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6.1 Introduction

Switzerland is a small country by its territory and number of inhabitants: 8.5 million in 2018.¹ Yet it is also a big player as a financial centre and for decades has been the preferred place of private banking for continental Europe if not the world. Quite uniquely, it has four national languages, of which German, French and Italian are official while Romansh is also an official language under certain conditions.²

Switzerland possesses a long tradition of stable and reliable institutions and a highly qualified workforce, making it a preferred choice for setting up new business. In the Global Innovation Index 2018 it has again ranked number one.³ Unemployment is less than 3 per cent, which is comparatively very low.⁴ Apart from banking and financial services, the pharmaceuticals, technology and commodities trade sectors each account for an important share of the Swiss economy, including tourism. Switzerland is not only famous for its chocolate, cheese and watches but also for its high-quality healthcare and education.

¹ 'Country Reports: Country Forecast Switzerland' (*Economist Intelligence Unit*) <https://country.eiu.com/Switzerland> accessed 25 February 2020.

² CC 101 Federal Constitution of 18 April 1999 of the Swiss Confederation (CONST), Articles 4 and 70. Romansh is also an official language of the Confederation when communicating with persons who speak Romansh (Art. 70 al. 1 CONST). The Cantons decide on their official languages (Art. 70 al. 2 CONST).

³ Cornell University, INSEAD and WIPO, 'The Global Innovation Index 2018 Report' (2018) www.globalinnovationindex.org accessed 25 February 2020.

⁴ *Economist Intelligence Unit* (n 1). According to the OECD, unemployment in Switzerland is even less than 2 per cent. See 'Switzerland' (*OECD Better Life Index*) www.oecdbetterlifeindex.org/countries/switzerland accessed 25 February 2020.

The country is a confederation of 26 semi-autonomous cantons of which four are half-cantons (*Confoederatio Helvetica*).⁵ The main legislative authority is federal but each canton has autonomy to rule and regulate in certain domains in extension or execution of federal rules. This is the case, for example, in construction and certain local infrastructure, environmental policy as well as taxes. The Swiss tax system is tripartite and divided into a federal, cantonal and municipal layer for both individuals and corporations as tax subjects. The federal component is usually the lowest and the major tax is levied by the canton and municipality. The canton levies the federal taxes for the confederation.

Switzerland's governing principle of federalism creates interesting opportunities for start-ups by allowing them to choose their place of business and/or domicile in a canton favourable policy-wise and/or tax-wise to their project. For example, a biotech start-up may be interested in working in a canton like Basel (BS/BL), Zurich (ZH) or Schwyz (SZ) where biotech hubs or similar are sponsored by the local government and where an established ecosystem is in place.

The Swiss tax system allows one to submit a business plan with a binding private tax ruling request to a cantonal tax administration and get legal certainty about tax rates or brackets that would apply to the business even before it actually started, provided the business stays within the frame set out in the tax ruling.⁶ Quite uniquely, one can also discuss tax matters with the officials once the company (or individuals) has opened for business. The Swiss tax system is also flexible insofar that one can migrate a company from one place to another within any tax year, which can be particularly beneficial for optimization if the business changes or revenues take off.

Switzerland is governed by a Federal Council that consists of seven members (*Bundesräte/conseils fédéraux/consiglieri federali*) elected by the national chamber every four years. It is co-opted in a way to represent all major political wings. Every year one of the seven members of the Federal Council is elected President and acts as *primus inter pares* with

⁵ Switzerland's ISO Code is hence CH and stems from the Latin term.

⁶ The binding tax rulings by the cantonal administrations are a matter of practice and tradition, not necessarily based on a specific law or otherwise written rule (i.e. the practice is not codified in a piece of legislation).

mainly international representative functions in addition to the other six colleagues. Each member of the Federal Council heads a ministry. The legislature consists of two chambers each elected for a four-year term: the National Council with 200 members (lower house) and the Council of States with 46 members (upper house). For the latter each canton appoints two members elected by the relevant cantonal voting population.⁷

A strong element of the Swiss mentality is the drive for consensus, which is also reflected in its political system and the possibility of the voting population to directly influence the legislative process (direct democracy) through initiatives and referendums and similar instruments.

The rural roots of the country may be the reason for its down-to-earth culture. An illustration of this modesty and understatement is the fact that it is quite common to find private bank partners cycling to work while they could easily afford a limousine with chauffeur. The country has opened up towards foreigners in the past decades and in particular welcomes qualified immigrants as part of its workforce. However, a strong tendency to 'keep among ourselves' remains, particularly in the countryside outside the bigger cities and economic centres of the country. An immigration backlash even for EU citizens has happened since February 2014 where a referendum passed aiming at restricting such immigration. Immigration remains contentious⁸ and work permits are limited in particular for non-EU citizens.⁹

An important fact to consider for budget-short start-ups is that Switzerland is an expensive country. Although the country's comparatively high wages in a safe-haven currency¹⁰ and good infrastructure and quality of life¹¹ are attractive for highly qualified and skilled international workers, the high expenses for labour, office or production space, insurances, procurement

⁷ For more information about the political system in Switzerland see www.admin.ch, www.parlament.ch and www.ch.ch.

⁸ *Economist Intelligence Unit* (n 1).

⁹ A special regime exists, for example, for investor permits according to the Swiss Federal Act on Foreign Nationals (FNIA) of 16 December 2005, see Art. 23 al. 3.

¹⁰ *Economist Intelligence Unit* (n 1).

¹¹ Three Swiss Cities ranked among the top 10 in Mercer's 2019 Quality of Living Ranking. See 'Quality of Living City Ranking' (Mercer) <https://mobilityexchange.mercer.com/Insights/quality-of-living-rankings> accessed 25 February 2020. Zurich comes second (after Vienna, Austria), Geneva ninth and Basel tenth.

and other operational costs require careful cash-flow planning on the side of start-uppers.

The chapter ahead will pragmatically introduce you to the general legal framework for starting a company in Switzerland, as well as to all aspects you should keep in mind (or an eye on) during the life of the company once started.

Given the limited format, only general principles and rules are covered by this chapter in order to give you a fair overview of Switzerland as a place for your business, with guidance provided for where you can find more details. Differences in terminology in the different official languages are indicated where useful.

6.2 Establishing a company

Many forms of business are available in Switzerland, but for considerations of limitation of liability, representation and overall ease of doing business a company with limited liability ('GmbH'/'Sàrl'/'Sagl', hereinafter 'LLC') or a company limited by shares ('AG'/'SA', hereinafter 'LTD') is often preferred over partnerships and similar structures. Hence, the present chapter focuses on these two legal entity types (see Table 6.1 for a comparison of these forms).

Depending on the chosen canton for domiciling a new entity and provided a Swiss bank solution is available for a blocked capital account the actual incorporation process takes on average two to three weeks. The legal entity (LLC or LTD) is deemed constituted only in the moment its incorporation is published in the register of commerce (RC). Once constituted the blocked capital account of the company has to be switched into an operational bank account, which has become more and more difficult with Swiss banks when foreigners stand behind the business or its funding. Compliance and due diligence procedures are often cumbersome and time-consuming.

Switzerland is a member of the Financial Action Task Force (FATF)¹² and has enacted one of the first and most detailed and strict laws combating money laundering and terrorist financing with the Anti-Money Laundering Act (AMLA) in 1997. Banks review very thoroughly the origin of assets (even if it is only a limited amount needed as capital for founding a company) and the backgrounds and standings of all shareholders and directors or other persons involved or connected to the set-up and operations of a new company (so-called 'Know-Your-Client' principles, or KYC). So even the opening of a blocked capital account for the constitution of a company is being subject to full KYC and AMLA controls.

Once released from the blocked capital into an operational bank account, the capital can be used for doing business (such as paying for salaries and office needs) but the rules against insolvency and over-indebtedness of the company must be kept in mind.¹³

6.3 Running a business

The main considerations (and concerns) for choosing one or another enterprise form for running your business are liability (limitation), representation and cost.

6.3.1 Sole Entrepreneur

Even though a sole proprietorship does not have legal personality, it is required to be publicly registered as an enterprise in the register of commerce if the business carried out is of a trade, production or otherwise commercial nature.¹⁴ The sole proprietorship does not allow for any limitation of liability. This means the entrepreneur is liable with all of their assets in case of a claim against the sole proprietorship. An advantage is the usually lower set-up and running cost given the absence of legal entity (no capital to be paid in among others) and there is normally no issue

¹² See Financial Action Task Force www.fatf-gafi.org accessed 25 February 2020.

¹³ Such as Art. 725 of the Swiss Code of Obligations (CO), according to which half of the capital and legal reserves need to be covered or a duty to notify respectively to take measures for recapitalization is triggered.

¹⁴ Art. 934 CO.

Table 6.1   Comparison of Swiss LLC and LTD legal forms

Forms of business entities	GmbH/Sàrl/Sagl (LLC)	AG/SA (LTD)	Comment
Formal requirements	• Minimum one corporate or individual member • Block capital and get Swiss bank confirmation about it • Get Notarial Constitutional Act Prepared • Get signature(s) of director(s) legalized • Request Register of Commerce (RC) filing • Minimum one Swiss resident Director or Manager with sole signature	Same as for GmbH/Sàrl/Sagl	Notarial act includes articles of association (AA). Bilingual AA are recommended in case of foreign current or future members. All documents have to be in the domicile canton's main language (for example German in Zurich, French in Geneva, Italian in Lugano).
Division of powers	Members' Assembly General (AMG ¹) is the supreme governing body; board of Directors (Dir. ²) is the managing body (executive); audit is optional ³ at set-up.	Same as for GmbH/Sàrl/Sagl but beware of terminology ⁴	Comparable to a democratic state within a firm there shall be checks and balances of power. The AMG could be considered the 'Legislative', the Directors resemble the 'Executive' and the auditor and / or again the AMG resemble the 'Judiciary'.

Forms of business entities	GmbH/Sàrl/Sagl (LLC)	AG/SA (LTD)	Comment
Initial capital (CHF)	20,000.00	100,000.00	The capital of an LLC has to be fully paid in; for a LTD it can be 20% of the nominal value but minimum 50,000.
Procedural aspects	• Check company name availability • Bank account for blocked capital – pay-in – get confirmation • Auditor's consent if any • Notary holding founding AMG and drafting act • Filing with RC for actual constitution	Same as for GmbH/Sàrl/Sagl	Company name availability can be formally checked on www.regix.ch or (without guarantee) on www.zefix.ch . ⁵ If foreign founder not present at constitutional AMG a proxy is necessary. Directors' signatures need to be legalized for RC.
Bank account setup	Usually prepared at same time and with same bank as blocked capital account for company constitution.	Same as for GmbH/Sàrl/Sagl	Swiss banks require details on beneficial owner(s) and/or controlling person(s) for their compliance.

Forms of business entities	GmbH/Sàrl/Sagl (LLC)	AG/SA (LTD)	Comment
Founders' agreement	If there are several members, then a shareholder agreement (SHA) is recommended. Founders if they are Directors (or then Directors between them) can also additionally determine Internal Rules of the Board.	Same as for GmbH/Sàrl/Sagl	In particular, where contributions in kind are or were made or are planned (e.g. work contribution by a director without corresponding consideration in turn) it is recommended to clarify rights and duties in a written agreement prior to start.
Future debt/equity considerations	Financing by loan (debt) convertible into shares is often seen in practice or shares issued with a premium (also called equity reserve). For substance considerations (e.g. firm's attractiveness to banks for financing) a reasonable debt/equity ratio should be respected.	Same as for GmbH/Sàrl/Sagl	A reasonable debt/equity ratio depends on the relevant industry but in general a balance of 1/3 equity versus 2/3 debt financing should be workable.

Notes:

¹ 'Gesellschafterversammlung' / 'l'assemblée des associés' / 'assemblea dei soci' in the official legal terminology.

² 'Geschäftsführer' / 'gérant(s)' / 'gerenti' in the official legal terminology.

³ In particular, ordinary audit is mandatory for companies open to the public and those obliged by law to adopt group accounts. For private companies, ordinary audit is only mandatory if during two consecutive business exercises two of the following parameters are exceeded: balance sheet total CHF 20 million / turnover total CHF 40 million / 250

employee full time equivalents (FTE) in a yearly average. In all other cases it is optional. If the set-up was made without an auditor ('opting-out'), such can be nevertheless appointed any time by the AMG. Optional limited audit (so-called 'review') is recommended for all entities with more than just one shareholder and/or such where it is planned to on-board external investors and/or new stake- or shareholders later on.

⁴ In an LTD context the Assembly General Meeting is called '*Generalversammlung*' / '*assemblée générale*' / '*assemblea generale*' and the Board of Directors is called '*Verwaltungsrat*' / '*conseil d'administration*' / '*consiglio d'amministrazione*'. A LTD can even have a second separate executive body acting under the supervision (and by delegation of powers) of the Board and is called management ('*Direktorium*' or '*Geschäftsleitung*' / '*comité directeur*' / '*direzione*'). It is a category seen in practice with bigger companies which, however, is not separately defined in detail in the Code of Obligations (CO), but mentioned in Art. 716b CO.

⁵ See Zefix – Central Business Name Index <www.zefix.ch> accessed 25 February 2020.

about representation as a sole proprietorship is obliged to have the proprietor's name in its enterprise name. If any other person will be allowed to represent the firm then he/she has to be registered as an attorney authorized to represent and sign for the firm as '*procura*' or similar by the sole proprietor with the relevant register of commerce.

An important point is that any sole entrepreneur is allowed to establish a legal entity in the form of an LLC or LTD.¹⁵ Such structure immediately grants a limitation of liability on assets, as only the amount of capital (fully paid-in) can be sought by creditors and the legal entity's assets are separated from the owner's ones. The cost is a bit higher for constitution (the capital needs to be paid in) and for running it there might be an audit in addition to the standard accounting (which can be and very often is outsourced to third-party providers). Representation is as per the persons indicated in the register of commerce and the relevant mentioned signature rights (solely or jointly if several directors or managers, for example).

6.3.2 Group of entrepreneurs

If a group of entrepreneurs starts working together by combining their efforts or resources towards a common goal they are forming a simple partnership according to Swiss law.¹⁶ The simple partnership is also the default qualification when the distinctive criteria of no other partnership codified in the Swiss Code of Obligations (CO) is met. When teaming up, the entrepreneurs can either work as partners who are owners of the

¹⁵ Art. 772 CO for the LLC and Art. 625 CO for the LTD.

¹⁶ Art. 530 CO.

business, or as employees if they set up a company in a specific form and then get employed by that company through an employment agreement.

In the context of the LLC or LTD, any such legal entity can be formed by a group of entrepreneurs and even by companies.¹⁷

6.3.3 Hiring new employees/consultants/partners

Various ways of employing people in a company are possible. If the people are hired based on an employment agreement they are employees *stricto sensu*, and as such subordinated. If they are independent workforce hired for a project or task they are called consultants. The difference between the two lies mainly in the responsibility, the autonomy in the work performed and the termination timelines. A consultant can in principle be hired and fired immediately as the contract on which the engagement took place is a mandate agreement or simple agency.¹⁸ The employee is protected by law with minimum notice periods for termination.¹⁹ The consultant owes, as an independent provider, full quality output to the ‘employer’ or principal and is in principle autonomous²⁰ in the way a task or job is performed. However, the consultant is supposed to carry out the job competently and subject to industry standards as the case may be. On the other hand, the employee is responsible for performing their tasks diligently according to the instructions received from the employer;²¹ dependent on the latter’s input guidance and resources.²²

Both owe a duty of care and loyalty to the employer or principal. The agent has the same duty of care as the employee in an employment relationship.²³

Partners *stricto sensu* are those owning a share in the business; depending on the structure of the company they can officially work under an employment agreement, often in an executive position. That being said,

¹⁷ See note 15 *supra*.

¹⁸ Art. 394 CO and in particular Art. 404 CO with respect to termination.

¹⁹ Art. 335 CO.

²⁰ The consultant is still bound to comply with instructions received from the principal. See Art. 397 CO.

²¹ See Art. 321e CO about Compliance with General Directives and Instructions and Art. 321d CO about Employees’ Liability.

²² See also Art. 327 CO.

²³ Art. 398 CO.

in the context of a start-up, every person cooperating is an executive in the sense of doing whatever is necessary at a given moment in order to carry out the company's purpose. Specialization and separation of functions usually occurs at a later stage of the company development.

6.3.4 Managers' vs. company's liability

There are two different types of liability: the criminal one and the civil one. In case of criminal conduct, in principle the one indicted and who is to take responsibility is the individual, for example, the manager, not the company itself. The range for statutes with criminal aspects is growing and no longer limited to the Swiss Criminal Code; for example, the Federal Law on Unfair Competition has penal provisions and so does the Anti-Money Laundering Act.

Regarding civil liability, there is the manager's liability towards the company for diligent and loyal execution of functions. Such liability will increase the higher in the hierarchy the manager is and the more empowered he becomes.²⁴ In case of an official function within the company such as a member of the board of directors, the responsibility level is higher than as a simple employee. The company itself has a civil liability towards its clients and providers for acting in good faith in contractual relations as well as for the quality of its services and products sold to the public.²⁵

Who has capacity to sue a manager or the company directly in case of a liability issue is a fact-specific question and needs to be determined on a case-by-case basis.

A company's shareholders are in principle not liable towards the company for anything else than to pay in the amount for the shares or units they hold and to which they committed.²⁶ If the company starts with only partly paid-in capital then the board can (and shall!) later on issue a capital call for full pay-in when the company needs more financing to sustain its business.

²⁴ In case of LTD the body to control and sanction a director or manager, as the case may be, is the Assembly General Meeting (AGM) according to Art. 698 CO.

²⁵ See the Swiss Product Liability Act.

²⁶ See Art. 680 ff CO.

6.3.5 Employee considerations

The key aspects of employment are the following:

- clear job description;
- financial commitment of the employer (remuneration of the employee and payment terms);
- human resource commitment of the employee (time to be dedicated and personal input);
- additional employee benefits (vacation, social security, insurance, bonus, etc.); and
- termination modalities.

Where the employment has been concluded for an indefinite period of time or for longer than one month, the employer has a duty of information towards the employee and needs to inform in writing within one month of starting the cooperation about key elements of their relationship such as function of the employee,²⁷ salary and length of working week.

6.3.6 Forms of employee equity compensation

The most common forms of employee equity compensation are a stock option or share purchase plan where following the first year of service and every consecutive accomplished year the employee has the possibility to receive or purchase at nominal value or other value but usually lower than market (based on a vesting schedule) a certain amount or percentage of the company's shares or call options to be converted upon a certain (usually longer) period of service time.

In some cases, the employee receives a certain amount of shares or stock options at start. All of these forms of incentives are designed in order to keep up employee motivation while the financial reward level will usually be a lower than market 'start-up' salary. A second important point is to avoid employee turnover in the crucial beginnings of the company. As an example: when you can only exercise a stock option after two full years of service you will think twice before leaving after 18 months to move to a competitor.

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²⁷ Art. 330b CO.

Another common form of special employee compensation is profit-sharing such as a commission.²⁸

The key question is whether such compensation is part of the salary (fixed element) or rather a bonus (variable element); the treatment for social security purposes (and effect on any pension plan contributions) is different accordingly and so is tax.²⁹ Many equity compensation plans eliminate any entitlement over the year in case an employee leaves the company. A clause with a precisely defined bonus would be in the interest of the employee (e.g. a certain amount for the first year, another for the second, without subjecting the employee to conditions).

6.3.7 Employee inventions and non-compete

According to the Swiss CO,³⁰ the rule is that designs and inventions made by an employee (or together with others) in the course of their work for the employer and in performance of their contractual obligations belong to the employer. By special written agreement (which is commonly a sub-clause of the employment agreement), the employer can reserve the right to acquire designs and inventions made in the course of their work by the employee, but which are not made in performance of their contractual obligations.

The non-compete³¹ clause is a standard in most industries and a special aspect of the employee's duty of loyalty towards the employer. Its particularity is that it takes effect upon termination of the labour agreement. The employee undertakes by such commitment to refrain from engaging in a rival business or activity. Such clause is binding only where the use of special knowledge by the employee might cause the employer substantial harm. The prohibition of competition must be proportional and limited in time, place and scope, not to unfairly restrict the employee in their economic freedom.³² A non-compete clause is often combined

²⁸ See Art. 323 CO about payment terms and periods for the salary, any commission and any share in business results.

²⁹ Shares are normally an element falling under the wealth tax while the salary falls under income tax rules.

³⁰ Art. 332 CO.

³¹ Art. 340–340c CO: Prohibition of competition, requirements, restrictions, consequences of infringement and extinction.

³² Art. 340a CO.

with a non-poaching clause.³³ It is recommended to foresee a contractual penalty in case of a breach of such clause, as otherwise in practice it tends to prove difficult to number the damage on the company's side.

It is important to note that the courts are likely to limit the validity and applicability of non-compete clauses and in particular any punitive damages foreseen in the employment agreement. The law itself foresees termination once the employer demonstrably no longer has a substantial interest in its continuation.³⁴ Even more striking, the extinction also occurs when the employer has terminated the employment relationship without providing cause or if the employee terminates it for a good cause attributable to the employer.

6.3.8 Securing the company in case of a shareholder's death

Succession planning is key in ensuring that a company's success can span across generations and through crisis and changes. A director's departure from the company is in most cases not only a knowledge and expertise loss for the company but also a work force and driver loss in the first place. If the director does not only leave the company, but actually passes away this adds a strong emotional dimension to the human resource loss issue. All remaining directors (if any), any employees as well as clients have to bear and 'digest' such loss.

Death being an extreme scenario, its consequences for a company nevertheless have to be addressed by proper communication in the first place, internally and externally. In case of a multiple member company, business continuity must be secured and directors should discuss specific scenarios as early as possible.

In case a shareholder passes away the shares held will pass automatically to the heirs as per the Swiss CO.³⁵

Well-drafted shareholders' agreements will foresee restrictions on the transferability of unlisted registered shares, and in particular in the case

³³ Undertaking not to entice former colleagues to follow the departing employee in a competing business venture.

³⁴ Art. 340c CO.

³⁵ See Art. 685 ff CO and in particular Art. 685b IV. CO.

of death of a partner, and define the applicable process for securing and maintaining control of the company by the remaining partners. If a partner has made no special arrangements, Swiss law foresees inheritance of shares by the surviving spouse or relatives. The company could, however, purchase the shares at real value according to the Swiss CO.³⁶ The articles of association cannot be more restrictive than the relevant provisions of the Swiss CO.

6.3.9 Prenuptial agreement

A prenuptial agreement, if made in the correct form (meaning in front of a Swiss notary), can either foresee a specific separation regime for assets of the spouses, or provide specifically for the case of death and what should happen with shares in the business where the deceased was a partner. This is particularly recommended where the spouse is not involved in the business nor has business knowledge and should not inherit any shares.³⁷

6.3.10 Will

In any case and independently from proper formulations in the articles of association of the company and in the shareholders' agreement, it is recommended for each partner to have an individual will in place that clearly stipulates what shall be the fate of shares falling into the estate.³⁸ Such decision shall take place in order to avoid inheritance by law (in the absence of a will or similar) to a person who may block a company's decision process or harm that process in any other way if they are not a matching or appropriate co-shareholder.

6.3.11 Other: estate planning structures

Switzerland is a civil law jurisdiction knowing and recognizing public or private foundations with mainly charitable purposes.³⁹ The use of private foundations with non-charitable purposes is limited. Although recognizing Anglo-Saxon trust structures without having its own trust law, Switzerland does not have such a vehicle as a purpose trust to hold shares

³⁶ Art. 685b CO.

³⁷ Art. 685b–685d CO.

³⁸ Art. 685b–685d CO.

³⁹ Art. 80 Swiss Civil Code of 10 December 1907 (CC).

for business continuity.⁴⁰ In general, the use of estate planning structures in relation to holding shares of a start-up is very limited. Recent examples, however, are Swiss foundations tested in the trend market of blockchain and crypto-assets, such as Tezos Foundation (founded in 2017).⁴¹

The specific use of planning structures is decisive. For managing a business it seems preferable to use a corporate legal entity type rather than a foundation. For estate planning purposes the use of a private foundation can be discussed. However, it is not recommended to use Swiss foundations to such effect as they cannot be managed or terminated in a flexible way, the relevant provisions of the Swiss CC⁴² being rather old and archaic. An alternative might be to opt for a private foundation in a jurisdiction with more flexible rules regarding the reorganization or termination of such an entity.

6.4 Growing the business

Start-ups and businesses in general require capital to grow and be successful. Several options for securing funding are available to start-up founders in Switzerland. Understanding what they are, how they are regulated and each advantage and disadvantage will prove beneficial for both first-timers and experienced founders.

6.4.1 Crowdfunding

The practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet, is commonly referred to as ‘crowdfunding’.⁴³ During recent

⁴⁰ In 2006, Switzerland ratified the Hague Convention on the Law Applicable and the Recognition of Trusts of 1985, which entered into force on 1 July 2007.

⁴¹ More on the Tezos Foundation can be found at <https://tezos.foundation/>.

⁴² Art. 85 CC: The only limited causes are accepted by law for amendment of the purpose of a foundation or to change its organization, among others. The surveillance authority has a rather pragmatic approach and tends, however, to interpret these rules in the most flexible possible way so as to avoid keeping alive and operational a foundation that does not really have the means to survive.

⁴³ See ‘What Is Crowdfunding?’ (*UK Crowdfunding Association*) www.ukcfa.org.uk/what-is-crowdfunding accessed 25 February 2020.

years, such practice has become increasingly common,⁴⁴ with a significant number of online crowdfunding platforms being established as the main point of entry to this new market. Therefore, capital markets regulators had to quickly intervene to enact legislation to manage this new phenomenon.

While many countries have embraced the phenomenon and adapted their existing regulation to fit the activity, Switzerland – widely known as a financial centre – decided not to radically amend its tech-neutral financial regulation. Therefore, the absence of crowdfunding specific regulation requires that financial markets regulation and private law provisions be applicable to crowdfunding activities. As a result, entrepreneurs or companies wanting to access crowdfunding might be required to obtain a licence and/or publish a prospectus.⁴⁵

Crowdfunding is usually divided into four types, sorted by the different returns that investors can expect. These are:

- **Crowdinvesting:** A form of crowdfunding typically used by start-ups, since in this case investors participate to the success of the company by receiving an amount of equity corresponding to their investment.
- **Crowdlending:** Investors loan an amount to the project developer/entrepreneur, expecting to be paid back with interest.
- **Crowdsupporting:** Investors do not receive any compensation for their financial support, but rather purchase goods or services from the project/company.
- **Crowddonating:** In this particular case, as the name suggests, donors (not investors) relinquish any return or compensation for their support to the project/company.

In this light, both establishing a crowdfunding platform and collecting funds through such activity in Switzerland is a fairly complicated – and risky – activity. If we consider that according to the Swiss Financial Market Regulation and Supervision Authority (FINMA), the activity of collecting more than 20 deposits from the public is considered to be subject to a banking licence requirement, then establishing an online

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⁴⁴ *ibid.*

⁴⁵ See 'Financial Services Act and Financial Institutions Act' (*Federal Department of Finance*, 6 November 2019) www.efd.admin.ch/efd/en/home/themen/wirtschaft--waehrung--finanzplatz/finanzmarktpolitik/fidleg-finig.html accessed 25 February 2020.

crowdfunding platform may require a significantly bigger effort than could be anticipated.⁴⁶

However, on 1 August 2017, the Swiss Federal Council, which had already put FinTech (financial technology) in its legislative aim, set into force a partially revised Banking Ordinance.⁴⁷ The newly minted version of the Banking Ordinance, among other things, eased the regulatory pressure put upon crowdfunding.

Two major revisions appear relevant for crowdfunding. First, a banking licence is no longer required for more than 20 deposits collected if the total amount is less than CHF 1 million. Secondly, even if the amount raised through crowdfunding qualifies as an acceptance of funds from the public and exceeds the aforementioned limits, the execution period for settlement accounts has been extended from seven to 60 days, thus allowing enough time for the crowdfunding platform and/or entrepreneurs to transfer the funds safely without trespassing into the banking licence area.⁴⁸

Furthermore, on 1 September 2017, FINMA issued a circular called 'Public Deposits with Non-Banks' which shed some light on the revised regulation set forth by the new Banking Ordinance. In the circular, FINMA clarified that the 60 days execution period only covers business models in which money is forwarded to third parties, including crowdfunding.⁴⁹

Under Swiss law, crowdfunding platforms and project developers are considered to be financial intermediaries and thus must comply with anti-money laundering regulations. Such obligation is not detrimental to entrepreneurs looking to enter the crowdfunding market. This requirement is two-fold: on the one hand, they must observe the duty of due diligence and the prescriptions of the AMLA;⁵⁰ on the other hand, they must

⁴⁶ Urs Kloeti and Oliver Widmer, 'Crowdfunding: Requirements under Swiss Law' (*Pestalozzi*, 25 October 2017) <https://pestalozzilaw.com/en/news/legal-insights/crowdfunding-requirements-under-swiss-law/> accessed 25 February 2020.

⁴⁷ Swiss Banking Ordinance of 30 August 2012.

⁴⁸ CC (n 39).

⁴⁹ FINMA Circular 'Public Deposits with Non-Banks' of 1 September 2017.

⁵⁰ Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 2017. Also known as Anti-Money Laundering Act (AMLA).

either obtain a licence from FINMA as a Directly Supervised Financial Intermediary or become member of a Self-Regulatory Organization recognized by FINMA.⁵¹

With respect to crowdfunding, the Swiss CO provides that if the offer for a subscription resulting in the acquisition of securities is not aimed to a limited number of people,⁵² it requires the issuer (i.e. the entrepreneur/project developer) to draft a prospectus.⁵³ Failing to do so would render the entrepreneur/project developer liable to each investor in the event of losses resulting from the investment.

For crowdlending, the provisions of the Consumer Credit Act⁵⁴ apply if the project developer/entrepreneur does not set up a company (i.e. a commercial activity) before collecting loans via crowdfunding, thus subjecting borrowers to potential liability and prosecutorial risks.⁵⁵

The enforcement of these licensing requirements is certainly on FINMA's agenda. The regulator has, in fact, disclosed in the fact sheet of 1 August 2017 entitled 'Crowdfunding' that formal investigations will be started with respect to all crowdfunding activities carried out without proper authorization or licensing.⁵⁶

However, good news seems to be on its way. The Federal Council on 4 November 2015 promulgated the drafts of the Financial Institutions Act⁵⁷ and the Financial Services Act⁵⁸ entered into force on 1 January 2020. While both Acts will not remove any of the regulatory burdens to crowdfunding activities, the prospectus requirements will be significantly softened, providing exemptions which are in line with the more relaxed European Economic Area (EEA) regulation.

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⁵¹ CO (n 13).

⁵² *ibid.*

⁵³ See the CO for further details on prospectus obligations.

⁵⁴ Federal Law on Consumer Credit of 23 March 2001 (in force since 1 January 2001).

⁵⁵ CO (n 13).

⁵⁶ FINMA 'Crowdfunding Factsheet' version as of 1 August 2017.

⁵⁷ Swiss Financial Institutions Act (FinIA) of 1 January 2020.

⁵⁸ FINMA (n 49).

6.4.2 Venture capital and angel investing

Switzerland is widely known to be one of the wealthiest countries in the world and home to an incredibly high number of banks compared to its tiny population.⁵⁹ Certainly, for start-ups looking for funding, Switzerland is an attractive place.

The investing landscape for start-ups here is composed of different players:

- **Institutional investors:** They are the largest number of investors and are divided into (1) commercial banks; (2) private banks; (3) asset management companies; and (4) venture capital firms.
- **Industrial partners:** They are large industrial companies which systematically invest in high-potential start-ups. Among these noteworthy of mention are Swisscom, ABB, Roche, Novartis, and others.
- **Family offices:** These are private companies that are usually set up by ultra-high-net-worth individuals to manage their own fortunes.
- **Business angels and business angels clubs:** Business angels are individuals with experience as entrepreneurs/investors who support start-ups by providing capital (usually seed capital), skills and network. In Switzerland, there are many business angels clubs that organize regular meetings during which a selected group of start-ups pitch their ideas in front of an audience of highly experienced business angels. Established business angels clubs in Switzerland are: Business Angels Switzerland (BAS) and Swiss ICT Investors Club (SICTIC).

For early-stage start-ups, being able to pitch to one of the business angels clubs is definitely the best way to begin fundraising and gain valuable feedback from experienced entrepreneurs and investors. In fact, after each meeting, the angels discuss in detail the merits of each start-up and assess whether to invest. Start-ups are then notified of the decision and can talk directly to the angels in an informal setting and ask crucial questions about the pitch and/or the start-up.

Venture capital investment companies in Switzerland, in the so-called Cryptovalley,⁶⁰ are starting to raise funds in an unconventional way,

⁵⁹ FINMA (n 56).

⁶⁰ The Canton of Zug is home of the so-called 'Cryptovalley', the world's most important centre for blockchain technology and related business initiatives.

which can be defined as a hybrid venture capital model. Part of the funds is raised through a traditional equity-backed venture capital financing round, whereas the other part is raised by launching an initial token offering, i.e., a blockchain-based financial offering. This model is proving to be quite successful, especially for start-ups aiming to raise conspicuous amounts to support their activities. Institutional investors in fact are open to invest in both equity and tokens simultaneously, especially if the tokens are listed on an exchange, which makes them easily marketable, therefore constituting a partial exit opportunity for the investors.

6.5 Tax

As mentioned in the Introduction, for both individuals and corporations the special tripartite tax system in Switzerland applies. The main taxes levied are income taxes for individuals, profit taxes for corporations and value-added tax (VAT). These taxes will be described in slightly more detail than the wealth tax (applicable to individuals) and the capital tax (applicable to corporations but marginal in the tax bill given low *pour-mille* rates).⁶¹

Furthermore, a major corporate tax re-haul has taken place in Switzerland recently with the adoption of the Swiss corporate tax reform in 2019. The Tax Reform and *Alters- und Hinterlassenenversicherung* (AHV) Financing came into effect on 1 January 2020 in order to keep Switzerland competitive and attractive for foreign investors by harmonizing and lowering corporate taxes on profits and foreseeing a patent box regime with additional tax benefits and deductions.⁶²

6.5.1 Tax on income of individuals

Swiss national and assimilated tax residents have to file annual returns about their income in Switzerland. Foreign employees in Switzerland will be subject to tax at source for which the employer is liable towards the tax

⁶¹ More information can be found on the Swiss Federal Tax Administration Official website www.estv.admin.ch. For the general principles of taxation please refer to Articles 127–135 CONST.

⁶² More information can be found on the Swiss Federal Department of Finance official website www.efd.admin.ch/efd/en/home/dokumentation/legislation/abstimmungen/staf/fb-steuervorlage17.html accessed 17 July 2020.

administration.⁶³ The average tax rates (weighed between federal, cantonal and municipal) will vary depending on the income and may come up to roughly 30 per cent of an individual's income. Various deductions exist where an annual tax declaration is filed, which allows for some optimization of tax. What is important to know is that capital gains are tax-free. Hence, it can be advantageous tax-wise for entrepreneurs to have a lower salary accompanied by incentive plans with shares in a company, options or similar.

6.5.2 Tax on profits of companies

The equivalent of income taxes for individuals in a company context are taxes on profits. On the federal level, the profit tax is flat at 8.5 per cent.⁶⁴ Weighed together with the cantonal and municipal taxes the tax obligation can vary substantially across the country. The City of Geneva, for example, will have a higher tax rate than Zug or Schwyz. The tax bill across federal, cantonal and municipal level can vary from some 15 to 25 per cent. Therefore, it makes sense for entrepreneurs to assess taxation before settling a business at a given place (except if it is anticipated that the first year or years of business will be at a loss anyway). Most cantons offer a tax simulator online.⁶⁵

6.5.3 VAT

Value-added tax is currently set at 7.7 per cent on production of goods and most services. Food is generally subject to a reduced VAT rate of 2.5 per cent. A special rate of 3.7 per cent VAT applies to tourism lodgings. If the goods or services are exported abroad and the place of supply is deemed to be abroad then no VAT applies in principle.⁶⁶ As the VAT legislation is rather complicated each situation has to be analysed carefully and preferably before taking up the business activity. Below CHF 100,000 turnover VAT registration is optional. However, it can benefit companies to register with the VAT authorities and to file returns even if the

⁶³ For higher salaries there is a threshold above which no tax at source applies and the tax resident must file a normal tax return despite being a foreigner. The threshold is defined by the relevant canton, see Art. 34 al. 2 of the Federal Act on Harmonization of the Direct Taxes of Cantons and Municipalities; see also www.estv.admin.ch.

⁶⁴ See Art. 68 of the Federal Direct Tax Act.

⁶⁵ See Canton Zug www.zg.ch accessed 25 February 2020.

⁶⁶ See Articles 7 and 8 of the VAT Act.

business does not yet generate CHF 100,000 or more as it will allow them to retrieve the paid VAT to other providers including external lawyers, accountants, auditors and the like.

6.5.4 Research and development tax reliefs and similar

Some cantons like Zurich offer special tax statuses like the holding or mixed company status.⁶⁷ We strongly recommend obtaining proper tax advice before setting up a business. As mentioned in the Introduction, huge differences in tax obligations can result by intelligent structuring and choice of domicile, including the possibility to get legal and tax decisions by a tax authority prior to establishing a start-up by applying for a tax ruling.⁶⁸ It is also worth working with the economic promotion service of the canton chosen for business set-up, as they are best aware of what makes them more attractive compared to other cantons.

The special tax statuses are supposed to disappear in the future with the corporate tax reform that has been pending for several years now, but overall the tax reform should strengthen the competitiveness of the country.⁶⁹

6.5.5 Other tax matters – working in an international context

Switzerland has concluded a broad set of international treaties against double taxation allowing most foreign individuals holding shares in Swiss companies to benefit from reduced or even nil withholding tax rates on dividends, for example. This actually favours foreigners over Swiss nationals as for Swiss individuals holding shares in Swiss companies the withholding tax rate is strictly set at 35 per cent.⁷⁰ The same treaties usually foresee reduced rates when it comes to dividends and royalties.

⁶⁷ See § 73 and § 74 of the Zurich Tax Act (*Steuergesetz*) of 1997 www.steueram.tz.ch.

⁶⁸ For example, information on tax rulings for businesses established in the Canton of Zurich can be found at www.steueram.tz.ch/internet/finanzdirektion/ksta/en/business_location.html accessed 17 July 2020.

⁶⁹ See the Federal Council's note of 5 June 2015 on the said reform at www.estv.admin.ch.

⁷⁰ But as far as such dividends are declared by the individual in the personal annual tax return the 35 per cent is taken into account against the overall tax bill of such subject.

In an international comparison, Switzerland may well have a competitive advantage with its tax system and rather flexible structuring options at hand.

6.6 Protecting an idea or product

Switzerland is ranked by international institutions such as the World Economic Forum, the World Bank and the European Commission as a premier location for research, innovation and competitiveness.⁷¹ What allows the country to achieve and maintain this status is a cohesive mixture of extremely advanced technological development, dynamic labour market, efficient and effective research institutions and functional intellectual property (IP) rights and regulation.

As innovation is a key component of Switzerland's global competitiveness, start-ups are thus offered a legal environment that fosters and successfully protects innovation.

6.6.1 Trade secrets protection

While under Swiss law there is no formal trade secrets act, different statutes provide multiple provisions, which ensure an adequate trade secret protection. In this respect, the most important statutes to be considered are the Swiss CO,⁷² the Swiss Act against Unfair Competition⁷³ and the Swiss Criminal Code.⁷⁴

The regulatory framework provided by these statutes is in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights

⁷¹ See 'Economy Profile Switzerland' (*World Bank Group*) www.doingbusiness.org/content/dam/doingBusiness/country/s/switzerland/CHE.pdf accessed 25 February 2020.

⁷² See CO at <https://www.admin.ch/opc/en/classified-compilation/19110009/index.html> accessed 17 July 2020.

⁷³ See Swiss Act against Unfair Competition of 19 December 1986 at <https://www.wipo.int/edocs/lexdocs/laws/en/ch/ch016en.pdf> accessed 17 July 2020.

⁷⁴ See Swiss Criminal Code of 21 December 1937 at <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html> accessed 17 July 2020.

(TRIPS),⁷⁵ which is an agreement drafted and administered to countries under the umbrella of the World Trade Organization. Switzerland is among the signatories of the agreement, which mandates, among other things, the minimum standards for the regulation of trade secrets.

Swiss jurisprudence and legal theory define trade secrets and require that in order for any information to be considered a trade secret, an objective and a subjective requirement must exist. The definition provides as follows: (a) any information that is neither publicly known nor accessible, as of which (b) the carrier of the secret has a legitimate interest in the maintenance of its secrecy (objective requirement) and (c) wants to maintain such information secret (subjective requirement).

In this light, the Swiss Code against Unfair Competition under Article 5 forbids the use or exploitation of trade secrets, or so-called work results, without explicit permission to use or disclose.⁷⁶ Such prohibition clearly also applies in any case in which such information is unlawfully obtained (i.e. industrial espionage), including the infringement by a third party, provided that it should have known or knew that the information was obtained unlawfully.⁷⁷ Article 4 also prohibits any conduct which would induce employees, agents and/or any other auxiliary persons to spy and/or betray their employer or principal with the goal of unlawfully obtaining trade secrets.⁷⁸

While Swiss law does not specifically have a *lex generalis* concerning confidentiality, many *lex specialis* bring forward obligations not to disclose confidential information. Among these, employment law sets forth that employees must not reveal and/or exploit confidential information – including trade secrets – obtained while performing their duties. Confidential information therefore should be intended broadly to be any information which is not already publicly known, and that if disclosed, can cause damage to the business and/or provide a competitive advantage to others. Furthermore, this confidentiality obligation remains in force

⁷⁵ For more information see ‘Trade-related Aspects of Intellectual Property Rights’ (*World Trade Organization*) www.wto.org/english/tratop_e/trips_e/trips_e.htm accessed 25 February 2020.

⁷⁶ Art. 5 CONST.

⁷⁷ Art. 6 CONST.

⁷⁸ Art. 4 CONST.

even after the end of the employment relationship – to the extent that it is required to protect the employer's interests and business.⁷⁹

The Swiss Criminal Code, under Article 162, provides that it is a criminal offence to disclose trade secrets while under a contractual or statutory obligation of confidentiality, or to exploit such information for one's own or a third-party benefit. Sanctions for such criminal offence include a fine and imprisonment up to three years.⁸⁰ In addition, industrial espionage is also clearly forbidden by the Swiss Criminal Code under Article 273.

6.6.2 Copyright

Before diving into copyright regulation in Switzerland, it should be highlighted that even if the German word *Urheberrecht* is translated in English as copyright, the latter should be considered as a common law institution with differences and similarities to the concept of *Urheberrecht* in the German civil law.⁸¹

Copyright protection in Switzerland is regulated by the Federal Act on Copyright and Related Rights (CopA).⁸² The CopA regulates:

1. 'the protection of authors of literary and artistic works';
2. 'the protection of performers, producers of phonograms and audio-visual fixations and broadcasting organisations';
3. 'the federal supervision of the collective rights management organisations'.⁸³

Under Swiss copyright law, works are defined as 'literary and artistic intellectual creations with an individual character, irrespective of their value or purpose'.⁸⁴ The regulation does not provide a fixed list of works protected by copyright, but rather a list of examples, which includes inter alia, 'literary, scientific and other linguistic works'; 'musical works and other acoustic works'; 'works of architecture'; 'choreographic works

⁷⁹ Art. 321a Abs. 4 CO.

⁸⁰ Swiss Federal Department of Finance (n 62).

⁸¹ See [https://www.uni-jena.de/en/academic+career/news/archive+2019/bmbf+information+on+the+german+copyright+\(_urheberrecht_\)+in+science](https://www.uni-jena.de/en/academic+career/news/archive+2019/bmbf+information+on+the+german+copyright+(_urheberrecht_)+in+science) accessed 17 July 2020.

⁸² See Federal Act on Copyright and Related Rights of 9 October 1992.

⁸³ *ibid* Art.1.

⁸⁴ *ibid* Art. 2.

and works of mime'.⁸⁵ The protection granted under the CopA hinges on the concept of originality (i.e. the individual character of the work). Therefore, any work that is considered to be unique or original from a statistical perspective is automatically granted copyright protection under Swiss law. Internet content can generally be considered to be copyright protected under Swiss law, unless any other copyright protection applies, or the individual character of the creation is visibly non-existent.

The definition of protected works also includes computer programs.⁸⁶ Swiss copyright law provides a number of special provisions to protect software works. As for any other category of work protected under the CopA, software must also satisfy the criteria of the individual character in order to receive copyright protection, which covers source code and the object code. Algorithms, formulas, ideas and principles are excluded from protection.

The CopA also explicitly provides that certain categories of works be excluded from copyright protection. These are 'acts, ordinances, international treaties and other official enactments'; 'means of payment'; 'decisions, minutes and reports issued by authorities and public administrations', and 'patent specifications and published patent applications'.⁸⁷

Protection under the CopA starts from the moment that the work is created. The creator owns the copyright and has freedom to assign the IP rights on such work to third parties.⁸⁸ The absence of a centralized register for works protected by copyright means that there is no need for authors to register their works in a public register in order to get copyright protection. In addition, copyrights quotation (i.e. ©) are not necessary for protection in Switzerland – however, they can be used to deter usage and/or copying from foreign third parties.

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⁸⁵ *ibid.*

⁸⁶ *ibid* Art. 1.

⁸⁷ *ibid* Art. 5.

⁸⁸ *ibid* Articles 9 and 15.

6.6.3 Trade mark

The Federal Act on the Protection of Trademarks and Indications of Source regulates the protection of trade marks in Switzerland.⁸⁹ This act is organized in a way that resembles closely that of the CopA. The definition of a trade mark is provided under Article 1: '[a] trademark is a sign capable of distinguishing the goods or services of one undertaking from those of other undertakings'. 'Trademarks may, in particular, be words, letters, numerals, figurative representations, three-dimensional shapes or combinations of such elements with each other or with colours.'⁹⁰

A trade mark is protected in Switzerland from the moment it is entered into the public register held by the Swiss Institute for Intellectual Property.⁹¹ 'The right belongs to the person who first files the trade mark.'⁹² 'Registration is valid for 10 years from the date of filing of the application.'⁹³ It can be renewed, provided that the holder of the trade mark submits an application for renewal to the Swiss Institute for Intellectual Property within 'the last 12 months prior to the expiry of the term of validity, but not later than six months after its expiry'.⁹⁴

The Swiss Institute for Intellectual Property may refuse registration on the basis of two grounds: (1) Absolute grounds for refusal;⁹⁵ and (2) Relative grounds for refusal.⁹⁶ Absolute grounds for refusal include, among others, 'signs that are in the public domain', 'misleading signs' and 'signs contrary to public policy, morality or applicable law'.⁹⁷ On the other hand, relative grounds for refusal include signs that are: 'identical to an earlier trade mark and are intended for the same goods or services' or 'identical to an earlier trade mark and intended for similar goods or services such that a likelihood of confusion results'.⁹⁸

⁸⁹ The Federal Act on the Protection of Trade Marks and Indications of Source of 28 August 1992.

⁹⁰ *ibid* Art. 1.

⁹¹ *ibid* Art. 4.

⁹² *ibid* Art. 6.

⁹³ *ibid* Art. 10.

⁹⁴ *ibid* Art. 10.

⁹⁵ *ibid* Art. 2.

⁹⁶ *ibid* Art. 3.

⁹⁷ *ibid* Art. 2.

⁹⁸ *ibid* Art. 3.

Earlier trade marks under Swiss law are intended as any ‘filed or registered trade mark that gives rise to a priority under this Act’ or ‘a trade mark that is well known in Switzerland within the meaning of Art. 6bis of the Paris Convention for the Protection of Industrial Property’.⁹⁹ In this respect, Switzerland, by being among the signatories of the Paris Convention, allows an applicant whose right is already registered in another member state of the convention to claim the date of the first original filing when applying for registration in Switzerland.

Non-use of the right of trade mark for a period of five years – provided that no opposition has been submitted in due time – produces the expiration of such right. However, if the use of the trademark is ‘commenced or resumed after more than five years, the right to the trade mark is restored with effect from the original priority date, unless non-use of the trade mark has been invoked’.¹⁰⁰ In such case, whoever invokes the non-use of the trade mark must substantiate the claim and provide evidence.¹⁰¹

All trade marks in Switzerland can be licensed, provided that the licence has been entered in the Register.¹⁰²

6.6.4 Patents

The Federal Act on Patents for Inventions (PatA)¹⁰³ represents the umbrella under which patents are regulated in Switzerland. PatA is a very broad piece of a regulation, thus, due to space limitation, we will only provide an overview of how patents for inventions are regulated and protected under Swiss law.

Under PatA, as a general rule, patents for inventions are only granted to new inventors that can find application in industry. Patents are not granted to ‘[a]nything that is obvious having regard to the state of the art’.¹⁰⁴ Furthermore, the human body,¹⁰⁵ gene sequences,¹⁰⁶ as well as

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⁹⁹ *ibid.*

¹⁰⁰ *ibid* Art. 12.

¹⁰¹ *ibid.*

¹⁰² *ibid* Art. 18.

¹⁰³ See Federal Act on Patents for Inventions of 25 June 1954.

¹⁰⁴ *ibid* Art. 1.

¹⁰⁵ *ibid* Art. 1a.

¹⁰⁶ *ibid* Art. 1b.

all 'inventions whose exploitation is contrary to human dignity or that disregard the integrity of living organisms or that are in any other way contrary to public policy or morality are not patentable'¹⁰⁷ and surgical and diagnostic methods are excluded from patentability.

According to PatA, the right to a patent belongs to '[t]he inventor, his successor in title, or a third party owning the invention under any other title'.¹⁰⁸ However, the right is assigned jointly in the case where an invention has been jointly created by several inventors,¹⁰⁹ whereas, '[w]here two or more inventors have made the invention independently of each other, the person who makes the earlier application or whose application has the earliest priority date has this right'.¹¹⁰

In order to be granted a patent, the inventor or any other right holder, must undertake the required procedure before the Swiss Federal Institute of Technology.¹¹¹ The Institute will then evaluate the state of art of the invention, thus assessing whether the invention can be considered new or whether a previous application regarding the same invention has been submitted.¹¹²

Once the patent is granted, it 'confers on its proprietor the right to prohibit others from commercially using the invention'.¹¹³ Commercially using the invention 'includes, in particular, manufacturing, storage, offering, placing on the market, importing, exporting, and carrying in transit, as well as possession for any of these purposes'.¹¹⁴ 'Products that are protected by a patent ... may be marked as being patented with the Federal Cross and the number of the patent'.¹¹⁵

Patents are granted for a maximum term of 20 years from the date on which the application was filed.¹¹⁶ Patents can lapse prematurely if the

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¹⁰⁷ *ibid* Art. 2.

¹⁰⁸ *ibid* Art. 3.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*.

¹¹¹ *ibid* Art. 4.

¹¹² *ibid* Art. 7.

¹¹³ *ibid* Art. 8.

¹¹⁴ *ibid*.

¹¹⁵ *ibid* Art. 11.

¹¹⁶ *ibid* Art. 14.

right holder to the patent renounces it by written declaration to the Swiss Federal Institute of Intellectual Property or if the renewal fee¹¹⁷ has not been paid within the given timeframe.¹¹⁸

6.6.5 Licensing agreements

Licensing agreements are considered *sui generis* agreements under Swiss law,¹¹⁹ and therefore are subject to the general provisions contained in the Swiss CO. IP law only provides for certain facets of licensing agreements, whereas other features are regulated by the general provisions of contract law as well as property law.

As a rule of thumb, the parties to a licensing agreement have freedom of negotiation of all aspects of the agreement. Such freedom is limited only by a very narrow number of provisions of competition law and general contract law.¹²⁰

Under Swiss law, the parties to a licensing agreement are bound to it without a registration of the licensing agreement. However, if the parties want to have the licensing agreement to be considered by third parties, they must register it with the Swiss Federal Institute of Intellectual Property.

A written contract is required only for the assignment of trade marks, patents and designs. The assignment of copyrights does not require a written contract since there is no copyright register in Switzerland.¹²¹

Licensing agreements can vary in scope. They can provide for exclusive, sole and non-exclusive licences. Exclusive licences confer all rights in the IP content to the licensee.¹²² Sole licences – which are not very common – provide that the licence is exclusive, but the licensor still reserves the

¹¹⁷ For an idea of the fees required for registering a patent, see 'Costs' (Swiss Federal Institute of Intellectual Property) www.ige.ch/en/intellectual-property/guide/patents/costs.html accessed 25 February 2020.

¹¹⁸ Federal Act on Patents for Inventions (n 103) Art. 15.

¹¹⁹ *Sui generis* agreements, as the name states, are agreements of 'their own kind'.

¹²⁰ 'Switzerland Licensing' (*Getting the Deal Through*) <https://gettingthedealthrough.com/compare/19/jurisdiction/29/licensing-switzerland/> accessed 25 February 2020.

¹²¹ Federal Council (n 69).

¹²² Federal Act on Patents for Inventions (n 103) Art. 2.

full rights to use and exploit the IP content. Non-exclusive licences provide that the licensor is free to grant a limited or unlimited number of licences to the same IP content. In this case the rights of the licensees are narrower.¹²³

From a pre-contractual perspective, Swiss law does not require parties to adhere to ad hoc disclosure provisions. The general – and widely known – principles of good faith and fair dealing are applicable and must be respected by the parties. The latter are therefore required to share any information that could potentially influence the decision of the other contracting party.¹²⁴

Foreign licensors who want to enter into a licensing agreement in Switzerland, need not ‘establish[] a subsidiary or branch office in Switzerland. However, there are no particular restrictions on the establishment of a business entity or joint venture by foreign licensors in Switzerland, and no filing or regulatory review process applies.’¹²⁵

Furthermore, Swiss law provides that the parties to an international licensing agreement can freely select the governing law of the agreement.¹²⁶ Some limitations, however, are provided by the Federal Statute on International Private Law:

1. mandatory Swiss provisions that by virtue of their special aim are applicable to the specific case remain applicable regardless of the parties’ chosen law;
2. the application of a foreign provision that gives rise to an incompatibility with Swiss public policy is excluded.¹²⁷

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¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ Art. 122 (e.2) Federal Statute on International Private Law of 18 December 1987.

¹²⁷ *ibid.*

6.7 Operational liabilities and insurance

6.7.1 Insurance

In Switzerland, social insurances are generally a shared responsibility between employers and employees.

If you are thinking about starting a company in Switzerland, Table 6.2 is a list of the main insurance policies that you will need to underwrite for yourself, your co-founders and your employees.

6.7.2 Risk assessment and compliance management

Assessing risk is crucial for both start-ups and insurers. A correct assessment of all risks connected to the business, as well as to the founders and employees, allows the founders to foresee potential issues that might arise and makes it possible for insurance companies and the government to respectively quote policies and mandatory public contribution and social insurances such as the AHV. As Switzerland is known to be a place where business is conducted in a trustworthy manner, both insurance providers and the government rely on yearly review forms compiled and submitted by the founders to assess the current state of the organization and therefore adjust premiums and contributions.

With respect to insurance, start-up founders have to fill and submit forms or questionnaires to insurance providers. Such forms are required for all mandatory insurance policies such as the UVG (accident insurance), and require founders to provide information regarding the business, the number of employees, the financial situation, if any other insurance has been contracted, and if there are existing insurance claims pending with other insurance providers.

It is important to highlight that many regulated activities which require a specific licence (e.g. asset management, many FinTech activities) will also have different ad hoc insurance requirements. Hence, founders should always seek counsel to ensure that (1) licensing requirements related to the business activity they are trying to seek are satisfied, and (2) that ad hoc insurance requirements are known and can therefore be satisfied.

Table 6.2 *Swiss insurance policies*

AHV (1st Pillar)	Retirement and survivors insurance	• Mandatory insurance for people living or working in Switzerland. • Contribution obligatory for all employed persons. • Insurance for retirement (retirement pension) and for death of a spouse or parent (survivors' pension). • Total contribution rate: 8.4% of salary. • Contribution is shared half and half by employer and employee. • As of 1 January 2019, the AHV is optional for salaries up to a yearly total of CHF 23,050.
IV (1st Pillar)	Disability insurance	• Everyone taking part in AHV also automatically pays into IV. • Security in the case of disability (disability pension). • Does not cover treatment costs in the case of sickness or accident. • Contribution rate: 1.4% of salary. • Contribution is shared half and half by employer and employee.

BVG (2nd Pillar)	Personal pension fund	• Insurance obligatory for all employed persons; optional for freelance workers and those in registered partnerships. • Workers with an income of at least CHF 20,520 must make contributions toward life and disability insurance upon turning 17 years of age and additional contributions to the retirement provision upon turning 24 years of age. • Coverage of risks related to death and disability as well as financing retirement. • The pension fund is an additional pension benefit. • Contributions from employer and employee are collected and accrue interest. • Contributions are dependent on age and lie between 7% and 18% of one's income. • At least half of the amount is paid by the employer; some employers pay 3/4 of the contributions. • When changing positions within Switzerland, the vested benefit amount is transferred to the benefit plan of the new employer. • Since 1 June 2007, early cash pay-out of paid benefits can occur only when moving outside of Switzerland so long as there is no foreign insurance requirement, or if moving to a country outside of the EU. It is also possible to receive a partial early pay-out if using the funds to purchase residential property for one's own use or for establishing self-employment.
ALV	Unemployment insurance	• Entitlement to benefits exists for those who were employed in Switzerland for at least 12 months over the preceding 2 years. • Contribution: 2% of the salary. • Contribution is shared half and half by employer and employee.

UVG	Accident insurance	• Mandatory insurance for all workers employed in Switzerland. • Work-related accidents and illnesses as well as accidents on the way to work and non-work-related accidents (NBV) are covered. • Automatically insured from employer with employment of more than eight hours per week. No additional insurance is necessary. • Unemployed persons must take out accident insurance along with their health insurance. This also applies for a position of less than eight hours per week. • Exception: contributions to NBV vary by earnings and employer. • Insurance providers: the Swiss National Accident Insurance Fund (SUVA), private insurance companies, recognized health insurance providers and public accident insurance providers. • Benefits and premiums are based on the insured earnings.
KV	Health insurance	• Mandatory insurance for all Swiss residents regardless of their employment status. • Benefits are set by law and are the same with every insurance provider. • The provider can be freely chosen.

3rd Pillar	Bound provision	• Optional tax-deductible provision plan. • Contributions can be deducted from withholding tax. • If already taking part in a pillar 2 pension plan, the yearly contribution for employed persons is limited to approx. CHF 7,000 tax deductible, updated yearly. • Pillar 3a funds can be withdrawn unconditionally if permanently leaving Switzerland.
KTG	Sick leave insurance	• Protects income in case of inability to work for a prolonged period of time • Not mandatory by law • Contributions are usually paid by the company

Source: [Comparis.ch](https://www.comparis.ch).

Furthermore, when it comes to AHV, the government will immediately send a form to the founders as soon as the company is legally constituted and published in the register of commerce. Such form requires founders to disclose if any salary will be paid during the first year and if UVG insurance has been contracted already (remember that UVG is mandatory if the start-up has employees).

As mentioned in Table 6.2, AHV contributions are optional in case the salaries paid are up to CHF 23,050 per year. For any amount above such threshold AHV contributions are mandatory. In other words, these exemptions entail that should the founders decide to forgo salaries to bootstrap the start-up in its ultra-early stages, there is a significant amount of relief from AHV and other contributions (UVG and BVG) but at the same time there is no protection in case of adverse events which might affect the company or the founders.

However, should the founders benefit from the exemption above and thus not be covered by any of the mandatory public insurances, it is strongly advised to contract private accident insurance to cover all potential costs incurring from accidents, as a potential accident in Switzerland may carry significant high costs if uninsured.

Ensuring compliance with public contributions and social insurances on a recurring basis is straightforward in Switzerland, given that founders

are required to submit yearly questionnaires or forms which are also used by insurance companies to evaluate the current state of the business and re-adjust the risk profile, as well as contributions and premiums.

Administration websites are easy to consult and provide all the necessary information for basic compliance in four languages.

6.8 Dissolving a company

The main causes for a company dissolution are business restructuring (whether voluntary or compelled by economic¹²⁸ or legal circumstances), business failure, lack of business succession or take-over options, or where the actual owners want or have to divest for one reason or another or are so totally in dispute that dissolution seems the only way out of a decision-taking paralysis. When it becomes evident that the company cannot continue as a going concern or similarly is in financial trouble, the board of directors has to propose restructuring measures and may need to resort to court.¹²⁹

6.8.1 Process

The first step for starting the dissolution process of a company is for the members to pass a dissolution resolution at a general meeting, which has to be recorded by public deed (by a notary).¹³⁰ The deed has to mention the dissolution resolution, the liquidator and their signatory power. Then the management of the company has to notify the register of commerce immediately about the dissolution so that the company's name will be reflected with a mention 'in liquidation' behind it.

In a second step, the actual liquidation of the company takes place. All business is being wound down, any outstanding share capital called in, contracts terminated as far as possible, assets sold or transferred or otherwise realized, debts paid or settled by arrangements and the company's

¹²⁸ For example, in case of over-indebtedness or insolvency, the board of directors has specific duties to convene an AGM for restructuring respectively to inform the competent judge as per Art. 725 ff CO.

¹²⁹ Art. 725 ff CO.

¹³⁰ Art. 736 CO for the LTD and Art. 821 CO for the LLC.

obligations performed. The liquidator prepares a liquidation balance sheet. This is also the moment when the company has to publish three notices to creditors or creditors' calls in the Swiss Official Gazette of Commerce (SOGC).¹³¹

Then there is a statutory waiting period for creditor protection reasons and once it is over the liquidator can distribute any remaining assets after liquidation and notify the RC.

The company, however, will not qualify for striking off the register before the federal and cantonal tax authorities have given their green light for doing so.

6.8.2 Length

The first two steps can be quick if there was no or only little activity left and an annual general meeting (AGM) can be convened without delay to pass the relevant dissolution resolution recorded by a notary. The three creditor calls could be made and published within the same week in order to save time although it is common to spread them over three weeks or a month.

The waiting period foreseen by law is normally one year after the publication of the last (third) notice to creditors in the SOGC.¹³² It can be shortened to three months if an accredited auditor confirms the debt is paid and it can be assumed that according to the circumstances no third party interests are endangered.

The biggest timing uncertainty lies with the tax authorities: provided all tax debts are paid it can take them weeks, or even months, to approve a strike off the RC.

6.8.3 Fees

As Switzerland is structured into rather autonomous cantons the fees for notaries, the RC and even auditors may vary strongly from one canton to

¹³¹ See Swiss Official Gazette of Commerce (SOGC) www.sogc.ch accessed 25 February 2020.

¹³² Art. 745 al. 2 and 3 CO in case of a company limited by shares and *per analogiam* for a limited liability company.

another. The notary's fee for the public deed recording the dissolution resolution will normally cost between around CHF 200 at the lower end and CHF 1,000 or slightly more at the higher end. The RC mentioning 'in liquidation' for the company's name and the actual striking off the register at the end of the process will typically cost CHF 200 as well.¹³³

6.8.4 Tax consideration

Even though the company may have ceased activity, some tax is still due. In fact, the primary company tax regime in Switzerland is divided into two major categories: the profit tax and the tax on capital. Even though there might be no profits, the capital tax is still due and is calculated on the amount of capital. As long as any tax liability remains unpaid, be it cantonal or federal (even if it is a secondary tax applicable to the company such as (value-added tax) VAT or Anticipatory Tax or Stamp Duty or the like), the tax authorities will withhold approval for striking off the company at the RC. As a general rule you should be on good terms with the tax authorities or you will not be able to dissolve your company.

6.8.5 Possibility of establishing a new business

An alternative to putting the company to death by a dissolution process would be spinning off or splitting off part of it into a new business venture. A new business can also be established from scratch, without any link to the predecessor company. However, this may be more cumbersome, with the advantage (or inconvenience as the case may be) of having no track record. Still another option could be to migrate the company to another more flexible or otherwise more suitable jurisdiction. Switzerland is a business-friendly place¹³⁴ although it has its price.

¹³³ For example Zurich's fees are available at https://hra.zh.ch/internet/justiz_innere/hra/de/gebuehren.html accessed 17 July 2020.

¹³⁴ See also the World Bank's Country Profile for Switzerland at http://databank.worldbank.org/data/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=CHE accessed 17 July 2020, and the World Bank's business ranking (DB 2018 Rank Overall is 33 for Switzerland) at <http://www.doingbusiness.org/data/exploreeconomies/switzerland> accessed 20 July 2020.

6.9 Swiss start-up environment

Although for some industries like funds and collective investment vehicles Switzerland has lost attractiveness due to a perhaps hesitant political positioning (such as no tax advantages granted for newcomers, no reliefs on the heavy regulation), others have started to become increasingly attractive for start-ups. This is the case, for example, for medical, pharmaceutical, biotech and other high-tech driven start-ups where Switzerland has taken measures on the legislative level in order to foster research and development and attract talent and entrepreneurs.¹³⁵

Basel, for example, is internationally known as a hub for pharmaceutical companies thanks to being the home of Novartis and Roche among others. Zurich rivals with Lausanne when it comes to medical technology and biotech, where hubs are being created and sponsored in order to foster innovation, while Geneva is also in the run for new technologies thanks to being the home of CERN, among others. Zug is on the forefront when it comes to the newest technological developments in the field of finance, such as crypto-assets.¹³⁶

The competitive advantages of Switzerland are its central geographical location with excellent infrastructure, highly educated work force, open economy, political stability and low taxes.¹³⁷

6.10 Conclusion

‘Small but beautiful’, you can call Switzerland, with its down-to-earth, efficient legal system and administration. Although some authorities are not fast (but where are they?), overall the economic system is very reliable and hence an excellent base for starting a business in the heart of Europe. You know what you get for the money you spend on setting up a business in Switzerland: reliability, stability and reputation.

¹³⁵ See the Federal Act on the Promotion of Research and Innovation of 14 December 2012.

¹³⁶ See Cryptovalley, www.cryptovalley.swiss accessed 25 February 2020.

¹³⁷ *Economist Intelligence Unit* (n 1).

The Swiss banking and finance environment is world renowned and the transportation infrastructure is excellent as well. High technology and innovation are key drivers of business and the focus of the government, which promotes them actively. The excellent universities and other institutions of the educational system attract skilled international human resources and the good quality of life brings a qualified workforce to the country.

Expert advice will save you money by helping you choose the appropriate legal structure for your venture as well as its geographic implantation in a tax friendly canton and municipality.

Tables 6.3 and 6.4 list some useful resources for starting a business in Switzerland.

Table 6.3 List of useful Swiss websites

www.admin.ch	Official website of the Swiss government
www.ch.ch	Official website of the Swiss authorities
www.estv.admin.ch	Official website of the Swiss Federal Tax Administration
www.parlament.ch	Official website of the Swiss Parliament
www.ahv-iv.ch	Official information website for the Swiss social insurances system
www.startup.ch/	'The Swiss Start-up Platform' website
www.fatf-gafi.org	Official website of the Financial Action Task Force

Table 6.4 Additional sources and referred sources

Swiss Code of Obligations (CO)	https://www.admin.ch/opc/en/classified-compilation/19110009/index.html
Swiss Federal Constitution	https://www.admin.ch/opc/en/classified-compilation/19995395/index.html
Swiss Criminal Code	https://www.admin.ch/opc/en/classified-compilation/19370083/index.html
Swiss Federal Act on Patents for Inventions	https://www.admin.ch/opc/en/classified-compilation/19540108/index.html
Swiss Federal Statute on International Private Law	https://www.unine.ch/files/live/sites/florence.guillaume/files/shared/publications/pil_act_1987_as_from_1_1_2017.pdf
Swiss Federal Act on the Protection of Trade Marks and Indications of Source	https://www.admin.ch/opc/en/classified-compilation/19920213/index.html
Swiss Civil Code	https://www.admin.ch/opc/en/classified-compilation/19070042/index.html
Swiss Federal Act on Copyright and Related Rights	https://www.admin.ch/opc/en/classified-compilation/19920251/index.html
Federal Direct Tax Act	https://www.efd.admin.ch/efd/en/home/themen/steuern/steuern-national/the-swiss-tax-system.html
Swiss Act against Unfair Competition	https://www.wipo.int/edocs/lexdocs/laws/en/ch/ch016en.pdf
Swiss Banking Ordinance	https://www.admin.ch/opc/de/classified-compilation/20131795/index.html
Swiss Banking Act	https://www.admin.ch/opc/de/classified-compilation/19340083/index.html
Federal Anti-Money Laundering Act	https://www.admin.ch/opc/en/classified-compilation/19970427/index.html

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Swiss Financial Institutions Act 'FinIA'	https://www.efd.admin.ch/efd/en/home/themen/wirtschaft--waehrung--finanzplatz/finanzmarktpolitik/fidleg-finig.html
Swiss Consumer Credit Act	https://www.bj.admin.ch/bj/en/home/wirtschaft/gesetzgebung/archiv/konsumkredit.html

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