

Doing business in Switzerland

MME - Meyer Müller Eckert Partners
 Kreuzstrasse 42
 8008 Zürich
 Phone: +41 44 254 99 66
 Fax: +41 44 254 99 60

Table of contents

I.	Overview of the legal framework of Switzerland	2
II.	Ways to enter Switzerland	3
A.	Establishing a separate legal entity	3
B.	Establishing a branch office.....	4
C.	Use of agents, distributors and travelling sales persons.....	4
III.	Regulation of foreign Investments	5
A.	Restrictions on foreign investment.....	5
B.	Financial incentives.....	5
IV.	Forms of doing business in Switzerland	6
A.	The “Aktiengesellschaft (AG)”	6
1.	Foundation procedure	6
2.	Liability and risk limited to capital.....	8
3.	Management	8
4.	Minimum share capital.....	9
5.	Taxation	9
B.	The “Zweigniederlassung” (branch office).....	10
1.	Foundation procedure	10
2.	Liability and risk limited to capital.....	11
3.	Management	11
4.	Minimum share capital.....	11
5.	Taxation	11
V.	Visas, residence and work permits.....	11
VI.	Tax treaties	12

I. Overview of the legal framework of Switzerland

- 1 Switzerland is one of the world's leading financial centres. The main factors which helped Switzerland to attain this position are a stable political situation, the country's capacity to facilitate savings, a stable currency with minimum transfer restrictions, traditionally low interest rates, and highly sophisticated and secure financial institutions. The principles of freedom of trade and industry as well as the freedom of contract ensure that domestic and international investors encounter a favourable financing climate.
- 2 Swiss law does not distinguish between Swiss-owned and foreign-owned business entities, and, in principle, there are no registration or local agent requirements. According to the Swiss Private International Law, companies are subject to the law under which they were formed. When establishing a Swiss company or a Swiss branch office the **Swiss Code of Obligations** (CO, SR 220) is the main body of law which regulates the different business entities.
- 3 Free and fair competition is strengthened by a strict **Cartel Act** (SR 251). Cartels are not illegal per se but abuses are prosecuted. The Swiss Anti-Trust Commission (www.weko.admin.ch) is responsible for applying and enforcing these stipulations.
- 4 Commercial enterprises doing business in Switzerland are obliged to register in the **commercial register**. Its central focus is its public disclosure role. Accordingly, the Central Business Names Index (www.zefix.ch) is open to anyone to anyone for inspection and can respond to inquiries as to whether a company name is available. It also specifies each company's extent of liability and its authorized representatives but not the annual statements. As a rule it is only after registration in the commercial register that legal entities receive their own legal personality and status.
- 5 The state has a federal structure and is divided into three political levels: federal, cantonal and municipal. The Swiss **tax system** mirrors this characteristic by various levels of direct taxation: direct federal tax, cantonal and municipal taxes. The accomplished reform of the income tax system in recent years provided harmonization of the formal aspects of the various cantonal tax legislations. Another specific characteristic of the Swiss tax regime is that it is quite simple and very common to request an advance tax ruling. Discussions with the tax authorities are conducted informally in a climate of mutual trust and, in general, lead to a result satisfactory to both the taxpayer and the tax authorities. More information is available under www.estv.admin.ch.

- 6 Concerning **regulations on immigration** visas, residence and work permits are strictly controlled in Switzerland. Since there are no agreements on the free movement of persons, non-EU/EFTA citizens, in particular U.S. nationals, who wish to work and live in Switzerland have to fulfil certain conditions. For EU/EFTA citizens a more liberalized regulatory framework applies. The Federal Office for Migration publishes the latest requirements for entering the country on its homepage (www.bfm.admin.ch).

II. Ways to enter Switzerland

- 7 There are two ways to enter Switzerland: By establishing a separate Swiss legal entity (see II. A.) or by forming a branch of a foreign company (see II. B.). Besides, business relationships can, of course, also be set up on a purely contractual basis, e.g. as that of an agency or sole distributorship. There are numerous ways to structure agreements of that kind under Swiss contractual law, which recognises only a small number of restrictions regulated by compulsory law (see. II. C.).

A. Establishing a separate legal entity

- 8 The so-called “Aktiengesellschaft (AG)” in German, „Société anonyme (SA)” in French and „Società anonima (SA)” in Italian is the most important type of business entity in Switzerland. It is an appropriate legal form not just for large companies but also small and medium-sized for-profit-businesses. It is the customary type of corporation for holding companies and financial enterprises. In addition, it is often chosen by foreign companies as the legal form for their subsidiaries.
- 9 The AG’s corporate structure is similar to a corporation in the United States or a public limited company in the UK. It has its own legal personality and its own name. The registered share capital is determined in advance and subdivided into shares. The liability is limited to company assets. The owners of the shares (the shareholders) exercise their rights at the General Meeting of Shareholders. Actual management of the AG is the exclusive responsibility of the Board of Directors and the executive officers who are appointed by that Board.
- 10 To form an AG one or more private individuals or legal entities are required. If the shareholders are private individuals, it is irrelevant from the point of view of Swiss corporate law whether they are Swiss nationals or foreigners. On the other hand, a new formation can become somewhat more complicated if one or more of the founding shareholders are foreign companies. It is therefore advisable either to authorize private individuals by proxy to set up the company or – after incorporation by private individuals – to transfer the shares to a foreign company.

- 11 The text of the Limited Company Law is available under www.admin.ch/ch/d/sr/c220.html (Article 620 et seq. CO; in German, French, Italian).

B. Establishing a branch office

- 12 A foreign company may also establish one or several branch offices in Switzerland. The advantage of a branch office is that it is simpler and less expensive. Branch offices have a certain organisational and financial autonomy from the principal enterprise on which it depends: under Swiss law, a branch office can enter into contracts and execute and settle transactions in its own name, and can sue and be sued at its place of business. Legally, however, the branch office is part of the foreign parent company and not a separate legal entity. If the foreign parent is liquidated or becomes insolvent, the effects of such liquidation or insolvency also extend to the Swiss branch office.

C. Use of agents, distributors and travelling sales persons

- 13 A foreign supplier can also choose to enter the Swiss market by selling his/her products through agents, distributors or travelling sales persons. The different channels of selling are subject to different legal frameworks.
- 14 **Agency contracts** are governed by article 418a to 418v Swiss Code of Obligations (CO). Article 418a CO defines the agent as a person who is contractually obliged, on a continuous basis and without being an employee, either (i) to act as an intermediary on behalf of one or several principals in business transactions (application agent), or (ii) to conclude such transactions in their names and for their accounts (underwriting agent).
- 15 Although an agent in the aforementioned sense is acting in the name and for account of a third party (the principal), he always performs his work independently, that is in a self-employed capacity. He may organize his work and dispose of his time freely. Swiss law does not permit a principal to inspect the books of his/her Swiss agent. In practice, commercial agents and insurance agents play a decisive role in business. To insurance agents, additional rules of the Swiss Insurance Contract Law (SR 221.229.1) apply.
- 16 If a person or a company acts independently, like an agent, but on a case by case basis or on a single deal basis rather than continuously, such arrangement is not to be qualified as an agency contract but constitutes a **brokerage contract**. Brokerage contracts are governed by different legal rules (article 412 et seq. CO). On the other hand, even if a commercial agent is working only on a part-time basis, but continuously, the provisions concerning commercial agency agreements (article 418a et seq. CO) are applicable, unless the parties have stipulated something different in writing (article 418a para. 2 CO).

- 17 A person or company undertaking, against payment of a commission, to sell and/or purchase goods in his own name rather than in the principal's name, although acting on the principal's account, is not a (commercial) agent, but a commission agent, again subject to a different legal regime (article 425 et seq. CO)
- 18 **Distribution agreements** are not regulated by statute in Switzerland. A distributor is defined as a person or a company who is contractually obliged to buy the supplier's products in order to resell them in a particular territory on an exclusive or non exclusive basis. A typical duty of the distributor is the duty to perform sales promotions. In contrast to an agent who only acts as an intermediary of the principal, a distributor is legally independent and acts on his own behalf and for his own account and risk. Thereby, the ownership of the contractual goods shifts from the supplier to the distributor. Accordingly, the distributor bears the whole marketing risk.
- 19 A **travelling sales person** (Handelsreisender, article 347 CO) is subordinated to his/her employer and is obligated to strictly perform work according the employer's instructions. Such person acts as an intermediary or concludes business transactions outside of the premises of the employer, similar to a commercial agent, but he or she is acting under an employment contract and not as an independent business person. A travelling sales person is entitled to a fixed salary, with or without commission, and reimbursement of travel and entertainment expenses. If a foreign supplier chooses to sell his/her products in Switzerland through travelling sales persons or other employees who are not Swiss nationals, a work permit is required prior to immigrating and/or working in Switzerland. Both, the foreign supplier and his/her travelling sales person(s) (employees) may become subject to Swiss social security legislation. If travelling sales persons buy products from a stock maintained by the foreign supplier in Switzerland, such activity may qualify as permanent establishment under Swiss tax law, subjecting the foreign supplier to Swiss taxes on his Swiss earnings.

III. Regulation of foreign Investments

- 20 Switzerland welcomes foreign investment and accords it national treatment. Foreign investment is not hampered by significant barriers.

A. Restrictions on foreign investment

- 21 In general, there are no restrictions on foreign investments.

B. Financial incentives

- 22 **National tax incentives:** Financial incentives (e.g. loan guarantees and interest subsidies) and federal tax holidays or reduced federal taxes for up to ten

years may be granted to businesses making major investments or creating jobs in areas in need of economic development. The incentives as well as the regions for which such incentives are available are specified in the so-called “Lex Bonny Decree”.

- 23 **Cantonal tax incentives:** In order to attract new enterprises and thus strengthen regional economies, cantons may grant investment and tax incentives to newly established corporations. Incentives include tax holidays or reduced taxation for up to ten years at the cantonal/municipal level, interest subsidies, job-related subsidies or special guarantees. Incentives can be granted to both manufacturing and service enterprises and usually depend upon the type and amount of investment, the number of employment opportunities created and the region where the new enterprise is to be established.
- 24 Apart from tax incentives, there are no direct state subsidies for foreign investment.

IV. Forms of doing business in Switzerland

A. The “Aktiengesellschaft (AG)”

1. Foundation procedure

25 The **main steps** in establishing an AG are the following:

- 26 1. Draft the articles of association in the presence of a notary public, who notarizes the personal and corporate signatures on the application form and authenticate the articles of association and the public deed of incorporation;
- 27 2. Place the paid-in capital in an escrow account with a bank; It is important to note that during the procedure of inscription in the commercial register, the share capital remains blocked. The inscription procedure ends when the corporation is formally registered in the commercial register. The paid-in capital will, however, continue to be blocked until the bank receives an extract from the commercial register, proving that the new corporation has been duly inscribed;
- 28 3. File the deed certifying the articles of association to the local commercial register to obtain a legal entity;
- 29 4. Pay stamp tax at post office or bank after receiving an assessment by mail;
- 30 5. Register for VAT;
- 31 6. Enroll employees in the social insurance system (federal and cantonal authorities).

32 The following plan serves to give an approximation of the **time** required in order to form a new AG:

Clarification – acceptability of company name	1 to 5 days
Preparation of foundation documents with annexes (foundation document, articles of association, application to commercial registry, etc.)	1 to 5 days
Clarification of domicile and auditors	
Paying in of capital	
Meeting of founding shareholders/members	less than 1/2 day
Inscription in commercial register	3 to 7 days

33 The following incorporation **costs** are likely to arise when setting up a new AG with a share capital of CHF 100,000.-.

Notary fees	2% of share capital (min. CHF 500.-)
Registration fees (Commercial Register)	approx. CHF 800.-
Advisory fees (depending on requirements)	approx. CHF 4,000.- to 7,000.-
Federal stamp duty (1%)	the first CHF 1,000,000.- of capital is exempt
Other costs (general expenses)	individual by needs

34 The following **founding documents** are needed to form the company:

- Personal data of the founders (or their representatives), members of the board, the authorized representatives of the company and the auditors;
- Application for registration in the commercial register, signed by two members of the board of directors or by one member with power of proxy and the corporate signatures of all authorized signatories. All signatures must be officially certified;
- Deed (notarized document) of incorporation;
- Clear and unequivocal articles of the association containing the details required in legislation (in particular the name of the company, its registered domicile and purpose);
- Declaration of acceptance of the appointments by the members of the board of directors if this is not apparent from the deed of incorporation;

- Minutes of the constitutional meeting of the board of directors, stating who was elected chairman and what signing authority has been given;
- If shares are paid in cash: Confirmation from a Swiss bank;
- If the company does not dispose of a legal domicile where it is registered: Declaration by the domicile holder that the company has been granted a legal domicile where it is registered (c/o address);
- Declaration by the founders to the intent that no other payment in kind exists and that shareholders have not be granted and privileges other than those mentioned in the documents (Stampa declaration);

If contributions in-kind are made, or if such are to be made, or if special privileges are granted to shareholders the following documents also have to be submitted:

- Contracts for contributions in-kind including the necessary documents (inventories and/or acquisition balance sheets);
- Take-over contracts including the necessary documents (inventories and/or acquisition balance sheets);
- Founders report (signed by all founders);
- Unreserved confirmation of an audit by a state supervised auditing company, accredited auditing specialist or auditor.

2. Liability and risk limited to capital

35 The shareholders have no personal liability beyond the share capital. A shareholder's liability is restricted to the amount of subscribed for share capital.

36 Founders, members of the board of directors and all persons who participated in the foundation become liable to the company, as well as to shareholders and company obligees, for any damage caused by indicating intentionally or negligently an incorrect or misleading information in breach of the legal requirements and their duties in general.

3. Management

37 The board of directors is the management body of the AG. The board of directors consists of one or more members. The law confers the board of directors with untransferable and inalienable duties (e.g. overall management of the company, definition of the management structure, control of employees entrusted with management functions, preparation of the annual report, etc.).

There is no requirement for a board member to be a shareholder. If it so wishes, the board can, by means of internal organisational regulations and based on corresponding articles of association nominate individual members (delegates) or third parties (managers, authorized clerks) to carry out those functions of management which can be delegated. Those people authorized to sign on behalf of the corporation must be entered in the commercial register.

- 38 There are generally no restrictions with respect to the nationality of the shareholders. However, one member of the board of directors authorized to represent the company must reside in Switzerland. When appointing members of management, it is important to note that it may well be necessary to obtain work permits for non-Swiss people.

4. Minimum share capital

- 39 An AG has to have a share capital of at least CHF 100,000.–. The share capital can be divided into bearer and/or registered shares. The nominal value of those shares must be at least CHF 0.01. When establishing the corporation, each share must be paid up to at least 20 % of its nominal value, but the total paid-up share capital must amount to at least CHF 50,000.–.

- 40 A part of the share capital can also be issued in the form of so-called participation certificates. Essentially, these are shares without voting rights.

5. Taxation

- 41 **Income tax:** *The Swiss Federation* levies corporate income tax at the flat rate of 8.5% on profit after tax of corporations such as the AG. The basis for determining taxable income is the worldwide income pursuant the statutory accounts, with exception of income attributable to foreign permanent establishment or foreign immovable property. Such income is excluded from the Swiss tax base and is only taken into account for rate progression purposes in cantons that still apply progressives rates. Apart from the participation exemption for dividend and capital gains income, various adjustments required by tax law and the use of existing loss carryforwards (the loss carryforward is seven years), there are very few differences between statutory profit and taxable profit. The most common deductions allowed are depreciation, tax expense, interest expense and management and service fees/royalties. The last two are deductible to the extent that they are in accordance with the arm's-length principle. Furthermore, the Swiss Federal Tax Administration has issued safe harbor rules for thin capitalization purposes. Given the tax harmonization on *the cantonal and municipal levels*, most tax rules are identical or very similar to the rules on the federal level. Nevertheless cantonal tax laws offer special tax regimes differencing between the operating company, the holding company, the domicile company and the mixed company.

- 42 **Capital tax:** On the *federal level* no capital tax is levied. The basis for the calculation of *cantonal/municipal* capital tax is in principle the company's net equity (i.e. share capital, paid-in surplus, legal reserves, other reserves, inappropriate retained earnings). The taxable base of an AG also includes any provisions disallowed as deductions for tax purposes, any other undisclosed reserves, as well as debt that economically has the character of equity under the Swiss thin capitalization rules. Some cantons even provide for crediting the cantonal corporate income against capital tax. The tax rates vary from-canton to canton and depend on the tax status of the AG. It equals 0.01% of the taxable equity with a minimum of CHF 250.-, multiplied by the current cantonal and communal multiplier.
- 43 **Withholding Tax:** The distribution of a AG's profits, e.g. in the form of dividends or other kinds of distribution, is subject to the federal withholding tax. This tax is levied at source and is currently at a rate of 35 %. A refund of this tax depends on whether the double taxation treaty between Switzerland and the country of residence of the recipient provides for a refund. In a relationship between a Swiss parent and a Swiss subsidiary, the company which is paying out a cash dividend can choose between delivering up the (withholding) tax or applying the notification procedure.
- 44 **Value-added tax:** Within the framework of business activity, it is important to note that supplies of goods and services within the territory of Switzerland give rise to value-added tax (VAT) which is levied on gross sales. Liability for VAT begins as soon as domestic gross sales reach a level of CHF 100,000.– per annum. The normal rate is 8.0 %, which is low in an international comparison. Turnover derived from the supply of goods and services to customers abroad is exempted from VAT.
- 45 **Issuance stamp tax:** The tax on the issuance (and the increase) of shares of a Swiss AG is 1% on the fair market value of the amount contributed, with an exemption on the first CHF 1 million of capital paid in, whether it is made in an initial or subsequent contribution. Issuance stamp tax is further levied in respect of some debt instruments such as bonds and money market papers at a rate of 0.06% or 0.12% on the nominal value of such instruments for each year or part thereof till maturity of such instrument. Special rules apply for instruments that run for less than one year.

B. The "Zweigniederlassung" (branch office)

1. Foundation procedure

- 46 All foreign companies must register their branch offices with the register of commerce in the canton in which they are domiciled. Further, a representative with full power of representation who resides in Switzerland must be appointed for the branch office.

47 A branch office must have the same company name as its head office and may contain additional wording in its name that is valid only for the branch office. In addition, the company name of a foreign branch office must include the place of its headquarters, the place of the branch office and the explicit designation as a branch office.

2. Liability and risk limited to capital

48 The liability of a branch office is not limited as such. It is the foreign main company which is jointly liable for debts of its branch office.

3. Management

49 The branch office is managed by local managers, although the main company can exercise influence directly. At least one member authorized to represent the branch office must reside in Switzerland.

4. Minimum share capital

50 When setting up a branch office no separate equity is required. The capital resources of the foreign main company are sufficient.

5. Taxation

51 Branches of foreign corporations are in general treated the same way as legal entities for tax purposes. They are however not subject to issuance stamp tax upon formation. Profits of a Swiss branch office are exempt from taxation (Swiss withholding tax) in the partner-nation under many double-taxation agreements which Switzerland has signed with most industrial nations.

V. Visas, residence and work permits

52 Switzerland has basically a dual system for the admission of foreign potential workers/residents which distinguishes between EU/EFTA citizens and third country citizens.

53 **Third country citizens:** Generally a valid travel document recognized by Switzerland is sufficient to enter the country. Only citizens of certain countries need an *entry visa* (e.g. China, India, Russia, but not the U.S.). A *residence and work permit* is needed in any case for a stay of over three month and people working in Switzerland during their stay. They are still subject to existing admissions regulations (priority of nationals, control of wages, quotas), but they have been granted significantly more mobility in the interest of labor market flexibility. Residence and work permits are issued by the competent Cantonal Authorities who examine the application and – if a visa is needed – inform the competent Swiss Embassy abroad to issue a visa as soon as the

Cantonal Authority is ready to issue a residence and work permit. As a rule, the application for a work permit has to be filed by the future employer. In all cases, a written employment contract is required by the authorities. In principle, the employer has to demonstrate that no local employee and no employee from the EU/EFTA can fill the vacant position. He must document that he has searched for possible employees on the local market in vain. However, this principle of the priority of local employees does not apply in some exceptional cases as e.g.:

- executives or qualified specialists of internationally operating firms within the scope of an intracompany transfer; and
- executives or highly qualified specialists who are indispensable for important research projects, or essential for the fulfilment of extraordinary assignments.

54 **EU-citizens** (i.e. Belgium, Denmark, Germany, Finland, France, Greece, Great Britain, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Sweden, Spain, Island, Norway, Cyprus and Malta): regardless of their qualifications they are granted an easier access to the Swiss labor market under the Agreement on the Free Movement of Persons. EU-citizens may stay in Switzerland as tourists for up to three months without a residence permit. If EU-citizens plan to stay in Switzerland for longer than three months, or if they plan to work in Switzerland, a residence permit is needed.

VI. Tax treaties

55 The following list shows the Swiss double taxation agreements currently in effect with Switzerland (source: Federal Department of Finance, www.efd.admin.ch):

Agreements in force

Albania	Côte d'Ivoire	India	Liechtenstein ²	Pakistan	South Africa
Algeria	Croatia	Indonesia	Lithuania	Philippines	Thailand
Armenia	Czech Republic	Iran	Luxembourg	Poland	Trinidad and Tobago
Australia	Denmark ¹	Ireland	Malaysia	Portugal	United Kingdom
Austria	Ecuador	Israel	Morocco	Rumania	Tunisia
Azerbaijan	Egypt	Italy	Macedonia	Russia	Ukraine
Bangladesh	Estonia	Jamaica	Mexico	Sweden	Hungary
Belarus	Finland	Japan	Moldavia	Serbia	United States
Belgium	France	Kazakhstan	Mongolia	Singapore	Uzbekistan
Bulgaria	Germany	Kyrgyzstan	Montenegro	Slovakia	Venezuela
Canada	Ghana	Korea (South)	New Zealand	Slovenia	Vietnam
Chile	Greece	Kuwait	Netherlands	Spain	Qatar
China	Iceland	Latvia	Norway	Sri Lanka	

Signed agreements (not yet in force)

Argentina ³	Colombia	Georgia	Hong Kong	Malta	Tajikistan
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