"Let's move to Switzerland!"

Companies' immigration to Switzerland
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Overview

A. Introduction

B. Corporate

C. Tax

D. Listed companies
A. Introduction

How to move a company to Switzerland?

• Direct immigration into Switzerland

• Transfer of (some) assets and liabilities from a foreign company to a Swiss company

• Dissolution of the company abroad and transfer of the assets and liabilities to a Swiss entity

• Cross-border merger
A. Introduction

How to move a company to Switzerland?

- Direct immigration into Switzerland
- Transfer of (some) assets and liabilities from a foreign company to a Swiss company
- Dissolution of the company abroad and transfer of the assets and liabilities to a Swiss entity
- Cross-border merger
B. Corporate

Conditions

- The company can be transformed into one of the legal entities of the Swiss Code of obligations

- The laws of the current domicile permit the outbound migration

- The immigrating company will become a Swiss entity only upon the registration in the Commercial register

- Check the "equivalence" of the foreign legal entity with the Swiss legal entities

- The transferred company shows a surplus of net assets
B. Corporate

Actions and documents

- The shareholders' meeting of the foreign company shall resolve:
  1. transfer of the registered office to Switzerland
  2. amendment of the articles of association according to Swiss law
  3. rearrangement of the existing share capital and drafting of the balance sheet in Swiss francs
  4. ascertainment of Swiss law as the authoritative legislation
  5. ascertainment of the principal place of business
  6. appointment of an auditing company (if any)
  7. appointment or confirmation of the managers (if any)

Art. 161 et seq. PILA

Swiss compulsory rules on corporate governance shall be respected (quorum, voting rights, qualified majorities, exclusive competencies)

Art. 814 (3) CO

At least one representative with full representation powers to be domiciled in Switzerland
B. Corporate

Actions and documents

• Two **legal opinions** are required:
  1. A legal opinion confirming that the company can be transformed into a Swiss corporation
     • Usually issued by the **Swiss Institute of Comparative Law** (approx. 15 days delivering time)
  2. A legal opinion confirming that the migration of the legal seat is possible according to the laws of the current domicile
     • **Formal decision authorizing the outbound migration** of the company
     • Alternatively: an opinion of the Swiss Institute of Comparative Law or a declaration of a notary public of the country of origin (accepted by the office of the commercial register of Canton Ticino)

Art. 161 et seq. PILA

Art. 126 Swiss Commercial Register Ordinance
B. Corporate

Actions and documents

• Other documents:
  • Balance sheet
  • Special report of the auditor confirming a surplus of net assets
  • Statement about the main place of business
  • Legalised signatures of company's representatives
  • Proof of the existence of the company

• Application to the Commercial register of the new Swiss domicile of the company

• The transferred company will be considered a Swiss company as soon as it is registered in the Commercial register
B. Corporate

Consequences

- The company (and its assets and liabilities) are transferred

- In particular, all employment contracts are transferred (information to the employees, insurance and pension matters, working permits, ...)

- In particular, all contracts with third parties are transferred (caveat: contractual clauses?)

Art. 126 Swiss Commercial Register Ordinance

Coordination between Swiss and foreign regulators requirements
B. Corporate

Excursus: transfer of assets and liabilities?

- Transfer of the company's domicile
- Transfer of (some) assets and liabilities from a foreign company to a Swiss company
- Dissolution of the company abroad and transfer of the assets to a new Swiss entity
- Cross-border merger
B. Corporate

**Excursus: transfer of assets and liabilities?**

- The laws of the current domicile permit the outbound transfer of assets and liabilities
- The transferred assets and liabilities show a surplus of net assets
- Transfer base is an *inventory of the transferred assets and liabilities*
  - Assets and liabilities need to be described in the inventory in order to be transferred
  - In particular, some cantonal Register of Commerce request that the *contracts to be transferred are identified singularly by disclosing the names of the parties, the object and the date.*
- The transfer has to be filed with the commercial register
  - *The inventory is public*
B. Corporate

Excursus: transfer of assets and liabilities?

- Consequences: all assets and liabilities registered in the inventory are transferred "uno actu"

- However, it is questionable whether the consent of business partners is required to transfer the agreements. *In dubio*, it is advisable to obtain the consent

- **If the transfer of assets and liabilities is not possible pursuant to Merger Act and foreign law, an asset deal may still be possible:**
  - No public inventory is required (confidentiality),
  - Each single asset and liability shall be transferred
C. Tax

Taxes concerned by the immigration

• Capital stamp duty
• Securities transfer stamp tax
• Registration duties
• Corporate income tax
• Annual Capital Tax
• Federal withholding tax
• VAT
C. Tax

Capital stamp duty

- In principle, the immigration does not trigger any capital stamp duty
- Only in the case of a shareholder's contribution to the equity during the immigration

Art. 5 et seq. Federal Stamp Tax Act
C. Tax

Securities transfer stamp tax

• The shares of the migrating foreign company and any taxable equity or debt securities are not subject to federal securities transfer stamp tax upon the immigration into Switzerland.

• After the immigration the new Swiss company may qualify as a Swiss securities dealer and thus be liable to levy transfer stamp tax.

  • Condition: taxable securities in excess of CHF 10 million

  • Requirements: registration as a Swiss securities dealer within 6 months after the end of the business year during which the threshold has been exceeded.
C. Tax

Registration duties

• The migration to Switzerland will trigger some minor fees for the Swiss commercial register entry as well as for notary services
C. Tax

Corporate income tax

• If the accounting values of assets or liabilities contain "hidden reserves" at the date of legal immigration to Switzerland, it is generally possible to obtain a corresponding "basis step-up"

• Evidence for the "basis step-up"
  • It is given by showing proof that the foreign tax authority has applied an "exit taxation" on such hidden reserves

• The difference (if any) between the lower accounting values and the higher Swiss tax values would be treated as a "taxed hidden reserve", and ongoing depreciation may be taken from such stepped-up tax values
C. Tax

Federal withholding tax

- The distribution of reserves which stem from capital contributions to the shareholders can be made without applying the withholding tax, if the company can prove that they stem from capital contributions made by its shareholders after 1996. The relief does not apply to any retained earnings, even if they are "imported" from abroad.

- The conditions for applying withholding tax reliefs under double taxation treaties have to be verified from the perspective of the ultimate beneficial owner.
C. Tax

VAT

• For Swiss VAT purposes, the transfer of the legal seat to Switzerland should be treated as a new incorporation of a Swiss company.

• The migration to Switzerland (deemed creation of a new Swiss VAT subject) may trigger a VAT liability on:
  - any goods physically imported to Switzerland regardless of whether a consideration is paid or not,
  - on services "imported" from a supplier who is not a Swiss VAT subject, including intangible assets treated as services for VAT purposes, provided that such deemed import of services or intangibles is made against consideration (usually not the case by immigration of companies).

• The new company is allowed to deduct the import VAT with respect to the goods or services imported.
D. Listed companies

Criteria for being listed in Switzerland

• The company must have equity of at least CHF 25 million on a consolidated basis.
• **At least 25% of the shares** shall be publicly traded.
• In the three financial years prior to the listing application the company must issued annual financial statements that comply with the financial reporting standards recognized by the stock exchange (IFRS / US GAAP).
• The auditors of the company must fulfill the requirements for auditors of public companies.
• The shares must be negotiable and transfer restrictions must not impede the market.
• The issuer must ensure that transactions can be cleared and settled via the settlement systems that are permitted by SIX Exchange.
• The company must appoint a paying agent in Switzerland.
D. Listed companies

Recurring criteria

- Publish annual audited financial statements and half-year non-audited financial statements
- Corporate Governance: "comply or explain" applies, meaning that the rules are rather flexible
- **Disclosure of all salaries of board members and aggregate numbers on top management** with individual disclosure of the member with the highest compensation
- Ad hoc publicity
- Disclosure of management transactions
- Investors are obligated to disclose their purchase or sale of company's shares once certain threshold values have been reached (3%, 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50% and 66 2/3%).
- **Swiss rules on tender offers** apply, including the necessity to launch a mandatory bid if the acquirer passes the 33.3% threshold (this threshold can be lifted to up to 49% or the mandatory offer rule can also be declared by the company to not apply at all).
Thank you for your attention!
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