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Reform of Swiss stock corporation law on the home stretch?

For the last decade and a half, the Swiss Federal Council and Parliament have been working on a revision of the Swiss stock corporation law, occasionally interrupted by the popular initiative against excessive compensation (Minder Initiative). The objective should now be within reach: at its meeting on 19 June 2019, the Swiss Council of States discussed the matter a second time and largely approved the proposals of its legal commission (Commission). On the same occasion, it rejected a number of minority motions from the Commission. The Commission had previously brought a set of proposals which the Council of States had rejected in December 2018 on the grounds that they were of a rigid nature and would have been difficult for the economy to implement. Instead, the Council of States deemed that the proposal should be revised in a business-friendly manner such that it would not contain any unnecessary bureaucratic burdens, remain close to the Ordinance against Excessive Remuneration for Listed Stock Corporations (VegüV/OaER) which implements the Minder Initiative, and not require companies to amend their articles of association.

The revised bill substantially meets these requirements. It also generally corresponds to the proposals of the National Council, which was the first institution to deal with the revision. Politically, the prevailing view is therefore that the main content of the stock corporation law revision is now fixed, although various adjustments can and will of course still be made. The matter will now go back to the National Council, and then the remaining differences between the Councils are to be settled. The final vote and adoption by Parliament could take place in the springtime session of 2020. If this schedule is met, the new provisions could enter into force on 1 January 2022, with certain transition periods to allow for practical adjustments.

1. FUNDAMENTALS OF THE STOCK CORPORATION LAW REVISION

— Unity of law of stock corporation remains untouched

In principle, the unity of the law of stock corporation will remain untouched, i.e. there will be no different codification of law for publicly traded companies compared to private stock corporations. However, the recent trend towards differentiating between companies according to their economic importance (in particular with respect to different accounting regulations and different auditing requirements depending on the size of the company) will continue. In particular, the special provisions for publicly traded companies will be further expanded. To a large extent, these have already been implemented through the OaER. Further provisions specific to publicly traded companies are proposed in respect of the consolidation of shares, the content and scope of mandatory provisions in the articles of association, the cancellation or limitation of priority subscription rights and the amount of any participation capital.

— Companies limited by shares will remain capital-related corporations with a fixed share capital

In contrast to limited liability companies, companies limited by shares will remain purely capital-related corporations. Furthermore, the articles of association will still not be able to oblige the shareholder to do more than contribute the amount determined for the subscription of his shares. Aside from reporting and disclosure obligations resulting from international anti-corruption and tax harmonization measures, the sole obligation of a company's shareholders will be to pay the share capital. The concept of fixed share capital for companies limited by shares will also be maintained.

— The principle of parity will be maintained, but with slight shifts towards the general meeting.

The stock corporation law revision maintains the so-called principle of parity, i.e. the principle that each corporate body (general meeting, board of directors, auditor) is assigned certain inalienable powers. However, as already mentioned, for publicly traded companies various transfers of powers from the board of directors to the general meeting will take place.

— The revision will bring welcome flexibility and administrative simplification in a number of areas

Real innovation is introduced with the so-called "capital band".

Additionally, the stock corporation law revision will introduce a number of administrative simplifications. For instance, the obligatory content of the articles of association will be streamlined. The creditors call in the case of capital reductions and dissolutions will only need to be made once instead of three times. The regulations regarding acquisitions in kind will be removed. Lastly, companies will be able to benefit from the simplifications introduced by digitalization, particularly in respect of activities of the board of directors and communications with shareholders.

2. SELECTED TOPICS

A. Flexibilization with regard to financing

a. Introduction of the capital band

One pillar of Swiss stock corporation law will continue to be the fixed share capital. Capital changes, either by way of increases or reductions, must therefore follow strict rules.

The previous stock corporation law revision introduced the concept of authorized share capital in order to simplify share capital increases. Specifically, in the case of an authorized share capital increase, the general meeting delegates the powers it has in respect of an ordinary share capital increase to the board of directors. The board of directors is then authorized to determine the time, conditions and amount of the share capital increase itself within the parameters set by the general meeting.

The ongoing revision should now make it possible to delegate also decisions regarding reductions of share capital to the board of directors. The board of directors will be able to decide on capital increases and decreases within a "capital band". The capital band can be determined within the limits of the following parameters:

— The board of directors may be authorized to increase or decrease the share capital by up to 50 % of the existing share capital. In theory, the board of directors could

increase the share capital by 50 % and then reduce it by 100 % of the original share capital.
— The capital band can be granted for a maximum of five years. This also enables a very extensive delegation of powers (current law: two years).

Of course, the general meeting may also make the delegation of power more restricted. For example, it may allow for only an increase in share capital, which would correspond to today's authorized capital increase regime. Now it will also be able to provide for a reduction only (authorized capital reduction). Finally, the scope and/or timing of the authorization can be limited.

b. Further simplifications

In the area of financing, there are a number of other welcome simplifications. The most important ones include the following:

— The minimum par value for shares will no longer have to be 1 cent, but must simply be at least greater than zero. This will enable share splits and lead to a similar result as would have been achieved through the introduction of no-par shares. This is a useful, pragmatic solution because the introduction of genuine no-par shares would have been very complicated from a legal point of view.
— The concept of an (intended) acquisition in kind will be removed. This is to be welcomed, because in practice it is often not clear whether an acquisition in kind exists and, according to an older Federal Court decision, non-compliance with the regulations could have the drastic consequence of nullifying an incorporation or capital increase.

B. Improvement of restructuring chances

Traditional Swiss restructuring law has various weaknesses. The stock corporation law revision is intended to address these weaknesses - in addition to the already completed revision of the restructuring law in the Swiss Debt Collection and Bankruptcy Act - with the aim of increasing the chances of successful restructuring without exposing creditors to additional risks.

On the one hand, the measures consist of improving the "early warning system" and making it more effective at an earlier stage in the event of financial problems. In addition to the existing indicators of capital loss and over-indebtedness, new regulations regarding impending insolvency will be introduced. This will take account the fact that, in practice, illiquidity often represents a greater risk than (temporary) over-indebtedness. In the case of a capital loss, the threshold value which obliges the board of directors to act could be raised from 50 % to two thirds of the share capital and certain reserves, but that will be subject to final agreement between the two Councils. However, this change could be "too much of a good thing" and result in start-up companies, in particular, having to deal with restructuring issues shortly after they are incorporated.

The revision provides that, in certain circumstances, notification of the judge in the event of over-indebtedness does not need to be immediate. Since the notification of the judge in practice reduces the chances of a restructuring to close to zero due to the publicity usually generated as a result, it has already become generally accepted under applicable law on the basis of court practice that a postponement of the notification is permissible in order to allow for silent restructurings. However, there is great uncertainty as to how long this postponement can last. It is to be hoped that the final agreement between the two Councils removes the uncertainty and provides clarification.

There are also a number of other proposals to improve the chances of a restructuring, including the following:

— It should be possible to protect restructuring loans against appeals.
— Confirmation that reorganization offsetting, within the meaning of prevailing doctrine, is permissible: admissibility of offsetting subscription payment against an open debt of the company, even though the company is over-indebted.
— It is confirmed that the capital reduction provisions do not apply if the share capital is simultaneously reduced and increased (so-called harmonica), whereby, as an additional easing of the rules, it is no longer necessary for the new capital to be fully paid in.

C. Strengthening of shareholder rights and the protection of minorities

Strengthening the position of shareholders as owners of the company is a central concern. In the case of publicly traded companies, this is to be achieved by shifting powers in favor of the general meeting. Minority rights shall then be strengthened for all companies.

a. Extension of the powers of the general meeting

As part of the stock corporation law revision, the implementation of the Minder Initiative will be raised from the level of an ordinance to that of a formal law. This will enable publicly traded companies to maintain their well-established processes and the series of resolutions passed by the general meeting.

Furthermore, the law stipulates that any delisting of a company's shares is the responsibility of the general meeting. So far, the prevailing doctrine has been that this is a power of the board of directors.

b. Strengthening of minority rights

The stock corporation law revision will strengthen minority rights as follows:

— The thresholds for the assertion of minority rights will be lowered, with different levels for public and private companies.
— The information rights of shareholders will be improved.
— It will be easier to assert the right to propose motions and items for inclusion on the agenda as well as the shareholders' right to take legal action.

D. Modernisation and flexibilisation of the provisions for the general meeting

The rules for the general meeting will be modernized. In the future, it will be possible to exercise shareholders' rights electronically.

In addition, the provisions for holding the general meeting will be made more flexible. In the future it may

— be held in writing (which was previously only possible for resolutions of the board of directors),
— take place at several venues (not yet clear if also abroad) at the same time,
— be carried out without a conference venue virtually and by electronic methods, respectively.

However, the concept of the general meeting per se will not be impacted. In the case of public companies with a large number of shareholders, who cast their votes predominantly via the independent proxy, the "Landsgemeinde" remains the case, which implies that an immediate formation of opinion takes place, even though the decision already has been made before the meeting.

E. Gender quotas

The revision intends to introduce a gender quota into the law of stock corporation that applies exclusively to "major" listed companies, of which there are approximately 300: Each gender should be represented by at least 30 % on the board of directors. A quota of 20 % is proposed for executive management.

After a transitional period of five years for the board of directors and ten years for executive management, the quotas will become binding once the new law comes into force. Although there is no threat of sanctions in the event of non-compliance, the company must state the reasons why the quota was not achieved in the sense of "comply or explain" and must disclose the measures taken to remedy the non-compliance.

F. Transparency provisions for companies in the raw material sector

Finally, transparency provisions are to be introduced to fight corruption. These apply exclusively to companies in the raw material sector. Disclosure of payments to governmental and quasi-governmental agencies or persons is mandatory.

3. CONCLUSION

The stock corporation law revision perhaps does not constitute a bold move, but does modernize and introduce greater flexibility to Swiss stock corporation law in several areas. For companies and, thus, for Switzerland as a business location, the revision, which has now essentially been completed, brings a number of improvements. It is therefore to be hoped that the legislative project can now be completed quickly without any major changes. As the most important corporate form in the private sector, the company limited by shares will thus once more be fit for purpose.

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