Chapter Legal & Tax

Swiss Corporate Law Reform

The bulk of Switzerland's general corporate law reform (the "Swiss Corporate Law Reform") will enter into effect on January 1, 2023 providing for new corporate law features such as:

- share capital denominated in a foreign currency
- a minimum par value below one cent
- a "capital band" to give companies more flexibility to increase and reduce their share capital
- clarification of the requirements for distributions out of capital reserves and interim dividends and
- enhanced shareholder rights to improve corporate governance

but unfortunately no lighter rule set for start-ups during that start-up phase as lobbyied in vain by SECA.

ESG Reporting

After the "Responsible Business" Initiative failed in the referendum on November 29, 2020 due to a majority of the cantons, the indirect counter-proposal has entered into force on January 1, 2022. At the heart of the matter are:

- new reporting requirements on "non-financial matters", in particular in the areas of environment, social responsibility and human rights, which are based on the existing EU Directive 2014/95/EU (Non-Financial Reporting Directive); and
- new due diligence and reporting obligations with respect to conflict minerals and to prevent child labor throughout the supply chain.

a) Concerned Companies

In contrast to the reporting obligation on "non-financial matters", the new due diligence obligations in the area of conflict minerals and child labor apply to every company domiciled in Switzerland whose business area may potentially come into contact with conflict minerals or child labor, by:

- importing minerals (ores and concentrates) or metals containing tin, tantalum, tungsten or gold from conflict or high-risk areas or processing them in Switzerland, or
- offering products or services for which there are reasonable grounds to suspect that they have been produced or provided by children.

b) Specific scope of application

Re conflict minerals, if a company falls below certain import and processing quantities of minerals and metals containing tin, tantalum, tungsten or gold, it is exempt from the due diligence and reporting obligations regarding conflict minerals. Complex is the determination what is to be considered a conflict and high-risk area and the non-binding list of "Conflict-Affected and High Risk Areas" (available at www.cahraslist.net) may only serve as a starting point for classification.

In the area of child labor, the Ordinance specifies the requirements under which companies are exempt from the new due diligence obligations. Potentially affected companies have to go through three assessment steps:

1. Thresholds: If a company does not meet the SME thresholds, it is exempt from further clarification. The SME thresholds are not met if the company concerned falls below two of the following thresholds on a consolidated basis in two consecutive financial years: Total assets of CHF 20 million, sales of CHF 40 million and an annual average of 250 full-time employees.
2. Risk assessment: If the company meets two of the three SME thresholds, it must assess whether it qualifies as a "low-risk company with regard to the area of child labor". A company is considered to have a low risk if it produces in countries or provides services from countries whose "due diligence response" is classified as "basic" by UNICEF in its "Children's Rights in the Workplace Index", or if it procures products or services from these countries. If, according to this test, the company is considered to be a "company with low risk with regard to the area of child labor", it is exempt from further evaluations.
3. Verification of suspicions: If none of the aforementioned exceptions apply, the company must verify whether there is a reasonable suspicion of child labor in relation to a specific product or service. If there is no reasonable suspicion of child labor, the company is exempt from the due diligence and reporting obligations. This finding and the reasons for it must be clearly documented.

The Ordinance provides a counter-exception to the aforementioned exceptions: If the company offers products or services that were evidently produced or provided using child labor, the company is subject to the due diligence and reporting obligations regardless of the result of the above-mentioned three assessment steps.

c) Equivalent international standards

Annex 2 of the Ordinance contains a list of international regulations that are considered to be equivalent standards, both with regard to conflict minerals and child labor. If a company fully complies with such an international standard, it is exempt from the new due diligence and reporting obligations under the CO.

d) Outlook

Even companies that do not meet the application requirements for the new due diligence obligations as of January 1, 2022, or benefit from an exemption must keep the new due diligence obligations in mind. The decisive parameters for the applicability of the new due diligence and reporting obligations are dynamic and adapt continuously, such as the classification of a region as a conflict or high-risk area or its risk classification according to UNICEF's "Children's Rights in the Workplace Index".

Consequently, even Swiss companies that are not currently affected will have to reassess in regular intervals whether they are still exempt and they will have to document the relevant findings and the justification thereof. Likewise, when entering into new business relationships or other expansions of business activities, it must be reassessed in each case whether the self-classification still corresponds to the facts.

e) Clarification of due diligence requirements

The Ordinance also contains a number of details on the specific content of the due diligence and reporting obligations in the area of conflict minerals and child labor. The focus is in particular on the management system to be introduced along the supply chain by the companies concerned in accordance with Art. 964sexies para. 1 CO. The management system must, in particular, contain the following two elements, the specific content of which is now detailed in the Ordinance:

- a supply chain policy; and
- a supply chain traceability system.

The management system must be supplemented by a risk management plan that describes the methods used by the company to identify, analyze and weigh the risks of harmful effects of its business activities in the supply chain. The Ordinance also contains specifications in this regard.

f) Entry into force

The new due diligence and reporting obligations under the indirect counter-proposal and the new Ordinance will enter into force on January 1, 2022. However, the affected companies will be granted a transitional period of one year to adjust to the new obligations, i.e. they will apply for the first time to the 2023 financial year (or the financial year beginning in 2023). Concerned companies should nevertheless start preparing and implementing the necessary measures and policies now in order to comply with the new legal requirements by that time.

Political Activities relating to the Swiss Startup Ecosystem

Swiss Innovation Fund

The Federal Council seeks to strengthen Switzerland's appeal as a location for startups. In this context, the Federal Council mandated in August 2021 the Federal Department of Economic Affairs, Education and Research EAER to examine Switzerland's startup ecosystem. In view of the fact that numerous states around Switzerland have launched extensive programs to support startups in recent years, measures for a more active growth strategy are also being examined in order to strengthen Switzerland's appeal as a location for startups in the long term. To this end, the Federal Council has decided in particular to comprehensively examine the advantages and disadvantages of a Swiss innovation fund. The aim is to explore the extent to which such a fund could expand the venture capital market in Switzerland and thus improve the growth opportunities of innovative companies in Switzerland. SECA is actively pursuing and contributing to the discussion around the Swiss innovation fund idea. Representatives of SECA were e.g. involved in a roundtable organized by State Secretariat for Economic Affairs SECO and further were involved in organizing a webinar on the pros and cons of a Swiss innovation fund. The Federal Council is expected to decide on next steps in June 2022.

Modernization of the "GmbH"

The National Council has accepted Andri Silberschmidt's postulate on the modernization of the GmbH. In this context it will have to be analysed how a partial paying up of the capital of a GmbH or, alternatively, a reduction of the initial share capital can be made possible. For more information see: www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20214422

Facilitate Digital Accounting

With the approval of motion 22.3004 (Facilitate digital accounting), the National Council resolved to simplify accounting. The motion demands that the filing of files should also be possible without a special signature or time stamp on commercially available storage media. The implementation would be a massive relief for all startups and SMEs in Switzerland. For more information see: www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20223004

Horizon Europe - Transition measures for startups and SMEs

To support SMEs and startups that currently do not have access to the "Accelerator" funding instrument of the European Innovation Council (EIC), the Federal Council is enacting a new legislative provision as early as April 2022. The Federal Council has also adopted the corresponding financial measures for the attention of parliament. For more information see: www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87456.html

Allow loss offset for ten years

The National Council approved a motion to extend the possibility of offsetting losses from the current seven to ten years. An adjustment would allow losses incurred from 2020 onwards to be carried forward with tax effect for ten years. This would ease the situation of companies that are in a difficult economic situation as a result of the Covid crisis. For more information see:

www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20213001

Reform of withholding tax and transfer stamp tax

In order to strengthen the Swiss debt capital market and to increase Switzerland's attractiveness for group financing activities, the Swiss Parliament has approved on 17 December 2021 an amendment of the Swiss Withholding Tax Act. Currently, a withholding tax of 35 % is levied – amongst others - on interest payments on domestic bonds and bond-like instruments. Switzerland is thus less attractive as an issuing location by international standards. The withholding tax and transfer stamp tax reform essentially includes the following elements:

- The withholding tax on domestic interest shall be abolished to a great extent. This includes – amongst others – interest payments on newly issued Swiss bonds. The abolition of WHT on interest does not apply to interest on customer deposits held with banks and insurance companies by natural persons domiciled in Switzerland.
- Domestic bonds shall no longer be treated as taxable securities for Swiss transfer stamp tax purposes. Foreign bonds, however, will remain taxable securities subject to Swiss transfer stamp tax for secondary market transactions.
- The withholding tax on compensatory payments - i.e. payments in which income subject to withholding tax is replicated or passed on (i.e. in case of securities lending/borrowing) - is to be regulated by law. The risk of multiple refunds of with holding tax shall be minimised. The legal regulation corresponds to the previous practice, which was not protected by the Federal Supreme Court due to the lack of a legal basis.

The amended law regarding the abolition of withholding tax on interest on bonds is supposed to enter into force as of 1 January 2023. However, the law is subject to the facultative referendum, which is likely to be called by the social democratic party.

Taxation of cryptocurrencies

On 14 December 2021, the Swiss Federal Tax Authority (SFTA) published an updated version of the working paper on the taxation of cryptocurrencies. It replaces the working paper first published in 2019. The updated working paper takes into account developments in the crypto sector over the past two years and an ever-increasing investor interest in cryptocurrencies and blockchain technologies. In particular, the updated working paper includes the following additions and adjustments worth mentioning:

- The paper foresees three categories of investment tokens: dept tokens, investment tokens on a contractual basis and investment tokens with participation rights, which reflects the so-called Distributed Ledger Technology (DLT) securities. Investment tokens with participation rights are to be treated as shares or participation certificates for tax purposes. This means that a distribution is considered a dividend and is consequently subject to withholding tax of 35%. In addition, the issuance of such tokens is subject to the issuance stamp tax.
- If own tokens are provided as collateral in a Proof of Stake mechanism ('Staking'), a return in the form of a token (or part of a token) is paid to the token holder. The income from the Staking qualifies as income from movable assets for tax purposes and, in the case of an individual, is subject to income tax. If a token holder receives crypto-currencies via airdrop, therefore by allocation of free tokens without any action on the holder's part, then these are taxable as income from movable assets at the time of allocation at fair market value.
- Investment tokens on a contractual basis and utility tokens issued to employees do not qualify either as artificial or as non-artificial employee participation. This is because the exchange of services for these tokens is based on a contractual relationship and the tokens do not represent participation rights as such. The free or discounted distribution of such tokens to employees constitutes other non-cash benefits, thus subject to income tax to the extent of the difference against the market value.

The updated working paper creates increased legal certainty from a tax perspective, especially for companies in the crypto sector and for crypto investors. The attractiveness of Switzerland as a crypto location is thus further strengthened.

BEPS 2.0

The Base Erosion and Profit Shifting ("BEPS") 2.0 measures initially aimed to address tax issues arising from increasing digitalization of businesses. They are one of the top priorities of the Organization for Economic Co-operation and Development (OECD). BEPS 2.0 sets out two proposals, referred to as Pillar 1 and 2 — one on nexus and profit allocation (Pillar 1) and another on ensuring a minimum level of taxation (Pillar 2). Most rules are expected to come into effect in the beginning of 2023 or relatively shortly thereafter.

Pillar 1

The main objective of Pillar 1 is to align taxing rights more closely with the local market engagement. The goal is to allocate profits to market jurisdictions irrespective of any physical presence in those jurisdictions and therefore to levy taxes in the end market jurisdictions where goods or services are used or consumed. Furthermore, the application of the arm's length principle to in-country baseline marketing and distribution activities will be simplified and streamlined, with a particular focus on the needs of low-capacity countries.

In-scope companies are the multinational enterprises (MNEs) with global turnover above 20 billion euros and profitability before tax above 10% calculated using an averaging mechanism.

Most financial services companies will likely not be within scope of Pillar 1 as there is an exemption for regulated financial services. However, the exact scope of the exclusion is not yet clear.

Pillar 2

The aim of Pillar 2 is to ensure that multinational enterprises are subject to a minimum jurisdictional effective tax rate of 15% regardless of where their operations are conducted or headquarters are located. The basic concept of Pillar 2 follows the idea that with a global minimum tax rate, international tax competition and thus the incentive for artificial profit shifting within a group shall be further restricted by aligning both the applicable effective tax rate as well as the tax base across different jurisdictions.

The Pillar 2 rules will generally apply to multinational enterprises with global annual turnover above EUR 750m.

Asset management companies or other companies in the financial services industry may be subject to the Pillar 2 rules, if they meet the above-mentioned thresholds. Pension Funds or Investment funds that are Ultimate Parent Entities of an MNE Group or any holding vehicles used by such entities, organizations or funds should typically not be subject to the Pillar 2 rules.

The following example shall illustrate how these rules could be interpreted: [1)]

A Luxembourg domiciled private equity fund makes the investments through separate Luxembourg SPV's. Each SPV has itself (on a consolidated level) less than EUR 750m turnover. The investment manager is domiciled in Switzerland. The private equity fund has a) more than 20 investors; or b) only one corporate investor (which is part of a MNE).

Question 1: At which level is the EUR 750m turnover threshold calculated?

- Alternative a): The consolidation should take place at the fund level. The fund qualifies as the ultimate parent entity. Consequently, this set-up should not be in the scope of Pillar 2.
- Alternative b): The consolidation should take place at the level of the top holding of the investor.

Question 2: At which level is the 15% minimum tax calculated?

- Alternative a): The Fund is considered transparent and is not subject to the 15% minimum taxation in the fund domicile.
- Alternative b): As there is only one corporate investor, the fund should not qualify as an investment entity. If the fund is opaque from a tax perspective in the investor's country, the income is - based on our interpretation of the rules - to be allocated to the fund domicile. This would result in a 15% minimum taxation at the fund level. In case the fund is transparent, the income should be allocated to the investor domicile and must be taxed there at a minimum rate of 15%.

Although not all rules are clear yet, companies that are in scope of either Pillar 1 or Pillar 2 are advised to analyse - sooner rather than later - the implications of BEPS 2.0.

[1)] This analysis is based on our interpretation of the model rules, subject to further clarification.

ATAD III

On 22 December 2021, the European Commission has published a draft Directive laying down rules to prevent the misuse of shell entities for tax purposes (known as anti-tax avoidance directive III ("ATAD III")). By defining minimum substance for undertakings in Member States, the Directive aims to increase scrutiny of shell companies within the EU to prevent them from being used for tax evasion and avoidance.

The Directive would apply to all undertakings that are considered tax resident and are eligible to receive a tax residency certificate in an EU Member State including SMEs, partnerships, trusts and other legal arrangements. There is no minimum threshold applied.

Certain undertakings such as companies listed on a regulated stock exchange, regulated financial undertakings, holdings in the same Member State as shareholders or the ultimate parent entity, or undertakings with at least 5 own full-time equivalent employees carrying out the income-generating activities of the undertaking are excluded from its scope.

An undertaking must pass a set of "gateway" criteria that would indicate whether the entity is "at risk" of being a low-substance entity that could be misused for tax purposes. The (simplified) relevant gateway criteria indicators are:

- Passive Income Flow: 75% of their revenue in the preceding two years is passive income.
- Cross-border activities: either more than 60% of the book value of specific assets was located outside of the Member State in the preceding two years or more than 60% of the undertaking's 'relevant income' is earned or paid out via cross-border transactions.
- Administration outsourcing: the entity has outsourced the administration related to day-to-day administration and decision-making on significant functions to other entities in the preceding two years.

If an entity resident in an EU Member State crosses all three gateway tests, it will be subject to reporting obligations under ATAD III. Specific information must be disclosed in the annual tax return that will indicate whether an entity fulfills the required minimum substance indicators (i.e. exclusive use of premises, availability of an active bank account in the EU and qualified directors or employees). If the entity does not have the required minimum substance indicators, it would be presumed to be a shell entity and has the possibility to rebut this presumption by proving that it has minimum substance or that it is not misused for tax purposes.

If a company qualifies as a "shell" entity under ATAD III, this entity may not be able claim tax benefits provided for by EU Directives (e.g. the Parent-Subsidiary Directive or the Interest and Royalties Directive) and bilateral tax treaties (in particular, it may not be able obtain a tax residence certificate valid for claiming treaty or EU tax benefits). Additionally, the proposed Directive will provide for a CFC (Controlled foreign company)-type taxing right over the "relevant income" of a shell entity such that the entity's shareholder(s) – to the extent resident in an EU Member State - shall tax this income.

If adopted, Member States will be required to implement the Directive by 30 June 2023 for an application as from 1 January 2024. The Directive, however, will have a backlooking effect (since the gateway criteria should be assessed based on the circumstances existing in the preceding two years – i.e. FYs 2022 and 2023).

Therefore, it is of highest importance that Swiss based asset managers start assessing the set-up of their investments as of today in order to analyze whether a reporting obligation might apply and, if so, whether withholding tax exemptions/reduced rates or other taxes could be adversely impacted as a result of these rules.

Limited Qualified Investor Fund (L-QIF)

In December 2021, Swiss parliament adopted the revision of the Collective Investment Schemes Act ("CISA") with its core element being a new innovative fund type, the Limitited Qualified Investor Fund ("L-QIF").

The L-QIF, unlike any other fund type in Switzerland, will not require FINMA product approval which will significantly accelerate the time-to-market and lead to a reduction in formation costs. In turn, to safeguard investor protection, L-QIFs *(i)* are open for qualified investors only as defined in the CISA (e.g. occupational pension schemes, large companies, family offices established for high-net-worth private clients) and *(ii)* must be managed by financial institutions under prudential supervision.

L-QIFs are very flexible in nature: They may be set up as open-ended structures (contractual investment fund, investment company with variable capital) or as closed-ended structures (limited partnership for collective investment) within the meaning of the CISA and can benefit from liberal investment rules both in terms of investment products and investment techniques.

Due to the Swiss withholding tax regime as well as the persisting restrictions on the offering of Swiss financial products abroad, in particular in the EU, L-QIFs will mainly target domestic investors. However, the introduction of this new fund type will create an attractive Swiss vehicle and thus strengthen the Swiss financial center as a production location, especially in the alternative investments area.

On the assumption that the referendum deadline in April 2022 expires unused, Swiss government will enact the implementing provisions and submit them for consultation in mid-2022. The revised CISA will likely enter into force in the second quarter of 2023.

SECA Model Documentation

Recognizing the market success of the VC Model Documentations and the fact that these have become the market standard for VC/PE investments in Switzerland, the two sets of the VC Model Documentations are being continuously revised and updated under the guidance of SECA's Legal & Tax Chapter by the two standing working groups of external experts to reflect relevant legal and regulatory changes and market developments.

In March 2022, the standing working group has launched the first edition of a new Convertible Loan Model Documentation to facilitate and standardize investment terms for convertible loan investments into Swiss startup companies (www. seca.ch/Templates/Templates/Convertible-Loans-Model-Documentation.aspx). For 2022, the standing working groups' prime focus will be to launch an updated 2nd edition of the VC Model Documentations "light" as well as an updated 5th edition of the VC Model Documentation "large".

This is a glimpse of relevant recent or imminent legal, regulatory and tax changes and 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.

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