

Chapter Legal & Tax

The SECA Legal & Chapter (Hannes Glaus, Dieter Wirth, Beat Kühni and Christian Koller), were active lobbying for the private equity industry in the past year in a number of respects, relating among others to the distribution of private equity funds into and out of Switzerland, the private equity fund cost reporting and tax issues. In addition, Beat Kühni has put together a small team of experts to draft a “lean and mean” of the otherwise very successful and renowned venture capital model documentation of SECA.

TER Formula

Since the summer of 2014 a delegation of SECA is developing with the OAK (“Oberaufsichtskommission Berufliche Vorsorge”) a plan to replace the NAV as a denominator in the SECA TER formula. Late last year a compromise was reached whereby SECA’s guidelines will only cover the calculation of the expenses without specifying any denominator, the so-called TE (total expenses) as opposed to a ratio like TER. The new TE Guidelines of SECA are approved by the OAK and are effective from this day covering the financial reports for the year 2015 onwards.

Swiss Collective Investment Schemes Act: Distribution rules

In 2013 the revised Swiss Collective Investment Schemes Act entered into force. Among others, the new law introduced a conceptual change to the distribution of foreign private equity funds in Switzerland. Hence, SECA’s legal & tax chapter was frequently confronted with questions relating to such changed concept. In order to shed light on that topic, we collated the questions and prepared a Q&A document on “Private Placement and Distribution Rules in Switzerland”. In summer 2015 the paper was uploaded on the SECA webpage and discussed at our last year’s Private Equity & Corporate Finance Conference.”

GAFI, AIFM-D, Fidleg etc.

In the current year we are working on guidelines on how to implement the new anti-money laundering rules for the registration of major shareholders. Further, the current discussion of the FIDLEG legislation in parliament may provide an opportunity to lobby for certain changes in the legislation which are unduly cumbersome for the private equity industry. Finally we would like to explore with the authorities options to give the Swiss private equity industry better access to the European market.

Swiss Corporate Tax Reform III (CTR III)

In 2016, two tax topics will start to have a strong influence on the private equity industry: The actions in order to avoid “base erosion and profit shifting” (BEPS) to low-tax countries as issued by The Organization for Economic Cooperation and Development (OECD) and the Swiss Corporate Tax Reform III (CTR III) in Switzerland.

While CTR III focuses on the abolishment of the special tax regimes for holdings, mixed and domiciliary companies and on strengthening Switzerland as an attractive business place, the aim of OECD with BEPS is to avoid profit shifting to jurisdictions where little or no real activity is performed but offers a “low tax system”.

BEPS

Some jurisdictions already started with early BEPS interpretations and have implemented corresponding initial measures in their domestic law respectively tightened measures in view of BEPS. As a short overview, the following four aspects of BEPS (out of 15 proposed action items) might impact the private equity industry:

Hybrid mismatch arrangements: This measurement of BEPS aims to avoid any hybrid instruments and entities resulting in the effect that payments can be deducted but do not create taxable income in other jurisdictions or that a double deduction on the same payment in separate jurisdictions is possible. As hybrid

elements like Profit Participating Loans, CPECs and similar instruments are commonly used in the private equity sector, asset managers will have to rethink structures and vehicles in order to prevent any negative tax consequences in the future.

Preventing Artificial Avoidance of Permanent Establishment Status: The OECD is significantly lowering the threshold for the assumption of permanent establishments in a foreign jurisdiction. This action item will affect the asset management sector with respect to marketing, capital raising, client relationship activities as well as with investment research, advisory and management activities outside Switzerland. Such activities in a foreign country may already create a permanent establishment and undesired tax consequences as of today but will become considerably more restrictive with the introduction of BEPS. Therefore, the risk of private equity activities in a foreign jurisdiction needs to be reviewed from a BEPS perspective.

Transfer Pricing and Country-by-Country Reporting: It is the aim of BEPS to have the profits taxed at the place of the effective value chain and real assets. The shifting to jurisdictions only based on legal contracts with no effective added value shall not be considered from a tax point of view. From a transfer pricing perspective the focus shall relate to the location in which control of risks and intangibles is exercised. Furthermore, multinational groups with a turnover of EUR 750M shall prepare reports for the tax authorities outlining where profits and losses are located in relation to employees per country, assets and taxes effectively paid. With these measurements, multinational groups shall become more transparent from an economic point of view for the tax authorities. Therefore, private equity structures have to evaluate if they might be affected by these more restrictive approaches.

Preventing Treaty Abuse and Treaty Shopping: The OECD wants to avoid treaty abuse and treaty shopping by group structures that rely on double tax treaty structures and the use of tax treaties to effect stateless income. In this regard, the OECD evaluated that the focus of this BEPS-action is to develop treaty provision and recommend domestic law changes in order to prevent any abuse of double tax treaty. Tax treaties shall contain so called "Limitation on Benefits"-clause and/or "Principal Purpose Tests". Such clause requires that at least one of certain tests has to be fulfilled in order to make use of the tax treaties. As a result, private equity structures, which rely on the use of certain tax treaties, need to be reevaluated whether they are still covered by tax treaties in view of BEPS.

This is a glimpse of the past and ongoing initiatives of the Legal & Tax Chapter. We continue to strive to improve the regulatory and fiscal environment for the private market industry. This is an up-hill battle in a number of respects in view of the current trends of ever more stringent regulation and of fiscal tightening. Bear with us and please let us have your comments and suggestions.

For the SECA Legal & Tax Chapter:

Hannes Glaus, Dieter Wirth,
Beat Kühni, Christian Koller

Hannes Glaus

Partner

Bratschi Wiederkehr & Buob

Postfach 1130

Bahnhofstrasse 70

8021 Zürich

hannes.glaus@bratschi-law.ch

Dieter Wirth

Partner

PwC

Birchstrasse 160

8050 Zürich

dieter.wirth@ch.pwc.com

Beat Kühni

Partner

Lenz&Staehein

Bleicherweg 58

8027 Zürich

beat.kuehni@lenzstaehelin.com

Christian Koller

Partner

Blum&Grob Rechtsanwälte AG

Neumühlequai 6

Postfach 3954

8021 Zürich

c.koller@blumgrob.ch