



Corporate Structures for Foreign Companies in Switzerland

A foreign investor faces a multitude of options on how to structure a market entry in Switzerland. As a rule, corporate foreign direct investments are structured either by setting up a corporate entity, usually in the form of a GmbH (*limited liability company*) or an AG (*corporation*) or by setting up a company branch (*Zweigniederlassung*).

The following explanations shall give an overview of the three most common corporate structures for foreign companies in Switzerland.

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A Establishment of a Corporate Entity

A corporate entity is principally distinguished by the following characteristics:

- It has its own legal personality, i.e. it is a legal entity which can sue and be sued, has to pay taxes on its profits ("corporation tax") and can acquire property.
- The shareholders of a corporate entity will (with very limited exceptions) not be held personally liable with their private assets.
- The directors (*Verwaltungsräte*) and managers (*Geschäftsführer*) do not need to hold a share in the capital.
- Voting at the shareholders' meeting is always based on equity interests.

The most common forms for a corporate entity are the GmbH or the AG.

1 Establishment of a *Gesellschaft mit beschränkter Haftung* or "GmbH" (limited liability company)

A *Gesellschaft mit beschränkter Haftung* (GmbH) is an independent legal entity under private law and as such the bearer of its own rights and obligations. It can be formed for any permissible purpose, including non-commercial purposes. The establishment process of a GmbH begins with the founders' meeting and ends with the registration of the GmbH in the competent commercial register. It involves the following steps:

1.1 Deed of incorporation

In order to establish a GmbH, the founders declare in front of a notary public that they are forming a limited liability company, lay down the articles of association and appoint the managers and, if applicable, the auditor. However, a GmbH can also be founded by a single person.

Representation by proxy is permissible, but this requires at least a notarised power of attorney.

1.2 Determination of the articles of association

The articles of association must in particular contain the following:

1.2.1 Name of the company

The company name is the name under which the GmbH is registered in the commercial register and under which the company operates. In general, the shareholders are free in their choice of the company name. However, the company name must always contain the legal-form addition "*Gesellschaft mit beschränkter Haftung*" or a generally understandable abbreviation of this designation ("GmbH").

1.2.2 Registered office of the company

The Swiss municipality where the company has its registered office shall be specified in the articles of association.

1.2.3 Object of the company

A GmbH can pursue any legally admissible aims. The field of activity of the GmbH should be set forth as accurately as possible in the articles of association.

1.2.4 Nominal capital and shares

The nominal capital of the GmbH must be at least CHF 20,000 and consists of one or more shares. The nominal capital, the number and the nominal amounts (at least CHF 100 each) of the shares form part of the minimum required content of the articles of association.

1.3 Appointment of the company's management

The GmbH has one or more manager(s). The first managers have to be appointed at the founders' meeting.

Only natural persons with unlimited legal capacity can be appointed as managers. They do not need to be Swiss nationals. However, the GmbH must at least have one authorized representative whose official place of residence is in Switzerland.

1.4 Provision of the nominal capital

In view of the fact that the shareholders of a GmbH are, as a general principle, not personally liable, and only the company's assets are subject to claims of creditors, the shareholders must transfer their contributions, in total at least CHF 20,000, to the company prior to the founders' meeting.

The nominal capital can not only be provided in cash, but also in kind. However, if the nominal capital is provided in kind, additional formalities need to be complied with.

1.5 Registration of the company in the commercial register

The management must apply for the registration of the company in the commercial register. The competent commercial register office examines the filed registration documents. If all registration requirements are met, the GmbH is normally registered in the commercial register after approximately 10 to 15 working days. Thereafter it enjoys its own legal personality.

The commercial register can be inspected by anybody, free of charge, at the local commercial register office or accessed in electronic form online at: www.zefix.ch. Among others, it contains information on the name of the company, its legal form and purpose as well as its shareholders.

2 The corporate bodies of the GmbH

The GmbH acts, as a legal entity, through its corporate bodies. The corporate bodies of the GmbH are the shareholders' meeting, the management and the auditor.

2.1 The shareholders' meeting

The shareholders' meeting (*Gesellschafterversammlung*) is the highest decision-making body of the GmbH. It is responsible for the fundamental matters of the GmbH, in particular:

- the amendment of the articles of association;
- the appointment and removal of the managers and the auditor;
- the dissolution of the company;
- the approval of the annual financial statements and the appropriation of profits.

The shareholders' meeting can decide all matters within its competence as long as this is not prohibited by law or by the articles of association of the company.

The participants of the shareholders' meeting arrive at their decisions through the adoption of resolutions. The law stipulates special requirements in terms of the majority required for resolutions concerning specific issues, such as the amendment of the purpose or the dissolution of the company. Otherwise, resolutions are passed with a simple majority. However, different rules may be stipulated in the articles of association.

2.2 The management

The management (*Geschäftsführung*) is the representative body of the GmbH. Only natural persons may become managers. However, they do not have to be shareholders of the GmbH (third-party representation).

Further to the managers' obligation to represent and manage the company, they are also subject to other specific obligations. For example, they are responsible for convening and preparing the shareholders' meetings. In addition, managers are responsible for entries in the commercial register, making sure that the company fulfils its tax obligations and the fulfilment of the accounting obligations of the GmbH. The managers are also responsible for the preparation of the annual financial statements and their submission to the shareholders' meeting.

Finally, it should be pointed out that, in the event of grounds for insolvency of the company, the managers are obliged, without undue delay, to apply to the shareholders' meeting for restructuring measures or, if these are not successful, for the opening of insolvency proceedings.

2.3 The auditor

The annual financial statements of the GmbH have in general to be audited for correctness and accuracy by a state-licensed auditor.

The auditing obligation depends on the size and the economic importance of the GmbH. Regular audits have in particular to be carried-out by companies that are required to prepare consolidated financial statements, or if two of the three parameters below are met in two successive fiscal years:

- Total assets of CHF 20 million;
- Annual sales revenues of CHF 40 million;
- An average headcount over the year of 250 employees or more.

If the conditions for a regular audit are not met, the annual financial statements of a GmbH are only subject to a limited audit (questioning of the management, appropriate detailed checks, analytical audit procedures, etc.). The audit can also be waived, subject to the approval of all the shareholders, if the company does not have more than ten full-time employees on annual average.

3 Miscellaneous

3.1 Amendments to the articles of association

Resolutions regarding the amendments of the articles of association of the company must be notarised and amendments to the articles of association must be registered in the commercial register. For this purpose, the public deed including the full text of the (revised) articles of association and an application for registration must be submitted to the commercial register by the management.

3.2 Liability of the shareholders

The shareholders are not personally liable for the liabilities of the company. As a general principle, the company is only liable with its corporate assets.

An exceptional direct liability on the part of the shareholders can only be considered under very limited preconditions, such as in the case of undercapitalisation or the misuse of corporate structures.

3.3 Preservation of capital

The assets of the company paid-in in order to maintain the nominal capital may not be paid-out to the shareholders. Any payments made contrary to this prohibition must be refunded to the company by the relevant shareholder.

3.4 Annual financial statements

Each GmbH is obliged to prepare annual financial statements (balance sheet, income statement and notes). The specific scope of the obligation to prepare the annual financial statements as well as the auditing (as mentioned above) of the annual financial statements depends on the size of the company.

4 Purchasing a GmbH

Instead of establishing a new GmbH, it is as well possible to acquire an already existing GmbH. This can as well involve the purchase of a so-called "shelf company", which has not yet started any business operations, from specialised providers.

After the signing of a share purchase agreement and the assignment of the shares, the new shareholder must be registered with the commercial register.

In most cases an amendment of the articles of association is also necessary, since the company name and the object of the company are usually changed. Such amendments require notarisation and must also be registered in the commercial register.

5 Establishment of an Aktiengesellschaft or "AG" (corporation)

The *Aktiengesellschaft* (AG) is a legal entity under private law and as such the bearer of its own rights and obligations. Only the company's assets are liable for liabilities of the company towards creditors. If the shares of the company are traded on the stock exchange, one speaks of a listed corporation (*börsenkotierte Aktiengesellschaft*).

Establishing an AG involves the following steps:

5.1 Deed of incorporation

In order to establish an AG, the founders declare in front of a notary public that they are forming a corporation, lay down the articles of association and appoint the board of directors and, if applicable, the auditor. However, an AG can also be founded by a single person.

Representation by proxy is permissible, but this requires at least a notarised power of attorney.

5.2 Determination of the articles of association

The articles of association must in particular contain the following:

- company name and registered office of the company;
- object of the company;
- the total share capital and the extent to which it is paid up, as well as the number, nominal value and types of shares;
- the procedure for convening general meetings and the voting rights of shareholders;
- the governing bodies for management and auditing.

5.3 Share capital

A minimum share capital of CHF 100,000, which is divided into shares, is required for the formation of an AG. Each share thus represents a fraction of the share capital. The nominal value of each share must be at least CHF 0.01.

5.4 Distinction between bearer shares and registered shares

Shares can be issued as bearer shares or registered shares.

In the case of the anonymous **bearer shares**, the holder of the certificate is a shareholder in the company. The share certificate serves as documentary proof of the shareholder's interest in the AG. The transfer of bearer shares can take place anonymously, which means, however, that the company cannot exercise any influence on the shareholder structure. For unlisted companies, the use of bearer shares is only allowed if they are structured as intermediated securities.

In the case of **registered shares**, the names and addresses of the shareholders are known to the company and are recorded in the company's share register. The transfer of registered shares can only be validly executed through registration of the new shareholder in the share register of the company, which, however, requires that the company is provided with proof of the proper transfer of the shareholding. The transfer of registered shares can be made subject to the company's approval in the articles of association (so-called "registered shares with restricted transferability"). This makes it – to a certain extent – possible for the company to exercise influence over the shareholder structure and, for example, defend itself against hostile takeovers.

5.5 Appointment of the board of directors and the auditor

The founders appoint the first board of directors and (if required) the auditor. Only natural persons with full legal capacity can be appointed as members of the board of directors. They do not need to be Swiss nationals. However, the AG must at least have one authorized representative whose official place of residence is in Switzerland.

5.6 Deposit of the share capital

Prior to the establishment of an AG, capital equivalent to at least 20% of the nominal value of each share must be paid up. However, the minimum capital contribution must be at least CHF 50,000 in total.

Contributions in cash must be deposited with a bank for the exclusive use of the company before its establishment by the founders. The corresponding bank may release the money only when the company has been entered in the commercial register.

For contributions in kind special regulations apply (including the requirement of a statutory report by the founders and an audit confirmation).

5.7 Registration and entry of the AG in the commercial register

The board of directors must apply for the registration of the company in the commercial register. The competent commercial register office examines the filed registration documents. If all registration requirements are met, the AG is normally registered in the commercial register after approximately 10 to 15 working days. Thereafter it enjoys its own legal personality.

6 The corporate bodies of the AG

The AG acts, as a legal entity, through its corporate bodies. The corporate bodies of the AG are the general meeting, the board of directors and the auditor.

6.1 The general meeting

All the shareholders exercise their rights in the general meeting (*Generalversammlung*), which is the highest decision-making body of the AG. The general meeting has competence only in those cases prescribed by law; it does not enjoy universal competence. The general meeting has in particular the following inalienable powers:

- to determine and amend the articles of association;
- to elect the members of the board of directors and the external auditor;
- to approve the management report and the consolidated accounts;
- to approve the annual accounts and resolutions on the allocation of the disposable profit, and in particular to set the dividend and the shares of profits paid to board members;
- to discharge the members of the board of directors;
- to pass resolutions concerning other matters reserved to the general meeting by law or the articles of association.

At least once a year, the shareholders convene to pass resolutions. Certain formalities have to be observed prior to a general meeting as well as in regard to the exercise of the voting rights during the general meeting.

6.1.1 Calling the general meeting

A general meeting is normally convened by the board of directors. The board of directors must announce the meeting at least 20 days ahead of the meeting date in the form prescribed by the articles of association. The notice convening the meeting must include the agenda items and the motions of the board of directors and the shareholders (if any).

If all shareholders or their representatives are present and if they all agree, the general meeting can also pass resolutions without observing the statutory forms and periods of notice (*Universalversammlung*).

6.1.2 Conduct of the general meeting

The mandatory **ordinary general meeting** takes place every year within six months after the end of the financial year. Optional **extraordinary general meetings** can further be convened as and when required.

Unless stated otherwise in the articles of association of the company, it is not strictly necessary for the shareholders to appear in person. They can also be represented by proxy.

The general meeting must have a chairman. The chairman is chosen by vote unless already specified in the articles of association. In general, the chairman of the board of directors is as well chosen as the chairman of the general meeting.

The chairman opens and closes the general meeting and deals with the subjects proposed for resolution in the order published in the agenda. The chairman shall invite the speakers to take the floor, limit – if necessary – speaking time and take measures to impose order on individual participants in the general meeting.

Each shareholder, in his or her capacity as a participant at the general meeting, has the right to obtain information from the board of directors on the affairs of the company, which is primarily intended to allow the shareholders to obtain the information necessary to cast their vote.

The chairman of the meeting initiates and leads the voting on the motions raised and rules on the outcome of the resolution. In order to ensure proper documentation of the general meeting, the board of directors has to ensure that minutes are kept.

6.2 The board of directors

The board of directors (*Verwaltungsrat*) is the representative body of the AG. Only natural persons may become members of the board of directors. However, they do not have to be shareholders of the AG (third-party representation).

The board of directors is responsible for all matters not reserved to the general meeting by law or the articles of association. Unless the responsibility for such management has been transferred to individual members or third parties (what is common for large companies), the board of directors as a whole is responsible for the management of the company's business.

The board of directors has in particular the following non-transferable and inalienable duties:

- the overall management of the company;
- the determination of the company's organization;
- the organisation of the accounting, financial control and financial planning systems;
- the appointment and dismissal as well as overall supervision of persons entrusted with managing and representing the company;
- the compilation of the annual report, preparation for the general meeting and implementation of its resolutions;
- the notification of the court in the event that the company is overindebted.

6.3 The auditor

The annual financial statements of the AG have in general to be audited for correctness and accuracy by a state-licensed auditor.

The auditing obligation depends on the size and economic importance of the AG. Regular audits apply to publicly traded companies, companies that are required to prepare consolidated financial statements, or companies that exceed two of the following thresholds in two successive fiscal years:

- Total assets of CHF 20 million;
- Annual sales revenues of CHF 40 million;
- An average headcount over the year of 250 employees or more.

If these conditions are not met, the annual financial statements are only subject to a limited audit (questioning of the management, appropriate detailed checks, analytical audit procedures, etc.). The audit can also be waived, subject to the approval of all the shareholders, if the company does not have more than ten full-time employees on annual average.

7 Comparison between GmbH and AG

The most significant differences between a GmbH and an AG can be summarised as follows:

- Whereas the minimum nominal capital of a GmbH is only CHF 20,000 (deposited in full), the minimum share capital of an AG is CHF 100,000 (minimum deposit of CHF 50,000).

- In contrast to the anonymity of the shareholders in an AG, the shareholders in a GmbH are published in the publicly accessible commercial register.
- The transfer of GmbH shares requires in general the approval of the shareholders' meeting, whereas AG shares are (unless stated otherwise in the articles of association) freely transferable.

B Establishment of a Company Branch

If a company wishes to operate in Switzerland, in addition to the establishment of a legally-independent subsidiary, there is also the possibility of setting up a company branch.

Setting up a company branch does not involve establishing a legal entity separate from the main company. The branch remains, legally and in terms of organization, part of the main company, although it has a certain organizational and financial independence and can (on behalf of the main company) sign contracts, preform transactions and appear in court at its place of business as a plaintiff or defendant.

The typical characteristics of a branch office are:

- Separate management
There is a branch manager who represents the company branch independently in business transactions.
- Separate capital resources
The branch office possesses its own operating capital. However, a minimum sum is not prescribed.
- Separate accounting and balance sheet preparation
The branch office usually keeps its own business accounts and prepares an independent annual balance sheet.
- Certain duration
The branch office does not merely handle short-term transactions, but, like the main company, also pursues those of long-term.

The managers of the branch office represent it independently in external dealings. They must be vested with a power of attorney, which authorizes them to act for the branch office. The branch office of a foreign company must at least have one authorized representative whose official place of residence is in Switzerland. The debtor in terms of any liabilities is, however, always the legal entity of the main company, not the branch office itself.

Since the branch office is not an independent company but part of the main company as a whole, its name has to be identical to that of the main company with further additions, such as the seat of the main company, its corporate form (branch office) and its local seat in Switzerland.

As soon as a branch office is established based on a corresponding resolution of the main company, it must be registered in the commercial register. A registration of the branch office at the location of the main company abroad is not required from a Swiss perspective. The application for registration has to be submitted to the commercial register in writing by the representatives of the Swiss branch or the directors of the main company.

As far as licensing, registration, taxation and accounting records are concerned, a branch office of a foreign company is treated like any Swiss company.

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We have extensive experience in helping our clients to facilitate their market entry in Switzerland, in particular in the context of corporate foreign direct investments. We provide our clients with comprehensive legal advice in all stages of company development. We assist in the formation of

legal entities, branches and joint ventures in Switzerland and advise on all aspects of company management and corporate housekeeping. Our in-house notaries are thereby able to provide the required Swiss notarizations in the form of public deeds and legalizations in German, French, English and Mandarin. Furthermore, we are specialized in accompanying clients in financing matters and the establishment of tax-efficient structures.



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