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## LEGAL AND FISCAL ASPECTS OF SETTING UP A BUSINESS IN CANTON TICINO

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This article is aimed at giving the reader an outline, touching on both corporate and fiscal aspects at both Federal and Cantonal level, in particular with reference to Canton Ticino, and also offering an overview of Cantonal incentives for newly created business.

### 2. Legal vehicles for doing business

- ***Sole proprietorship***
- ***Partnerships***
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### ***Sole proprietorship***

A natural person can conduct a trade or in general a business as the sole owner of the business. He or she thus creates a sole proprietorship, administered by one person who assumes unlimited proprietary liability. No special formalities are required for the setting up. Registration at the '*Registro di Commercio*' (commercial registry) is obligatory for a sole proprietorship when the annual total turnover exceeds CHF 100,000.

### ***General partnership and the Limited partnership***

The General partnership is governed by article 552 and the articles that follow of the CO (Code of Obligations) and by article 557 paragraph 2 CO, which govern the provisions regarding partnerships (art. 530-551 CO).

General partnerships are the first type of commercial entity mentioned in the CO and they are the ones used by two or more natural persons, who, while not limiting their liability towards the creditors, unite with the aim of running, under the form of an enterprise, a business, an industry or other commercial activity; something that cannot be done by a simple partnership. The partnership must be registered in the '*Registro di Commercio*'; such a registration being obligatory, whether or not there is a commercial activity – art. 552 paragraph 2 CO).

Limited partnerships are governed by art. 594 and subsequent articles of the CO.

Such partnerships have the following main features:

- At least one of the partners (who must be a natural person and cannot be a company) has unlimited liability (unlimited partner);
- The other partners (limited partners) on the other hand, have limited liability up to the amount of a given asset contribution, called limited capital;
- The partnership is obliged to register with the Register of Commerce and therefore to maintain accounting records;
- In the absence of special provisions, the norms envisaged by the general partnership are equally applicable to the relationship between the partners.

### ***Corporations***

The Code of Obligations provides for three types of corporations:

- Joint stock company (art. 620 and following articles of the CO);
- Limited liability company (art. 772 and following articles of the CO);
- Company with limited partnership for shares (art. 764 and following articles of the CO).

Below, we will inform briefly on the Joint stock company and the limited liability company.

### ***Joint stock company***

A common type of company used is the Joint stock company (Società anonima (SA) /Aktiengesellschaft)

### ***Share capital***

The minimum share capital is CHF 100,000 and at least 20% of that must be paid, with a minimum of CHF 50,000, upon incorporation.

The shares must be in registered form and their nominal value cannot be less than CHF 0.01.

Following the 2012 OECD Financial Action Task Force (FATF) recommendations on combatting money laundering and the financing of terrorism, which have also led to changes in the Civil Code and in the Swiss Code of obligations, the owners or purchaser of shares of a Swiss joint stock company that is not quoted on the stock exchange, must announce the ownership of such shares to the company.

The company must keep a register of both the shareholders of the registered shares and of the respective beneficial owners (starting with a shareholding of at least 25% of the issued share capital).

#### *Incorporation*

A limited stock company can be formed by one or more natural or legal persons or any other commercial entity or partnership.

If the incorporating shareholder does not wish to be himself or herself disclosed in the public reports, he or she can be represented by a third party as trustee in the deed of incorporation.

The company must be registered in the trade register of the place where it has its legal seat, as must the Directors and the Auditor.

Incorporation takes place through a notarial public deed.

On incorporation, there must be paid a stamp duty (Federal law on stamp duties) equivalent to 1 % of the share capital. Companies with capital of less than CHF 1,000,000, are exempted from paying this tax.

#### *Articles of association*

The articles must contain information on the following:

- Name, registered office and object of the company;
- The amount of the share capital and the nominal value of each share;
- Rights and duties of the General meeting of shareholders, the Board of Directors and the auditor.

#### *Company's Bodies*

The law prescribes three governing bodies:

- The general meeting of the shareholders;
- The Board of Directors
- The auditor

#### *The General Meeting*

The general meeting of the shareholders is the supreme body of the joint stock company and the annual general meeting is held within six months of the end of the financial year. To it, are referred all the most important tasks, such as:

- The approval and modification of the articles of association;
- The appointment of the members of the Board of Directors and the auditor
- The approval of the management report; of the annual financial statements (balance sheet, income statement and notes), as well as the deliberation of the utilisation of available profits, in particular the determination of dividend distributions and of profit participations as well as the discharge granted to the directors.

#### *The Board of Directors*

The company's Board of Directors consists of one or more members. Legal persons and commercial entities cannot, even if they are shareholders, be members of the Board of Directors but their representatives can be members in their place. Directors are elected for three years, unless otherwise laid down by the articles. The term in office cannot exceed six years. Re-election is allowed.

The Board of Directors can discuss all matters that have not been referred to the General Assembly by law or the articles of association.

It manages the affairs of the company insofar as it has not delegated such management.

The directors are responsible to the shareholders and creditors for their control over the executives of the company with regard to meeting the company's objectives.

There is a complete list of the inalienable duties of the Board of Directors (art. 716 CO).

The Board of Directors represents the company in so far as third parties are concerned. Unless otherwise provided for in the articles or by the organisational regulations, each director has the power to represent the company. It may delegate the power of representation to one or more directors or to executive managers. At least one director authorised to represent the company must be resident or domiciled in Switzerland.

The company must always be able to be represented by a person of whatever nationality domiciled in Switzerland.

This requirement can be fulfilled either by a director or a manager of the company.

#### *Auditor*

With the entry into force of the new Federal law on enabling and supervising auditors and of new auditing rules, there has been an important law reform regarding auditing. The new legislation provides for two types of auditing: ordinary auditing and limited auditing.

Companies subject to ordinary auditing are:

- a) Companies with shares listed on the stock exchange,
- b) Unlisted companies that exceed, for two consecutive financial years, two of the following values:
  - A balance sheet of 10 million francs
  - A turnover of 20 million francs;
  - 50 fulltime jobs (at an annual average)
- c) Companies obliged to set up a group account.

Those who are not given the conditions for an ordinary audit will be subject to a limited audit carried out by an auditor who will only check the annual financial statements. The law provides for an opting out by waiving the limited audit, with the agreement of all the shareholders and provided the company has an annual average of not more than 10 fulltime employees.

The auditor must be independent. The auditor's independence must not be compromised either in fact or appearance. These provisions apply to both types of audit (art. 728 ad art. 729 of the CO).

The General Assembly appoints the auditors, which can consist of one or more natural or legal persons or partnerships.

#### ***Companies with limited liability (Società a garanzia limitata)***

The limited liability company (Sagl), unlike the joint stock company, is conceived as a capital company strongly focused on the individual members.

Essentially, the members of a Sagl have more rights (such as the right to have extensive information from the management of the company, a more extensive right of being able to withdraw the veto right to certain decisions) and more obligations (such as the prohibition of competition and the obligation to make supplementary contribution and ancillary services) when compared with shareholders of joint stock company (SA). The Sagl and the SA do not therefore necessarily differ in size, but rather because the Sagl allows an organisation where greater weight is given to the shareholders rather than to capital.

The Sagl, while being regulated in large part by rules that apply to joint stock companies (SAs), provides in fact a simplified management and is therefore used by the many small and medium size businesses.

#### *Share capital*

The minimum share capital is CHF 20,000, with a full payment obligation. The minimum share nominal contribution per member is CHF 100 and each member may hold more shares.

What has been said regarding the share capital of the Società anonima (SA), also applies to companies with limited liability (Sagl), which is obliged to keep a list of the beneficial owners of the shares owning at least 25% of the issued share capital.

#### *The one-person member Sagl and company representation*

The new governing law permits the creation of a single member company, i.e. having a single shareholder, whether an individual, a legal person or a commercial enterprise.

For the corporate governance of a Sagl, each shareholder has the right to represent the company individually.

The representation of the company by the manager (gerente) can be entrusted to a single shareholder or to an external person following a decision taken by the company.

At least one representative must be domiciled in Switzerland.

#### *Shareholders' meeting*

The shareholders meeting is the supreme body of a Sagl and determines its statutes, and appoints and dismisses the managers and the auditors. It approves the annual financial statements and its result and the profit and loss account. It also deliberates on the use of the available profits and can discharge the manager/ administrator of his or her office.

#### *Auditor*

The provision of the new law regarding the audit that also applies to the joint stock company are equally applicable.

#### **Swiss branches of foreign companies**

By a 'branch', what is meant is a fixed place that exercises, as part of a main enterprise, a similar or complementary activity through a permanent establishment that enjoys a certain economic and commercial autonomy. It must have at its disposal an independent organisation that is separate from the main seat of the company.

The corporate bodies are those of the foreign company, but the person responsible for management of the Swiss branch operation must be domiciled in Switzerland.

The branch is obliged to register in the Commercial Register, as provided for in Article 935, para. 2 of the code of Obligations (CO) and Articles 69 and following of the Ordinance on the Register of Commerce (ORC).

### 3. Work and residence permits

#### **Work permits for foreigners**

The entry into force on 1 June 2002, of the bilateral agreements, particularly the Agreement on the Free Movement of Persons (AFM), resulted in significant changes in the labour market. Basically, it has gone from a system where the authorities decided whether to issue a permit, to a system in which a citizen of a member state of the European Union (EU) or the countries of the European

Free Trade Association (EFTA) exercises the right to enter Swiss territory, to stay, to seek employment and to establish himself or herself as an employee or independent person.

### ***Agreement on the Free Movement of Persons (AFM)***

As of 1 June 2007, the limitation on the number of residence permits for citizens of EU-15/EFTA countries and Malta and Cyprus, who intend to pursue gainful employment or freelance activities in Switzerland was abolished. Therefore, they benefit in full freedom of movement. As from 1<sup>st</sup> of May 2011, citizens from EU-8 countries and as from 1<sup>st</sup> of June 2016, also Bulgarian and Romanian citizens, benefit of AFM.

As from 1<sup>st</sup> of January 2017, the AFM has also been extended to Croatia, for which are in force transitional provisions that provide limitations and contingencies for Croatian citizens who want to have access to the labour market.

### ***Residence permits***

The right of residence is effective through the issuance of a work permit. Residence permits granted to people who are gainfully employed are granted upon presentation of an employment contract and are valid throughout Switzerland. The period of validity of these permits is determined by the duration of the employment contract. More precisely, with effect from 1 June 2002, there entered into force for the citizens of the EU/EFTA, the following categories of permit:

- Residence permit (B-EU /EFTA);
- Permanent residence permit (C-EU / EFTA);
- Temporary residence permit (L-EU / EFTA);
- Border commuter permit (G-EU / EFTA).

To read more about these, you are referred to the article relating to 'The transfer of residence to Switzerland, Canton Ticino' ([click here to read the article](#)).

### ***Presentation of personal application for obtaining a work permit***

The registered application must be submitted by the employer and the individual applicant by using the official form, to the competent local office of the *Ufficio degli Stranieri* (office of the regional migration authorities).

### ***Third State Nationals***

Citizens of third countries (non-EU/EFTA) can obtain a work permit only if they are qualified specialists with skills not available on the Swiss and EU labour market, in accordance with the Federal law on foreigners.

In this case, in addition to the authorisation of the Cantonal administration, it is also necessary to have that of the Federal Authority. The complete procedure for issuing the permit takes approximately three months.

### ***Application to obtain a preliminary governmental opinion to start a business activity***

The third state national entrepreneur who intends to start a business activity in Canton Ticino, has the possibility of submitting to the competent local authorities an application called 'istanza di massima'. It is a tool that allows the promoter of the entrepreneurial initiative to know in advance the opinion of the competent governmental department on the release of the work permit or permits.

The “istanza di massima” must contain the following information:

- A presentation by the applicant / applicants (curriculum vitae);
- Function and remuneration of the applicant / applicants;
- Description of the activities that the applicant / applicants wish to undertake in Canton Ticino;
- Strategic motivation and information regarding target markets (suppliers, customers);
- Provisional economic data about the new company (turnover, profits, employment, investments etc.).

***Cross-border provision of services (self-employed or employed by foreign resident employer)***

The provision of service covers the work in the context of mandates or contracts entered with a Swiss counterpart without relocation of the domicile or headquarters of the foreign company. Those to benefit from such a right are EU/EFTA citizens who are providing services in Switzerland.

- Provision of services in the context of special agreements on the supply of services:

Persons who carry out a service in areas for which there is a special agreement between Switzerland and the EU /EFTA (such as public procurement or air and land traffic):

- A)** Stays of up to three consecutive months or 90 actual working days in a calendar year:  
A permit is not necessary. There is, however, the obligation to notify the competent cantonal authorities about the place of employment, where the gainful employment exceeds eight days in a calendar year;
- B)** Stays exceeding three months or 90 actual working days in a calendar year:  
A short period (L EU/EFTA) residence permit is issued.

- Supply of services outside the special agreement of the supply of services:

In sectors not governed by an agreement on the free movement of service, the AFM provides for:

- A)** Stays of up to three consecutive months or 90 actual working days per calendar year:

A permit is not required. There is, however, the obligation to notify the competent Cantonal authorities of the place of employment, where the gainful employment in Switzerland exceeds eight days in a calendar year. The activity carried out during a period not exceeding eight days over a period of three months, is then authorised without the requirement of any permission or notification. This rule does not apply to activities in the construction and related engineering sectors and where a permit is required from the start of gainful employment.

- B)** Stays exceeding three months or 90 actual working days per calendar year:

In this case, the Federal laws on foreigners are applicable, in accordance to which there is no right to obtain a permit. The competent authorities may therefore decide, based on conditions of access to the labour market, whether to issue EU/EFTA citizens with a permit either for a temporary stay or permanent residence for the duration of the employment.

### *Third State Nationals*

If the employed worker is a national of a non-EU /EFTA country, the right to a permit exists only if, prior to the posting the person concerned has been admitted to the regular labour market of an EU member state for at least 12 months.

A permit will not be granted to independent self-employed people.

## 4. The taxation of business

### **General considerations**

Switzerland, as a federal state, is divided into the Confederation, Cantons and municipalities (comune).

In accordance to this political structure, taxes are being levied at all three levels. While the federal government can, however, only collect taxes that are expressly assigned to it by the federal constitution, the Cantons are, in theory, free in their choice of taxes. The Constitution represents a limitation only to the extent that expressly prohibits the levying of certain taxes or attributes them explicitly to the Confederation.

The fact that the Constitution confers on the Confederation the power to levy a tax, does not exclude, however, the right of the Cantons to levy a tax of the same kind.

The municipalities (comuni), however, may tax only within the authorisation granted to them by their Canton.

In the majority of cases, the municipalities draw their taxes in the form of Cantonal tax supplements (municipal tax coefficients, multipliers).

At Federal and Cantonal level, we can speak therefore of a primary sovereignty while the municipalities (comuni) have a derived or delegated tax sovereignty.

The business taxation refers therefore from one side to the joint stock company (SA) and the limited liability company (Sagl) as well as businesses conducted with a limited partnership by share, and on the other side partnerships and sole proprietorships, but with a different taxation.

### A) Companies

The aim of the Federal Act on Tax Reform and OASI (AHV/AVS) Financing (i.e. RFFA), passed in May 2019 and entering into force with the beginning of 2020, was to:

- Repeal of the cantonal special tax regimes for holding, mixed domiciliary and auxiliary companies;
- Tax incentives for research and development and patent revenues (patent box)
- Encourage the creation of start-ups to implement projects that meet precise innovative criteria.

The following presentation is limited to information on ordinary taxation.

### **Tax on profits**

Legal entities are taxed in Switzerland, respectively in Canton Ticino based on their personal 'affiliation', when they have their legal seat or place of central management in the Canton, or by virtue of their economic 'affiliation', when it comes to a fixed place of business in the Canton of companies having their seat in another Canton or foreign state.



The tax on profits is proportional and is perceived at the Federal level (IFD) at a rate of 8.5%, at a Cantonal (IC) level at a rate of 8% (5.5% starting from 2025) while the municipality (commune) applies the relevant municipal multiplier, variable from 50% to 100 % of the Cantonal tax.

#### *Deductions*

To arrive at the determination of the profit taxable base, certain tax deductions are permitted, among which:

- Depreciation of up to 1/3 of inventories;
- Creation of a fund for bad debts (up to 10% of foreign credits);
- Deduction of taxes which, according to Ticino tax law, are considered negative components of income and are therefore deductible as costs (see the example that follows);
- Accelerated depreciation (in accordance with the Legislative Decree of 13 November 1996).
- Social security contributions

#### *Tax on capital*

At the Cantonal and municipal level (therefore not at the Federal level), there is a provision for the taxation of capital equivalent to 1.5‰ of equity (share capital + reserves + retained earnings).

#### *Determination of the effective tax rate on profits*

If we consider a corporation having its registered office in Ticino, and located in a municipality with a 77% multiplier (for example), an effective tax rate of 18.47% results as from 01.01.2024 onwards:

	2020-2023	2024	from 2025
<b>Federal direct tax rate</b>	<b>8.50%</b>	8.50%	8.5%
Cantonal multiplier	97.00%	100.00%	100%
Cantonal tax rate (Ticino)	8.00%	8.00%	5.5%
<b>Effective cantonal tax rate</b>	<b>7.76%</b>	<b>8.00%</b>	<b>5.5%</b>
Municipal multiplier	77.00%	77.00%	77%
<b>Effective municipal tax rate</b>	<b>5.98%</b>	<b>6.16%</b>	<b>4.235%</b>
Pre-tax rate (a)	22.24%	22.66%	18.235%
Pre-tax rate + 100% (b)	122.24%	122.66%	118.235%
<b>Effective tax rate applicable = a/b</b>	<b>18.19%</b>	<b>18.47%</b>	<b>15.4227%</b>

#### *Property taxation*

Legal entities that own real estate must pay real estate tax, which is calculated on the official valuation of the property located in the Canton and is perceived both at the Cantonal level (3‰ until and including tax year 2024) and at the municipal level (1‰).

### ***Taxation at source on dividend distribution ('anticipatory tax')***

The dividends that are distributed within the distribution of profits are subject to an anticipatory withholding tax (WT) at a rate equivalent to 35%.

This tax is levied at source, therefore from the debtor of the dividends due and has at its primary aim that of stemming tax evasion. It can be recovered under certain conditions and, in particular:

- From individuals, resident in Switzerland, who have complied with all their tax declarative obligations.
- From legal entities which have recorded the dividend as income subject to withholding tax.
- From taxpayer's resident in a country with which Switzerland has signed a double taxation treaty, through special procedures agreed with the country in question.

The method for recovering the taxes (fully or partially) may, in turn, be:

- As a rule, for Swiss tax resident subjects through full repayment of the anticipatory tax paid by the tax authorities, following a request for a refund filed by the taxpayer (within three years of the end of the calendar year in which the taxable dividend was due);
- Through partial repayment of the tax withheld in favour of the taxpayer resident in a foreign state, in accordance with the conventional relief as provided for by the applicable tax treaty (DTA) as entered between Switzerland and the other country;
- By distribution of the gross amount dividends to the foreign tax resident parent company and, under certain conditions, through the notification procedure that bypasses the anticipatory tax payment and its subsequent reimbursement and this requires the completion of a dividend payment notification form addressed to the Federal Tax Administration, in which the taxable dividend payment in question is specified.

On 27 May 2015, the Agreement on the Automatic Exchange of Information was signed with the EU which takes over the EU 'parent-subsidiary' directive (former art. 15 of the Tax Saving Agreement) and allows tax exemption at source (anticipatory withholding tax for Switzerland) on dividend payments in an intercompany relationship linked to the occurrence of certain requirements.

These provisions have also been incorporated into most of the double tax treaties concluded between Switzerland and the EU states.

### ***Taxation of shareholders***

On 1<sup>st</sup> January 2009, there came into force at the Federal level, the partial taxation of dividends for qualifying share holdings (those with a shareholder's stake of at least 10% of the total capital) providing for a reduced taxation base of the gross dividend amount as follows:

For qualified shareholdings being considered as private asset, at Federal level only 60% of the gross dividend income is taxed, whereas for shareholdings owned as a commercial business asset, the base is 50% of gross dividend amount at Federal level.

Since 01.01.2018, Canton Ticino has increased the taxable basis to 70% for both dividends from shareholdings owned as private assets and as commercial business assets.

As from 1 January 2011, the share premium, the contribution of capital or supplementary payments made as of 31 December 1996 by the shareholders, will be repaid in fiscal neutrality, being treated in the same way as repayments of share capital, with exemptions from Swiss dividend withholding tax and income tax in the hands of the shareholders.

#### B) Swiss branch of foreign company

Should a foreign company choose to do business in Switzerland through a fixed place of business this is to say a permanent establishment the economic affiliation to Switzerland provides for a limited taxation of the net taxable profits realized by the Swiss branch operation.

In principle, profit transfers to the foreign head office are exempted from the Swiss anticipatory tax as such transfer are not qualified as dividends.

#### C) Sole proprietorship / self-employment

As explained in the relevant section of this article, a sole proprietorship or partnership, whether simple partnership, general partnership or limited partnership, have no legal personality.

As hitherto explained, what has already mentioned applies to the taxation of companies having legal personality, whereas for partnership and sole proprietorship, there is the principle of allocation of the relevant net business profit directly in the hands of the individual partners that is to say the individuals of the sole proprietorship.

Net business income generated in Switzerland/Ticino is therefore subject to individual income tax (applying progressive tax rates). The profit of a partnership, whether distributed or not, are considered business profits of the partners pro quota on their share.

For an exhaustive examination of this topic, you are referred to the article 'the taxation of individuals in Canton Ticino, Switzerland.'

#### 5. Social charges

The social charges that the employer must pay, which determine the overall cost of the employee, amount to approximately 17% of the gross salary while the employee must pay about 14% for social charges of the same gross salary. The charges include, among the compulsory insurances, the old age and disability insurance; a pension fund, and unemployment insurance, which are divided equally between the employer and employee, as well as the 'insurance against occupational accidents' (LAINF), and family allowances, which are the sole responsibility of the employer.

There is also insurance against non-occupational accidents, that is charged either exclusively to the employee or by agreement, also to the employer, and wage loss insurance, which is split between employer and employee. These are optional insurances whose signing is at the discretion of the employer.

#### 6. Cantonal incentives to companies

Following the regulations introduced in Switzerland as of 1 January 2020 regarding tax reform and the OASI (AHV/AVS) Financing, and which have led to the repeal of cantonal tax privileges, the Canton of Ticino has introduced specific tax incentive measures in favour of:

- the economic innovation,
- creation of patents and their exploitation,
- research and development (R&D) activities

which represent a new opportunity to strengthen its innovation incentive strategy.

Completing the business support measures for industrial and craft businesses, as provided for by law to encourage economic innovation, are contributions towards the expenses of participating in specialised fairs of national and international importance. Even in this case, there are grants covering up to 50% of the chargeable expenses, such as the registration at the fair, the rent of the exhibition area, the staging of the event and the cost of renting a stand.

**For further information on the above, please do not hesitate to contact us**

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