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Doing Business In...

Switzerland

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Pestalozzi

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Law and Practice

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1. Legal System

1.1 Legal System and Judicial Order

Established in 1848 as a federal state, Switzerland is defined by its three levels of government: the Confederation, the cantons and the municipalities. While the 26 cantons are sovereign and exercise all law-making powers that are not vested in the Confederation, the Constitution assigns major legislative powers to the federal level, including civil and commercial law, civil and criminal procedures and important regulatory areas (such as financial market law and competition law).

Legislative, Executive and Judicial Structure

Legislative branch

The Federal Assembly in Berne is the supreme legislative authority of the Swiss Confederation. As a bicameral parliamentary system, with its two chambers having equal standing, the Federal Assembly consists of the National Council and the Council of State. The National Council is composed of 200 representatives of the people, whereby the cantons are represented proportionally in accordance with their respective populace. The Council of State as the parliamentary representation of the Cantons comprises a total of 46 members, with 20 cantons appointing two and six smaller Cantons appointing one delegate each.

Executive branch

The Federal Council is the supreme executive authority and the head of the Swiss federal administration. Also located in Berne, it consists of seven members (federal councillors), with each one in charge of a specific department. While elected by the Federal Assembly for a term of four years, every year the Federal Assembly appoints one of the federal councillors as President of the Confederation. The President, however, neither holds any specific powers nor qualifies as a formal head of state, but instead as “primus inter pares” performs merely representative tasks.

Judicial branch

The Swiss federal judiciary comprises the Swiss Federal Supreme Court (which is headquartered in Lausanne, while its two social security divisions are located in Lucerne), the Swiss Federal Criminal Court in Bellinzona and the Swiss Federal Administrative Court in St Gallen.

Although its 38 justices are elected by the Federal Assembly for a period of six years, the Swiss Federal Supreme Court is independent of both the Federal Assembly and the Federal Council. The Swiss Federal Supreme Court comprises seven chambers: two responsible for matters of private law, two for Constitutional and public law, two dealing with social security law, and one with Criminal Law.

As the supreme judicial authority of the Swiss Confederation, the Swiss Federal Supreme Court's two main responsibilities entail ensuring a consistent application of the federal laws by cantonal and federal courts in addition to protecting individual constitutional rights. While it can declare cantonal laws to be unconstitutional, the Swiss Federal Supreme Court is bound by federal legislation and international law. It does not have the authority to challenge acts of the Federal Assembly as being unconstitutional. Unless evidently and materially flawed, the Swiss Federal Supreme Court as an appellate court does not examine the facts as established in the appealed decisions of the lower cantonal or federal courts.

Legal System

Switzerland has a statute-based civil law system. In the hierarchy of legal norms, the Federal Constitution and international treaties are the sources of law at the highest level. Federal law generally takes precedence over cantonal laws, while regulations and instructions enacted by the Federal Council, the cantonal governments or other administrative authorities must comply with statutory law.

Swiss law can generally be divided into public and private law.

Public law governs the organisation of the state, as well as the relationships between the state and private individuals, entities and associations of individuals (eg, companies). It can be further subdivided into, inter alia, constitutional law, administrative law, tax law, criminal law, criminal procedure, public international law, civil procedure, debt enforcement and bankruptcy law, and financial market law.

Swiss private law, on the other hand, regulates the relationships between individuals. The two primary sources of Swiss private law are the Swiss Civil Code (governing the law of persons, family law, law of succession and property law) and the Swiss Code of Obligations (containing provisions on contract law, law of torts, commercial and company law as well as securities law).

2. Restrictions to Foreign Investments

2.1 Approval of Foreign Investments

There are no generally applicable Swiss acts (such as catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest, regardless of the industry sector. Foreign investments are, in principle, not hampered by significant barriers and there are no substantial discriminatory effects on foreign investors or foreign-owned investments in Switzerland.

However, foreign investments in companies engaged in certain regulated industries and sectors in Switzerland might require governmental permission or approval. Examples of these sectors/industries are:

- banking and financial services in general;
- insurance;
- traffic;
- real estate;
- defence; and
- the media.

In particular, depending on the area, investments that are above certain thresholds may need authorisation or may not be permitted.

Further, with respect to certain state-licensed undertakings and services, such as the telecommunications or nuclear energy sectors (see **3. Corporate Vehicles**), granting a state licence to a foreign undertaking (or to an undertaking with foreign investors) may, among other things, depend on whether reciprocal rights are granted in the country of the respective undertaking or investor.

In light of Switzerland's rather relaxed policies of benevolent non-interference towards foreign investment and because of its economic and political stability, transparent and fair legal system, reliable and extensive infrastructure and efficient capital markets, it is fair to say that Switzerland is a highly attractive destination for foreign investors.

For state-licensed undertakings and services, no distinctions are generally made between foreign and domestic applicants.

Certain local permissions and authorisations are issued on a cantonal (state) level and need to be assessed on a case-by-case basis as to whether the grant of, for example, a cantonal licence in a given sector might depend on the nationality or foreign residence or domicile of the applicant.

With regard to currency regulations and exchange controls, no controls exist on inbound investments or the repatriation of profits and capital on disinvestments.

2.2 Procedure and Sanctions in the Event of Non-compliance

The steps for foreign investors to obtain approval depend on the regulated sector/industry and, similarly, the consequences of investing without approval depend on the type of sector/industry. The length of the process could be considerable and the consequences could be manifold; in particular, withdrawal of a licence and a ban on conducting business in Switzerland.

2.3 Commitments Required from Foreign Investors

As with **2.1 Approval of Foreign Investments** and **2.2 Procedure and Sanctions in the Event of Non-compliance**, the conditions vary, depending on the regulated sector. Particularly, in certain areas, reciprocity is the main element, in addition to source of funds.

2.4 Right to Appeal

There is always the possibility to challenge a decision by an authority in court.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entities

All internationally known business vehicles are available in Switzerland, including share corporations, limited liability companies, co-operatives, partnerships and joint ventures. While Switzerland has ratified the Hague Trusts Convention, trusts are not available under Swiss substantive law. However, foundations can serve similar purposes.

The most common form of business vehicle used by foreign companies is a share corporation. The legal regime for the share corporation, including corporate governance, is very developed and flexible. However, limited liability companies are increasingly common as they are less regulated and because the "check-the-box" (entity classification election) rules apply to US parent companies.

Both the Swiss share corporation and the limited liability company can be established by one or more shareholder(s)/quota-holder(s), who can be either natural or legal persons. The mandatory minimum capital of the share corporation is CHF100,000, divided up into registered or bearer shares of a nominal value of CHF0.01 or more, which must be paid up or covered by contributions in kind on the basis of at least 20%, but with an absolute minimum threshold of CHF50,000 to be paid-up. The limited liability company requires a minimum capital of CHF20,000 (divided in minimum contributions per quota-holder of CHF100 each) to be fully paid-up or covered by contributions in kind at the time of establishment.

The shareholders of a Swiss share corporation do not appear in a publicly available register (except pursuant to the disclosure rules for listed companies). In contrast, quota-holders of a Swiss limited liability company must be registered by name in the publicly available Commercial Register.

3.2 Incorporation Process

An application must be submitted to the Commercial Register, containing all of the following:

- the public deed of the founders' meeting;
- publicly authenticated articles of association (articles);
- evidence that the initial share capital has been paid in (or evidence that contributions in kind have been made);
- a certificate confirming the appointment of the board of directors/management and the auditors;
- the nationality or domicile of the board members/managers; and
- certified signatures of the persons authorised to sign for the company.

The registration process takes typically one to two weeks.

3.3 Ongoing Reporting and Disclosure Obligations

The board/management must submit a business report for approval by the annual shareholders'/quota-holders' meeting. The business report includes the following:

- annual financial statements;
- a management report, if applicable; and
- consolidated statements, if applicable.

A company's annual financial statements are subject to an ordinary audit if, for two consecutive fiscal years, two of the following three threshold values are exceeded:

- CHF20 million for the balance sheet total;
- CHF40 million for revenue; and
- 250 full-time employees.

If a company does not meet the criteria for an ordinary audit, its financial statements are subject to a limited audit. If the shareholders/quota-holders agree unanimously and if the company has no more than ten full-time employees, a company may opt out of the limited audit entirely.

In addition, a tax return must be filed for each business year and special reporting requirements exist for regulated and/or listed companies.

Changes of management and changes of the company's signatories must be registered with the Commercial Register without undue delay by providing the respective resolutions of the shareholders/quota-holders and/or resolutions of the board/management. Amendments of the articles of incorporation must be publicly authenticated and filed with the Commercial Register.

Under the rules on disclosure of ultimate beneficial ownership, any person who alone or by agreement with third parties acquires shares (or quotas) in a company for which shares are not listed on a stock exchange and thus reaches or exceeds the threshold of 25% of the share capital or votes must within one month provide to the company the first name and surname and the address of the natural person for whom it is ultimately acting. Likewise, the shareholder/quota-holder must inform the company of any change to the first name or surname or to the address of the beneficial owner. For as long as the shareholder/quota-holder fails to comply with their obligations to give notice, the membership rights (including voting and dividend rights) will be suspended.

3.4 Management Structures

Swiss corporate law follows a one-tier management system, with the board of directors/management body being the only mandatory corporate body involved apart from the shareholders' or quota-holders' meeting.

The board of a share corporation and the management of the limited liability company must consist of at least one member, with all shareholders/quota-holders having the right either to assume the representation and management of the company or to entrust the management to a third party, who does not need to be a shareholder/quota-holder.

In the case of a share corporation, the following duties cannot be delegated or taken away from the board of directors by the shareholders:

- the establishment of the organisation;
- the appointment, removal and ultimate supervision of those entrusted with management and representation;
- the management of the company and the issuance of necessary management directives;
- the structuring of the accounting system, financial controls and financial planning;
- the preparation of the business report and shareholders' meetings; and
- the notification of negative equity to a judge.

There are no restrictions on foreign managers. However, one person (or, in the case of collective signature, two persons) entitled to represent the company must be resident in Switzerland.

3.5 Directors', Officers' and Shareholders' Liability

Directors and officers are personally responsible to the company, individual shareholders and the companies' creditors for damages caused intentionally or negligently by default of their duties.

Once the shareholders/quota-holders have fully paid up the respective company's capital, they are not personally liable for the company's debt vis-à-vis third parties (eg, the company's creditors). An exception to this rule of separation of liability between a shareholder/quota-holder and the respective company can occur under the concept of "piercing the corporate veil". If the sole shareholder has mixed his or her personal assets with the company's assets, in cases involving conscious undercapitalisation or in connection with undue instrumentalisation of a company for personal interests to the detriment of creditors, Swiss courts have set aside the separate legal personality of the company by holding the shareholder personally liable for the company's debt.

4. Employment Law

4.1 Nature of Applicable Regulations

The employment relationship is regulated by various sources, the most important being the individual employment agreement. In addition, the Swiss Code of Obligations (CO), the Labour Act and collective bargaining agreements (if any) are relevant.

In the employment contract, the parties may freely determine the employment relationship in compliance with the mandatory law. The statutory rules of the CO govern the employment relationship between an employer and an employee, and the Labour Act mainly contains mandatory provisions concerning the health protection of employees.

4.2 Characteristics of Employment Contracts

An employment agreement is an agreement whereby an employee commits (i) to perform work for an employer, (ii) for a defined or indefinite period of time and (iii) against payment of a salary.

Generally, an employment contract does not require a special form (eg, in writing). However, if the contract is related to specific employee categories, such as apprentices and travelling salesmen, it has to be in written form. In addition, some provisions also have to be in written form, such as post-contractual non-compete covenants.

4.3 Working Time

The law distinguishes between normal working hours, overtime and excess overtime. Usually, employment agreements provide that the normal working hours per week shall be somewhere between 40 and 42.5 hours when working full-time.

Any working time in excess of the normal working hours of up to 45 hours per week is considered overtime. Subject to a

written waiver, the employee is entitled to be compensated for overtime by time off in lieu of additional salary (including a 25% mark-up).

The Labour Act limits the maximum working time to 45 and 50 hours per week, depending on the area of work. An employee working in excess of the statutory maximum is entitled to mandatory compensation that cannot be waived.

The provisions regarding the maximum weekly hours, however, do not apply to higher executive employees. However, this only includes employees with significant influence on decisions of major importance that have an impact on the course of business.

4.4 Termination of Employment Contracts

The rules on termination of an employment relationship under Swiss employment law are quite liberal compared to other European countries. Generally speaking, an employment contract may be terminated by:

- mutual consent;
- the expiry of a fixed term; or
- unilateral notice of termination.

Also, an employment contract automatically terminates in the event of the death of an employee. However, the death or bankruptcy of the employer does not lead to an automatic termination of the employment contract.

Under Swiss law, the employer does not need a specific reason for the termination of the employment. All reasons are valid for termination, unless they would make the termination abusive (**5.1 Taxes Applicable to Employees/Employers**). Thus, termination for underperformance or for the reason of headcount reduction is possible, for example.

Upon request by the employee, however, the employer must state in written form the reasons for giving notice of termination. This enables the employee to assess whether or not the notice is abusive.

Furthermore, a dismissal is automatically void if it is given during a mandatory protection period (eg, if an employee is incapacitated from work or on maternity leave). During the probation period, the notice period is seven days. The parties can agree on a maximum duration of three months for the probation period, and the statutory default rule is one month. After the probation period, the contractual notice period applies. If the parties have not agreed on a contractual notice period, there is a statutory default rule (one to three months, depending on the years of service).

Swiss statutory law provides for protection from termination in certain circumstances. The two main areas in which the employee benefits from such protection are (i) cases in which the articulated reasons(s) for termination would constitute an “abusive termination”, and (ii) cases in which the notice of termination is given at an inopportune time for the employee (eg, during illness, pregnancy).

4.5 Employee Representations

Swiss law does not recognise mandatory employee representation. However, employees of companies with at least 50 employees are entitled to appoint an employee representative body.

Certain information and consultation rights of employees exist; eg, in the case of a business transfer (TUPE) or mass dismissal.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

An employee becomes tax-resident and subject to unlimited taxation if he or she is either:

- domiciled with the intent to stay permanently in Switzerland (resident in the country);
- involved in gainful activity in Switzerland and staying there for more than 30 consecutive days, even if domiciled and taxable outside of Switzerland; or
- not involved in gainful activity in Switzerland, but staying there for more than 90 consecutive days.

An employee becomes subject to limited taxation if he or she is either:

- physically working in Switzerland;
- a member of the board of directors or of the company management; or
- working on a ship (other than ships in open ocean) or an aircraft operating in international traffic or in transportation on roads and is paid by a Swiss resident employer or the Swiss permanent establishment of a foreign employer.

Tax-resident employees must pay the following.

- Federal and cantonal income tax – this is payable on worldwide income from all sources (with exceptions such as capital gains on movable private assets, income from non-Swiss real estate where the real estate is directly attributable to the individual, and income from permanent establishments situated outside Switzerland where the permanent establishment is directly attributable to the individual). The federal and, in general, the cantonal rates are progressive. The

federal rate is between 0% and 11.5% and the cantonal rate ranges between 0% and about 34.5%. Federal and cantonal tax returns must be filed annually.

- Cantonal net wealth tax – this is payable on worldwide assets (except non-Swiss real estate where the real estate is directly attributable to the individual, and permanent establishments situated outside Switzerland where the permanent establishment is directly attributable to the individual) minus liabilities. Usually a certain amount is tax-free. Tax rates are generally progressive, with a maximum of about 0.1% to 1%.
- Social security contributions – this includes old-age and survivors’ insurance, disability insurance and compensation for temporary loss of income insurance. This is at a total rate of 10.55% of gross salary liable to contribution (split 50:50 with the employer).
- Pension plan contributions – this is paid according to the specific pension fund regulations (usually split 50:50 with the employer). Rates depend on age, insured salary and pension fund plan.
- Unemployment insurance contributions – this is paid at a rate of 2.2% of gross salary up to CHF148,200 and 1% of gross salary above CHF148,200 and 1% of gross salary above CHF148,200 (split 50:50 with the employer).
- Non-occupational accident insurance premiums – this is paid in accordance with the individual insurance contract, if not paid by the employer.
- Social health insurance premiums – this is paid in accordance with the individual insurance contract.

Non-tax-residents must pay the following.

- Federal and cantonal income tax – this is levied on their taxable Swiss-source gross salary and is usually withheld and paid by the Swiss employer (wage source tax). Tax rates are generally progressive. Rates are about the same as for tax-resident employees (see above, “Tax resident employees”).
- Social security contributions – see above, as for tax-resident employees.
- Unemployment insurance contributions – see above, as for tax-resident employees.
- Exemptions can apply, based on a double taxation treaty between Switzerland and the employee’s state of residence, or a social security agreement between Switzerland and the state of which the employee is a citizen.

Employers must make contributions for the following:

- social security contributions – see above, as for tax-resident employees, at the total rate of 10.55% of gross salary liable to contribution (split 50:50 with the employee);

- pension plan contributions – this is paid according to the specific pension fund regulations (usually split 50:50 with the employee);
- unemployment insurance contributions – this is paid at a rate of 2.2% of gross salary up to CHF148,200 and 1% of gross salary above CHF148,200 (split 50:50 with the employee);
- occupational and non-occupational accident insurance premiums – this is paid in accordance with the individual insurance contract; and
- family allowances contributions – this is paid at a rate of about 0.1% up to 4% of gross salary liable to contribution, depending on the canton and the insurer.

Income tax owed by employees is levied in the form of wage source tax to be withheld by the employer if the employer is an entity in Switzerland (including a Swiss permanent establishment), and:

- the employee is subject to taxation as a non-resident in Switzerland (ie, as opposed to taxation as a resident in Switzerland); or
- the employee does not hold Swiss citizenship nor a Swiss permanent-residence permit type “C” and is not married to a person holding Swiss citizenship or a Swiss permanent-residence permit type “C” either.

5.2 Taxes Applicable to Businesses

Corporate Income Tax (CIT)

- CIT is levied on net profit, not including profit attributed to a permanent establishment or real estate abroad. The federal tax rate is 7.83% of profits before tax. Cantonal rates vary and are usually flat. The maximum effective (federal and cantonal) tax burden varies between 11.5% and 22% of profits before taxes. A tax return must be filed for each business year.
- Dividends and capital gains derived from qualifying participations are tax-exempt under a participation relief scheme.
- There is no separate federal capital gains tax for companies. However, some cantons levy a special capital gains tax on taxable disposal of real estate, rather than the cantonal profit tax. Tax rates are progressive and depend on the holding period. Non-real estate capital gains are part of ordinary income and are taxed accordingly.

Capital Tax

- This cantonal tax is levied on a company’s tax-adjusted net equity at the end of the business year concerned. Rates vary from about 0.001% to 0.53%.

Stamp Duty

Stamp duty is levied on the following.

- Issues of shares, at the rate of 1% of the consideration (at least the par value), provided the cumulated par value and share premium exceed CHF1 million. Exemptions are available, inter alia, for reorganisations.
- Shareholders’ contributions without share issue, at the rate of 1%. Tax relief is possible, inter alia, in the case of debt restructuring.
- Issues of dividend-right certificates without par value, at CHF3 each.
- Transfers for a consideration of certain domestic securities or similar foreign instruments if a Swiss securities dealer (that is, in particular, a domestic bank, securities broker or a corporation with more than CHF10 million balance sheet assets in taxable securities) is involved as a party or intermediary. This is levied at a rate of 0.15% for domestic (Swiss issuer) and 0.3% for foreign (issuer outside of Switzerland) securities (which may be owed 50:50 by each party). Exemptions apply to:
 - (a) the issuance of any securities other than rights in non-Swiss collective investment schemes;
 - (b) the redemption of securities;
 - (c) transfers of foreign bonds to the extent the transfer is made to a foreign buyer or from a foreign seller;
 - (d) handling money-market papers;
 - (e) reorganisations or restructurings;
 - (f) intragroup transfers of shareholdings of at least 20%; and
 - (g) foreign banks and brokers, and qualifying exempt investors.
- Certain insurance premiums, at the rate of 2.5% or 5%.

The tax must be declared and paid within 30 days after the taxable event or on a quarterly basis.

Value-Added Tax (VAT)

VAT is levied at federal level on any:

- domestic supply of goods and services for consideration;
- procurement of services from abroad (usually reverse charge); and
- import of goods.

The standard tax rate is 7.7%. A special rate of 3.7% applies to the hotel and lodging industry, and a reduced rate of 2.5% applies to certain other goods and services, such as water, food or medication.

In general, VAT must be declared and paid quarterly or, in special cases, monthly, twice yearly or yearly.

Dividends Paid

These are subject to a 35% withholding tax, which can be fully or partly refunded (or treaty relief at source may apply) under a double taxation treaty.

Dividends Received

These are taxed as ordinary income of the recipient Swiss company. A participation relief mechanism applies if the recipient holds either:

- shares with a market value of at least CHF1 million in the distributing company;
- at least 10% of the share capital of the subsidiary company; or
- an interest of at least 10% in the profit and reserves in the subsidiary company.

Interest Paid

A withholding tax of 35% is levied on interest from the following:

- deposits with a bank in Switzerland;
- bonds, debentures and similar debt instruments owed by a Swiss debtor (including a permanent establishment in Switzerland);
- units in collective investment schemes issued by, or in connection with, a tax resident.

IP Royalties Paid

No withholding tax is payable on arm's-length IP royalties.

Guarantee Fees Paid

No withholding tax is payable on arm's-length guarantee fees.

5.3 Available Tax Credits/Incentives

There is a participation relief regime for dividend income and capital gains derived from qualifying participations:

- dividends – must be derived from a participation of at least 10% in the capital (or in the profit and reserves) or from a participation with a value at least CHF1 million; and
- capital gains – must be derived from disposal of a participation of at least 10% in the capital (or in the profit and reserves) that has been held for at least one year.

Under the participation relief regime, the company's corporate income tax burden is reduced pro rata on the basis of the ratio "net participation income/taxable total profit of the company". "Net" participation income is the gross participation income minus a pro-rated allocation of financing and (flat) administration expenses.

- Tax-neutral step-up of tax basis upon relocation to Switzerland – enterprises moving assets, functions, business operations, permanent establishments, or their registered office or place of effective management to Switzerland may revalue all assets (other than participations of at least 10%) newly becoming subject to taxation in Switzerland at fair value. This step results in an income tax-neutral step-up of the tax basis. In the years following this income tax-neutral asset step-up, the assets can be amortised tax effectively and thereby reduce the taxable income.
- Patent box – at the cantonal level, the residual income derived from qualifying patents and similarly protected rights developed with qualifying nexus to Switzerland will generally be taxed at a reduced level (maximum tax discount of 90% at cantonal level).
- R&D super-deduction – the cantons may provide that up to 150% of the qualifying expenses for research and development activities with qualifying nexus to Switzerland can be deducted for cantonal and municipal income tax purposes. Such an R&D super-deduction can be claimed on:
 - (a) 135% of the costs for staff taken on due to, and directly attributable to, the qualifying R&D activities; and
 - (b) 80% of the costs for contract research with qualifying nexus to Switzerland.
- Notional interest deduction – in the Canton of Zürich, the cantonal tax law provides for a notional interest deduction. All cantons with a total pre-tax corporate income tax rate exceeding 18.03% may allow such a notional interest deduction. Broadly, this is a tax deduction of an arm's-length interest rate on equity exceeding the equity required for the long-term business activity.
- Cap for tax reliefs – a company's maximum cantonal income tax reduction resulting from the patent box, R&D super-deduction, amortisations on disclosed hidden reserves upon a status change under current law, and the notional interest deduction may not exceed 70% in total (ie, minimum tax burden at cantonal level of 30% of the ordinary tax burden). The cantons may introduce a more restrictive threshold.

5.4 Tax Consolidation

There is no tax consolidation but for VAT purposes. A VAT group may be formed by entities (including permanent establishments) in Switzerland that are under common control. If a VAT group is formed, then intra-group supplies within the group are disregarded for VAT purposes.

Unlike many other countries, Switzerland (not being a member of the EU) has no controlled foreign company (CFC) legislation.

5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation rules apply if a Swiss company raises debt from a related party.

No fixed debt-to-equity ratio applies. Instead, thin capitalisation is calculated on the asset base, such that a Swiss company will have its own individual thin capitalisation thresholds, subject to change from year to year.

If the Swiss tax authorities consider a Swiss company to be thinly capitalised:

- interest payments to a related party may be re-characterised as “hidden dividend” distributions that are subject to 35% Swiss dividend withholding tax, and if that Swiss dividend withholding tax is due on the (re-characterised) interest payments, this will affect the lender because the interest proceeds received by the lender are reduced to 65%; and
- at the level of the Swiss company that has incurred the related party debt, corporate income tax deductibility of interest may be challenged, and the capital tax base may be increased.

5.6 Transfer Pricing

Switzerland generally follows the OECD transfer pricing rules. Different from the OECD standard approach, for cost-plus arrangements the cost base normally includes taxes, such as, in particular, CIT. The reason is because under Swiss tax law, taxes are tax deductible.

Unlike many other countries, Switzerland (not being a member of the EU) has no CFC legislation.

5.7 Anti-evasion Rules

Swiss domestic tax law provides for a General Anti-Avoidance Rule (GAAR). The Swiss GAAR was developed mainly in court practice and is also applied in the context of double tax treaty relief.

The OECD’s Multilateral Instrument (MLI) entered into force for Switzerland on 1 December 2019. In its double taxation treaties, Switzerland includes the Principal Purpose Test (PPT Rule) proposed in the MLI chapter “Treaty Abuse” in its “simplified” form (ie, the simplest version/basic version).

6. Competition Law

6.1 Merger Control Notification

Pursuant to the Swiss Cartel Act, a concentration (takeover, merger or formation of a joint venture) by two or more under-

takings is subject to merger control in Switzerland if both of the following thresholds are met:

- the undertakings concerned reported, during the last business year, a combined worldwide turnover of at least CHF2 billion or a combined turnover in Switzerland of at least CHF500 million; and
- at least two of the undertakings concerned reported, during the last business year, a turnover in Switzerland of at least CHF100 million each.

Irrespective of the above thresholds, every concentration that involves an undertaking that has previously been found by the Swiss Competition Commission to hold a dominant position in a certain market will be subject to merger control if the concentration relates to that market or a related market.

Foreign-to-foreign acquisitions are also subject to merger control if the above thresholds are met. In practice, there is an exception for foreign joint ventures that have no effects in Switzerland. This is considered to be the case if the joint venture has neither activities nor turnover in Switzerland (in particular, no sales into Switzerland) and no activities or turnover in Switzerland are planned or expected in the future.

6.2 Merger Control Procedure

A concentration that is subject to merger control must be notified to the Swiss Competition Commission before it is implemented and is subject to a mandatory waiting period. Closing without notification or prior to clearance is subject to fines. Only upon request of the parties, and for good cause, may the Competition Commission exceptionally authorise implementation of the concentration prior to clearance.

After receipt of the notification, the Competition Commission conducts a preliminary investigation and decides within one month if there are grounds for conducting an in-depth investigation. If no such notice is given within one month, the concentration may be implemented without reservation. The one-month period starts the day after the receipt of a notification deemed complete by the Secretariat of the Competition Commission. The Secretariat has to confirm completeness of the notification to the parties within ten days. An in-depth investigation can take up to four months. An extension of these deadlines by the Competition Commission is not possible unless the Competition Commission was prevented from conducting the investigation within the deadlines for reasons attributable to the undertakings concerned.

6.3 Cartels

The Swiss Cartel Act prohibits unlawful anti-competitive agreements between independent undertakings operating at the same

or different market levels. It applies to all anti-competitive agreements that have an effect in Switzerland (effects doctrine) irrespective of whether the agreements were made in or outside of Switzerland. For example, restrictions regarding passive sales of products into Switzerland in distribution agreements outside of Switzerland (particularly in the EEA, but also in other countries) are within the scope of the Swiss Cartel Act.

Not only binding agreements but also non-binding agreements (such as gentleman's agreements) and concerted practices qualify as anti-competitive agreements if they have a restraint of competition as their object or effect. Anti-competitive agreements are unlawful if they either eliminate effective competition altogether or significantly restrict competition and cannot be justified on economic efficiency grounds.

The following agreements are presumed by law to eliminate effective competition altogether (hardcore restraints):

- horizontal agreements (agreements among competitors) that directly or indirectly fix prices, limit the quantities of goods or services or allocate markets geographically or according to customers; and
- vertical agreements regarding minimum or fixed prices (resale price maintenance) or distribution agreements with absolute territorial protection (ie, passive sales by distributors into other territories are not permitted).

The presumption may be rebutted if it can be shown that effective competition is in fact not eliminated altogether. In such a case, it must be assessed whether the respective agreement significantly restricts competition and whether it can be justified on economic efficiency grounds. In recent landmark cases, the Federal Supreme Court decided that if the presumption can be rebutted, hard-core restraints – with the exception of mere bagatelles – nevertheless significantly restrict competition just because of their qualitative nature, without the need to assess their quantitative effect. According to the Federal Supreme Court, hardcore restraints are thus in general unlawful, unless they can be justified on grounds of economic efficiency.

Economic efficiencies justifying otherwise unlawful anti-competitive agreements include:

- reduction of production or distribution costs;
- improvement of products or production processes;
- promotion of research into or the dissemination of technical or professional know-how; and
- more rational exploitation of resources.

Hardcore restraints can be sanctioned with administrative fines of up to 10% of the party's previous three years' cumulative turnover in Switzerland.

6.4 Abuse of Dominant Position

Unilateral practices of market-dominant undertakings that, by abusing their dominant position, hinder competitors or disadvantage trading partners are prohibited. The Swiss Cartel Act applies to all abusive behaviour that has an effect in Switzerland (effects' doctrine) irrespective of whether the actions occurred inside or outside of Switzerland.

Market dominance is defined as one or more undertakings that are able, as suppliers or customers, to behave to a significant extent independently of the other participants in a specific market, and thus covers individual and collective market dominance.

An unlawful behaviour of market-dominant undertakings may in particular consist of the following:

- refusal to trade (eg, refusal to supply goods);
- discriminating between trading partners in relation to prices or other conditions (eg, with certain rebate schemes);
- imposing unfair prices or other unfair conditions;
- practising predatory pricing;
- limiting production, supply or technical development; or
- tying the conclusion of a contract to the other party's acceptance of additional goods or services.

Unilateral practices of market-dominant undertakings are only considered abusive if they cannot be justified by legitimate business reasons.

Abuse of a dominant position can be sanctioned with administrative fines of up to 10% of the party's previous three years' cumulative turnover in Switzerland.

7. Intellectual Property

7.1 Patents

Definition and Legal Requirements

An invention or process can be patented if it is both:

- novel (based on the state-of-the-art at the time of the application); and
- capable of industrial application.

A patent is not granted if the invention or process:

- violates human dignity, such as the cloning of human beings and the modification of the germline genetic identity of a human being, and the dignity of animals, or is contrary to public interests, or immoral;
- concerns a method of surgery, therapy or diagnosis applied to a human or an animal body; or
- seeks exclusive rights for plant or animal species or breeding procedures (unless it is a micro-biological procedure or product derived from it).

The right-holder has the exclusive right to use, execute, offer for sale, sell, circulate and import the patented product.

Registration

Applications for Swiss patent registration are filed with the Federal Institute of Intellectual Property (FIIP). The FIIP's website provides information on the application procedure for registration of intellectual property rights in English at <https://www.ige.ch/en/protecting-your-ip/patents/application-in-switzerland.html>.

Enforcement and Remedies

Patent infringers can be prosecuted through both civil and penal proceedings. Criminal penalties include a custodial sentence not exceeding one year or a monetary fine (the maximum fine is 360 times the daily rate of CHF3,000). The calculation is at the discretion of the competent authorities, based on the default and economic means of the infringer. Criminal penalties can apply to natural persons and legal entities.

Length of Protection

Protection lasts for 20 years from the date of filing. This period is not renewable.

7.2 Trade Marks

Definition and Legal Requirements

The following can be registered as a trade mark provided they distinguish, or identify a source of, goods or services:

- words, letters and numerals;
- graphic depictions;
- three-dimensional shapes; as well as
- combinations of any of the above; and
- series of audible tones.

The right-holder has the exclusive right to identify the goods or services for which it is registered and to use, offer for sale, sell, circulate and import the trade mark.

Protection

Applications for national registration must be filed with the FIIP.

Enforcement and Remedies

This is the same as for patents (see 7.1 Patents).

Length of Protection and Renewability

Protection lasts for an initial period of ten years from the date of filing and can be renewed for further ten-year periods.

Cancellation Proceedings

Any person can file a request for the cancellation of a trade mark on the grounds of non-use for an uninterrupted period of five years. Administrative proceedings for the cancellation of non-used trade marks were recently introduced.

7.3 Industrial Design

Definition

To be registered, a design must be both:

- for an object with a physical shape or form, which may be combined with colours; and
- novel (this is only investigated if it is disputed by third parties in court proceedings).

The right-holder has the exclusive right to use, offer for sale, sell, circulate and import the design.

Registration

An application for registration must be filed with the FIIP.

Enforcement and Remedies

This is the same as for patents (see 7.1 Patents).

Length of Protection and Renewability

Protection lasts for 25 years from the date of filing. This period is not renewable.

7.4 Copyright

Definition and Legal Requirements

Literary, artistic and scientific works (including computer software) have copyright protection, provided they:

- are original;
- are intellectual creations of literature or art; and
- have a unique character.

The right-holder has the exclusive right to be recognised as the author of the work, produce, reproduce, offer for sale, recite, perform, broadcast and re-broadcast the works.

Protection

Protection arises automatically on creation of the work.

Enforcement and Remedies

This is the same as for patents (see 7.1 Patents).

Length of Protection and Renewability

Protection lasts for the life of the author, plus:

- 50 years for computer software and photography works;
- 70 years for all other copyrights.

7.5 Others

Factory and Business Secrets

According to Swiss law, know-how essentially consists of factory or business secrets; ie, secret information (i) in the sense that it is not, as a whole or in the precise configuration and combination of its elements, generally known or easily accessible to persons who normally deal with the type of information in question; (ii) has a commercial value as a secret; and (iii) has been subject to appropriate measures in the case in question, by the person to whose lawful control it is subject, to keep it secret (Article 39 II of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement)).

Know-how does not represent a specific category of intellectual property rights. It does not enjoy absolute legal protection against third parties, but the law ensures its protection against any disclosure to or acquisition and use by third parties in a manner contrary to fair commercial practices.

In Swiss law, the unauthorised use of factory or business secrets constitutes unfair conduct within the meaning of Articles 5 (exploitation of a service provided by others) and 6 (violation of factory and business secrets) of the Federal Act against Unfair Competition (LCD) and Article 162 (violation of factory and business secrets) of the Swiss Criminal Code (CP).

The principles applicable to the protection of factory or business secrets are largely uniform: they mainly include contractual rules, civil and criminal procedural rules to protect know-how and provide for the possibility of preventative measures and assistance from customs authorities.

In more general terms, the know-how can be contractually insured against exploitation by third parties, by agreeing confidentiality clauses.

8. Data Protection

8.1 Applicable Regulations

Data protection is governed by the federal Data Protection Statute 1992 (FADP) and cantonal law. The statute applies to any processing of data relating to natural and legal persons by private persons and federal bodies. It grants protection against the infringement of personality rights. Swiss data protection law is currently under revision.

8.2 Geographical Scope

With regard to private law provisions on data protection (eg, the right to information (Article 8 paragraph 1, FADP), breach of privacy through data processing), the question of when Swiss data protection law is applicable to international data processing is assessed according to the provisions of Swiss international private law (Article 139 of the Federal Code on Private International Law (CPIL)).

Accordingly, the civil law provisions of Swiss data protection law can be applied if:

- Switzerland's international jurisdiction is established (Article 129, CPIL, or Articles 2 and 5 No 3 of the Lugano Convention);
- the domicile or habitual residence of the data subject or data processor is in Switzerland or the data processing takes place in Switzerland;
- the data processor had to foresee that the effects of the data processing would occur in Switzerland; and
- the data subject exercises its right of choice in favour of Swiss law.

8.3 Role and Authority of the Data Protection Agency

The Federal Data Protection and Information Commissioner (FDPIC) contributes to sensitising and informing individuals who process personal data (ie, the holders of data files), but also individuals about whom data is processed (ie, the data subjects) about aspects of data protection. Alternatively, the FDPIC may intervene if the controllers of data files do not comply with the data protection principles, if the violation of his or her personality is the result of a system error in data processing. System error means that the violation of personality is such that a large number of persons may be affected.

In individual cases, it is the responsibility of the person concerned to take civil action against the violation of personality.

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Pestalozzi is a multicultural Swiss business law firm that has focused on high-end work for domestic and international clients since 1911. Pestalozzi lawyers are strong and empathic personalities who are singled out by the truly independent approach taken in their advice and representation of their clients' interests. The firm guides and supports its clients in their strategic business decisions, anticipates their future challenges and helps them solve their critical issues. Being fully integrated,

Pestalozzi encounters no internal limits in shaping the most adequate and efficient teams for its clients' needs. With over 100 professionals in Zürich and Geneva, they are at home in Switzerland's two main commercial hubs – and have developed a wealth of experience in their key industries of banking, life sciences, commodity trading and insurance. While being locally embedded, it has also developed a sought-after expertise in dealing with multi-jurisdictional transactions and disputes.

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SWITZERLAND LAW AND PRACTICE

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