Chapter Legal & Tax

Swiss Corporate Law Reform

In June 2020, the Swiss Parliament finally adopted the text of a general corporate law reform (the “Swiss Corporate Law Reform”), thereby ending a process that had started almost two decades ago. The Swiss Corporate Law Reform covers four main topics:

- First, compensation rules and thereby the incorporation of the Compensation Ordinance (Verordnung gegen übermäßige Vergütungen bei börsennotierten Aktiengesellschaften) into the Swiss Code of Obligations (and other federal laws).
- Second, a target gender quota of 30% for the board of directors and 20% for the executive committee of publicly listed companies on a “comply or explain” basis.
- Third, disclosure obligations regarding payments to public authorities for major companies in the natural resources sector.
- And fourth, numerous changes to “traditional” corporate law such as permitting a 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 the enhancement of shareholders’ rights in terms of better corporate governance.

The provisions on gender quotas and the transparency rules in the natural resources sector entered into force on 1 January 2021. The other adjustments are currently not expected to enter into force until 2023. The transitional provisions provide for an adjustment period of two years, during which the companies can amend their articles of association accordingly.

While the overall Swiss Corporate Law Reform understandably meets close attention of all relevant political and economic stakeholders, startup and VC/PE specific interests in the reform appeared underrepresented. Overall and from a VC/PE perspective, some opportunities were missed, including for a lighter rule set for startups during that startup phase.

Responsible Business Initiative

The “Responsible Business Initiative” (as reported in the 2020 SECA Yearbook) has been rejected by a majority of the Swiss cantons on November 29, 2020. As a result, the more moderate indirect counter-proposal adopted by the Swiss parliament will enter into force. In essence, the counter proposal provides for the following new duties imposed on Swiss businesses:

- Non-financial reporting duties on human rights, environmental, social and employment-related matters, largely following the Directive 2014/95/EU of the European Union on Disclosure of Non-Financial and Diversity Information requiring businesses, amongst other things, to outline the due diligence practices and processes applied in relation to these non-financial matters, the measures taken in this context and the main risks associated with them.
- Due Diligence and transparency duties (with a corresponding reporting duty) with respect to conflict minerals (i.e., minerals or metals containing tin, tantalum, tungsten, or gold from conflict or high-risk areas) and the prevention of child labor, for instance requiring businesses to implement a management system and supply chain policy addressing conflict mineral and child labor related issues.
The new non-financial reporting duties only apply to large Swiss “public interest companies”, i.e. publicly traded companies or regulated entities supervised by the Swiss Financial Market Supervisory Authority FINMA, which over the course of two consecutive business years employed at least 500 full-time employees on average and either had a balance sheet sum of at least CHF 20 million or an annual turnover of at least CHF 40 million. On the other hand, the due diligence and reporting duties related to conflict minerals and child labor apply to all businesses that either trade or process conflict minerals in Switzerland or offer goods or services in relation to which there is reasonable suspicion of child labor.

While the non-financial reporting duties seem less relevant in a startup and VC/PE context due to rather high thresholds for their applicability, it should be carefully assessed by all businesses (irrespective of their size and nature) whether there might be any indirect involvement in conflict minerals or child labor. The new law will likely enter into force at the end of 2021.

Covid-19 home office and cross-border commuter tax rules

After the first confirmed case of Covid-19 on 25 February 2020, Switzerland has been facing numerous challenges putting a strain on health and economic sectors. While lots of measures have started to gradually shape our daily life, it is less clear how Covid-19 will impact the taxation of salaried employees, self-employed as well as of the employers. Some unilateral and bilateral measures have been taken by the Swiss government and the cantons with the aim of trying to answer to tax questions related to the new pandemic situation. In particular working from home creates tax questions in relation to cross-border commuters (i.e. employees living in one of the bordering countries and working in Switzerland) and the creation of permanent establishments.

Cross-border commuters

The taxation of the salary of cross-border commuters is ruled in the double tax treaties with the bordering countries of Switzerland. As a general rule, Switzerland has the right to tax only the income related to Swiss working days of salaried employees living outside of Switzerland. Working days spent outside of Switzerland would generally be taxed by their country of residence.

As a result of Covid-19 measures taken by the countries, employees may have been obliged working from home, which could potentially lead to change the way employees would be taxed on their Swiss income. The Swiss government concluded between May and October 2020 mutual agreements with most of the bordering countries (Liechtenstein, France, Germany and Italy) to determine the status of cross-border commuters during these exceptional times.

The Covid-19 mutual agreements generally foresee that cross-border commuters that are forced to work from home\(^1\) continue to be taxed as if they would work physically in the office in Switzerland. Additionally, some of the Covid-19 mutual agreements foresee that if a cross-border commuter has to remain in Switzerland due to the Covid-19 measures (e.g. stay overnight in a hotel), these days do not count as “non-return days”\(^2\). This should avoid that the employee loses its status as a “cross-border commuter” in the sense of the double tax treaty.

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\(^1\) i.e. at the residency of the employee

\(^2\) Special rules to be considered for Germany as a result of the 60 days-rule
As the Covid-19 mutual agreements contain exceptional rules, they are applicable only for a predefined time period. Most of the Covid-19 mutual agreements renew for one month at a time until terminated by any of the states.

In relation to all other countries, where no specific Covid-19 mutual agreements exist, the rules according to the applicable double tax treaty apply. As a general rule, Covid-related home office days are therefore to be treated as working days at the place of the home office.

Permanent establishment as a result of home office

In general, a home office may create a permanent establishment (“PE”) of a company. This would mean that a company creates a limited tax liability at the place of the residency of the employee and would have to file there a tax return. The qualification as a PE may be relevant in the international context (e.g. employee of a Swiss domiciled company working from his home abroad) and in the intercantonal context (e.g. employee of a company domiciled in one canton working from his home in another canton).

The OECD is of the view that an exceptional and temporary change of the location where employees exercise their employment because of the Covid-19 crisis, such as working from home, should not create new PEs for the employer.

Some countries have published exceptional rules that provide a relaxation of the PE rules for employees whose international mobility is restricted due to Covid-19 and who have to work from home abroad. The Swiss tax authorities did so far not issue specific exceptional rules. However, it is expected that most cantonal tax authorities will deviate from the strict PE rules when assessing the Covid-19 driven home office activities of employees.

Generally, we recommend that companies assess the tax consequences of the home office set-up not only for the time period where the exceptional rules are applicable, but monitor the tax consequences also after the measures have expired and we are “back to normal”.

Exchange Traded Products as an investment vehicle for Crypto and Private Equity Investments

Switzerland is known for being one of the most innovative financial markets globally. One of the newest financial innovations, the actively managed Exchange Traded Product (ETP), helps to democratize investments in private equity. One of the key hallmarks of ETPs is that they can be issued by a special purpose vehicle without requiring the guarantee of a bank or broker (unlike a structured product). ETPs require according to the listing rules however a market maker, but do not require authorization from a regulator like a fund. The product documentation consists of a base prospectus and final term sheets for each additional new product that will be issued. Once the based prospectus is listed, additional products can be issued and listed within a very short period of time, unlike in case of a base prospectus of structured products. As a listed financial instrument, it will be subject to the ongoing rules and regulations of listed issuers under the listing rules. ETPs will however benefit from the liquidity and global accessibility like any other listed financial instrument.

From a tax perspective, an ETP may be very attractive in comparison to a Swiss issued fund, where distributions are subject to Swiss withholding tax of 35%.
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Table 1: Comparison of financial instruments

Swiss Withholding Tax and Transfer Stamp Tax Reform

In order to strengthen the Swiss capital market, the Swiss Government plans to introduce a withholding tax and transfer stamp tax reform. Currently, interest payments on Swiss client credit balances, Swiss issued bonds and bond-like instruments are subject to a withholding tax of 35%. The current withholding tax regime on interest payments is neither beneficial for Switzerland as a financial market nor satisfying as an instrument for securing tax. The main concern is the withholding tax on interest payments on Swiss issued bonds, which results in many bonds being issued abroad.

The Swiss Government therefore started a consultation process with various stakeholders and representatives of the financial services industry on a withholding and transfer stamp tax reform. The main innovation was the introduction of the paying agent principle for interest payments. This would have obliged the paying agent (e.g. a bank) to withhold the taxes on interest payments to Swiss individuals. Foreign investors and domestic legal entities would have been excluded.

The results report of the consultation process was published on October 28, 2020. The proposed reform faced hard opposition from the financial institutions and several other stakeholders. The main arguments were that the paying agent principle would cause a significant additional administrative burden for financial intermediaries. Additionally, the paying agent principle would cause problems in particular for interest received by accumulating Swiss and foreign collective investment schemes. For this reason, it is expected that the withholding tax reform will not be implemented as proposed.

It is expected that a redrafted and amended withholding tax reform will be announced soon. A possible amendment to the federal act is the general withholding tax exemption of interest payments on Swiss issued Bonds.
Sustainable Finance

The critical role of the financial services industry in pursuing the global agenda to promote environmental, social and governance (ESG) matters has turned to the attention of the public over the past few years and has led to various initiatives on sustainable finance worldwide. Sustainable finance is generally understood as any form of financial services that integrate ESG criteria into business and/or investment decisions for the lasting benefit of both clients and society at large. The importance of ESG conform investments has risen sharply, for all sectors such as wealth management, investment advice, pension funds and insurance companies. For example, sustainable financial investment in Switzerland surged from CHF 141.7 billion in 2015 to over CHF 1,163 billion in 2019.

From a regulatory perspective, particularly the European Union (EU) enacted a comprehensive set of measures to tackle sustainable finance, including, *inter alia*, (i) the Non-Financial Reporting Directive (NFRD), (ii) the Sustainable Investment Framework (Taxonomy) and (iii) the Sustainable Finance Disclosure Regulation (SFDR). Under these regulations, EU corporates are obliged to disclose ESG data relating to their business operations (NFRD related) which is subsequently collected and screened by investment firms against technical criteria in order to classify the sustainability of their investment products (Taxonomy related). Such analysis is further shared with the public through firm websites, pre-contractual materials and periodic reports (SFDR related).

The EU sustainable finance regulation which in large parts already is or will be applicable in the near term requires considerable efforts from the private equity industry to ensure compliance. This holds true not only for EU based firms but also for Swiss companies to the extent their operations include management of investment funds established within the EU territory.

Switzerland, apart from the new non-financial reporting obligations on ESG matters for certain public enterprises and financial services providers which will be introduced in the foreseeable future as a result of the rejection of the so-called Responsible Business Initiative (*Konzernverantwortungsinitiative*) and the simultaneous adoption of the parliamentarian counterproposal, did not legislate on sustainable finance thus far. However, the Swiss Federal Council, driven by the respective EU regulations, in the recent past repeatedly confirmed its clear intention to further transform Switzerland into a leading location in terms of sustainable finance. To this end, on June 24, 2020 the Swiss Federal Council adopted a report and guidelines on sustainability in the financial sector in an effort to ensure continued improvement of the competitiveness of Switzerland’s financial centre with effective contributions to sustainability. Amongst other measures, the State Secretariat for International Finance (SIF) was mandated to evaluate and propose legislative amendments until autumn 2021 with a particular focus on the prevention of greenwashing, i.e. feigned sustainable business activity in terms of environmental impact (also a focus topic for the Swiss Financial Market Supervisory Authority (FINMA)). SECA will continue to closely follow these developments and to report on concrete actions and legislative initiatives relevant for the Swiss private equity industry.

DAC6

Mandatory disclosure requirements under the Directive on Administrative Cooperation (2011/16/EU, “DAC6”) are a new reporting standard that apply to cross-border tax arrangements, which meet one or more specified characteristics (hallmarks), and which concern either more than one EU country or an EU country and a non-EU country. DAC6 entered into force in the European Union (EU) on June 25, 2018 and apply as of July 1, 2020.
As a result of the severe disruption caused by the COVID-19 pandemic, the EU allowed Member States to defer the DAC6 reporting deadlines by up to six months, as follows:

- to February 28, 2021 for the interim period (i.e. for historical arrangements between 25 June 2018 and 30 June 2020);
- to January 31, 2021 for arrangements implemented after 1 July 2020 as well as any ongoing arrangements put in place post 1 January 2021 (for those arrangements the 30-day reporting deadline applies).

Most EU Member States have opted for a six-month deferral, with the notable exceptions of Austria (three-month extension), Finland and Germany (no deferral).

Failure to comply with DAC6 could mean facing significant sanctions under local law in EU countries and reputational risks for businesses, individuals and intermediaries.

Although the DAC6 regime has not been implemented in Switzerland, it might have impact on Swiss based entities / individuals carrying out operational activities within the EU.

ATAD

The EU Anti-Tax Avoidance Directives (“ATAD 1” - (EU) 2016/1164 of 12 July 2016 and “ATAD 2” - (EU) 2017/952 of 29 May 2017) are part of the Anti-Tax Avoidance Package of the EU and provide for the minimum harmonization of rules in the areas of controlled foreign corporations (CFCs), hybrid mismatches and interest deductions, and require the introduction of a general anti-abuse rule and an exit tax by the EU Member States. Both directives form part of a larger anti-tax avoidance package adopted by the EU in response to the OECD’s BEPS project.

The majority of the EU Member States have already adopted the ATAD 1 and ADAD 2 requirements into their national laws.

ATAD tax rules have brought significant changes to the tax law, and increased the complexity to a number of tax areas. As a result of the implementation of both directives, carrying out of business activities across the EU may be subject to further restrictions and as such, requires proper planning.

In particular, Article 6 of the ATAD 1 which mandate Member States to introduce a General Anti-Abuse Rule (“GAAR”) may be considered a big challenge for a lot of companies. The GAAR allows tax authorities to look at business arrangements and determine whether the primary purpose of those arrangements is to gain an unintended tax advantage. These are generally arrangements that do not reflect economic reality or that do not have valid commercial reasons. EU Member States are currently in the process of implementing additional criteria such as minimum substance requirements which request economic activity to be supported by staff, equipment, assets, and premises in order to benefit from tax treaties.

As a result of the implementation of those regulations it will be increasingly relevant for the future structures to demonstrate business purposes of an arrangement, and to ensure that there are adequate functions and substance to achieve these purposes.

Infrastructure Investments under OPP2

On August 26, 2020, the Swiss Federal Council made several amendments to ordinances relating to occupational pension plans, including the Ordinance on Occupational Retirement, Survivors’ and Invalidity Pension Plans (OPP2). The amendments to OPP2 came into force on October 1, 2020.

As it relates to art. 53 and 55 OPP2, the amendments implement the parliamentary motion ‘Weibel’ which aimed at making infrastructure investments more attractive to pension
funds. Before, infrastructure investments were allocated to the alternative investment ‘bucket’. Now, infrastructure investments are included in a dedicated asset class within OPP2 and can account for a maximum share of 10% of total assets. The share in the alternative investment class remains limited to 15%.

However, despite the amendments to art. 53 para. 1 OPP2, para. 5 of the same provision was not amended. According to para. 5, only alternative investments can have leverage. Thus, in case of leveraged infrastructure investments, such investments would continue to be considered alternative investments and count towards the 15% share in the alternative investment class. Whilst the Federal Social Insurance Office (FSIO) published a clarification setting forth that leverage at the level of an infrastructure portfolio company does not qualify as leverage under the OPP2, whereas leverage at the fund or fund-of-fund level does, market participants are seeking additional clarity as to what exactly leverage means in this context.

There seems to be consensus amongst asset managers, industry associations and auditors that leverage (Hebel) in the sense of art. 53 OPP2 does address structural leverage only, i.e. leverage with the aim to increase returns opposed to borrowings used to provide short-term working capital. Together with other industry associations, SECA’s Legal & Tax Chapter is working on an industry positioning paper. Beyond the FSIO’s clarification, it sets forth that short-term borrowings at fund/fund-of-fund level with a duration of up to 12 months, e.g. for cash/operational liquidity management, capital calls or hedging, shall not be considered leverage under Art. 53 OPP2 and, consequently, respective infrastructure investments shall continue to be included in the infrastructure asset class. Also, when qualifying the availability of such short-term borrowings, its effective use shall be decisive rather than the mere legitimacy according to the applicable fund documentation. Further clarifications are planned, including recommendations how legislators should address this topic at statutory level.

**Limited Qualified Investor Fund**

In August 2020, the Federal Council published its dispatch on the revision of the Collective Investment Schemes Act ("CISA"). At the heart of the revision is the introduction of a new fund type, the Limited Qualified Investor Fund ("L-QIF").

L-QIFs 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. The fund itself does not require FINMA approval which is a real innovation in Swiss fund law. The abolition of product approval will significantly accelerate the time-to-market and lead to a reduction in formation costs.

To safeguard investor protection, L-QIFs must be managed by prudentially supervised financial institutions, as further defined in the law. These institutions are responsible for ensuring compliance with all regulations applicable to L-QIFs, which results in indirect product supervision. L-QIFs are only available to qualified investors and can benefit from liberal investment rules. Indeed, the investment restrictions of the CISA regarding permissible investments, investment techniques, use of derivatives and risk diversification do not apply.

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

It is expected that the revised CISA introducing the L-QIF will enter into force in mid-2022.
SECA Model Documentation

VC 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. For 2021, the standing working group’s prime focus will be to launch an updated version of the VC Model Documentations “light” and the first edition of a new Convertible Loan Model Documentation in Q2/Q3 2021.

LP Model Documentation

Finally, SECA’s Legal & Tax Chapter, together with the Asset Management Association Switzerland, intends to revise the model documentation for Swiss limited partnerships (LP) and to obtain acknowledgment of such revised LP model documentation by the Swiss Financial Markets Supervisory Authority (FINMA) in Q2 2021. This serves the purpose to reflect the new financial markets regime introduced by the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) and to ensure continued reliability of the LP model documentation as the basis for application procedures with FINMA.

Political Activities relating to the Swiss Startup Ecosystem

2020 was a year during which a number of political motions were pushed forward which aimed to increase the attractiveness of the Swiss startup and venture ecosystem. Here’s a selection of the main developments:

1. Covid19 Guarantee Program: When the Federal Covid guarantee program was launched in spring 2020, a large number of startups were left out, in particular companies that were not yet generating revenues were not able to benefit from the support. Thanks to continuous stakeholder commitment (including SECA), a startup guarantee program of CHF 154 million from the Federal Council was launched. By the end of 2020, just under CHF 100 million of this facility had been granted to startups.

2. Taxation of Employee Shares: The Swiss Federal Tax Administration (FTA), following a hearing with representatives of the Swiss startup ecosystem in 2019, enacted significant adjustments to Circular No. 37. These adjustments, among other improvements, have led to a “nationalization” of the so-called “5 years-rule” which allows the realization of a fully tax-free capital gain from selling employee shares after a holding period of five years. This rule was previously only applied in certain Cantons (including Zurich) but was not mandated to all Cantons under the Circular No. 37. It will have to be seen how strictly Cantons will apply the new rules but the amendment is a first success for more concentrated political lobbying of the startup and venture stakeholders.
3. Taxation of Business Angels: An interpellation (20.4048) was submitted by Andri Silberschmidt to the Federal Council with respect to the requalification of tax free capital gains into taxable income in case of professional securities dealers, a topic of particular concern to business angels with Swiss tax residence. Although the reply of the Federal Council did not result in any direct legislative action, the FTA has offered to enter into a more structured dialogue with the Swiss startup ecosystem in order to clarify remaining concerns under the current Swiss tax framework. The dialogue is currently ongoing.

4. Expert group on Switzerland as a tax location: In the fall of 2020, the “Expert Group on Tax Location Switzerland” met for the first time. The group of experts has been commissioned by Federal Councillor Ueli Maurer to develop areas of action to strengthen Switzerland as a tax location. In total, it has formulated 16 fields of action to strengthen Switzerland as a tax location. For the Swiss startup ecosystem, the following sub-areas are particularly relevant:
   a. Reduction of capital and wealth taxes: Reducing substance-depleting taxes strengthens the resilience of companies, promotes investment and makes Switzerland more attractive for capital-heavy companies.
   b. Eliminate transaction taxes: Reducing transaction taxes promotes risk diversification, supports equity financing and strengthens location conditions.
   c. Establish financing neutrality: By maintaining financing neutrality, the tax system supports the productive use of capital and thus promotes growth.
   d. Promote research, development and innovation: Promoting research, development and innovation forms the basis for greater competitiveness, location attractiveness and growth.
   e. Expand loss offsetting: Expanded loss offsetting strengthens companies’ ability to bear risks.

5. By the end of June, the Finance Department intends to submit measures based on the recommendations of the expert group to the Federal Council for a decision.

6. Startup Visa: While many industrialized and emerging countries have already introduced special work permits for startup, Switzerland does not have a separate permit category for founders of startups. Political initiatives to change this situation have been rejected so far. Discussions are currently underway with Economiesuisse to determine which elements a political initiative should contain in order to take a step forward in this matter.

7. Finally, in spring 2020, the ETH Council has formed a task force that analyzed, among other points, the merits of government-backed matching funds for the Swiss startup ecosystem and/or a Swiss mandate to the European Investment Fund in order to strengthen the access to venture capital for Swiss startup companies in the longer term. The recommendations of the task force are yet up for endorsement on the level of the ETH Council but it is planned to present the results on the occasion of the Swiss Startup Days 2021 in Berne.
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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