NKF Client News

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Stock corporation law reform nearing completion

On 19 December 2019, the Swiss National Council discussed the reform of stock corporation law for a second time, dealing in particular with the topics in which differences remained between the National Council and the Council of States.

This heralds the final round of the reform, which began in 2007 with a Federal Council draft, and was later severely impacted by the initiative "Against Fat-Cat Salaries" (*Abzocker-Initiative*). The task now is for the Councils to reach agreement on the outstanding points. While the differences are numerous (as the National Council has stubbornly stuck to most of its positions and has only made minor concessions to the Council of States) only a few fundamental issues remain.

It is now clear which innovations in stock corporation law are definitely to be expected. It is, however, also clear which questions are still open and finally, what topics will definitely not be subject of this reform, even though they may be worthy of discussion.

A few remarks on this:

1. What has been decided?

— It is now certain that the reform will come to a *positive conclusion* within the foreseeable future. Even a year ago, this certainty did not exist: In its introductory debate of 11 December 2018, the Council of States rejected a no-action motion (*Nichteintretensantrag*) only by a relatively narrow majority of 23 to 20 votes.

— The *nature* and *broad lines* of the reform *are defined*. Surprises are no longer expected.

— A summary round-up of the changes (which will be presented in detail in a newsletter in due course):

  — The share capital will be made more flexible: While decisions on capital *increases (Kapitalerhöhungen*) can already be delegated to the board of directors by the general meeting within certain limits set by law and by the general meeting (authorized capital increases), in the future it will also be possible to delegate decisions on capital *decreases (Kapitalherabsetzungen)* within certain limits to the board of directors. This creates a *range (Kapitalband) within which the board of directors can increase or decrease the capital*. The general meeting can set the limits, and it can choose to permit the board of directors to decide only on increases or only on decreases.

  — Shares will continue to have a nominal value, but the value must simply be greater than *zero*. This allows for *any desired share split*, resulting in the kind of flexibility that would be associated with no-par-value shares, without giving up the concept of fixed share capital.

  — The future law abandons special provisions on the intended *acquisition of assets (Sachübernahme),* which has repeatedly led to uncertainties in practice. The special provisions for *contributions in kind (Sacheinlage),* however, remain in place.

— The provisions governing the *general meeting* will be modernized and made more flexible, in particular by allowing the *use of electronic means of communication*. In the future, it will also be possible to pass resolutions at universal meetings (i.e., meetings with the participation of all shareholders or their proxies) by written and electronic means. Participation in the general meeting can also take place electronically and the general meeting can be held entirely electronically (virtual general meeting). The future law therefore opens up new possibilities and simplifications without creating new obligations for companies.

— The use of electronic means of communication for the board of directors is also envisaged, again on a voluntary basis throughout.

— *Formal facilitations* will also be introduced. In the future, for example, the debt call for constitutive capital decreases and for liquidations will only have to be made once instead of three times.

— As is well known, the implementation of the reorganization of the relationship between the board of directors and the general meeting in public companies, as required by the *initiative "Against Fat-Cat Salaries"*, is currently provisionally regulated by a Federal Council ordinance (Ordinance against Excessive Remuneration). Its definitive regulation at a statutory level is also part of the reform of Swiss stock corporation law. Public companies will be relieved to find that the *future law* will largely adhere to the well-established guidelines in the *Ordinance against Excessive Remuneration*.

— Finally, the regulation of two matters that are more of a socio-political nature than a matter of stock corporation law has been made certain: specifically, the introduction of *gender guidelines* for the board of directors and executive management in publicly traded companies (whereby each gender should be represented on the board of directors by at least 30% and on the executive management by at least 20%), and *transparency regulations for companies in the extractive industries* in the case of payments to state and quasi-governmental bodies of CHF 100'000 or more per financial year.

2. What is still pending?

To eliminate the differences between the Councils, about 30 provisions remain, but the vast majority are questions of detail. Some of the more important differences are as follows:

— It has not yet been decided whether share capital in a *foreign currency* should be possible in the future. The National Council has twice spoken in favor of it, while the Council of States is opposed to the proposal.

— To allow so called *loyalty shares*, which was first proposed in the National Council, remains controversial. According to the proposal, it should be permissible to provide in the articles of association that privileges of up to 20% in respect of dividends and subscription rights be granted on shares that have been registered in the share register for at least two years for the same shareholder. The Council of States rejected the proposal to permit such preferential rights, and did not make a countermotion. The National Council voted in favor of the proposal by 150 votes to 32 (with 5 abstentions).

— A further important disagreement exists in the area of *liability law*: Under current law, *auditors* are *jointly and severally liable* with the members of the board of directors and the executive management for breaches of duty under the corporate law liability regime. In practice, this often leads to unfair results because plaintiffs may focus their attention on the auditors, given their expected assets and insurance coverage, even though the auditor is usually not the main actor in cases where mistakes are made.

- According to the Federal Council's proposal, this joint and several liability should be replaced by *proportional liability* in the event of mere negligence on the part of the auditors. Although this appeared to be undisputed, the new proposal was surprisingly rejected without discussion in the National Council, which was apparently not at first realized by the industry. The Council of States returned to the Federal Council's proposal, but the National Council again rejected it on 19 December 2019 – again without discussion.
- The Councils are divided on a further question concerning the law of liability: namely, whether the Federal Supreme Court's practice, according to which a *subordination* of liability claims *(Rangrücktritt)* is *ineffective* in bankruptcy and does not protect the members of the board of directors and executive management from claims for damages, should be corrected.
- In the case of listed registered shares, it is currently unclear whether, in order to recognize a share purchaser as a shareholder, a stock corporation can insist on the applicant making a declaration that "he or she bears the economic risk associated with the shares" as a prerequisite for recognition.

3. What was rejected or not subject to any discussion?

A number of issues that could have been expected to be discussed in the context of a comprehensive reform of stock corporation law is not addressed in the future legislation. This will be either welcomed or regretted, depending on one's point of view. In some cases, the Federal Council had already excluded them, and others were excluded during the course of parliamentary deliberations. The following are worthy of mention:

- *a facilitation of claims for restitution and liability*, which would have allowed shareholders with a small minority stake to take such legal actions at the expense of the company and therefore all shareholders,
- rules for an *electronic shareholders' forum*, which would have enabled shareholders of listed companies to exchange views before the general meeting,
- a solution to the problem of so-called *dispo shares* (shares that are not registered in the share register),
- additional *restrictions on shares with privileged voting rights (Stimmrechtsaktien),*
- the possibility of granting the general meeting a reservation of approval for certain resolutions of the board of directors analogous to art. 807 of the Swiss Code of Obligations (limited liability company),
- and last but not least, the proposal to waive the requirement of *notarization* of shareholders' resolutions in simple cases of incorporation, changes in capital and dissolution.

Parliament rightly rejected certain proposals that were not relevant to stock *corporation law*, such as regulating the services of proxy advisors *(Stimmrechtsberater)* and disclosure requirements with regard to party and campaign financing. However, these issues, although outside the scope of stock corporation law, remain on the political agenda.

4. Completion of the reform and entry into force of the new law

If parliament imposed a tight timetable on itself for the settlement of the remaining differences, a conclusion of the reform would theoretically be possible in the coming spring session. It is more likely, however, to be concluded in the summer session with final votes in mid-June 2020.

The new law could be expected to enter into force on 1 January 2021 at the earliest. However, it is more likely – and reasonable – to become effective during 2021 or on 1 January 2022. This would give lawyers, in-house counsels, trustees and all others professionally involved in stock corporation law sufficient time to familiarize themselves with the new law. Companies would also have enough time to implement the necessary adjustments to the new law. However, this should not be costly and time-consuming, as existing companies will not be forced to amend their articles of association under and in connection with the reform.

The general *transitional period* during which the old and new law will be in force side by side has been set at two years by the Federal Council, and is undisputed by parliament. The five-year period provided in the last reform proved to be unnecessarily long.

5. Preliminary assessment

It is still too early to make a final judgment on the reform. Overall, however, it is relatively positive: While the new provisions will not direct Swiss stock corporation law in a wholly new direction, it does introduce numerous simplifications and provide for new degrees of freedom, not least regarding the use of digital solutions. Furthermore, it clarifies certain controversial issues and corrects misguided court practice. The stock corporation, which is still the most important organizational form for economic activities in Switzerland, will thus continue to be a suitable legal form for small, medium, large and very large companies in the future.