

## Swiss Industrial Holding Company Transaction

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### Summary

From October 2016 until July 2017, Schoch, Auer & Partner, Attorneys-at-Law, St. Gallen, Switzerland (in short "schochauer") provided **legal support to a large Swiss industrial holding in its divestment of one of its group divisions**. The entire transaction involved five sub-transactions which included preparatory legal work as well as share and asset deals (including the sale of loan receivables, consignment stocks and intellectual property rights) with counterparties from various European countries. This and the fact that the group division to be divested included various affiliates on almost every continent led to a variety of foreign and cross-border legal questions which had to be dealt with in the course of the respective transactions.

schochauer has repeatedly advised Swiss clients in such large and complex cross-border transactions. One of the more recent of such transactions was the purchase of a part of the business of HSBC Bank (Suisse) SA, Geneva, by LGT Bank (Switzerland) Ltd., Zurich, in which schochauer advised LGT Bank (Switzerland) Ltd. as Swiss legal counsel.

### Overview

The division of the large Swiss industrial holding was offered for sale in **four distinct parts** for various reasons. For each part, the seller invited potential purchasers to a bidding process. Prior to selling these parts to selected bidder, *inter alia*, a Swiss holding structure was established which included the hive-down of foreign subsidiaries in view of the collective sale of these subsidiaries to foreign and Swiss buyers. Where an affiliate in the People's Republic of China (PRC) was involved, **conflicts between Chinese and Swiss commercial laws** arose which could hardly be dissolved (cf. "Commercial law aspects" below).

The divestment of the entire division in four consecutive transactions also included a series of **national and international tax aspects** that entailed, apart from comprehensive Swiss tax advice on all aspects of the respective transaction steps and Swiss group companies, a close coordination and collaboration with foreign tax advisors in the US, Italy, Germany and the PRC (cf. "Tax law aspects" below).

### Commercial law aspects

In the course of the establishment of the Swiss holding structure, **Swiss and PRC commercial laws conflicted**. For practical reasons of the transaction, the seller and sole shareholder of the operating Swiss and PRC companies established a new Swiss holding company into which the operating Swiss company and its Chinese sister company were to be brought by way of an incorporation with a contribution in kind (*Sacheinlagegründung*) of the shares of these two companies. According to mandatory Swiss laws, the newly incorporated Swiss holding company needed to be enabled to

freely dispose of the shares in both companies at the point in time of its registration with the competent Commercial Register. Under PRC laws, however, shares in a PRC (limited liability – similar to a *GmbH* or *LLC*) company can only be transferred once a certified excerpt of the Commercial Register of the (newly incorporated) owner company of the shares has been submitted to the competent PRC authorities. The certified excerpt of the Commercial Register of the new Swiss holding company, however, was only available once the PRC requirements were fulfilled. Literally, the **cat bit her tail**. Since no solution was available under PRC laws, a **Swiss law based solution** was to be developed. In essence, the incorporation of the Swiss holding company was **split up into two consecutive steps**. Upon its incorporation by cash subscription, the PRC authorities could be provided with an excerpt of the Commercial Register of the Swiss holding company. The shares in the PRC company were then hived down to the Swiss holding company in a second step (capital increase by means of a contribution in kind).

### **Tax law aspects**

The two asset deals involving a Swiss entity, which also comprised the sale of consignment stock items in various jurisdictions, required a close coordination with foreign tax advisors regarding local **VAT and customs duties** issues. The implementation of the two share deals in turn required substantial **Swiss tax** structuring work at various levels (tax neutral establishment, *inter alia*, of a Swiss holding structure and hive-down of Swiss and foreign subsidiaries in view of the collective sale of these subsidiaries to foreign and Swiss buyers). In addition, a series of pre-sale measures needed to be implemented from a Swiss tax perspective leading, amongst others, to the intragroup disposal of Swiss **real estate** which the foreign buyer of one of the business sections did not want to acquire. At international level, the share deals also covered German tax matters at the level of German subsidiaries that were within the scope of the transactions such as the **German real estate transfer tax** (*Grunderwerbsteuer*) as well as the – sometimes neglected – **PRC 10 percent capital gains** tax on the sale of PRC corporations owned by a foreign investor (tax filings etc.). All these international tax issues were handled within a tight time frame in close collaboration with local tax and law firms.

*A partner at Schoch, Auer & Partner, most of Nicolas' advisory activities relate to M & A transactions and regulatory issues of banks, providers of collective investment schemes, asset managers and insurance companies.*

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