

# Wilhelm Gilliéron

## AVOCATS



Auteur: Steve Gomes | Le : 1 September 2022

## How do you convert an individual company into a Limited Liability Company (LLC) or a company limited by shares (Ltd)

Many entrepreneurs start their business through an individual company. As their business grows, some entrepreneurs want to convert their individual company into a limited liability company (LLC) or a company limited by shares (Ltd.).

These two types of companies are the most suitable legal forms for attracting investors, expanding the company's commercial or industrial activities or transferring the business to a third party.

The legal transformation of an individual company into a limited liability company or a company limited by shares can essentially be carried out in two ways, either by the formation of a new company (1) by a contribution in kind or (2) by an acquisition of assets.

The tax consequences of such a transfer will not be discussed here, but it should be noted that the legal form of the transfer is of little importance to the tax authorities, which have established their own criteria for determining whether the transfer is tax-neutral (cf. in particular art. 19 para. 1 let. b LIFD).

### 1. The creation of a new company through a contribution in kind of the individual company

A classic LLC or Ltd is founded by the contribution of a cash amount (CHF 20,000 for a LLC, CHF 100,000 (of which at least CHF 50,000 must be paid up at the time of foundation) for a Ltd) in exchange for the shares (LLC) or stock (Ltd) of the incorporated company.

If the owner of an individual company wishes to convert it into a LLC or a LTD, he must make a contribution in kind. In other words, he will bring the value of his individual company and will receive the shares of the incorporated company in exchange.

The procedure for incorporating a company by contribution in kind is subject to the following conditions:

- a. **Establishment of the accounts of the individual company:** The establishment of these accounts is very important, as they will determine the value of the individual company to be transformed into a LLC or a Ltd. The net assets (company assets - debts) must be positive and amount to at least CHF 20,000 for a GmbH and CHF 50,000 for an AG (if necessary, a subsequent release of CHF 50,000 may be required), otherwise an additional cash contribution will be necessary. The accounts must not be older than six months before the incorporation.
- b. **Drawing up a contribution agreement:** This agreement describes what is contributed to the company in exchange for the shares. It is a contract for the transfer of assets within the meaning of Art. 69 ff. of the Merger Act (SR 221.301 / Merger Act) and must have the minimum content prescribed by law (names of the parties, inventory clearly identifying the

transferred items, value of the transferred assets and liabilities, value of the consideration, list of the transferred employment relationships). The conclusion of such a contract also implies other obligations such as the information of the partners or the joint and several liability of the owner of the sole proprietorship.

- c. **Drawing up a foundation report:** this document, drawn up by the notary, summarises what the settlor contributes in exchange for the shares.
- d. **Obtaining a verification certificate from a certified auditor:** the certified auditor is responsible for verifying that the value of the individual company contributed in exchange for the shares is correctly established.

If the owner of the individual company has employees, the procedure for the transfer of employment relationships described in Art. 333 ff CO.

The articles of association must state the purpose and valuation of the contribution, the name of the contributor and the shares to which he is entitled. In addition, the asset transfer agreement, which lists all assets and liabilities of the individual company, is accessible to any interested third party (Art. 11 ORC).

## **2. Establishment of a new company and subsequent takeover of the assets of the individual company**

The owner of the individual company may also decide to incorporate a company by means of a cash contribution and subsequently transfer the individual company to it. This is an acquisition of assets within the meaning of Art. 628 para. 2 CO.

The law does not clearly define an asset takeover, but it does require the purpose of the takeover, the name of the transferor and the consideration to be paid by the company to be set out in the company's articles of association.

If the terms of the takeover of the individual company are clear at the time of incorporation of the company, the definition of the elements required by law will be easy. If, on the other hand, the terms of the takeover are not yet clear at the time of incorporation, the definition of the takeover of assets will be more complicated and it may be appropriate to mention a maximum price at which the takeover can be carried out.

The legal document which materialises the takeover of assets will usually be a contract for the transfer of assets and will have to comply with the requirements mentioned above if the individual company is registered in the commercial register.

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We recommend that you opt for a contribution in kind, as this allows you to transfer the individual company as soon as the new company is formed, without two entities existing side by side.

As mentioned in the preamble, the entrepreneur who wishes to convert his individual company into a company must pay particular attention to the tax consequences of such a transfer and draw the necessary conclusions in order to choose the best way to carry out this conversion.

We advise entrepreneurs wishing to proceed with such a transformation to seek the services of competent agents (notary, lawyer and trustee).

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**Source :**

***<https://www.wg-avocats.ch/en/actualites/company-law/how-do-you-convert-an-individueal-company-into-a-limited-liability-company-llc-or-a-company-limited-by-shares-ltd/>***