss pool participants, there are several actions that can be taken to mitigate the risks described above:

- The purpose clause of the Swiss pool participant must be amended to (i) expressly authorise the granting of up- or cross-stream loans and guarantees/security interests, (ii) without consideration in case the intra-group loans do not meet the arm's length test, and (iii) allow for the pool participant to consider the interests of the whole group.
- Notwithstanding the above changes to the pool participants' articles of association, it is necessary to agree upon interest rates which are at arm's length terms and comply with the guidelines of the SFTA.
- It is one of the key responsibilities of the board of directors of each pool participant to ensure that the company has sufficient liquidity. Accordingly, the corporate bodies of the pool participants have to take into account a possible insolvency scenario. In particular, they can do this by way of the following:
    - Manual cash pooling. The pool participants' corporate bodies decide manually in each case about transfers (loans) to the pool master and drawdowns from the cash pool.
    - Target balancing. Instead of a zero-balancing model, the pool participant has a target balance on its account at the closing of the day. This target balance aims at covering the liquidity needs of the pool participant during the term of the regular notice period under the cash pool agreement.
    - Alternative sources of liquidity. The pool participant remains entitled to maintain alternative sources of liquidity, such as bilateral loans with third party banks. The respective sources of liquidity should cover at least the liquidity needs of the respective pool participant during the term of the regular notice period under the cash pool agreement.
    - Collateral. The pool master could provide collateral to the pool participants in order to secure any up-stream loans. In practice, this is usually difficult to implement,

because the cash pool bank will usually request its claims to be secured by the pool master and the pool participants.

- If not at arm's length, up- and cross-stream loans may only be granted in an amount covered by freely distributable reserves.
- Each of the pool master and the pool participants' corporate bodies are required to continuously review the financial standing of the other group companies participating in the cash pool. Accordingly, the intra-group loan agreements must provide for information obligations and rights on the other pool participants.
- The intra-group loan agreements are one of the elements of the arm's length test and must be in writing. It is important that they are drafted carefully and are aligned with the cash pool agreement.
- In order to safeguard the interests of each pool participant, the parties should agree upon termination rights in the intra-group loan agreement. Typically, the parties distinguish between an ordinary termination with a notice period and an immediate extraordinary termination for valid reasons (*e.g.* in case of financial distress of the pool master or another pool participant). As mentioned above, the pool participant must ensure that it always disposes of sufficient liquidity to continue to run its business – without taking into account any potential borrowings under the cash pool – for the whole duration of the notice period in case of an ordinary termination. The pool master shall also have the right and the obligation to exclude from the cash pool with immediate effect any pool participant which is in financial distress.
- Subsidiaries with minority shareholders must be excluded from the cash pool arrangement.
- The introduction of credit limits may reduce the overall risk associated with the cash pool and prevent a pool participant from making excessive drawdowns under the cash pool.
- The cash pool bank usually requests that the pool participants are jointly and severally liable with the pool master and to provide a pledge over their cash pool account. To the extent possible, this should be avoided. Where this is not possible, the pool participant's liability should be limited to its freely distributable reserves.
- The pool participants shall have the right but not the obligation to make their liquidity available to the pool master. Thereby the pool participants' corporate bodies retain flexibility to

keep liquidity in the required amount in case of signs of financial distress of the pool master or another pool participant.

- The cash pooling arrangement and all related agreements should be approved by the board of directors and by the shareholders' meeting of the pool participant.

6. Impact of the corporate law reform

The revision of the Swiss corporate law did not bring about any significant changes in the area of intra-group financings. The following provisions, however, are in some way relevant to cash pools.

Firstly, Art. 675a CO allows for the payment of interim dividends to meet the increasing practical needs. This new provision sets out the requirements for such interim dividends, *i.e.* the existence of a statutory basis and the preparation of interim financial statements. This clarification is important in particular for intra-group financings. It will make it easier to comply with the formal rules on distributions in connection with a transaction during the financial year and even to dissolve reserves blocked in relation with the granting of a loan (up- or cross-stream).

Secondly, the corporate law reform amended the provisions on capital and profit reserves (*i.e.* Art. 671 and 672 CO). The aim of these amendments is to simplify the legal restrictions and to conform to the international practice and case law of the Federal Supreme Court. These new articles clarify in particular the conditions under which the legal reserves from the capital can be repaid to the shareholders. In the case of intra-group financing, this will have the merit of making the calculation of freely available capital more transparent.

Thirdly, the corporate law reform introduces an interesting provision with regard to subordination within groups (*i.e.* Art. 757 para. 4 CO). According to this new provision, the claims of corporate creditors who have agreed to have their rights subordinated to all other claims of the company are not taken into account in the calculation of the damage in an action for damages in case of bankruptcy of the company. In downstream financing in particular, the parent company often agrees to subordinate its loan to its subsidiary. This new provision responds to the criticism of the Federal Supreme Court's case law applicable prior to the entry into force of the new corporate law reform according to which subordinated claims were so far included in the calculation of damages. This case law severely restrained the effect of the subordination of claims within intragroup financings. Under the new corporate law reform, this new provision expressly provides that claims of corporate creditors subordinated to all other claims are not considered in the calculation of the damage anymore. Even though the text of the provision appears very broad, the assimilation of the subordinated claims to quasi-equity is to be welcomed.

Finally and as indicated above, it is one of the key responsibilities of the board of directors of each pool participant to ensure that the company has sufficient liquidity. Under the new corporate law, Art. 725 CO now provides for explicit duties of the board of directors to act in order to prevent insolvency. Insolvency in the sense of this article is given when the company has neither the liquidity to pay its outstanding debts nor the credit necessary to obtain such liquidity. In the context of cash pools, this means that the board of directors shall now have a legal obligation to act and take measures to remedy the situation if the group cash pool puts the company at risk of becoming insolvent.

Employment and Labour Law in Switzerland

I. Employment Law

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1. Entering an Employment Relationship

1.1. Concluding an Employment Contract

Articles 319 et seq. CO set out the mandatory, semi-mandatory and optional provisions relating to individual employment contracts. With a few exceptions, such as an apprenticeship contract, an individual employment contract can be made in writing, orally or even implicitly.

The written form is usually recommended for all individual employment contracts, particularly because some deviations from the statutory law require written form (*e.g.* notice periods, probationary period, etc.). Further, collective bargaining agreements may also stipulate that deviations from the provisions must be set out in writing. Thereby, it is important that "written" means a wet signature or an electronic signature process approved by the Swiss government based on the Swiss Law on Electronic Signatures.

1.2. Probationary Periods

By statute, the first month of employment is considered the probationary period. The parties may mutually agree in writing on a longer probationary period, which may not exceed three months. Any inability to work during the probationary period (*e.g.* owing to illness) may extend the probationary period.

2. Restrictive Covenants

An employee may make a commitment to the employer to refrain from any competing activity for a certain period after termination of the employment relationship. A post-termination non-compete clause is only binding if the employment relationship gives the employee access to customer data, manufacturing secrets or business secrets, and if the use of such knowledge could significantly damage the employer. According to the Federal Supreme Court this is never the case when the relationship between client and employer or between client and employee is strongly personal. The non-compete clause must be made in writing and shall be reasonably limited in terms of place, time and subject to preclude an unreasonable impairment of the employee's economic prospects. The statutory maximum duration of a post-termination non-compete clause is three years, but typically does not exceed one year.

A judge may limit an excessive prohibition of competition. If an employer gives consideration in return for a non-compete agreement – although this is not legally required – it is more likely that the covenant will be fully enforceable. As a matter of law, any non-compete clause will cease to apply if the employment is terminated by the employer, unless the employee has set a reason, or even provoked the termination.

3. Wages

Five Swiss cantons have implemented general minimum wages into their cantonal constitutions. Other cantons or federal laws do not provide for general minimum wages. However, many collective employment contracts include minimum wages. In light of the freedom of movement of labour within the EU, the authorities started to implement mandatory minimum wages in areas where undercutting of market standard wages by foreign labour has become an issue.

For Swiss corporations listed in Switzerland or abroad, certain compensation payments to senior management are prohibited. The prohibited payments are, *inter alia*, severance payments, sign-on bonuses which do not compensate a demonstrable financial disadvantage, compensations for non-compete clauses in case the non-compete clause is not justified by business or the compensation exceeds the average compensation of the last three years, bonuses for certain M&A transactions and compensations related to the past activity for a corporate body of the company that are not in line with market practice as a general clause. In the context of the Swiss corporate law reform, the amended provisions on compensation in listed stock corporations have been included into the CO. Swiss companies have a transitional period of two years to amend their articles of associations and regulations. Following the enactment of the new law as of 1 January 2023, non-listed stock corporations may stipulate in their articles of associations that the compensation provisions also apply to them in part or in full.

4. Working Time

4.1. Time-Keeping Records

The Labour Act provides for a strict obligation of companies to maintain detailed time-keeping records, including start and ending times of the working day and break times, of all employees being governed by the Labour Act. With the exception of very senior management personnel, the Labour Act applies to all employees.

4.2. Working Hours

The Labour Act determines the maximum weekly hours of work, distinguishing between two categories of employees: (i) workers employed in industrial enterprises and white-collar workers (office workers, technical staff and other salaried employees) as well as sales staff in large retail companies; and (ii) other workers, mainly workers in the construction sector and craftsmen, workers in commerce, as well as sales staff in small retail companies.

The maximum hours of work are fixed at 45 hours a week for the first category and 50 hours a week for the second. If both categories of employees are employed in the same enterprise the maximum of 50 hours applies to both categories. Within these limits the effective weekly hours of work are fixed by collective agreements and individual contracts.

4.3. Overtime and Excess Hours

Swiss law provides for overtime and excess hours. Overtime concerns cases in which the employee works more than the working hours stipulated in the employment contract, up to the maximum working time allowed under the Labour Act (see section 4.2 above). Pursuant to the CO, any overtime not compensated by time off must be paid by the employer with a supplement of at least 25%

of the applicable wage, unless there is an agreement to the contrary in writing (*i.e.* a collective agreement or individual employment contract). Thus, an agreement may provide that no supplement applies or that any overtime is included in the standard wage.

Excess hours relate to the hours worked in excess of the Labour Act limits of 45 or 50 hours. Excess hours must be paid with a wage supplement of 25% of the hourly wage. This compensation is a mandatory provision from which the parties may not depart by agreement (in contrast to overtime). The Labour Act specifies that for white-collar workers and sales staff in large retail companies, the supplement is due only if the total excess hours performed exceed 60 hours per calendar year. In case of a 45-hours week, the first 60 excess hours per calendar year are treated as regular overtime.

5. Transfer of Company

5.1. Definition of Transfer of Company

Pursuant to Art. 333 CO, the employment relationship is transferred from the employer to a third party if the employer transfers the company or a part thereof to such third party and if this transfer does not take place within a restructuring scenario (transfer of company). A transfer of company will only be assumed if the business unit maintains its structure and organisation after the transfer. However, it is not required that any assets are transferred.

5.2. Transfer of Employment Relationships

If a transaction qualifies as a (partial) transfer of company, the employment relationships existing at the time of the transfer (including the ones under notice) are automatically transferred, including all rights and obligations as of the date of transfer, unless an employee objects to the transfer. If an employee objects to a transfer, the employment relationship is terminated upon the expiry of the statutory notice period even if longer or shorter contractual notice periods apply.

5.3. Joint Liability

The current employer and the new employer are jointly and severally liable for an employee's claims that have become due before the automatic transfer and that will later become due until the date upon which the employment relationship could have validly been terminated.

5.4. Consultation Process

If any redundancies, terminations or changes in the working conditions are planned in connection with a transfer of company, the works council or the employees need to be consulted in due time before the decision to make employees redundant is made or the changes in the working conditions are implemented. This consultation process is also necessary if the employees will be dismissed or changes will be implemented after the transfer (by the new employer). Within the consultation process, the employer needs to give the works council or the employees at least the possibility to make suggestions on how to avoid any measures, specifically on how to limit the number of dismissals. Accordingly, the employer has to provide all pertinent information to the works council or to the employees. According to case law, the employees or the works council need to have at least 14 days to make their suggestions or proposals. In case of a breach of the duty to consult, the employer could become liable for any damages of the employees. Further, the government can force the involved parties to conduct the consultation process (which could delay a contemplated transfer considerably) and can fine the parties. In addition, it is argued by some scholars that any terminations issued or implemented changes are void.

5.5. Information of the Employees

After the consultation, or directly if no consultation is required, the works council or the employees need to be informed in due time before the transfer of: (i) the reasons for the transfer, (ii) the results of the consultation process (if any required), and (iii) the final legal, economic and social consequences of the transfer for the employees (including the number of dismissals; changes in the working conditions).

6. Discontinuing Employment

6.1. Ordinary Termination

A contract concluded for an indefinite period terminates after a notice given by either of the parties. By statute, an employment agreement might be terminated with a notice period of seven days during probationary period, and thereafter with a notice of one to three months, depending on the employee's years of service. The statutory notice periods might be replaced with a different written contractual agreement, whereby the notice period after the probationary period must not be reduced to less than one month. However, collective bargaining agreements might set forth longer notice periods.

In principle, no cause to terminate an employment relationship is required. Nevertheless, the employee has a statutory right to be informed of the reasons for the termination in writing, on request.

6.1.1. Abusive Termination

A termination of an employment agreement must not be abusive. A party that gives notice abusively must pay an indemnity to the other party, but the termination remains valid. The termination of the employment contract by either party is considered abusive if, for example, it occurs for one of the following reasons (non-exhaustive list): (i) personal characteristic of one party (*e.g.* race, creed, sexual orientation, age), unless they are relevant to the employment relationship or significantly impair the cooperation within the enterprise, (ii) the other party makes use of a constitutional or contractual right, or (iii) where the sole purpose was to frustrate the formation of claims arising out of the employment relationship.

6.1.2. Untimely Termination

There are certain periods during which a notice of termination is invalid. After the probation period has expired, the employer may not terminate the employment relationship at the following times: (i) when the employee is performing military service or civil defence, or (ii) when the employee is prevented from working through no fault of his or her own as a result of sickness or an accident (for a certain period depending on the employees years of service, up to 180 days), or (iii) during pregnancy and for 16 weeks following the birth of the baby or any extended period of maternity leave due to the hospitalisation of the new-born child, or (iv) when the employee is entitled to carer’s leave to care for a child who’s health has been seriously impaired by illness or accident, or (v) when the employee participates in an official aid project in another country.

Any notice to terminate an employment contract during such period is invalid. Any notice served before such period starts is suspended when the period begins and then recommences after recovery from illness or accident or expiration of the protection period.

6.2. Summary Dismissal

If any of the parties has a "significant cause" it may terminate the employment contract at any time, without prior notice and may claim compensation for the damage caused from the other party. But, if the employer terminates the contact with immediate effect without a significant cause, the employer must compensate the employee for the damage that has thus been caused to him plus a penalty of up to six months' remuneration.

6.3. Severance Payment

Generally, if an employee aged 50 or older leaves employment after 20 or more years of service, the employer must pay a severance compensation of between two and eight months' salary. Such severance pay, however, is not very common in Switzerland because the employer can deduct the contributions made to the (mandatory) pension plan from the mandatory severance pay.

6.4. Collective Dismissal

The CO provides special rules regarding collective dismissals, being notices issued by the employer within a period of 30 days for reasons unrelated to the person of the employee and that affect a certain number of employees, depending on the total number of usually employed persons.

When conducting a collective dismissal, an employer must inform and consult with the works council or the employees. Employers must also inform the cantonal labour office of every planned collective dismissal. Non-compliance with the procedural rules by the employer constitutes abusive termination of the affected employment, which may lead to damages payment and additional remunerations and in the case of substantial non-compliance the terminations can be found void and reinstatement ordered.

6.5. Social Plan

Companies normally employing 250 employees or more and making within a period of 30 days at least 30 employees redundant have to negotiate with the works council or the employees directly a social plan to work as a safety net for the dismissed employees. For companies below that threshold no obligation to issue a social plan for the terminated employees exists. However, there can be obligations to negotiate or issue a plan based on collective agreements.

II. Social Security and Pension

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1. In General

The Swiss social security system consists of a network of different types of social insurances and pensions which offer protection to individuals insured under the Swiss social security system against the financial consequences of old-age, invalidity, death, illness, accident, maternity, paternity, child-care, service and unemployment.

Companies, employees and self-employed individuals play an important role in financing the social security system. Also, employers have several duties and obligations to comply with. The following overview focuses on the employer's duties and obligations. Its structure is based on the degree of the employer's involvement and liability. Following the overview relevant business-related topics will be addressed.

2. Swiss Social Security System

2.1. Social Security 1st Pillar – State Pension

2.1.1. Old-Age, Survivor's and Disability Insurance and Loss of Earnings Compensation

The OASI and the DI form the so-called 1st pillar of the social security system and provide for benefits in form of pension for retired or disabled people. The LoE provides for income compensation in case of service, in case of maternity and paternity and in case of carer's leave for parents caring for a child whose health is seriously impaired by illness or accident. For practical reasons, OASI, DI and LoE are administratively handled together and the contributions are collected by the same authority. Individuals domiciled or employed in Switzerland are insured on a compulsory basis.

OASI, DI and LoE are financed mainly through contributions levied on income (no upper limit, for the amount of the contributions see section 2.1.4 below). For employed individuals the contributions are shared equally by the employer and the employee. The employer pays the contribution whereas the employee's portion is usually deducted from the salary. Self-employed individuals pay their contributions depending on their earnings while the contributions of individuals not engaged in gainful activity are determined on their assets.

2.1.2. Unemployment Insurance

Unemployment insurance provides compensation in the form of daily allowances in the event of unemployment, weather-induced losses of working hours, short-time work and the inability of an employer to pay its employees due to insolvency. It also pays for readjustment measures to support unemployed persons in a quick and lasting professional reintegration. The contributions for unemployment insurance are levied on income (for the amount of the contributions see section 2.1.4 below). The contributions are shared equally between the employee and the employer. The employer pays the contribution whereas the employee's portion is usually deducted from the salary.

2.1.3. Family Allowance

The family allowance includes child and education allowances as well as the birth and adoption allowances introduced by some cantons in Switzerland. Family allowances for employees are mainly financed by the employers in the form of contributions based on a percentage of the salary (typically from 0.7% to 3.5% of the salary). The contribution rates vary depending on the canton and the competent compensation office. Family allowances are paid out by the employer upon request of the employee. The employer gets reimbursed by the competent compensation office.

2.1.4. Organisation and Contribution Collection

The compensation offices are responsible for collecting the contributions for OASI/DI/LoE, unemployment insurance and family allowance. Employers in Switzerland are required to register with the competent compensation offices to enable it to collect the contributions. The contributions are set provisionally based on the employer's declaration of expected total payroll of the employees and have to be paid upfront on account in either quarterly, monthly or annual arrears. The final contributions will then be determined on the basis of the employer's final declaration and invoiced taking into account the provisional contributions paid upfront. The compensation office periodically checks employers' compliance with the statutory social security provisions.

As per 2023, the contributions to the 1st pillar social security (except family allowance) are as follows:

	OASI	DI	LoE	Total OASI/DI/LoE	Unemployment Insurance
Employee (% of gross income)	4,35 %	0,7 %	0,25 %	5,3 %	1,1 % of income up to CHF 148,000
Employer (% of employee's gross income)	4,35 %	0,7 %	0,25 %	5,3 %	1,1 % of income up to CHF 148,000
Self-employed (% of income, digressive scale)	8,1 %	1,4 %	0,5 %	10 %	–
Gainfully inactive (monetary)	CHF 422 to 21,100	CHF 68 to 3,400	CHF 24 to 1,200	CHF 514 to 25,700	

2.2. Social Security 2nd Pillar – Occupational Pension

Occupational pension funds amend the 1st pillar social security. Employers are obliged to either establish a pension fund or to join an existing registered pension fund by entering into a so-called accession agreement with a pension fund provider. Pension funds are set up as a foundation and, if not instituted by the employer itself, established and registered by an insurance company which acts as a pension fund provider. A pension fund hosting more than one employer is organised as a collective pension fund.

The pension schemes run by a pension fund are usually set up as defined contribution schemes and based on the funding principle: Both, employer and employee contribute to the pension scheme whereby the employer must bear at least half of the total contribution. The contributions are determined by the applicable benefits plan based on individual factors such as insured salary and age. The contributions are paid by the employer whereas the employee's portion is deducted from the salary. At retirement, the accumulated capital is converted into an annual pension on the basis of a statutorily defined conversion rate unless a lump-sum capital is paid out.

Swiss law provides for minimum requirements which all pension schemes must fulfil (mandatory occupational pension). Employees whose annual salary is above CHF 22,050 and up to CHF 88,200 (figures valid in 2023) are subject to mandatory pension fund. However, further benefits complementing the statutory minimum, referred to as the extra-mandatory occupational pension, are also feasible and quite customary in Switzerland. Extra-mandatory plans cover the salary beyond the coordinated salary. Such schemes are less regulated than the mandatory schemes and often apply different retirement credits and conversation rates.

2.3. Social Insurance

2.3.5. Accident Insurance

Accident insurance provides for benefits in the event of occupational or non-occupational accident or occupational diseases. The accident insurance covers the costs for medical treatment and compensates losses of pay up to 80% of the wages. As an exemption, employees working less than eight hours per week are only insured against occupational accidents. The premiums for occupational accidents and occupational illnesses insurance are paid by the employer. The premiums of insurance for non-occupational accidents are usually paid by the employee. The employers are obliged to take out an accident insurance and are liable for the entire premium amount but may deduct employees' shares from their salaries.

2.3.6. Daily Sickness Benefits Insurance

Where an employee is prevented from performing his/her work due to illness, the employer must continue to pay his/her salary for a limited period of time. To limit the costs related to continued salary payment, employers may take out daily sickness benefits insurance for their employees. Such daily sickness benefits insurance compensates losses of pay, typically for a period of two years and is capped. If mutually agreed with the employee in writing, the employer can even transfer the obligation for continued salary payment to the daily sickness benefits insurance if the insurance benefits are equivalent to the statutory obligations. Typically, employers pay at least half of the amount of the premiums.

2.3.7. Health Insurance

Health insurance is obligatory for all Swiss residents and provides for medical treatment in the event of illness, pregnancy or accidents (if the latter is not covered by accident insurance). The insurance cover is taken out by each person independently and the contributions depend on the health insurance company, the place of residence and the insurance model selected. There is no employers' obligation nor is it customary that employers contribute to the employees' health insurance premiums.

3. Business Related Topics

In this section a few topics companies doing business in Switzerland often are confronted with are addressed.

3.1. Determination of Applicable Social Security Legislation in Cross-Border Work Situations

In an international context, as a principle, an individual who works exclusively in Switzerland is subject to Swiss social security legislation. In case an individual works not only in Switzerland but also in another country, in particular, in case of cross-border employment or cross-border services, the applicable social security legislation could shift (partially or fully) to such other country. Therefore, in a cross-border work context, the applicable social security legislation needs to be determined in the individual case.

3.2. Swiss Social Security for Members of the Board of Directors

Under Swiss social security law, members of the board of directors of a company are considered as gainfully employed. Thus, compensation to board members is in principal considered income from dependent employment and subject to OASI/DI/LoE, unemployment insurance and family allowance (see section 2.1 above).

Furthermore, compensation to board members is subject to mandatory accident insurance if the individual in question has actually an operating role within the company (see section 2.3.1 above).

Also, compensation to board members is regularly subject to mandatory pension fund contributions if it exceeds an amount of CHF 21,510 per year (see section 2.2 above). If the member of the board fulfils his/her role as a side activity and if the individual in question participates in an occupational pension fund via his/her main activity, the compensation to such board member is typically exempt from mandatory pension fund contribution.

3.3. Personal Subsidiary Liability for Members of the Board of Directors for Damage Due to Non-Compliance with the Company's Obligations Related to Social Security

Pursuant to Art. 52 OASI, the employing entity is responsible for any damage caused by deliberate or grossly negligent disrespect of OASI regulations and must compensate the competent authorities for the damage caused. In particular, the employer violates the OASI regulations if it does not register with the competent compensation office or if the employer does not pay the employees' contributions together with the employer's contributions to the competent authorities.

Apart from the employer's liability, Art. 52 OASI provides for a personal subsidiary liability for members of the board of directors of the company and/or for the responsible persons acting on behalf of the employer. Hence, in case of the employer's insolvency, directors could potentially be personally held liable for damage incurred by the OASI fund.

3.4. Risk of Underfunding of Occupational Pension Schemes

By law, at any point in time, pension schemes must ensure the funding of all assumed obligations. A 100% funding ratio means that there are just enough assets to finance all current and future obligations. However, pension fund providers are free to choose the exact form of financing as long as respective obligations are funded. Underfunding means that the funding ratio of a pension scheme is less than 100%, *i.e.* the pension scheme is no longer able to satisfy all of its obligations towards the insured individuals. In the event of an underfunding, the law obliges the pension fund provider to take precautionary measures to recapitalise in order to raise the funding ratio back up to at least 100% within a reasonable period. This may lead to benefits reduction, but, if the pension fund is seriously underfunded, measures can also be imposed on employees and employers. In other words, in case of a substantial underfunding the employer could potentially be required to provide additional financial contributions. However, this risk does not occur in case of a fully re-insured pension fund.

3.5. Partial Liquidation of Pension Funds

According to statutory provisions, a pension fund is partially liquidated if the staff of an affiliated employer is reduced significantly or in case of a restructuring of the employing entity. Even if the employer is not directly affected by such partial liquidation of the pension fund (because the pension fund must be a separate entity), such partial liquidation of the pension fund must be kept in mind in case of mass redundancy or in case of restructuring (*e.g.*, transfer of

III. Foreign Employees

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1. In General

Immigration of foreign employees to Switzerland may occur on a voluntary basis or be encouraged through mutual agreements between countries. Switzerland's most important one in this area is the AFMP entered into with the EU and the EFTA countries. The mobility of foreign employees which results from such type of agreements may, however, raise a certain number of questions in terms of protection of the labour market of the countries opening their borders. In this context, Switzerland enacted accompanying measures in order to limit the risks of social dumping which might result from the opening of the labour markets, in particular in the context of assignment of foreign employees. Such protection can be justified considering that Switzerland is a high-wage country compared to most of its neighbours.

The nationality of foreign employees relocating to Switzerland usually has a direct impact on the conditions applicable to the grant of a work and residence permit as immigration requirements are more or less strict depending on the employee's status (*i.e.* posted worker as opposed to "regular" migrant worker) and his nationality.

The AFMP introduced a partial liberalisation of cross-border services for providers located in the EU which would like to assign employees to Switzerland (see section 2 below).

The situation is different for EU/EFTA migrant workers wishing to settle in an autonomous and more permanent manner in Switzerland – in the sense that they are not assigned by a foreign company –

as they entirely benefit from the free movement of persons as provided by the AFMP (see section 3.1 below).

Third-country nationals do not benefit from AFMP and are subject to stricter requirements for obtaining a work and residence permit on the basis of the FAFNI (see section 3.2 below).

2. Assignments of Foreign Employees to Switzerland

The AFMP introduced a partial liberalisation of cross-border services for service providers located in the EU.

2.1. Immigration Law Aspects (Work Permits)

As a preliminary comment, it should be noted that the main characteristics of assignments is that the posted worker remains subordinate to his employer located abroad. Assignment is also always meant for a limited period of time and the posted worker remains, in principle, affiliated to the social security system of his country of origin. A "secondment contract" may be signed for the duration of the assignment, without breaking the initial employment relationship.

2.1.1. Assignments for Less Than 90 Days

A company located in an EU/EFTA country has the right to provide a service on Swiss territory, and therefore to post workers there, without any restrictions, as long as the assignment does not exceed 90 days of actual work per calendar year. The 90-day credit is granted per service provider (*i.e.* per employer) and per calendar year.

The 90-day rule also applies to third-country nationals, provided that they have been permanently integrated into the labour market of one of the EU/EFTA member states (*i.e.* they worked for at least twelve months for their employer in the concerned EU/EFTA country).

In this case scenario, no work permit is required. The only requirement is to notify the Swiss authorities of the arrival of the assigned employee(s), when the assignment exceeds eight days of service per year (registration procedure). The employer must use the official form (online form) in the official language of the place of assignment and indicate the necessary information, in particular identity and salary of employees posted to Switzerland, activity carried out in Switzerland and place of work.

In some sectors (*e.g.* construction, hotel/restaurant, security, industrial or domestic cleaning, landscaping) the registration procedure is mandatory from the first day of assignment.

Companies located in a third country (non-EU/EFTA) have to apply for and obtain a work and residence permit for the employees that they would like to assign to Switzerland, even if the assignment does not exceed 90 days. In this context, the application is subject to quota restrictions.

Following the Brexit, a transitional phase was agreed between the United Kingdom and Switzerland. This transitional phase ended on 31 December 2020. As a result, since 1 January 2021, the United Kingdom is no longer considered as EU/EFTA country but as a third country.

Switzerland and the UK signed an agreement on the acquired rights of UK nationals on 25 February 2019. This agreement aims at protecting the acquired rights of Swiss nationals in the UK and of UK nationals in Switzerland. It provides for limited access to assignment in Switzerland compared to the AFMP. Additionally, Switzerland and the UK signed, on 14 December 2020, an agreement on the mobility of service providers. From 1 January 2021 this agreement softens the conditions for the access to services from the UK up to 90 days per calendar year for a period of two years. To date, this special agreement has been extended until 31 December 2025, under the same conditions.

To date, on the basis of this agreement, self-employed UK nationals or service providers having their headquarters in the UK can continue to benefit from the registration procedure, similarly as service providers located in an EU/EFTA country, for assignments up to 90 days per calendar year.

As far as self-employed EU/EFTA service providers located in the UK are concerned, they can continue to use the registration procedure provided that the assignment began no later than 31 December 2020, and that a written contract for services was concluded before this date.

2.1.2. Assignments for More than 90 Days

For assignments lasting more than 90 days (per calendar year), the admission of foreign workers (for both EU/EFTA and third country situations), is governed by the FAFNI, as the AFMP does not apply to assignments exceeding 90 days per calendar year.

2.2. Other Specific Requirements Applicable to Assignments

Other specific requirements regarding assignments of foreign employees to Switzerland are governed by the FPWA.

2.2.1. Obligation to Comply with Swiss Working Conditions

The main purpose of the FPWA is to prevent the underbidding of working conditions and wages. Foreign employers which post their workers to Switzerland are therefore obliged to comply with the working and wage conditions prevailing in Switzerland, which are dealt with by federal laws or by collective labour agreements declared binding on companies in the sector (known as extended collective labour agreements) or by standard employment contracts. All assigned workers must, therefore, benefit from the minimum working conditions prevailing in Switzerland inter alia regarding wages, working hours and rest, holidays, occupational safety, health, protection of pregnant women, non-discrimination and accommodation conditions.

2.2.2. Sanctions

In case of a breach of the duties set by the FPWA, the sanctions range from a warning to a fine or even a ban on providing services in/from Switzerland.

2.2.3. Derogations

FPWA does, however, not apply in some cases. In particular, minimum requirements concerning remuneration and holidays do not apply to "small works" (*i.e.* of 15 days of work per calendar year at maximum) and to assignments lasting less than eight days and which are fully part of a contract for supply of goods. In addition, cross-border service rental is expressly excluded from the scope of the FPWA and is governed by a separate legislation (see Act of Hire of Employees and Rental of Services).

3. Work and Residence Permits in Relation to Migrant Employees

Slightly different immigration requirements apply to migrant workers (as opposed to assigned employees). The regime applicable in this context varies depending on the nationality of the migrant worker.

3.1. EU/EFTA Nationals

When they are not in an assignment situation, EU/EFTA nationals have a right to enter, to work and to settle in Switzerland on the basis of the AFMP, without any particular restrictions, provided that two minimal requirements are fulfilled: (i) they are financially self-sufficient and intend to carry on business in or from Switzerland either in a self-employed capacity or as an employee and (ii) they have a valid health insurance covering all risks in Switzerland for all accompanying family members.

3.1.1. For a Stay of Less or Equal to 90 Days

In order to exercise a short-term gainful activity of no more than three months or 90 days per calendar year, EU/EFTA national do not need any work permit. However, the Swiss employer is required to announce the employment of such EU/EFTA nationals using the registration procedure mentioned above (the same as in the case of assignment). This announcement must be made no later than the day before the start of the activity.

Following the Brexit, UK nationals who take up an employment in Switzerland for up to three months can no longer use the registration procedure. Since 1 January 2021, UK nationals need to apply for a work permit, in accordance with the provisions of the LEI.

3.1.2. For a Stay of More than 90 Days

For longer stays, EU/EFTA nationals need a work and residence permit, it being specified that they are entitled to it from the moment the conditions mentioned above are met (*i.e.* an employment or an activity as a self-employed person and a health insurance). This type of work and residence permit (*i.e.* permit B with the mention of gainful activity), is usually issued for a period of five years. The registration of the EU/EFTA national's arrival must be made to the municipality of residence before taking up the employment. To date, Bulgarian, Rumanian and Croatian nationals are still subject to certain specific requirements.

3.2. Third Country Nationals

As opposed to EU/EFTA nationals, gainful employment in Switzerland by third country nationals is subject to certain quota restrictions. When issuing residence permits authorities will take into consideration in particular factors such as conditions on the Swiss labour market and review the employment contract for unusual clauses, based on LEI requirements.

Furthermore, eligibility for a residence permit with gainful activity is restricted to qualified or specialised professionals. "Qualified workers" means workers with a degree from a university or institution of higher education with several years of professional experience. Depending on the profession or field of specialisation, individuals with special training and several years of professional work experience may also be admitted. Besides professional qualifications, foreign workers nationals from third states must fulfil certain other criteria which would facilitate their long-term social integration. These include, in particular, social adaptability, age and knowledge of languages. The requirements of the latter have been increased since 1 January 2019.

In addition to being a qualified worker, a third country national may only be admitted as an employee if a Swiss or a EU/EFTA national cannot be recruited for the same position on the employment market in Switzerland or in another EU/EFTA member state. Swiss nationals and foreign nationals from EU/EFTA member states are always given priority. Accordingly, employers in Switzerland must prove that they have been unable to recruit a suitable employee from this priority category despite intensive efforts.

This "Swiss-EU/EFTA priority" does, however, not apply to transfers of workers at management level, to highly qualified specialists and to individuals benefiting from family reunification.

Usually, the residence permit with gainful activity is initially limited to one year and may be renewed on an annual basis, provided that the conditions on which it has been granted are still fulfilled. A potential change of canton of residence or work is subject to a new permit application.

As mentioned above, following the Brexit and the end of, on 31 December 2020, the transitional phase agreed between the United Kingdom and Switzerland, the AFMP concluded with the European Union (EU) no longer applied to relations between Switzerland and the United Kingdom. Since 1 January 2021, the UK is no longer considered as EU/EFTA country but as a third country, meaning that UK nationals have to fulfil all the LEI requirements set forth above in order to obtain a Swiss work and residence permit.

4. Social Security Aspects

Social security affiliation in particular concerns benefits regarding illness, age, disability, work accidents and work-related sicknesses and unemployment (see chapter on Social Security and Pension).

From a Swiss law perspective, health insurance is subject to a separate regime (in case of affiliation to a foreign health insurance system, exemption may be granted by the Swiss authorities, under certain conditions).

As a general rule, employees are subject to the social security system of their place of work, with the two following exceptions: (i) when a foreign employee carries out activities in/from the territory of different countries (including Switzerland), he will in principle be subject to the social security legislation of his country of residence or of the employer's registered office (depending on what is provided for in the applicable treaty); (ii) usually, for assignments, posted workers remain subject to the social security system of their country of origin.

As far as EU/EFTA nationals are concerned, social security aspects are governed by a European regulation (R/883/2004). One should, however, note that following the Covid-19 crisis, a special regime regarding social security and tax aspects applied, until 30 December 2022, between Switzerland and France for employees working remotely (home office). To date, this special regime regarding social security has been extended until 30 June 2023. Taxwise, France and Switzerland also reached a special agreement based on which, from 1 January 2023, remote work is possible up to 40% of the annual working time, with no tax impact neither for the employers nor their employees.

An assignment between a Swiss employer and a worker who does not hold the nationality of an EU/EFTA member state is regulated on the basis of bilateral agreements or national laws (where there is no treaty). Furthermore, Switzerland entered into more than 40 bilateral and multilateral social security conventions with other foreign countries.

Social security aspects remain, however, complex issues which need to be carefully examined, depending on the specificities of each case, in particular in case of multi-activity in various countries in addition to Switzerland or when no treaty on social security has been concluded with the foreign country at stake.

Real Estate in Switzerland

I. Acquisition of Real Estate



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1. Ownership in Real Estate

1.1. Main Types of Ownership

Swiss law provides for different types of ownership in real estate. The most common forms of real estate ownership are sole ownership, joint ownership and co-ownership which exists in the form of (i) classical co-ownership and (ii) condominium-principled co-ownership. The latter is primarily used for apartments in multifamily homes.

Generally, the ownership in a real property includes the ownership in the land and its integral parts including any buildings built thereon. However, the owner of a property has the right to grant a building right to a third party, leading to a separation of the ownership in the soil and the building constructed thereon.

1.2. Land Register

Each privately owned piece of land in Switzerland (including condominium units) need to be registered with the land register. Federal law requires the land registries to provide certain minimum information with respect to each real estate property such as title information, easements and mortgages.

As there is a legal presumption for federal land register entries being true and correct, anybody relying on such information in good faith is fully protected by law.

2. Transfer of Ownership

2.1. Asset Deal

In order to transfer legal title to a real property, an asset sale and purchase agreement in the form of a public deed needs to be entered into between the buyer and the seller in the presence of a notary public. Afterwards, such public deed needs to be filed with the land registry which will then register the transfer of ownership in the land register. The transfer becomes effective with the registration in the so-called journal.

2.2. Share Deal

In case Swiss real estate is held by a legal entity, such real estate may be acquired indirectly by way of purchasing the shares in the relevant legal entity. In this scenario, a share sale and purchase agreement will be entered into by the buyer and the seller and does not need to be notarised. Also, no registration with the land register is required as the direct owner of the property remains unchanged. Due to their complexity and due diligence requirements, share deals are not commonly used in Switzerland for real estate transactions.

2.3. Real Estate Due Diligence

Real estate investors typically perform a due diligence prior to acquiring real estate. As registration with the land register is conclusive, legal due diligence involves analysing the land register extract and its supporting documents containing all relevant property information.

In addition, the following aspects are typically reviewed in a legal due diligence for a real estate transaction:

- All existing lease agreements, given that these are transferred to the buyer by operation of law upon completion of the sale;
- Environmental law issues, given that the legal owner of a real property has certain liability risks resulting from such issues (see section 3 below);
- A potential infringement of the Lex Koller, given that any infringement may render the transaction null and void (see section 4 below);
- Potential zoning law and other public law restrictions.

Furthermore, prudent buyers perform a tax, technical and financial due diligence in addition to the legal due diligence.

2.4. Typical Representations and Warranties

In asset deals, representations and warranties are usually given on a rather limited basis. First and foremost, a seller does typically not provide any warranty as to the substance of the building, *i.e.* any warranty of the seller in that respect is usually excluded to the maximum extent permitted by law.

However, it is market practice that sellers provide representations relating to the accuracy of rent rolls and due diligence information as well as to facts which cannot be independently verified by the buyer (*i.e.* pending or threatened litigation, tax payments, etc.). In specific cases, representations, warranties and/or indemnities may be given with respect to existing or potential contaminations of the soil or parts of the building.

In share deals, additional warranties are usually given as a result of the transaction structure. In particular, corporate warranties relating to the correct organisation and valid existence of the company, accurate and correct presentation of the financial statements and title to shares are regularly contained in a share sale and purchase agreement. However, most of the seller's warranties in share deals are often capped at an agreed amount; typically, such cap does not apply to the seller's title warranty.

In the event of any misrepresentation, the seller is liable to compensate the buyer for any damage incurred. In share deals, part of the purchase price is often held in escrow for a limited period of time to protect the buyer.

3. Environmental Law Considerations

Pursuant to the Environmental Protection Act, the legal owner of real estate is – in addition to the person having caused the contamination – liable for such pollution, even if it was caused prior to the acquisition. Moreover, a landlord can also be held responsible for a pollution stemming from its tenant.

4. Legal Restrictions on Foreign Investors

4.1. Lex Koller

The acquisition of certain types of Swiss real estate by foreign investors is restricted by the Act on the Acquisition of Real Estate by Persons Abroad, the respective ordinance and further provisions on cantonal and municipal level (all these provisions are referred to as the so-called Lex Koller).

4.2. Definition of a Foreign Investor

The Lex Koller provides for a very broad definition of the term "foreigner" which includes, *inter alia*, the following individuals and legal entities:

- Non-Swiss citizens domiciled outside of Switzerland;
- Non-Swiss citizens domiciled in Switzerland who are neither citizens of an EU/EFTA member state nor hold a valid permanent residency permit category C;
- Legal entities having their registered office outside of Switzerland (even if they are directly or indirectly owned by a Swiss citizen);
- Legal entities having their registered office in Switzerland but being under foreign control, whereas the foreign control is presumed if a foreign person holds more than one third of the company capital or the voting rights or if loans in a significant amount are provided by any foreign person.

4.3. Acquisition of Commercial Properties

As a general rule, the acquisition of commercial properties is not restricted by the Lex Koller. Therefore, foreign investors may acquire commercial properties for their own use or for pure investment purposes. Commercial properties include manufacturing premises, warehouse facilities, offices, shopping centres, retail premises, hotels, restaurants and medical practices.

As an exception, commercially used properties with a portion of more than one third of undeveloped land are subject to an authorisation requirement, unless such undeveloped land is developed within one year from the date of the acquisition. In general, it can be noted that not only parts of a property which contain a building are regarded as developed but also such other parts which contain access roads or parking spaces.

4.4. Acquisition of Residential and other Non-Commercial Properties

The acquisition of residential and other non-commercial real estate by foreign investors is subject to an authorisation requirement pursuant to the Lex Koller. As the conditions for granting an authorisation are very restrictive, authorisations are rarely granted.

Very limited exceptions apply for (i) foreigners who are lawfully and actually resident in Switzerland and intend to acquire a primary residence in Switzerland as well as for (ii) foreigners who intend to acquire a holiday house or apartment (maximum net habitable surface: 200 sqm).

4.5. Acquisition of Mixed-Use Properties

If a property is used for both commercial and residential purposes (mixed-use property), such property may be acquired by a foreign investor without authorisation only if (i) the residential space is necessary for the business (apartment for technician or housekeeper) or (ii) cannot practicably be separated from the commercial premises (*e.g.* minor residential areas in a multi-story building with commercial premises) or (iii) is required by zoning law.

4.6. Acquisition of Shares in a Company Holding Real Estate

The acquisition of shares in a company is subject to an authorisation if such company's main factual purpose is the acquisition, holding or sale of real estate which can only be acquired by foreign investors subject to an authorisation (*i.e.* residential and certain types of mixed-use properties as set out above). As there are no clear court precedents, it is debated under which circumstances a company is regarded as having such a main purpose and the cantonal practices differ.

4.7. Purchase in Breach of the Lex Koller

Purchases in breach of the Lex Koller are null and void. In addition, the evasion of the authorisation requirements may have administrative consequences and be prosecuted under criminal law in case of wilful or negligent misconduct.

4.8. Lex Koller Ruling

In light of the severe consequences of a violation of the Lex Koller, in certain cases (where the need of an authorisation cannot be excluded upfront) it is advisable to obtain in advance a ruling from the competent cantonal Lex Koller authority confirming that an envisaged transaction does not violate the Lex Koller.

5. Taxes Applicable to a Real Estate Transaction

Taxes are levied at federal, cantonal and municipal level. As a consequence, there are substantial differences to be taken into account depending on the location of the relevant property. For example, capital gains realised by a legal entity upon sale of a real property are in some cantons subject to ordinary corporate income tax. However, in other cantons a substantially higher specific real estate capital gains tax applies (on federal level, ordinary corporate income taxation applies).

Accordingly, tax consequences of a real estate transaction have to be carefully considered in real estate transactions (see chapter on Taxation of Corporations, section 5 and chapter on Taxation of Individuals, section 4). Typically, real estate transfer tax (1.0-3.3%) and, alternatively, corporate income tax or real estate capital gains tax do apply. In addition, the transfer of real estate is subject to cantonal and/or municipal land registry and notary fees. In case of a share deal, tax consequences are more complicated. Therefore, tax rulings are often obtained ahead of such transactions.

Most cantons imposing a real estate transfer tax and/or a real estate capital gains tax foresee the registration of a legal lien on the property, if such taxes remain unpaid by the seller. Therefore, buyers will typically request security for such tax payments at closing of the transaction.

II. Development of Real Estate Properties

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1. Notion, Key Players and Timeline

1.1. Notion

The development of real estate, as defined and interpreted in this chapter, is the economic process of combining a certain area of land with capital as well as a specific concept in a way that creates sustainable value and new assets.

1.2. Key Players

The conception and execution of real estate development involves various players, such as:

- The *landowner*, who purchases (or already owns) the property to be developed.
- The *project developer*, who assists the landowner in the overall development process. Some landowners take on this role personally, if they are sufficiently experienced in this field.
- The *financing partner and the investors*, who provide the capital for the purchase of the property, the planning as well as the realisation of the real estate development project.
- The *architects and various engineers*, who are in charge of the planning process.
- The *contractors*, who build the construction.

1.3. Timeline of a Real Estate Project Development

A real estate development usually goes through the following four stages:

i. *Acquisition phase*: time period during which the property considered for the development is purchased or at least secured by way of a purchase right or a preliminary contract;
ii. *Planning phase*: time period during which various professionals cooperate to reach a detailed project, duly authorised by the competent public authorities;
iii. *Construction phase*: time period during which contractors literally build the project;
iv. *Operation, sale or lease phase*: time period during which the project can either be operated by the landowner for its own use (*e.g.* for operational companies), be sold or leased on the market.

2. Main Agreements and Risks

2.1. Purchase Agreement

The conventional acquisition of a property is usually made by a real estate purchase (right) agreement, which must be executed in the form of a notarial deed. While this method is still very common, the acquisition phase may also be carried out under other types of agreements:

- If the property is owned by a real estate company (or is transferred to such a company before the sale), the control of the property may also be transferred by acquiring the shares of such company, through a *SPA* (see chapter on Private Share Deals). Such an agreement does not have to be notarised (as opposed to a conventional real estate purchase agreement) and often triggers different tax and legal implications.
- If the property had already begun to be developed, it may be purchased with the ongoing real estate development project, through a *project purchase agreement*. Such an agreement may take place at various stages of the development, for example after the building permit has been granted. Such an agreement may be made in the form of a usual notarised real estate purchase agreement or, if the property is owned by a real estate company, in the form of a SPA (not necessarily to be notarised).
- Another possible approach is to conclude a *development agreement*, which allows both the seller and the buyer to benefit from the success of the operation. Such an agreement usually

implies a profit-sharing (*i.e.* earn-out) clause, which is meant to compensate the seller for the fact that the price of the property may not fully reflect its potential. Such an earn-out clause generally compares the costs incurred by the buyer for the development of the project with the market value of the property achieved after completion of a real estate development project. The profit margin is then split between the seller and the buyer, so that both benefit from the success of the project. In the end, such a system consists of setting a variable price for the sale of the property. As for any real estate purchase, a development agreement can either be integrated in a conventional notarised agreement or in a SPA (not necessarily to be notarised) and may include the purchase of an existing project.

The main risks during the acquisition phase are of legal (*e.g.*, if restrictions on landownership are not taken into account, in particular in the case of public law regulations limiting the acquisition and/or use of the real estate at stake) and economic nature (*e.g.*, poor market valuation). Therefore, all the above-mentioned agreements require a due diligence to be performed and proper safeguards to be put in place, in particular with respect to the representations and warranties given (if any) by the seller. For instance, combinations of the above-mentioned earn-out clauses with warranty clauses guaranteeing the buyer a certain minimal rental income by the seller during a certain period of time are often found.

2.2. Public Law Planning Agreements

A public law planning agreement is an agreement between public institutions (*e.g.* municipalities, cantons) and private entities which deals with planning and zoning matters. This type of agreement is seen, for example, in connection with the conversion of industrial wastelands into residential and commercial areas as well as in connection with the provision of infrastructure facilities and the compensation for zoning added value. Such agreements are usually of limited scope, as the public institutions are bound by the rule of law. Furthermore, in most cases the bargaining power is rather unequally distributed between the public institutions on the one hand and the private parties involved on the other.

2.3. Planning Agreements with Architects and Engineers

The first planning stage is to conceptualise the project. For regular projects, the design work is carried out by a single service provider, such as an architect, under a planning agreement. Such an agreement often also covers the construction management during the execution of the project.

For larger projects, architectural competitions are usually organised to find the most suitable architectural and design approach. While architectural competitions do not necessarily need specific agreements to be made with the various bidders, clear rules must be established regarding the selection process and potential prizes for the winners of the competition. The successful bidder is then, in most cases, hired to carry out the planning through an agreement, usually called planning agreement. Depending on how these architectural competitions are organised, public procurement regulations may apply, in particular if the award of the agreement following the competition is subject to these regulations.

Once the planning stage is sufficiently advanced, administrative steps are required to obtain a building permit. For larger projects, a modification of the city planning may be necessary. The time and the legal challenges involved in obtaining such administrative authorisations should not be underestimated, given the legal complexity of construction projects and the legal protection granted to concerned third parties. Once the building permit is secured, detailed planning must take place, usually within the framework of the planning agreement.

For large-scale projects, instead of contracting different planning agreements with the different professionals involved (architects, engineers of all kinds, other professionals depending on the nature of the project), it is possible to conclude a general planning agreement. Under such agreement, the general planner undertakes to conceive the whole project and hires its own consultants to achieve the planning.

2.4. Financing Agreements

Real estate development requires significant funds (*i.e.* regularly several hundred million Swiss francs) to be invested, whereas return on investment generally only occurs decades after the funds are spent. The number of real estate developers who can carry out a project with their own funds is therefore very limited. Most often, the funds are provided under equity investment agreements by investors (mostly banks or insurance companies acting on behalf of investment funds, pension funds or sovereign wealth funds). Sometimes, financing is organised under loan agreements and securities agreements which are secured by mortgages. Financing by foreigners is to be thoroughly checked legally in advance, as restrictions may apply according to the Lex Koller (see previous chapter on Acquisition of Real Estate, section 4).

2.5. Contractor Agreements

The construction itself is made by concluding contractor agreements, which can be of different types:

- *Individual contractor agreements* are entered into between the project developer and various suppliers. Each of these suppliers only delivers its own works and is therefore not responsible for the overall execution and supervision of the project. Entering into such contracts involves a significant amount of coordination and supervision for the project developer.
- A *general contractor agreement* is made with a "general contractor" who shall then hire various subcontractors to perform the works. Depending on its structure, the general contractor may provide certain works by itself or, on the contrary, outsource all the works to subcontractors. In any event, the general contractor remains responsible for the subcontractors' work towards the project developer.
- A *total contractor agreement* is similar to a general contractor agreement, but also includes the architect's and engineer's services. The total contractor therefore assumes both the planning and the execution of the real estate development project.

The main risks during the construction process are both practical (*e.g.* delays in the planning, coordination between various contractors and subcontractors) and legal (*e.g.* unexpected increase in costs, defects, claims from unpaid subcontractors). In order to mitigate risks, the agreement must be carefully drafted and provide, as far as possible, adequate protections for the project developer. Such protections generally include bank guarantees, warranties, insurance requirements and penalty clauses for improper performance.

2.6. Real Estate Management Agreements

Once the real estate development project is completed from a construction point of view, its maintenance and management should be governed by agreements.

Various agreements come into play, such as asset management agreements, property management agreements or facility management agreements. The differences between asset management, property management and facility management agreements are not clearly delineated and regularly give rise to debate, but it is generally understood that an asset manager would focus on the administration of the property (*e.g.* conclusion of leases) and that a facility manager would mostly be in charge of practical and technical aspects, with the property manager in-between of these roles.

Furthermore, various service agreements or maintenance agreements are to be entered into with external providers to ensure the proper operation of the building (*e.g.*, elevator maintenance, electricity, heating, water supply *etc.*).

2.7. Sale or Lease Agreements

At any stage of the real estate development, an exit of the investor and/or the owner is possible and the property or the project can be sold on the market either as a whole (under a conventional real estate purchase agreement or under a SPA) or as small units, with the constitution of a condominium. Sales to foreigners are to be thoroughly checked well in advance from a legal point of view as restrictions may apply according to the Lex Koller (see previous chapter on Acquisition of Real Estate, section 4).

If the property is meant to be leased, classic commercial or residential lease agreements are concluded. Both residential and commercial leases are subject to strict legal constraints in Switzerland, including rent control and termination protection for the tenant. The developer is therefore well advised to be aware of the framework conditions of the mandatory provisions of Swiss tenancy law and to take them into account right from the start of any real estate development.

Taxation in Switzerland

I. Taxation of Corporations


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1. Corporate Income Tax

1.1. In General

Legal entities (companies, co-operatives, associations and foundations) are considered as Swiss tax resident and thus subject to unlimited taxation on their worldwide income in Switzerland if (i) their statutory seat and/or (ii) their place of effective management is situated in Switzerland. Non-Swiss tax resident companies are subject to limited taxation in Switzerland on their Swiss source income in particular if they own real estate or have a permanent establishment in Switzerland.

Corporate income tax is levied on federal, cantonal and municipal level. It is levied on the worldwide income earned by Swiss tax resident companies with the exception of income attributable to foreign enterprises, permanent establishments or real estate. Non-Swiss tax resident companies with limited tax liability in Switzerland are subject to corporate income tax on their net income allocable to Switzerland. The effective corporate income tax rates vary from canton to canton resp. from municipality to municipality and range between 12% and 22%. The corporate income tax liability may be reduced if the IP box, R&D super deduction or notional interest deduction can be applied.

Tax losses can be carried forward and offset against any income (taxable income as well as income benefitting from the participation relief – see section 1.2 below) of the next seven years and are not forfeited because of change of ownership.

1.2. Participation Relief

The participation relief applies to dividends received provided that the participation represents more than 10% of the nominal share capital or reserves of the distributing company or it has a fair market value of at least CHF 1 million. The participation relief also applies to capital gains derived from a disposal of a qualifying participation (at least 10%) provided that the minimum holding period of one year is met.

The corporate income tax liability will be reduced by the ratio between the net participation income (taking into account administrative and financing costs) and the aggregate taxable income. In cases of losses or tax loss carry forwards, qualifying participation income will run against these tax losses wiping out the ensuing tax benefit.

2. Annual Capital Tax

Swiss resident companies and non-Swiss resident companies with limited tax liability in Switzerland (Swiss permanent establishment or real properties) are subject to an annual capital tax on the cantonal and municipal level. The tax is calculated based on the net equity (nominal share capital, capital contribution reserves, reserves and retained earnings) plus any embedded equity and/or any other taxed embedded reserves to the extent that the aggregate taxable capital is allocable to Switzerland. The applicable tax rates vary from about 0.001% to 0.5%. Depending on the canton, a reduction of the tax base to the extent that the relevant equity relates to participations, intercompany loans and qualifying IPs may be available. Furthermore, in some cantons the corporate income tax is creditable to the annual capital tax.

3. Thin Capitalisation Rules

According to the Swiss thin capitalisation rules the minimum equity of a Swiss resident company is calculated based on the maximum indebtedness permissible for tax purposes for various categories of assets held by the company (which ranges between 0% and 100%). To the extent that related-party debt (including related party guaranteed third party debt) exceeds the maximum permissible debt as determined based on these rules, the company is deemed to be thinly capitalised for tax purposes. As a consequence, excess related party debt, if any, will be (i) considered as hidden equity for capital tax purposes and (ii) interest payments made on such related party debt are not tax deductible and (iii) would be re-qualified into constructive dividend distributions with respective WHT consequences.

4. Transfer Pricing

Switzerland does not have any statutory transfer pricing rules. Intercompany charges should be determined at arm's length. The tax authorities accept the transfer pricing methods described by the OECD guidelines.

Special guidelines apply concerning the minimum and maximum interest on loans granted to or from shareholders or related parties. With regard to the arm's length character of the interest rate, the SFTA annually publishes safe-haven interest rates in its Circular Letters. A higher interest rate might apply provided that the interest rate is at arm's length and that the respective proof can be provided by the taxpayer.

5. Real Estate Taxation

5.1. Real Estate Capital Gains Tax

In Switzerland there are two different systems of taxing capital gains derived from the disposal of real estate properties by companies or the transfer of an interest in a real estate company on the cantonal/municipal level, *i.e.* the monistic system (corporate income tax on recaptured depreciations and real estate capital gains tax on the appreciation of value above acquisition costs) and the dualistic system (only corporate income tax on recaptured depreciation deductions and appreciation of value above acquisition costs). On the federal level, ordinary taxation applies with regard to such immovable assets.

If the real estate capital gains tax applies, in principle the difference between the sales price realised (*i.e.* fair market value) and the acquisition costs incurred in the past will be subject to real estate capital gains tax. The tax rates are progressive and dependent on the length of the period of ownership (significant reductions of the tax rate if the real estate property was owned for a long time). The Seller is liable to real estate capital gains tax. However, as payment of the tax may be secured by putting a legal lien on the property sold, the buyer has an interest that the payment of the tax will be secured by retaining a portion of the sales price.

5.2. Real Estate Transfer Tax

Many (but not all) cantons levy a real estate transfer tax on the transfer of real estate properties or of an interest in a real estate company. The real estate transfer tax is generally computed based on the sales price (*i.e.* fair market value of the underlying properties transferred). In general, the buyer is liable for the payment of the real estate transfer tax. In some cantons buyer and seller may be liable for a share and/or the levy of the tax is secured by a legal lien on the property sold.

6. Swiss Withholding Tax

6.1. Dividend Distributions

Effective and constructive dividend distributions (including the distribution of the liquidation proceeds and stock dividends) - regardless of whether they are made in cash or in kind - made by a Swiss resident company to its shareholders are subject to WHT at a rate of 35%. The Swiss company is required to withhold the WHT from the dividend and remit it to the SFTA. Distributions based upon a capital reduction and reserves paid out of qualifying capital contributions (*i.e.* capital surplus contributed by direct shareholders) are not subject to WHT. Restrictions apply to Swiss-listed companies in the sense that they may only pay out withholding tax-free dividends from their capital contribution reserves if they pay out a dividend from their taxable distributable reserves in the same amount (the so-called 50/50 rule).

The WHT is refundable or creditable in full to a Swiss tax resident corporate and individual shareholder as well as to a non-Swiss tax resident corporate or individual shareholder who holds the shares as part of a trade or business carried out in Switzerland through a Swiss branch office, if such recipient is the beneficial owner of the distribution received and the income is recognised in the income statement or reported in the income tax return of the recipient, as the case may be.

Shareholders who are not resident in Switzerland for tax purposes (and who are not conducting a trade or business through a Swiss branch office) may be entitled to a full or partial refund of the WHT if the country in which such recipient resides for tax purposes maintains a bilateral treaty for the avoidance of double taxation with Switzerland and further conditions of such DTT are met. Under certain circumstances a full refund is also conceivable under the agreement with the EU regarding the international automatic exchange of information.

A notification procedure/relief at source is available (instead of paying the tax and claiming the refund) under certain circumstances for foreign qualifying corporate shareholders provided that an application for the grant of the notification procedure (Form 823B/C) has been filed with and granted by the SFTA prior to any distribution. The permit granted for the relief at source is valid for five years and can be renewed thereafter.

It should be noted that the SFTA applies strict substance requirements in order to grant DTT relief. Apart from substance requirements such as local office space, employees, business activities, it is also crucial that the foreign entity is properly capitalised. Accordingly, a standard requirement is that equity capitalisation is in line with the Swiss thin capitalisation rules (see section 3 above). According to the most recent practice of the SFTA, private equity structures are subject to detailed scrutiny. Currently, the SFTA seems to take the stance that a foreign intermediate/holding company is only eligible for DTT relief if the asset manager and the investment committee of the fund are located in the same jurisdiction as the intermediate/holding company.

6.2. Interest Payments

Interest payments made by Swiss residents are not subject to WHT unless (i) interest payments on customer deposits with Swiss banks, (ii) interest payments on Swiss bonds or (iii) in case of a re-characterisation of excessive interest payments into constructive distributions to related parties (*e.g.* interest on hidden equity or excessive interest rates; see sections 3 and 4 above). A Swiss fixed-term instrument will be characterised as a bond if a Swiss resident person raises money from more than 10 creditors at identical conditions or 20 creditors at differing conditions, respectively and the aggregate loan principal is at least CHF 500,000 (10/20 Non-Bank Lender Rule). On 14 April 2021, the Swiss Federal Council presented its dispatch to parliament proposing the abolition of the WHT on interest on bonds in order to facilitate and simplify all sorts of financing activities in Switzerland. However, by a public vote of 25 September 2022, the people of Switzerland rejected the revision of the WHT Act. Therefore, the existing rules remain in place and must be complied with.

6.3. Royalty Payments

Royalties paid by Swiss residents are not subject to WHT unless excessive royalty payments to related parties are made (see sections 4 above).

7. Stamp Duties

7.1. One-Time Capital Duty

The issuance of new shares by and capital contributions to a Swiss resident company are subject to one-time capital duty at a rate of 1% (issuances up to CHF 1 million are exempt from one-time capital duty). However, among others, restructuring, migration as well as recapitalisation reliefs are available.

7.2. Swiss Securities Transfer Tax

The transfer of taxable securities is subject to securities transfer tax of 0.15% for Swiss securities and 0.3% for foreign securities, respectively if taxable securities are transferred against consideration and at least one of the parties or intermediaries involved qualifies as a Swiss securities dealer and none of the exemptions applies (certain transactions and parties are exempt).

Swiss securities dealers include banks and bank-like financial institutions as defined by the Swiss banking law, as well as Swiss investment fund managers. It also includes individuals, companies, partnerships and branches of foreign companies whose essential activities consist in trading or acting as intermediaries in transaction involving taxable securities. Further, Swiss companies which are not in the securities trading business and Swiss pension funds qualify as a securities dealer if they hold taxable securities with a book value exceeding CHF 10 million.

8. Value Added Tax

VAT is levied on taxable supplies made in Switzerland as well as on the import of goods. The standard rate is 7.7% (expected to change to 8.1% from 1 January 2024 onwards). Taxable services received from suppliers outside of Switzerland are subject to the reverse charge mechanism. Any individual or legal entity having a business operation in Switzerland is required to register for VAT purposes if the worldwide taxable turnover exceeds CHF 100,000. Swiss VAT legislation allows for VAT grouping and group registration.

II. Taxation of Individuals

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1. Tax Residence in Switzerland

In Switzerland, the taxation of income and wealth is dependent on the tax residence status of the individual. While the worldwide income and net wealth of a foreign individual who is considered to be resident in Switzerland is generally subject to taxation (*i.e.* unlimited tax liability), the relevant taxation is limited to the respective income earned and to assets located in Switzerland in the event of a non-resident taxpayer (*i.e.* limited tax liability). The requirements to fall under these two categories are as follows:

1.1. Unlimited Tax Liability

Individuals will be subject to unlimited tax liability in Switzerland according to Swiss domestic tax law, either if:

– Their place of residence (*i.e.* centre of vital interests) is located in Switzerland;
– They stay in Switzerland for at least 30 consecutive days whilst carrying out a gainful occupation; or
– They stay for at least 90 consecutive days in Switzerland without carrying out a gainful occupation.

Switzerland has signed treaties for the avoidance of double taxation on income and capital with more than 100 countries. Thus, in an international context, Swiss domestic tax law may be overridden by an applicable DTT. In conflicting cases of dual residence (*i.e.* each of both countries considers a taxpayer to be their tax resident), the treaty will generally provide that the individual be considered a resident in the state of his centre of vital interest. However, the individual may still be subject to limited tax liability in the other state.

1.2. Limited Tax Liability

Individuals who are not tax resident in Switzerland may be subject to limited tax liability in Switzerland with regard to certain Swiss-sourced income and/or assets located in Switzerland. This applies in cases in which, for example, the individual:

- derives income in connection with real estate assets located in Switzerland;
- derives income in connection with a place of business or a permanent establishment located in Switzerland;
- performs a gainful occupation in Switzerland (*i.e.* is physically working in Switzerland);
- receives a remuneration as a board member or director of a legal entity or permanent establishment located in Switzerland; and
- receives pensions paid by Swiss pension funds.

Such persons are taxed only on the part of their income/assets attributable to Switzerland or to their Swiss activities, as the case may be. The applicable (progressive) tax rates are, however, based on the corresponding overall worldwide taxable assets and income. Under certain circumstances, the Swiss taxing rights may be overruled or limited due to an applicable DTT.

2. Income and Wealth Taxation for Individuals Resident in Switzerland

2.1. Income Tax

Income tax is levied on the federal, cantonal and municipal levels on the worldwide income, with the exception of income from enterprises, permanent establishments or real estate outside of Switzerland. The Swiss income tax rates are progressive and vary significantly from canton to canton and from municipality to municipality. The highest marginal income tax rates vary between roughly 22% and 41%. Dividend income will be subject to reduced taxation if an individual holds at least 10% of the nominal value of the share capital of a company («qualifying participation»). In such a case, the tax relief for dividend income will be 30% for federal and up to 50% for cantonal and municipal tax purposes.

Further, certain types of income, such as income from inheritance, gifts and matrimonial property rights, are exempt from income tax (but may be subject to gift or inheritance taxes, see section 5 below).

An important feature of Swiss tax laws is that capital gains realised upon the disposal of privately held movable assets (such as shares or other securities) will not be taxed in Switzerland unless the taxpayer is deemed to be acting as a professional dealer (of securities, art, *etc.*). Gains from immovable assets (*i.e.* real estate located in Switzerland) are also tax-exempt on the federal level except where the taxpayer is engaged in a trade or business. In contrast, such gains will be subject to real estate capital gains tax on the cantonal and municipal level.

2.2. Wealth Tax

Wealth tax is only levied on the cantonal and municipal levels and the tax rates vary significantly depending on the municipality and canton of residence.

In the event of an unlimited tax liability in Switzerland, the corresponding wealth tax will be levied on the respective worldwide wealth except on assets attributable to business operations, permanent establishments or real estate properties located abroad. However, these assets are taken into account for determining the applicable tax rate. The top marginal wealth tax rates range from roughly 0.1% to about 1%.

3. Lump-Sum Taxation in Switzerland

A foreign national may benefit from lump-sum taxation in the majority of cantons if he/she:

i. becomes resident in Switzerland either for the first time or after an absence of at least ten years; and
ii. does not pursue any gainful activity in Switzerland.

Foreign nationals entitled to lump-sum taxation are not taxed on their worldwide income and wealth. Rather, they are taxed on their deemed annual expenditure (cost of living) based on a simplified procedure. On the federal level, the annual expenditure must be equal to at least seven times the rental value of the taxpayer's home or the rent paid and the minimum taxable base can be no less than CHF 400,000. For cantonal and municipal tax purposes, the threshold for the minimum taxable base can be set at the canton's own discretion. Further, the law provides for an additional minimum calculation according to which lump-sum taxation must not be lower than the tax on Swiss-sourced income and wealth components and on income of foreign origin for which the taxpayer requests a partial or full refund of foreign source taxes under an applicable DTT concluded by Switzerland («Control calculation»).

4. Real Estate Capital Gains Tax and Real Estate Transfer Tax

Real estate capital gains taxes and real estate transfer taxes may be triggered upon the sale of real estate property in Switzerland.

4.1. Real Estate Capital Gains Tax

A capital gain realised by an individual from the sale of privately held real estate property will be subject to real estate capital gains tax on a cantonal and municipal level.

Real estate capital gains tax is levied by the canton where the real estate property is located. The tax rates are progressive and dependent on the length of the period of ownership. Thus, if a taxpayer disposes of the real estate property and has owned it for a long time, his/her tax rate will normally be significantly lower, whereas a speculation surcharge may even push up the tax payable in the event of a short duration of ownership. Hence, gains realised from the disposal of real estate property held over a short period of time may be taxed at a rate exceeding 50%.

4.2. Real Estate Transfer Tax

Real estate transfer tax is generally levied by the canton in which the property is situated. A number of cantons, such as the Canton of Zurich, have abolished this tax.

Real estate transfer tax is usually calculated based on the purchase price or the fair market value of the real estate property irrespective of whether the sale results in a gain or loss.

As a general rule, the buyer is subject to real estate transfer tax. However, in some cantons, any real estate transfer tax that falls due is split between the seller and the buyer. The parties may agree on a different split.

5. Inheritance and Gift Taxes

Inheritance and gift taxes are levied on a cantonal and municipal level in most of the cantons. Only the Cantons of Schwyz and Obwalden levy neither inheritance nor gift taxes and the Canton of Lucerne does not levy any gift taxes. The surviving spouse is exempt from inheritance and gift taxes in all cantons and most cantons also exempt direct descendants from such taxes.

In general, the tax rate is progressive and is dependent on the degree of kinship involved as well as the value of the inheritance or gift. The tax rate for gifts and bequests to unrelated persons is generally around 30%, but may be as high as 50% of the market value of the gift or bequests.

Foreign or Swiss recipients will become liable to tax if they:

- inherit property from a person whose last residence was in Switzerland (in this case, the entire worldwide estate, with the exception of foreign real estate and assets belonging to a foreign permanent establishment, will be subject to Swiss inheritance tax);
- receive a gift from a donor resident in Switzerland; or
- receive real estate property in Switzerland either as a gift or as an inheritance (even if the donor or the deceased is not a Swiss resident).

No Swiss gift or inheritance tax consequences will be triggered when a Swiss resident receives a gift or an inheritance from a person abroad. Such transfers are merely reportable and will be included in the taxable wealth of the recipient.

In an international context, Switzerland has only concluded inheritance tax treaties with a small number of countries and these treaties do not comprise any gift tax aspects.

Litigation & Arbitration in Switzerland

I. Litigation

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1. In General

Switzerland is a civil law jurisdiction. The method of adjudication in civil matters before state courts in Switzerland is adversarial, with some minor exceptions where there are also inquisitorial elements (generally speaking not relevant in commercial matters except for tenancy and employment claims).

Swiss civil procedure is mainly governed by the CPC, which came into force in 2011 and replaced the 26 cantonal civil procedure codes.

Main features of the Swiss civil litigation system include:

- In most cases mandatory conciliation before a conciliation authority;
- The claimant is to advance the court costs;
- Pleadings largely done by way of written briefs;
- Focus on documentary evidence, less on witness testimony;
- No "discovery";
- No jury trials;
- "Loser pays" principle with regard to court costs and compensation for legal fees;
- "No win, no fee" arrangements are prohibited, certain success fee elements may be possible;
- Litigation funding is possible.

2. Court Structure

The organisation of the courts of first and second instance in civil matters is governed by the law of the cantons. The organisation and number of professional judges sitting on a case therefore differs to some extent from canton to canton.

Depending on the official language at the place of the court, the proceedings are conducted in German, French or Italian.

In essence, there is a two-layer civil court system in the cantons, and the Federal Supreme Court on the federal level as the highest court in Switzerland (as to appeals, see section 10 below).

There are specialised courts in the fields of labour and tenancy, and certain cantons have established specialised commercial courts that basically handle all disputes between commercial entities. These commercial courts feature commercial expertise, facilitation of a settlement based on a preliminary view of the case given by the court and direct appeal to the Federal Supreme Court.

3. Conciliation

In most cases, before a matter may be brought to court, the claimant has to file a formal conciliation request with the conciliation authority that will attempt to facilitate a settlement. If all parties agree, such conciliation proceedings may be replaced by mediation.

The parties may choose to waive the conciliation proceedings if the value at stake amounts to at least CHF 100,000. Moreover, in cases where a commercial court (in the cantons that have provided for a commercial court) is competent, there is no formal conciliation proceeding.

If no settlement can be reached, the conciliation authority will grant to the claimant a three-month leave to sue, except for tenancy matters where the leave is valid for 30 days only. However, if the three-month period has lapsed and the claimant has not filed the action with the court, the claimant may repeat the conciliation proceeding (subject to the applicable statute of limitations).

4. Course of the Proceedings

Swiss civil proceedings essentially consist of two phases: First, the allegation phase (oral or written pleadings, and filing of documentary evidence by each party), and secondly the taking of evidence phase.

Normally, the claimant will file its action by filing a written brief, setting out in detail its prayers for relief, the claim(s) and the facts, along with documents that support its case (statement of claim along with exhibits). In such statement of claim, the claimant is to indicate in a detailed manner the facts supporting its claim and any and all means of evidence (in particular witnesses) that support its case. It is common to plead the law as well, but not formally required (*iura novit curia* applies).

It is the court that serves the written submissions and exhibits filed by one party directly on the other party.

Once a statement of claim has been filed with the court, the court will check whether certain formal requirements are met and will then normally issue an order, requesting the claimant to pay an advance on court costs (in accordance with an official tariff, essentially depending on the amount at stake). The court will also set a deadline to the defendant to file its statement of defence (again along with available evidence that the defendant believes to support its defence). In addition, the statement of defence shall contain the respondent's position regarding the facts alleged by the claimant in the statement of claim. Depending on the case, the court may order a second exchange of written submissions or call for a hearing. In commercial matters, pleadings are mostly done by way of exchange of written briefs, and hearings tend to be rather brief, *e.g.* focusing on settlement negotiations or on evidence taking, in particular testimony from witnesses.

Prior to taking evidence, the court renders the necessary evidentiary orders, which indicate the evidence admitted and specify which party bears the burden of proof for which fact.

It is the court that controls the procedure and the timetable and sets deadlines to the parties.

The length of the proceedings normally depends on the complexity of a case, whether witnesses and/or experts are to be heard or not, whether the case requires service of court orders *etc.* outside of Switzerland, whether taking of evidence outside of Switzerland via international legal assistance (Hague Convention on the Taking of Evidence Abroad) is necessary and also on the workload of the judge in charge of the file. As a rule of thumb, in commercial matters, the whole first instance procedure (from filing the action up to service of a judgment) normally takes one to two years minimum.

5. Documentary Evidence

There is no pre-hearing fact discovery in the sense of discovery as in the US. The parties (and third parties) have a duty to cooperate in the taking of evidence. In particular, they may be ordered to produce certain specifically identified documents (no fishing expeditions), subject to the attorney-client privilege. The court may take into account an unjustified refusal to cooperate by a party when weighing the evidence.

Documentary evidence, at least its relevant parts, must be translated into the relevant official court language (depending on the case, in German, French or Italian).

6. Oral Evidence

The parties and witnesses give their testimony only in court. The court will conduct their examination in the language of the proceedings, if needed with the assistance of an independent interpreter. There are thus no depositions and/or written witness statements.

The presence of the parties is required when they are questioned by the court on relevant facts; practically, parties generally attend all hearings but if their domicile is abroad, exemptions of personal appearance are, however, common after their first hearing.

Witnesses are heard with regard to – disputed – facts that they directly perceived and are not heard with regard to the law or mere hearsay.

Counsel may be given the opportunity to ask additional questions, but always under the control of the court. There is therefore no cross-examination as in common law jurisdictions.

Once the evidence has been taken, the parties may comment on the evidentiary proceedings and on the merits of the case in their final pleadings.

7. Expert Evidence

Parties may file written expert reports, but legally they do not qualify as means of evidence and have the same legal standing as the parties' allegations. In order to qualify as proper evidence, an independent expert must be appointed and instructed by the court. A party may request in its briefs that such expert be appointed by the court. It remains for the court to decide whether it considers an appointment of an expert as appropriate.

8. Alternative Dispute Resolution

The parties are essentially free to negotiate and settle their case (out of court or in court), they may also refer their case to mediation or to expert determination. In case of out-of-court conciliation or mediation, the parties would normally ask the court to formally stay (suspend) the proceedings. Moreover, Swiss courts normally assist with the facilitation of a settlement.

9. Publicity of Civil Court Hearings

In general, civil court hearings are open to public, but it is quite rare that other people than the parties or other people involved would actually attend. Court documents are not normally available to the public. It is possible to obtain a specific judgment, if certain requirements are met, and such judgment would then be anonymised. All judgments of the Federal Supreme Court are published (anonymised).

10. Appeals

It is possible for a losing party to appeal a judgment.

In general, there are two appeal instances: From the court of first instance to the court of second instance, and from there to the Federal Supreme Court. The appeal to the court of second instance provides for full scrutiny (both as to facts and law) and may take between one year and one and a half years. The appeal to the Federal Supreme Court essentially only allows for a scrutiny of law; the Federal Supreme Court is basically bound to the facts as established by the cantonal court. A judgement of a commercial court may only be appealed before the Federal Supreme Court. The procedure before the Federal Supreme Court generally takes between six months and one year.

11. Cost and Funding

The "loser pays" principle applies: The losing party has to bear the court costs and to pay a compensation for legal fees to the winning party. Both the court costs as well as the compensation of legal fees are determined by the court, usually in accordance with a tariff that normally depends on the amount at stake.

With regard to fees, clients are usually charged on a time spent-basis. It is also possible to agree on a fee calculated in accordance with the tariff.

"No win, no fee" and contingency fee agreements are not allowed. It is possible to agree on a success fee element in the sense that counsel will receive a top up on his fee in case of success, but it is required that the fee that is payable in any case (regardless of the outcome) must at least cover any and all costs of counsel and must also contain some profit element.

Subject to certain limitations, third party funding is permitted.

The claimant has to pay an advance on court costs. Security for legal costs of the defendant is only available in specific circumstances, to be ordered by the court upon request, in particular if the claimant is not based in Switzerland (and there is no treaty that exempts the claimant from providing security for legal costs, as is the case with regard to the relevant Hague Conventions).

12. Collective Redress?

To date, the Swiss legal system does not provide for class actions or collective redress. Multi-party actions, however, are allowed (*i.e.* several claimants with identical or similar claims may join together and file one action) and intervention of a third party is generally admitted.

II. Arbitration



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1. In General

Switzerland has a long-standing tradition to serve as the seat for international disputes. Thanks to its arbitration-friendly legal framework, and further supporting factors such as Switzerland's neutrality and business-enabling environment, Switzerland is among the most-preferred places for international arbitration for parties from all over the world. While safeguarding the parties' equal treatment and their right to be heard, Swiss arbitration law is globally appreciated for its procedural flexibility and respect for party autonomy. This is confirmed by recent surveys, such as the ICC Dispute Resolution 2020 Statistics, which all confirm the popularity of Switzerland, Swiss arbitrators and Swiss law in international arbitration.

Switzerland is not only one of the world's most frequently chosen seats for commercial arbitrations, it is also host to an increasing number of investor-state arbitrations. It is also well-known to serve as the seat for sports arbitration under the auspices of the Court of Arbitration for Sport in Lausanne, and to be home to several international organisations that provide international dispute settlement mechanisms, such as the WIPO and its Arbitration and Mediation Centre as well as the WTO.

2. Legal Framework

The legal framework for international arbitration in Switzerland, the *lex arbitri*, can be found in Chapter 12 of the PILA. It is globally lauded as a concise, flexible and innovative arbitration law.

The Swiss *lex arbitri* for international arbitration has been designed to grant the parties' maximum freedom for determining the conduct of the arbitration. Chapter 12 of the PILA contains only few mandatory provisions, such as ensuring the parties' right to be heard and their equal treatment.

Chapter 12 has recently been revised in order to further enhance the attractiveness of Switzerland as a seat for international arbitrations. In the revision, innovative ideas were implemented, while time-proven features were maintained: To give two examples, it is now possible to file a setting aside motion against the arbitral award in English, and foreign arbitral tribunals and the parties of these proceedings can directly turn to Swiss state courts, which enhances the enforcement of interim relief and the taking of evidence. Both of these amendments increase the global perception of Switzerland as a modern and arbitration-friendly venue.

3. Arbitration Agreement

Arbitration is based on consent. It requires an agreement to arbitrate. Formally, the arbitration agreement is required to be evidenced by text. An exchange of emails, *e.g.*, may thus suffice to meet the formal requirements.

Substantively, in an arbitration agreement, the parties consent that under the exclusion of state court jurisdiction a defined dispute will be bindingly decided by an arbitral tribunal. Pursuant to the principle of *favor validitatis*, an arbitration agreement is deemed substantively valid if it conforms either to the law chosen by the parties, or to the law governing the merits of the case, or to Swiss law.

The parties may agree on the application of institutional arbitration rules (such as *e.g.* the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution), or they may agree on tailor-made rules in case of an *ad hoc* arbitration.

Consistent with the principle of privity of contract, the arbitration agreement binds, in principle, only the parties to the contract. However, the Federal Supreme Court acknowledges that an arbitration agreement may, under certain circumstances, also bind parties who did not sign the agreement and have also not been mentioned therein, such as, *e.g.* in case of an assignment or a transfer of a contract.

In international arbitration, any dispute of monetary nature may be referred to arbitration. The scope of arbitrability under the Swiss *lex arbitri* is therefore broad and covers, in principle, every commercial dispute spanning, *e.g.* from contractual to corporate and IP claims.

Pursuant to the competence-competence doctrine, the arbitral tribunal decides on its jurisdiction. Further, under the separability doctrine, the arbitration agreement is separate from the underlying contract. Thus, an arbitration agreement may be valid even if the underlying contract is not.

4. Initiation of an Arbitration

The arbitration becomes pending when one of the parties initiates the procedure for the appointment of the arbitral tribunal. In the rare cases where the arbitrator or the arbitrators are designated in the arbitration agreement, the arbitration becomes pending when one of the parties seizes the sole arbitrator or the members of the tribunal with the claim.

The relevant initial step is primarily defined by the arbitration agreement, and the institutional arbitration rules that the parties may have chosen.

5. Arbitral Tribunal

The arbitral tribunal is appointed pursuant to the parties' agreement. Under Chapter 12 of the PILA, the parties are free in their selection, provided that the arbitrators are independent and impartial. The parties can also freely agree on the appointment procedure, with the exception, however, that no party may be given a predominant influence in that process. Thus, *e.g.* a party must not be granted the right to appoint a higher number of arbitrators than its counterparty. Typically, a sole arbitrator or a three-member tribunal with a presiding arbitrator will be appointed.

If the parties agree on the application of institutional arbitration rules, these rules govern the process of constituting the arbitral tribunal. In an *ad hoc* arbitration, the parties may seize the court at the seat of the arbitration (the *juge d'appui*) with the constitution, if the parties themselves are unable to find an agreement.

The possibility of the parties to participate in the selection of the arbitrator(s) is a key aspect of arbitration. Choosing the right arbitrator is an important decision and should thus be taken carefully.

Arbitrators can be challenged if circumstances exist that give rise to reasonable doubts as to their independence and/or impartiality. Upon the moment a party has learned of circumstances giving rise to such reasonable doubts, a challenge must be filed swiftly, otherwise the affected party runs the risk that it will be deemed to have waived its right. If the challenge is successful, the respective arbitrator will be replaced.

6. Conduct of the Arbitration

Under Chapter 12 of the PILA, the parties are free to determine the procedural rules for the arbitration, provided that the parties' right to be heard and their equal treatment is respected. Often, the parties opt for the application of institutional arbitration rules, which contain provisions on the conduct of the arbitration.

In both institutional and *ad hoc* arbitration, the arbitral tribunal will regularly, at the outset of the arbitration and upon consultation with the parties, issue (i) specific procedural rules that govern questions relating to the parties' written submissions, the taking of evidence, and the hearing (if any), and (ii) a procedural timetable, which may be amended in the further course of the arbitration.

It has also become very common for arbitral tribunals to declare in such specific procedural rules that they may be guided by the IBA Rules on the Taking of Evidence in International Arbitration. These rules govern, *inter alia*, the document production process, where they seek to strike a balance between the (rather extensive) common law and the (rather restrictive) civil law approach to document production.

The typical structure of an arbitration is as follows: Upon the exchange of the claimant's notice of arbitration and the respondent's answer to the notice of arbitration, the arbitral tribunal, once constituted, will invite the parties to attend a case management conference. Within the time limits provided for in the procedural timetable, the claimant will thereafter file its statement of claim followed by the respondent's statement of defence. Together with their written submissions, the parties will file supporting documentary evidence, witness statements and/or expert reports. Oftentimes, a time window is then provided for the parties' document production requests. The parties thereafter exchange their reply and rejoinder, respectively. Upon conclusion of the written phase, a hearing will take place during which the witnesses will be examined, often by adopting the common law practice of having a witness cross-examined by opposing counsel. The hearing may be concluded by the parties' oral closing submissions, or, in more complex cases, the arbitral tribunal will invite the parties to submit written post-hearing briefs.

That structure is by no means mandatory, and the parties are free to adapt the process to their specific needs and preferences. Further, numerous institutional rules foresee expedited procedure provisions that apply to arbitrations with lower amounts in dispute, or the application of which the parties may agree. Under the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution, *e.g.* the expedited procedure provisions provide that the award shall be made within six months from the date on which the files were transmitted to the arbitral tribunal.

Under Chapter 12 of the PILA, the arbitral tribunal is empowered to order interim measures. Its power, however, is limited to orders directed at the parties of the arbitration. Alternatively, a party may turn to state courts if it seeks to obtain interim measures. Under a number of institutional rules, a party may initiate emergency arbitration proceedings by which it may obtain interim measures prior to the constitution of the arbitral tribunal.

7. Arbitral Award and Enforcement

The award shall conform to the rules of procedure and in the form agreed upon by the parties. In the absence of an agreement, the arbitral award shall be made by a majority, or, in the absence of a majority, by the presiding arbitrator alone. The award shall be in writing, supported by reasons, dated and signed.

Pursuant to the arbitration agreement (incl. any reference to institutional arbitration rules), the arbitral tribunal shall allocate the costs of the arbitration, such as the costs for legal representation. The common approach taken by Swiss arbitral tribunals is to allocate the costs in proportion to the success of the parties; the procedural conduct of a party, however, might also be taken into consideration.

Swiss arbitration awards enjoy *res judicata* effect and are immediately enforceable in Switzerland upon their issuance. The enforcement of foreign arbitration awards in Switzerland is governed by the New York Convention (irrespective of whether the award has been rendered in a contracting state of the New York Convention). Under the New York Convention, the award debtor can only rely on limited grounds when seeking to refuse recognition and enforcement of the foreign award. In line with the spirit of the New York Convention, Swiss courts apply an enforcement friendly approach.

8. Remedies Against an Arbitral Award

A party may file a setting aside motion against a Swiss arbitral award before the Federal Supreme Court within 30 days of the date of receipt of the award. The grounds for such a remedy are limited and narrowly defined. A setting aside motion is essentially only possible in relation to (i) the composition of the arbitral tribunal, (ii) the jurisdiction of the arbitral tribunal, (iii) the failure to cover all of the parties' prayers for relief (*infra petita*), the failure to limit the award to the parties' prayer for relief (*ultra petita* or *extra petita*), (iv) the violation of a party's right to be heard, or of the principle of equal treatment, and/or (v) the incompatibility of the award with Swiss public policy. The Federal Supreme Court applies a very restrictive approach. Empirical studies show that the Federal Supreme Court dismisses the vast majority of the motions. This approach is a further reflection of the arbitration-friendly environment in Switzerland, where courts seek not to intervene with the arbitration process.

The Federal Supreme Court also acknowledges a party's right to request a revision of the award, which, essentially, may be filed upon the discovery of relevant facts within 90 days of such discovery. The threshold for that remedy is very high, and the revision thus only plays a marginal role in arbitration practice.

III. White Collar Crime

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1. In General

The main source of the Swiss substantive criminal law provisions is the SCC containing provisions about criminal liability, sanctions and specific criminal offences. However, many other acts also contain criminal provisions such as the UCA or the Trade Mark Protection Act.

The prosecution of the criminal offences contained in these laws is governed by the SCPC. Accordingly, the same procedure applies in all cantons, although each cantonal authority has its own way of interpreting and enforcing the procedural rules.

In addition, most administrative law acts sanction the infringement of specific rules and/or behaviours (see sections 3.5 *et seq.* below).

2. Specifics of Swiss Criminal Proceedings

2.1. Criminal Complaint/*Ex Officio* Investigations

In principle, the criminal prosecution authorities are obliged to commence and conduct proceedings if they are aware or have grounds for suspecting that an offence has been committed (obligation to prosecute) and may only waive prosecution in limited cases. As a result, everyone may report an offence which will then be investigated even in the absence of a request of an injured party (and even against the injured party's will). However, some crimes (such as contraventions against the

UCA) are only investigated "upon complaint" of the injured party which needs to be filed within three months after having learned about a crime and the perpetrator.

Once an investigation has been opened, the criminal proceedings are conducted *ex officio*, *i.e.* the criminal authorities are in charge of the gathering of evidence, *etc.* The public prosecutor (and not the party filing the criminal complaint) directs the investigations. In particular, the public prosecutor is not bound or limited by the injured party's account of the facts (nor the legal reasoning) in the criminal complaint, *i.e.* the public prosecutor can make independent investigations in relation to the alleged offence (and other offences).

If the offence is only investigated "upon complaint", the infringed party can stop the proceedings by withdrawing the complaint at any time before the judgement of the second court instance is handed down. Once withdrawn, the complaint cannot be renewed. This option makes it sensible to negotiate with the accused even after having filed the complaint.

2.2. Personal Liability of Directors and Corporate Criminal Liability

Criminal proceedings are primarily directed against individuals rather than legal entities. In principle, all individuals involved in the questionable act may be prosecuted, *i.e.* in particular those who decided to make certain transactions and those who implemented these transactions. Each individual will be responsible for his own contribution.

Furthermore, managers and directors could also be liable if they breached their own monitoring duty (based on the concept of an unlawful omission).

Legal entities would only incur criminal liability under Swiss law if an act (committed within/on behalf of the entity) cannot be attributed to a specific individual (*e.g.*, an employee) due to organisational deficiencies (so-called "secondary liability").

Apart from this secondary liability, a direct criminal liability of legal entities only applies to a limited number of crimes exhaustively set out in the SCC such as the financing of terrorism, money laundering and bribery. Such direct criminal liability applies if the legal entity has failed to take all reasonable organisational measures that are required in order to prevent such an offence; it is independent of and parallel to the liability of the individual offender, who equally remains liable for the offence.

In both scenarios, the fine cannot exceed CHF 5 million. In addition to a sanction, Swiss authorities could, however, confiscate the proceeds of the legal entity which resulted from the criminal acts.

2.3. Party Rights of the Injured Party

An individual and/or a legal entity which was infringed by the (alleged) crimes has a right (but no obligation) to participate in the criminal proceedings as a party. As a party, it has the same rights as the accused person. In particular, the infringed party (and his counsel) is entitled to attend interrogations of parties and witnesses (at least after the very first interrogation has taken place), to request the taking of additional evidence and the freezing of assets, to have access to the file (subject to specific requirements), to file appeals against decisions which go against its interests, to be informed about or to attend and to participate in court hearings. The infringed person can also file civil claims within the criminal proceedings (*i.e.* claims for monetary compensation).

Since only those who are directly affected by the offence may be considered as the Injured Party, his/her rights in the proceedings cannot be voluntarily transferred and/or assigned. The only exceptions to the assignments of Party Rights are listed in art. 121 SCPC: (i) the relatives of a deceased individual, respectively (ii) the legal assignee (*i.e.* a person who acquires by law the rights of a claimant and only in respect of the civil claim; this is notably the case for an insurance company). This means that even in the case of a merger of the companies, the assignment of the status, rights and civil claim within the criminal proceedings will be denied.

The injured party may use the information gathered during the investigation in other domestic proceedings and vice-versa. The criminal authorities may, however, restrict party rights for a limited period of time, for example by not allowing this party to take copy of the documents, which will automatically restrain its right to use the information in other proceedings.

2.4. Usual Course of the Investigations

2.4.1. Investigative Phase

The prosecutor conducts the investigation (if necessary, with the involvement of the police). If there is a reasonable suspicion that an offence has been committed or if he wants to order compulsory measures, the prosecutor formally opens an investigation.

During the investigative phase, the prosecutor is in charge of the gathering of evidence. In particular, she/he may hear witnesses, request the production of documents from the involved individuals, entities and third parties, order dawn raids or hear the accused person. The prosecutor has to inquire the "material" truth *ex officio* and has to investigate exculpatory and incriminatory circumstances with equal care.

After these initial investigative steps, the prosecutor decides on how to proceed. She/he has the following options:

i. Close the case: This is admissible if (i) no suspicions are corroborated which would justify bringing charges, (ii) the established facts do not fulfil the elements of a criminal offence, (iii) the offence was clearly justified (*e.g.* in case of self-defence *etc.*), (iv) there are procedural impediments (*e.g.* lack of a valid and timely criminal complaint/prescription of the offence), or, (v) if the prosecutor finds that one of the (limited) reasons for waiving prosecution is met, *e.g.* if the defendants are severely affected by their acts.
ii. Issue a summary penalty order: The prosecutor can also issue a summary penalty order against the accused if the accused's responsibility has been satisfactorily established and if a sentence of no more than six months is appropriate; such summary penalty order becomes final if no party objects.
iii. Bring charges: The prosecutor can (or rather: is obliged to) bring charges against the accused in case no other option applies. If the prosecutor brings the charges, the whole case goes to trial before the criminal court.
iv. Simplified procedure: The accused may request the prosecutor to conduct simplified proceedings provided that he admits the essential allegations and recognises, at least in principle, the civil claims brought by the injured party. Simplified proceedings are not an option when the prosecutor intends to request a custodial sentence of more than five years.

Overall, the Swiss criminal authorities only have limited prosecutorial discretion not to open investigations or to drop charges. As a rule, the criminal prosecution authorities are obliged to commence and conduct proceedings that fall within their jurisdiction where they are aware of or have grounds for suspecting that an offence has been committed. Accordingly, the prosecutor may not simply close a case if he/she deems fit. Quite to the contrary, a prosecutor has to bring charges to the court if he/she suspects that a crime was committed even if there are doubts whether this was indeed the case (*in dubio pro duriore)*.

2.4.2. Court Proceedings

Once the prosecutor has brought charges, it is up to the criminal court (typically consisting of one or three judges) to decide whether or not the accused committed the crimes as charged and to decide what sanction is appropriate. In case of doubt, the court has to acquit (*in dubio pro reo)*. The ruling of the criminal court is subject to appeal (both by the defendant and the prosecutor) to a cantonal court and ultimately to the Federal Supreme Court.

2.5. Settlement

The SCC allows the authority to refrain from prosecuting, bringing to court or punishing a perpetrator if he/she has repaired the damage or made every effort that one could reasonably expect to compensate for the harm caused provided that (i) the penalty incurred would not exceed a suspended custodial sentence of one year, a suspended monetary penalty or a fine; (ii) the accused has admitted the facts and (iii) the public interest and the harmed persons' interests were negligible.

2.6. Costs

The costs of the proceedings are to be borne by the accused if he/she is found guilty. In case of an acquittal, the costs are typically covered by the government (safe for costs in relation to the civil claims).

A compensation for legal costs can be awarded to the prevailing party. This compensation will, however, be calculated according to cantonal rules which vary considerably, and which do usually not fully cover the actual legal costs.

3. Spotlight on a Few Specific Offences

3.1. Criminal Mismanagement

Any person who has been entrusted with the management of the property of another, and who causes or permits that other person in the course of and in breach of his duties to sustain economic loss is liable to a custodial sentence of up to three years or to a monetary penalty. If the offender acts with a view to securing an unlawful financial gain for himself or another, a custodial sentence of up to five years may be imposed. The same goes for anyone who abuses the authority granted to him to act on behalf of another with a view to securing an unlawful gain for himself or another and as a result causes that other person to sustain economic loss.

Therefore, directors and officers can be held criminally liable for criminal management for any breaches of their obligations (*i.e.* those also giving raise to civil director's liability). From a practical perspective, however, only severe violations of such obligations trigger criminal liability.

In practice, the provision is mainly applied in rather clear scenarios such as the following:

– Sale/transfer of assets without adequate consideration, in particular if made to related parties;
– Granting of unsecured loans without adequate interest, in particular if the repayment of the loan is questionable;
– Assumption of debts of third parties;
– Spending the company's assets in the director's personal interest (*e.g.* by excessive reimbursement of expenses *etc.*).

Even more, criminal liability requires intent which reduces the scope of application of the criminal liability.

3.2. Bribery

Swiss law outlaws the bribing of domestic and foreign public officials, *i.e.* the offering, promising or giving an undue advantage to a public official (or to a third party), in order to cause a public official to carry out or to fail to carry out an act in connection with his/her official activity, in contradiction with his/her duty. The SCC contains a broad definition of public official, which also includes individuals and employees of companies who exercise public functions.

The SCC also includes a prohibition of (active and passive) bribery in the private sector.

In addition, the granting of an undue advantage to a domestic public official with a view to his function even if the advantage is not given to induce the public official to breach its obligations is prohibited as well.

3.3. Blocking Statutes

It is prohibited to perform official acts on Swiss soil for the benefit of a foreign authority. Such prohibition includes the taking of evidence for foreign proceedings, *e.g.* the taking of a deposition of an individual. The SCC does not require a pre-existing demand from a foreign authority to gather and disclose evidence. It is sufficient if the accused considers that the evidence in question might be disclosed to a foreign authority. In order to be lawful, the gathering of evidence would, therefore, typically have to be channelled through mutual assistance proceedings in criminal, administrative or civil matters.

The sharing of manufacturing or trade secrets with a foreign authority or even private enterprises outside Switzerland in the absence of the secret's owner's authorization/waiver is prohibited as well. The definition of manufacturing or trade secret is broad under Swiss law: any fact that is not publicly known outside of Switzerland and which is of commercial pertinence and relates to the Swiss economy (*e.g.* because the owner of the secret is domiciled/incorporated in Switzerland) is covered.

3.4. Other Crimes

3.4.1. Criminal Law Provisions in relation to Bankruptcy

In the case of the bankruptcy of a company, several additional criminal provisions may come into play:

In particular, may be held criminally liable under Swiss law (and may be punished with a custodial sentence of up to five years or a monetary penalty) anyone who reduces his (or a company's) assets to the detriment of creditors by damaging or destroying his assets, by disposing of them for a manifestly insufficient consideration, by waiving or renouncing rights without consideration etc. The same applies if someone causes or aggravates its indebtedness/insolvency through mismanagement, in particular by inadequate capital provision, excessive expenditure, hazardous speculation, the negligent granting or use of credit, the squandering of assets or gross negligence in the exercise of his profession or the management of his assets. The declared bankrupt can also be held liable if he/she failed to keep proper accounts.

In addition, debtors who fictitiously reduce their assets (*e.g.* by disposing or concealing of assets, by creating or accepting fictitious debts and claims) may be held criminally liable. The same applies to third parties who undertake such acts.

In contrast to civil liability, all of the above criminal provisions are only applicable if someone acted intentionally, *i.e.* knowingly and willingly. Please note, however, that intent may be assumed if someone accepted a significant risk (even if he did not, strictly speaking, intend to cause damage).

3.4.2. Accounting

The SCC also addresses the intentional or negligent failure to comply with accounting regulations, according to which any person who wilfully or through negligence fails to comply with the statutory duty to keep proper accounts or to preserve accounts and business correspondence can be held liable to a fine. Only the persons required by law to register their companies pursuant to Swiss law can be punished.

3.4.3. Criminal Law Provisions in relation to Cybercrime

Many actors on the Swiss market see cybercrime as the most significant risk over the next years, notably because of the increasing digitalisation of our society (business and consumers).

Swiss law outlaws specific behaviour related to cybercrime, in particular cracking (unauthorised obtention of data) and hacking without obtention of data. Both offences are only investigated if someone acted intentionally, *i.e.* knowingly and willingly. In addition, there are provisions in place against the deletion or alteration of data and against computer fraud.

3.4.4. Administrative Criminal Law

In addition to the above, several administrative law statutes contain criminal sanctions. Administrative criminal law concerns in particular the prosecution and trial of offences against financial market law (market abuse rules), tax law or customs law but also general administrative law acts such as the Environmental Protection Act, the Therapeutic Products Act and many more.

Some of these offences are prosecuted by administrative agencies and special procedural rules may apply. Moreover, the applicable fines may be higher than under the SCC and special rules as to the liability of legal entities may apply.

4. Mutual Legal Assistance Proceedings

Switzerland is generally very cooperative with regard to requests for mutual assistance from foreign countries, even in the absence of a bilateral treaty: most requests are granted unless the foreign proceedings do not meet basic procedural standards.

The request for mutual assistance may be aimed for the collection of evidence or the seizure of funds, the hearing of witnesses/parties and even arrest and extradition of foreign individuals. Before a request is being executed, its validity will be summarily examined by the Federal Office of Justice. Once the executing authority determines that the request is completely executed, *e.g.* when it has gathered the information requested, it issues a final ruling giving reasons on whether mutual assistance is granted and to what extent. This final ruling may be challenged by an appeal to a court.

IV. Compliance and Investigations

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1. Compliance

1.1. Compliance in Switzerland

Swiss companies as well as their management and employees have to comply with various laws and regulations. Furthermore, more and more importance is attached to soft law, guidelines, social and ethical standards as well as corporate values. The increasing density of rules, the more stringent scrutiny of regulators and the public opinion as well as the stricter requirements of investors and creditors have led many companies to implement internal compliance control systems and structures which have become best practices in Switzerland – in particular for companies of a certain size or if they are exposed to high-risk industries or countries.

Compliance mechanisms seek to prevent and detect misconduct in order to minimise the risk of civil and criminal liability, the reputational damage and other negative consequences for the company and its business.

Civil or regulatory liability is the primary risk a company faces in case of non-compliance. Under Swiss law, a company may also face criminal sanctions (fine up to CHF 5 million) if a crime has been committed in connection with its commercial activity that cannot be attributed to a specific natural person within the company due to inadequate organisation (secondary criminal liability) or in case the company has failed to implement mechanisms to effectively prevent that it participates in a criminal organisation, finances terrorism, commits money laundering or bribes Swiss or foreign officials or commits corruption in the private sector (primary, solidary and independent criminal liability). See, for more details, the chapter on White Collar Crime.

Moreover, the criminal authorities have the power to block and forfeit the proceeds of such criminal actions and may order compensatory claims against a company if these proceeds are no longer available.

1.2. Typical Risk Areas

The compliance measures to be implemented depend on the risk profile of the specific company which is a function of the risks that are most likely to materialise and the potential impact of such risks. This respective risk profile depends on the risks of the industry in which the company operates as well as on individual factors which have to be assessed on a case-by-case basis.

Almost every entity has to monitor general risks such as for example potential data privacy violations, violations of accounting duties, conflict of interest issues, violations of labour law obligations, antitrust violations and corporate social responsibility issues.

In addition, companies usually also face more specific risks in relation to their sector and/or business. In the financial sector, money laundering, financing of terrorism, sanctions, embargos, insider trading *etc.* are often an issue. In other areas such as construction and international trade, corruption presents a serious risk.

1.3. Whistleblowing and Whistleblower Protection in Switzerland

Swiss law does not offer statutory protection to whistleblowers and does not impose any obligations on Swiss companies to set-up an internal system for reporting suspected internal misconduct. Still, it becomes more and more common in Switzerland to establish internal reporting mechanisms that allow employees to report suspected misconduct in a structured form and without risk of retaliation.

The fiduciary obligations of employees require that they first raise their complaints internally before disclosing them to authorities or the public. If they fail to do so, they may suffer consequences (such as the termination of their employment) and they may become subject to criminal sanctions if they violate confidentiality or secrecy obligations by reporting a suspected misconduct to third parties. On the other hand, terminating a whistleblower's employment following a good faith escalation may constitute an unfair dismissal under Swiss employment law.

2. Investigations

2.1. Duty to Investigate

In Switzerland, there is no general legal obligation that would require a Swiss entity to proactively conduct an internal investigation or to report criminal activities to the authorities.

However, there are a number of provisions in Swiss law that indirectly require a company to investigate certain incidents. For example, a duty to investigate may be derived from certain corporate and labour law provisions or, in case of regulated companies, from their regulatory duties. For example, companies subject to the supervision of the FINMA may be ordered to explain certain incidents and/or to produce documents related to such matter. Companies subject to FINMA supervision usually also have the duty to report "material events" (*i.e.* also crimes of certain importance). Furthermore, companies listed on the SIX have certain *ad hoc* notification duties and financial institutions have reporting duties under the Money Laundering Act. All of these obligations may require companies to conduct internal investigations in order to comply with their statutory obligations.

Independent of any specific legal duty, it has become best practice for Swiss companies to initiate internal investigations where there is a clear suspicion of fraud or other criminal conduct within the company. In this regard it is important to know that even if the suspicion is employee-related, Swiss companies are free to conduct an internal investigation without the prior approval by employee representatives or other similar functions and in general, there is not even an obligation to inform the respective employee(s) about the investigation.

2.2. Investigation Process

2.2.1. Investigation Set-Up

Swiss companies are free to choose whether an investigation is conducted internally by its own employees or externally, by a law firm or other third-party investigator. For independency reasons and because the required skills (legal, accounting, *etc.*) are often not available or not as specialised within the company, Swiss internal investigations are typically conducted by an external investigator, but with the support of the company's employees. Law firms are often hired as investigators given that internal investigations are typically used to address legal questions and regularly entail legal proceedings.

The subject matter and scope of an internal investigation are usually defined in an engagement letter and in an investigation plan which acts as a roadmap for the investigation. If the internal investigation is conducted in order to get legal advice or to prepare for legal proceedings, it is important from a legal privilege point of view (regarding attorney-client privilege, see section 2.3 below) that this is reflected in the engagement letter and the other documents underlying the investigation.

At the outset of the investigation, the investigators should clearly identify the allegation(s) which is/are to be investigated and try to establish an overview of the different sources of documents, data and other information to be secured and analysed and assess which interim or immediate measures are to be implemented.

Typically, the first phase of an investigation consists in collecting and analysing documents and data before any witnesses are heard and the suspects are finally confronted with the allegations and the relevant evidence.

Once all the data, documentation and information has been collected and analysed and the suspects have been confronted with the allegations, an investigation report is drafted and based on the result of that report, a legal assessment is made and specific measures are recommended.

The investigation report and the results of an investigation are internal information which is usually not shared with any third parties, in particular not with the witnesses or suspects interviewed. However, an entity may choose to share the report of an internal investigation and/or the results of the investigation with certain authorities, in particular to avoid an investigation by these authorities (regarding cooperation with authorities, see section 2.2.4 below).

2.2.2. Witness Interviews

Swiss statutory law does not regulate witness interviews in the context of internal investigations. However, under Swiss employment law there are certain general obligations that have an impact on how to conduct interviews in an internal investigation:

The employer has a general duty of care towards its employees and must therefore respect their personal rights, in particular also during witness interviews. Accordingly, interviews with employees always have to be fair and objective. The employer's duty of care does, however, not require it to provide and/or bear the costs of legal representation to the interviewed employee, even if he or she is at risk of criminal prosecution.

On the other hand, the employee has a general duty of loyalty which obliges him to comply with his employer's instructions and to account for all his activities during employment. Based on this duty, the employee has an obligation to cooperate with the employer's investigation which includes the participation in witness interviews. Whether the employee has the right to refuse to answer certain questions in an internal investigation conducted by its employer with reference to the privilege against self-incrimination remains a matter of dispute.

In general, it is considered best practice in Switzerland that witnesses are informed in general terms about the background of the investigation (in particular regarding the allegations made) and the intended use of the information received during the interview. Also, the interviewer typically informs the witness that he does not act for the interviewed witness but for the company conducting the internal investigation. Furthermore, witnesses should be directed to keep the interview itself as well as its content confidential. There is no specific legal obligation to record the content of the interview in a particular form (*e.g.* a protocol) or to share the recordings with the interviewed witness and a company should consider carefully before doing so.

2.2.3. Collection of Data and Privacy Issues

The collection and use of personal data in the context of an internal investigation is governed by the FDPA as well as the Data Protection Ordinance (and in some cases foreign law such as the GDPR).

With regard to personal data related to employees, the admissibility to collect and review data depends on the usage guidelines implemented by the employer (*i.e.* on the data policy the employee has agreed to). With regard to email correspondence in particular, the employer in general has the right to review work emails of an employee in case of a suspected misconduct, but usually has to refrain from searching and reviewing private emails.

Additional restrictions may apply if the internal investigation is made with a view to foreign civil, criminal or administrative proceedings. In this case, the so-called blocking statutes may prevent the use of information collected in Switzerland in such foreign proceedings (see chapter on White Collar Crime).

2.2.4. Cooperation with Authorities

In principle, companies in Switzerland have no statutory obligation to voluntarily disclose the results of an internal investigation. Also, there is no general legal duty to self-report.

As an exception to this, entities under the supervisory authority of FINMA or other regulatory bodies may have certain reporting obligations and may also be – under certain circumstances – compelled to conduct internal investigations.

Furthermore, being cooperative with authorities can be beneficial for a company under investigation. For example, an entity may be able to minimise disruption caused by a dawn raid or even prevent it by agreeing to produce certain evidence voluntarily. Also, cooperation can have a potential impact on the sanctions imposed on an entity and may result in a bonus (for example the leniency policy according to the CartA; see chapter on Competition Law section 4).

Active cooperation with investigating authorities usually is of particular importance in cross-border cases: If an entity is investigated by several authorities in multiple jurisdictions it is usually in its best interest to coordinate the investigations and – whenever possible – to resolve the matter comprehensively in order to avoid being subject to multiple and overlapping proceedings and sanctions.

When assessing whether to cooperate with Swiss authorities it is important to note that enforcement authority's officials are in principle bound by secrecy obligations. This means that all the information a Swiss public official becomes aware of in his or her official capacity (incl. information shared with the authorities on a voluntary basis) in principle has to remain confidential. However, Swiss public officials also have certain reporting obligations that require them to inform other authorities, in particular if they become aware of unlawful conduct. Moreover, an authority may obtain access to information gathered by another authority. Accordingly, information shared voluntarily with a particular authority may end up with another Swiss or international authority.

2.3. Attorney-Client Privilege

Under Swiss law, attorney-client communication is privileged. The privilege protects communication as well as work products of an attorney in connection with an attorney's typical professional activity. Under some circumstances, the attorney-client privilege also extends to documents prepared by the client (*e.g.* documents that are prepared for the instruction of an attorney) or third parties (in particular also investigators).

The attorney-client privilege is, however, limited to independent attorneys who are admitted to practice in Switzerland or in other jurisdictions of the EU, EFTA and the UK. The Swiss Federal Supreme Court has recently restricted the scope of legal privilege by ruling that documents and communication that are exchanged between a party and his/her lawyers admitted to practice outside the EU, EFTA, and the UK may be searched and seized in criminal proceedings. Furthermore, the privilege does not extend to in-house counsel. Moreover, recent case law has considerably limited the scope of attorney-client privilege for the results of internal investigations, in particular if such investigations are being conducted in order to comply with statutory obligations (*e.g.* with regard to money laundering prevention).

Against this background, legal privilege can be best ensured if an independent external attorney is engaged at an early stage of the internal investigation. Furthermore, and as a general rule, work products and communication should only be shared with a pre-defined and carefully chosen small group of persons on a "need-to-know" basis only in order not to give up any privilege rights unnecessarily.

There are no requirements as to how the privilege must be invoked, but it should be invoked at the first possible occasion in order to avoid being considered as having been waived. The privilege can for example be invoked on the witness stand or in case of dawn raids with a search warrant that targets information or documents that are privileged. In case of such a search warrant, the holder of a privileged document is entitled to object to the search by requesting that certain documents be put under seal. In such cases the criminal authority is obliged to immediately seal the respective documents and may only obtain access based on a court ruling which concludes that privilege does not apply.