



Newsletter - June 2025

## **PROHIBITION ON THE TRANSFER OF DORMANT COMPANIES AND ITS CONSEQUENCES ON ECONOMIC FREEDOM: THE NEW ARTICLES 684A AND 787A OF THE SWISS CODE OF OBLIGATIONS**

*As of January 1<sup>st</sup>, 2025, articles 684a (for public limited company) and 787a (for limited liability companies) of the Swiss Code of Obligations prohibit, on pain of nullity, the transfer of dormant companies intended to circumvent the rules on the establishment or liquidation of companies. While this reform legitimately targets certain abusive practices, in particular the acquisition of companies with no assets in order to circumvent legal requirements, its application must avoid excessive restrictions on economic freedom. In sensitive cases, investors and entrepreneurs will have to accompany their requests to the Commercial Register with detailed explanations or even supporting documents in order to prevent any challenges under these new provisions.*

### **GENERAL CONTEXT**

The transfer of a dormant company is an operation involving the sale of shares in a company that is de facto often economically liquidated or no longer has any concrete economic activity, but which has not yet been legally dissolved. In addition to recovering some of the company's residual assets, often in the form of cash or listed securities, the buyer can recreate a new entity on the basis of the old one, changing its name, its purpose or the location of its registered office, while avoiding the sometime lengthy procedures and significant costs associated with setting up a new company or winding it up.

Although this mechanism has been deemed abusive from a tax point of view by the Swiss Federal Court for now several years<sup>1</sup>, since it could, for example, be assimilated to a liquidation of the company subject to withholding tax in the event of a liquidation profit, it was not, however, null and void from a civil law point of view, since the persons and/or entities involved only risked a tax adjustment without, however, seeing the entire operation called into question.

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<sup>1</sup> ATF 2C\_176/2008 rec. 5 of 26 August 2008

This shortcoming has been remedied by the new Federal Act on Combating the Misuse of Bankruptcy<sup>2</sup>, which aims to prevent certain dishonest debtors from evading their obligations, by introducing the nullity of the transfer of dormant companies in order to limit the abuses associated with these practices, which are likely to create unfair competition that is detrimental to other companies.

Thus, transfers of shares in companies that are over-indebted or have no concrete commercial activity will now be seen as circumventing the provisions applicable to bankruptcy proceedings and those governing the creation and liquidation of capital companies, and will be deemed null and void if the company has no realizable assets. The aim is to make it more difficult to use these mechanisms to circumvent tax and commercial rules, by providing for stricter identification of suspicious transactions and closer monitoring by the relevant authorities, such as the Commercial Registry.

In this respect, the Federal Act on Combating the Misuse of Bankruptcy also involved amending the Commercial Register Ordinance by introducing article 65a<sup>3</sup> of the Commercial Register Ordinance (CRO), which gives Commercial Register Officers the power to refuse applications for registrations which, in their view, conceal the purchase of shares falling within the scope of article 684a of the Swiss Code of Obligations (for public limited companies) or article 787a of the Swiss Code of Obligations (for limited liability companies)<sup>4</sup>.

Since article 65a CRO gives Commercial Register Officers a wide margin of discretion, it is here that these new provisions, if applied too strictly, could undermine economic freedom by severely restricting share buy-backs that are genuinely motivated by the desire to restructure a company in difficulty so that it can return to economically sustainable activity.

## **RISK OF INFRINGEMENT OF ECONOMIC FREEDOM**

The entry into force of article 684a of the Swiss Code of Obligations (for public limited companies) or article 787a of the Swiss Code of Obligations (for limited liability companies) has the advantage of reducing the risk of abuse in transactions involving the purchase of majority shareholdings by promoting the proper application of commercial procedures for the creation and liquidation of capital companies. By rendering certain abusive transactions null and void, the law aims to limit strategies for circumventing legal obligations, thereby providing greater protection against fraud and ensuring healthy competition.

However, it is from the point of view of the practical application of these new provisions that legitimate concerns may arise.

On the one hand, article 65a CRO lists a number of situations in which Commercial Registry Officers should suspect that a dormant company's sale has taken place, for example if several registered facts, including the purpose, registered office, company name and members of the Board of Directors, have been changed simultaneously or successively (paragraph 1, letter a). In such a case, the Commercial Registry Officers are entitled to demand that the company submits its annual accounts and audit report, and may, on the basis of these documents, establish that the company is over-indebted and/or no longer has any commercial activity.

Even if the procedure provided by article 65a of the CRO appears to be well circumscribed, excessive and sometimes arbitrary control cannot be ruled out, particularly when changes that are perfectly legitimate, such as a change of registered office, company name and directors in the frame of a takeover followed by restructurings dictated by circumstances (for example, when a company has positive economic prospects that have not been exploited due to poor management) are presumed to be suspect from the outset.

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<sup>2</sup> RO 2023 628

<sup>3</sup> RS 221.411

<sup>4</sup> RS 220

Furthermore, if these new tasks are not matched by new resources allocated to the cantonal commercial registers, this could lead to a significant administrative overload, delaying the efficiency of the system and risking temporary suspensions and delays in registrations, which could have an impact on the economic activity of the companies in question, and even on the competitiveness of the Swiss business location as a whole.

Despite the obvious benefits of this reform, it entails risks of procedural red tape that will have to be taken into account to ensure its real effectiveness.

## ADVICE TO INVESTORS

The new articles 684a (for the public limited companies) and 787a (for the limited liability companies) of the Swiss Code of Obligations should clearly put an end to certain practices that may still exist and consist of buying up "shell companies" to circumvent the provisions applicable to the creation of capital companies, in particular the minimum capital requirements.

Apart from the fact that these practices resulted in a certain form of unfair competition towards those who had complied with the procedures for setting up and winding up capital companies, they could also sometimes hold unpleasant surprises for investors or entrepreneurs who had chosen this option in the hope of gaining a financial advantage.

Indeed, notwithstanding the entry into force of these provisions, well-advised investors and entrepreneurs generally avoided these deceptively advantageous practices, if only because it is impossible to determine the economic situation of the dormant company with any certainty in the absence of audited accounts, which are generally unavailable in such cases; the risk of hidden and unidentifiable debts arising at the time of the takeover ultimately canceled out any financial advantage in choosing this option.

These new provisions, which are certainly welcome in principle, now require the diligent investor or entrepreneur to go beyond summary applications to the Commercial Register and provide additional explanations surrounding the contemplated investment project accompanied by supporting documents where necessary, in cases of share purchases that may fall under the scope of articles 684a (for the public limited companies) and 787a (for the limited liability companies) of the Swiss Code of Obligations or Article 65a CRO, interpreted broadly. If they fail to do so, their applications may be slowed down considerably or even rejected in certain cases.

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