

NewsLetter

English

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1. The New General Data Protection Regulation in the EU

The new EU General Data Protection Regulation (GDPR) entered into force throughout the European Union on May 25, 2018 and replaced the Data Protection Act that was more than 20 years old. It is intended to ensure better protection of personal data in the EU, which is indispensable in the age of ongoing digitalization. Personal data of a particularly sensitive nature include salary data, health data, privacy details, religious beliefs, data about administrative and criminal proceedings/sanctions and the like. The new General Data Protection Regulation essentially comprises the following changes: The definition of personal data has been extended, thereby expanding the rights of private individuals; obligations increased with new compliance requirements for companies; reporting obligations in the event of infringements of data protection implemented and stricter sanctions/penalties determined (in the EU up to 4% of the global annual turnover of the company).

Data protection in Switzerland is currently undergoing a reform process. Parliament is expected to lean fairly strongly toward the legislation of the European Union in order not to lose the status of homogeneity. Nevertheless, Swiss companies can already be affected today by the GDPR, among other things if goods or services are offered to natural persons in the EU, data of EU citizens exist or data requiring protection are stored in the EU. Companies are in principle required to comply with the GDPR if they have a branch office in the EU or hold data of EU residents. It is the responsibility of the companies to check whether they are subject to the EU GDPR. Even if this is not the case, it would nevertheless be advisable to address the issue as the new Swiss legislation that will probably be relevant in 2019 is unlikely to deviate strongly from the EU directive.

Is the way data are handled within the company acceptable? This is the key question with regard to data protection and data security. There is a requirement for the officer responsible to guarantee data security that matches the risk by means of suitable technical and organizational measures and to supply proof that data requiring protection are handled in accordance with the General Data Protection Regulation. For example, this can entail pseudonymization and the encryption of data if customer and employee data are dispatched, or of course also affect data security within the company's own fall walls (e.g. backups, recovery of personal data in the event of an incident or access controls to the server room).

In order to comply with the GDPR, the following steps need to be taken: First of all the responsibilities for this issue need to be determined within the company. A directory must then be compiled in which the data requiring protection are listed. Finally, suitable measures are defined on the basis of a risk assessment for protecting the data. The new General Data Protection Regulation primarily serves as an impetus to start thinking about which sensitive data exist within the company and how they should be handled. The practical implementation of the new Data Protection Act is still relatively intangible at the present time and we await the further development with interest.

2. Tax Planning with Regard to Tax Proposal 2017

As is well known, Corporate Tax Reform III (CTR III) was rejected by the Swiss electorate on February 12, 2017. The existing cantonal privileges enjoyed by special status companies accordingly remain in force, which is no longer in line with international standards. This current uncertainty is damaging both Switzerland as a location and its reputation and is giving rise to legal and planning uncertainties above all among globally active companies. The Swiss Federal Council therefore adopted the message for the Tax Proposal 2017 (TP17) on March 21, 2018. This naturally envisages abolishing special status companies but also proposes the implementation of countermeasures to ensure that Switzerland remains an attractive business location. The special tax rules to be introduced are above all aimed at promoting research and development: The so-called patent box will enable some of the profits from inventions to be taxed at a reduced rate in the cantons in the future. Furthermore, the cantons can grant an additional deduction of up to 50% of R&D costs. However, this is all subject to the condition that a company must pay tax on at least 30% of its taxable profits before it can apply these special rules.

Switzerland has come under strong international pressure as key countries have decided to reduce corporate income tax. The implementation of TP17 is therefore of a time-critical nature and must be accomplished as soon as possible. The cantons play a decisive role here. The principle that creates a uniform framework for the cantons but allows them freedom of scope in terms of tariff setting has paid off and will also be decisive for the successful future of Switzerland as a tax location. Owing to the complexity of the patent box and the abolition of special status companies, all cantons are likely to consider cutting corporate income tax rates, which will further intensify the competition between the cantons. Another term has found its way almost

unnoticed into TP17, namely the “transfer of functions”. In the case of cross-border operational restructuring, the tax authorities will in future review whether assets have been transferred abroad from Switzerland and whether any compensation of the Swiss company is owed.

Natural persons will also be affected by Tax Proposal 2017. Until now, an average of just 50% of the income from dividend payments (where the recipient holds more than 10% of the company’s shares) was taxed in the cantons (partial taxation). The Federal Council is now proposing to require at least 70% of dividends to be taxed at the cantonal level (increased at federal level from 50% to 70%) in order to finance the cuts in corporation income tax. In view of this, owners of companies need to weigh up whether it is possible and feasible to distribute ordinary and extraordinary dividends in the next two to three years in order to continue to benefit from the current partial taxation.

Tax Proposal 2017 was supplemented by the Council of States on June 7, 2018 with a sociopolitical settlement in favor of the AHV and has now gone to the National Council.

3. Lump-sum Taxation

The Swiss Federal Tax Administration published Circular No. 44 (Circ. 44) on July 24, 2018 that deals with the issue of lump-sum taxation for direct federal taxation. In the case of lump-sum taxation, the taxable person agrees the tax assessment basis for taxable income and assets with the Tax Administration according to his living costs. Lump-sum taxation was politically controversial some time ago. Some cantons (including Canton Zurich) were forced to rapidly abolish lump-sum taxation at the cantonal level following successful referendum votes. In order to rescue lump-sum taxation, the remaining cantons have tightened the regime for lump-sum taxation and in particular increased the minimum tax assessment bases. Circ. 44 summarizes the current practice. In order to pay a tax on a lump-sum basis instead of income tax, the following subjective requirements fundamentally apply to natural persons:

- No Swiss citizenship, also for the spouse
- Fully liable for tax for the first time or following an interruption of at least ten years.
- No employment activity in Switzerland
- Employment activities abroad must be examined on a case-by-case basis
- Minimum taxable income of at least CHF 400,000

Circ. 44 comprises a “framework program” for the Federal Government. The cantons are fundamentally also likely to comply with the conditions of Circ. 44. However, each canton has its own interpretations and specialties. It is worthwhile comparing the rules of the individual cantons in order to obtain the best solution for the taxable person in each specific case. A transitional period for existing agreements based on the previous law applies until the end of 2020.

4. Obligation to Give Notice of Job Vacancies for Sectors with High Unemployment

The Swiss Federal Council decided on December 8, 2017 how the Law on the Implementation of the Constitutional Article for the Control of Immigration (Art. 121a FC) – the so-called “Mass Immigration Initiative” – was to be implemented at the decree level. The *Obligation to Give Notice of Job Vacancies for Sectors with High Unemployment*, which entails some changes in various sectors regarding the recruitment of staff, entered into force on July 1, 2018. If after July 1, 2018 vacancies are to be filled, the employer must comply with the following procedure:

Step 1: In occupational groups with unemployment of 8% or more (from 2020 5% or more), vacancies must be reported to the Regional Employment Center.

Step 2: The Regional Employment Center will notify the employer within three days of proposed candidates for the vacancy reported.

Step 3: The employer will invite suitable job seekers to an interview and inform the Regional Employment Center whether the proposed candidates fit the bill.

Step 4: The reported vacancy may only be advertised publicly and/or filled with candidates who have not registered with the Regional Employment Center after five working days. This will give the job seekers a head start on the employment market to apply on their own initiative and quickly.

Willful infringement of the obligation to give notice and failure to conduct an interview or aptitude assessment for suitable candidates can incur a fine of CHF 40,000. The maximum penalty for negligent violation is CHF 20,000.

5. Share Versus Asset Deal

The acquisition of a company can take place via a share deal or an asset deal. The acquiring company often wonders which is the simpler, quicker, fiscally more favorable and less expensive method.

The share deal is a simple, lean and swiftly realizable transaction that ensures a high level of continuity as the existing company continues to exist. The existing contracts with customers and suppliers remain untouched and the disposal of the direct holding offers the seller the opportunity to generate tax-free capital gains. The share deal can prove disadvantageous regarding the assumption of all liabilities (including unknown ones). Reviewing potential liability risks can in some circumstances be very time-consuming and expensive.

In the case of an asset deal it is left to the buyer to decide what it wishes to acquire (which is of course reflected in the purchase price). This reduces the risk of assuming high-risk or unknown future liabilities. An asset deal is therefore more attractive when acquiring a company that is close to insolvency or in liquidation. The entrepreneurial state of the company to be acquired can thus by all means be relevant. From a tax perspective an asset deal is fundamentally disadvantageous for the seller as direct tax consequences arise from the sale of assets above the book value. On the other hand, the buyer can use the assets when purchasing to upgrade its market value, thereby increasing its depreciation potential. The buyer does not benefit from this opportunity with a share deal as the book values remain untouched.

The seller often prefers a share deal due to the simplicity, the tax consequences and the fact that it is not left with any liabilities. However, the potential buyer will conduct a due diligence to assess the target company and decide on the basis of a risk assessment what its better option is. While in most cases the share deal will prevail, depending

on the situation the asset deal may be applied in certain cases (such as if there are high loss carryforwards or the target company is about to go bankrupt). The share deal is preferred due to its simplicity, speed and tax benefits. These factors are often more strongly weighted so that in practice a significant preponderance of share deals can be observed.

6. In-house news

New Hires

Jovana Ivljanin, Trainee Merchant, 3rd year of apprenticeship: Joining the team as of September 1

Irène Bucher, account manager:
Joining the team as of October 1

Congratulations

Jasmin Werder this spring very successfully passed her examinations to become a **Federally Certified Finance and Accounting Specialist**.



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