

## **Unlimited Discretion of Swiss Courts re Remedies in Case of Organizational Deficiencies?**

The problem: Upon request of the Commercial Office of the Canton of Zurich, the Commercial Court of the Canton of Zurich ordered that a Zurich based limited liability company (*GmbH*) running a flower shop be dissolved as it lacked of statutory auditors. In accordance with the Swiss Code of Obligations, any Swiss GmbH must have statutory auditors who review and audit the company's yearly accounts. A GmbH may, however, decide to opt-out and not to have statutory auditors which is permissible (only) if the company employs not more than ten employees (full time equivalents).

In the case at hand, the company had been founded in 2005, while the statutory requirement requiring limited liability companies to appoint statutory auditors came into force beginning 2008 only. As until 2011 the company had not adapted its organizational structure and appointed auditors, the Commercial Register Office of the Canton of Zurich granted the company a deadline to cure the situation. The company, however, failed to observe the deadline so that the Commercial Register Office called upon the Commercial Court which decided to dissolve the company for reasons of organizational deficiencies.

The company filed an appeal against this decision with the Swiss Federal Court and requested that the Commercial Court's decision be abolished.

The solution: The Swiss Code of obligations (art. 731 b) provides for various measures that a court can order in case a company suffers from organizational deficiencies in the sense that it lacks of the required corporate bodies (*Organe*) or such corporate bodies do not fulfil the statutory requirements, the court can, in particular, (i) grant the company a deadline to cure the situation, (ii) appoint by itself the corporate body that fulfils the legal requirements or (iii) order dissolution and liquidation of the company. In light of this statutory provision, the Swiss Federal Court (decision no. *4A\_411/2012*) abolished the decision of the Commercial Court of the Canton of Zurich and ordered that the Commercial Court appoint the statutory auditors of the company. The Federal Court further ordered that if the company did not effect an appropriate advance payment covering the auditor's costs the court could order dissolution and liquidation of the company without any further request or proceedings. This decision of the Swiss Federal Court is a good example for the application of the basic principle of proportionality that applies across all Swiss legislation and jurisprudence, according to which courts and other state bodies must order those measures that are appropriate to properly address a specific problem while also ensuring that the measure chosen has the lowest effect on the entity concerned. Against this background, dissolution of a company in case of organizational deficiencies would be the *ultima ratio* only.

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