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Taking Stock of the Corporate Law Reform

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Key Take-aways

1.
The modernization of Swiss corporate law has now become final. Hallmarks of the reform include corporate governance developments, such as gender quotas and transparency obligations for resources extraction companies.

2.
The reform also introduces a range of relaxations and clarifications, including more flexibility in the share capital structure, a clear legal basis for interim dividends and the permissibility of virtual general meetings of the shareholders.

3.
The rules on gender quotas and transparency for resources extraction companies (both subject to conformance periods) will become effective on 1 January 2021, while the rest of the reform is likely to become effective in 2022.

1 Introduction

The referendum period expired on 8 October 2020 and so after protracted and at times intense debates the reform of Swiss corporate law has now become final. The new rules on gender quotas (with multi-year conformance periods) and transparency for resources extraction companies (with a one-year conformance period) will become effective on 1 January 2021, while the rest of the reform is likely to become effective in 2022.

The bill is intended to enhance corporate governance of public and private companies, including by incorporating say-on-pay and other executive compensation rules into the Swiss Code of Obligations, expanding minority shareholders' rights, promoting gender equality at board and executive levels and improving transparency for resources extraction companies. The bill further modernizes Swiss corporate law, mainly by introducing more flexibility into the share capital structure, providing a clear legal basis for interim dividends and enabling purely virtual general meetings.

We provide below a summary of the essential parts of the bill. It will be important for boards and management of public and private companies to be familiar with the key aspects of the reform to anticipate compliance and consider necessary or advisable changes to the articles of association.

2 Share capital and dividend distributions

2.1 Capital band

A pivot of the new flexibility is the new concept of **capital band**: Under the new law, companies will be able to provide in their articles of association that the board of directors is authorized to increase and reduce the share capital (or to take one of these two actions) by up to 50% of the original share capital, and this during a period of up to five years (as specified by the articles of association).

To date, companies are only able to authorize their board of directors to increase (but not reduce) their share capital by means of "authorized share capital". This new incremental flexibility will be particularly welcomed by public companies, which will be able to react more promptly to market conditions. Technically, the introduction of the capital band will render the authorized capital redundant and so that concept will be abolished.

Furthermore, the **procedure to reduce the share capital** will be streamlined. In particular, a share capital reduction will only require one creditor call (instead of three) and the period for creditors to file claims will be 30 days (instead of two months). In addition, creditors' claims will not need to be secured if the company can establish that such claims are not compromised by the share capital reduction.

2.2 Interim dividends

The bill explicitly allows for **interim dividends** (i.e., dividends paid out of the *current* financial year's profits), provided that they are declared and distributed on the basis of an interim balance sheet. The interim balance sheet will be required to be audited unless the company has opted out from the audit requirement or unless all shareholders approve the interim dividend and creditors' claims are not compromised. Particularly in intra-group contexts, this will facilitate the process of upstreaming profits of Swiss subsidiaries to their parent companies.

2.3 Technical Improvements

The bill introduces a number of technical improvements:

First, unlike under the current regime, it will be permissible to denominate the share capital in a **foreign currency** (selected among a basket of currencies that the Swiss government will determine to be acceptable for that purpose). The foreign currency in which the share capital may be denominated must be the most important currency for the trading activities of the company. In practice, this option will facilitate the distribution of dividends in a foreign currency.

Moreover, while shares will continue to have a **par value** under Swiss law, such value must simply be greater than zero (rather than being at least CHF 0.01). This flexibility may be helpful to conduct recapitalizations, including share splits.

Lastly, the bill abolishes the enhanced form requirements that apply when the company contemplates acquiring assets from a shareholder or related party shortly after the company's incorporation or a capital increase (so-called "**acquisition in kind**"). Those same requirements however will continue to apply to a "contribution in kind" when used as a means to pay for new shares upon incorporation of the company or a capital increase.

Interim dividends have been given a clear legal basis.

3 Shareholders' rights

3.1 General meetings

In what is shaping up as one of the hallmarks of the reform and will bring Swiss law in line with other jurisdictions, it will be possible to hold **general meetings virtually**. In a virtual general meeting, shareholders participate at the meeting **by electronic means**. For that to happen, the articles of association must contemplate virtual meetings and the board of directors must designate an independent proxy (a requirement with which public companies must already comply and that may be waived in the articles of association of privately held companies).

The board of directors will have to ensure that the virtual meeting enables (i) the identity of each participant to be validated, (ii) the motions and statements made at the meeting to be transmitted live, (iii) each participant to be in position to submit motions and participate in the discussions and (iv) the counting of the votes to be free from falsification. In case of technical difficulties that would impair the proper conduct of the general meeting, the meeting must be rescheduled. Any resolutions adopted prior to such technical difficulties remain valid.

In practice, public companies contemplating a virtual

meeting will have to consider a wide range of parameters, including the views expressed by proxy advisors and institutional investors (who, prior to the pandemic, favored hybrid over purely virtual meetings), and the technical implementation of a virtual meeting (vendors are expanding their offerings to accommodate the European markets).

The bill also clarifies that **in-person general meetings** can be held **outside of Switzerland** if (i) the articles of association contemplate such a venue, (ii) the chosen venue does not unduly impair the exercise of shareholders' voting and incidental rights and (iii) the board of directors designates an independent proxy (a requirement that may be waived in privately held companies with the consent of all shareholders).

Moreover, in-person general meetings can be held **simultaneously at different venues**. In this case, the motions and statements of the shareholders must be transmitted by live videocalls to all venues.

Another relaxation, helpful to privately held companies in its design, is to allow for resolutions to be adopted by **written or electronic consents**, provided however that all shareholders give their consent and that no shareholder asks for oral deliberations.

3.2 Minority shareholders' rights

The bill intends to improve the rights of minority shareholders in a number of respects:

- For public companies, the **eligibility threshold for shareholders to request that a general meeting be convened** will be reduced to 5% of the share capital or voting power (but it remains at 10% for privately held companies).
- **Eligibility to request the inclusion of agenda items and motions on the invitation to a general meeting** will require ownership of at least 0.5% (for public companies) or 5% (for privately held companies) of the share capital or voting power.
- For public companies, shareholders who hold at least 5% of the share capital or voting power will be eligible to **request a special audit**. The threshold remains at 10% for privately held companies.
- Importantly, subject to certain restrictions, **corporate books and files may be inspected** on demand by shareholders who hold at least 5% of the share capital or voting power.
- For public companies, authority to approve a **de-listing of shares** will be transferred from the board of directors to the shareholders.

4 Corporate governance

4.1 Gender equality (for large public companies)

One of the objectives of the bill is to promote **gender representation at board and executive levels** of large public companies with minimum targets of 30% on the board of directors and 20% for management.

Under a "comply or explain model", failure to reach these quotas will not expose the board of directors or company to legal action. However, it will crystallize a duty to explain in the compensation report the reasons why a gender is not sufficiently represented and any contemplated measures taken to promote such gender.

Large public companies will have until the financial year starting five years (insofar as the board of directors is concerned) and ten years (for management) after 1 January 2021 to reach the quotas (or explain failure to do so as outlined above).

4.2 Executive compensation (for public companies)

The provisions of the ordinance adopted by the Swiss government giving effect to the Minder initiative against excessive compensation for current or former members of the board of directors, as well as management and advisory board members (and their related persons), of public companies will now be embedded in the Swiss Code of Obligations without substantial modifications. Of note:

- **Compensation for a non-compete** will only be admissible if it does not exceed the average renumeration for the last three years and the non-compete is commercially justified.
- **Sign-on bonuses** will only be admissible if they compensate an actual financial loss incurred by the hired executive in connection with the change of employment.
- **Renumeration paid in respect of a previous board or executive position** at the company will only be admissible if line with market practice.

The bill allows privately held companies (where agency issues are typically less pronounced) to elect in their articles of association for a complete or partial application of these provisions.

Virtual shareholders' meetings will become new reality.

5 Insolvency

The bill introduces important changes to the scope of the duties of the board of directors in the event of financial distress.

Currently, if the board of directors concludes that the company is **over-indebted**, it must notify the court subject to certain limited exceptions. The bill provides in this respect that the board of directors may defer such notification as long as (among other prerequisites) there is a reasonable prospect that the over-indebtedness can be remedied within an appropriate period of time, which must not exceed 90 days after the audited (interim) balance sheet confirming the over-indebtedness has been issued.

In addition to this duty, the bill explicitly requires the board of directors to **monitor the solvency** of the company. If there is a risk that the company may become insolvent, the board is duty-bound to take measures intended to safeguard the company's solvency and if needed, restructuring steps (including by involving the shareholders when any such measure requires their approval). If necessary, the board will have to file an application for a moratorium.

6 Transparency obligations for resources extraction companies

Companies that are subject to a full audit and which, directly or indirectly through a controlled entity, extract minerals, oil, natural gas or primary forest wood, will be required to publish electronically, the first time in respect of the financial year starting one year after 1 January 2021, **a special report on a yearly basis** reporting each payment or series of **payments made to governmental authorities** (including government-controlled enterprises) in the aggregate amount of CHF 100,000 or more per financial year.

Companies that do not extract but trade in natural resources will not be captured by the new transparency requirements. However, as part of an international concerted action, the Swiss government is authorized to submit trading companies to the same transparency obligations.

7 Conclusion

Overall, even though a number of meaningful proposals were not approved by the Swiss parliament, the corporate law reform brings a welcome modernization of Swiss corporate law by pushing for bold governance updates, providing more flexibility on various aspects of Swiss corporate law and clarifying a range of important topics in the daily life of companies that had in the past created legal uncertainty.

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