

Chapter Legal & Tax

Corporate Law Reform

After a preliminary draft had been put forward in 2014 and consultation proceedings were carried out, the Swiss Federal Council presented on 23 November 2016 its new draft of the corporate law reform along with the explanatory report (*Botschaft*) and submitted it to parliament. The main proposals of the draft are:

- The Ordinance against Excessive Compensation in Public Companies is incorporated into the Swiss Code of Obligations. Several proposals to further tighten the compensation regime for listed companies have been dropped.
- A target gender quota of 30% for the board of directors and 20% for the executive committee of publicly listed companies on a "comply or explain" basis is proposed. This is in line with the preliminary draft except that the percentage for the executive committee has been reduced.
- Major companies in the exploitation of natural resources industry would be required to disclose payments to public authorities (as already included in the preliminary draft).
- Numerous changes in "traditional" corporate law, such as facilitating the process of incorporating and dissolving companies under simple circumstances, permitting a share capital denominated in foreign currency, a minimum par value below one cent, a "capital band" to give companies more flexibility to increase and reduce their share capital, clarification of the requirements for distributions out of capital reserves and interim dividends, and the enhancement of shareholders' rights in terms of better corporate governance.

The draft law is now being submitted to parliament and will not be enacted before 2018. SECA will monitor the further progress of the corporate law reform and will inform about significant developments of particular relevance for VC/PE investments in Swiss companies.

Consultation on FinTech regulation

On 1 February 2017, the Swiss Federal Council issued for consultation proposed amendments to the Banking Act (BA) and the Banking Ordinance (BO) aimed at facilitating the emergence of innovative business models based on financial technology

(FinTech). The proposed risk-based and technology-neutral amendments are designed to lower market entry barriers and include a new type of license for FinTech and other companies accepting public deposits. Contrary to the approach adopted by other jurisdictions, the proposed Swiss FinTech regulation model is based on three pillars: (1) banking license "light" to cater for the specific risk profile of FinTech business models, (2) creation of an innovation area (i.e., "sandbox"), and (3) "light touch" targeted regulatory adjustments. Key aspects of the proposed amendments include:

- FinTech license: A new license type is proposed under the draft BA amendments for companies accepting public deposits not to exceed CHF 100m while not using such deposits to fund the traditional lending business. Under such license, companies

would be subject to a more lenient capital adequacy framework. This new license type eases the regulatory burden in cases where FinTech or other companies (e.g., online banking, mobile payment processing, crowdfunding) take deposits while, from a risk perspective, it would seem disproportionate to impose a full traditional banking license given their specific business model.

- Innovation area or "Sandbox": The proposed Sandbox is a concept creating an innovation environment wherein providers of financial services are not subject to licensing as a result of public deposit taking up to CHF 1m irrespective of the number of public deposits if the deposits are not invested and no interest is being paid. The Sandbox allows FinTech and other companies to test and develop business models without blocking the capital and incurring the cost that a full banking license entails.

The consultation ends on 8 May 2017. While the draft BA will need approval by the parliament the new FinTech regulation may be enacted as early as 2018. Given the importance of the new FinTech regulation for new technology driven business models in the financial services sector, SECA will continue to monitor and report on relevant further developments.

SECA Model Documentation

Last but certainly not least, the Legal & Tax Chapter has initiated a second update round for SECA's VC Model Documentation in 2016 to reflect regulatory changes as well as market input and envisages that the 3rd edition of the documentation set will be launched by the working group in Q2 2017. In addition, the Legal & Tax Chapter of SECA is aiming at launching a VC Model Documentation "light" that will be fully compatible with the regular VC Model Documentation for smaller (pre institutional investor) financing rounds, expected for launch also in Q2 2017.

Taxation of founders of start-ups

Several Cantons are trying to improve their attractiveness for start-up companies and venture capital. In addition, we have experienced that the start-up industry is better organised and can articulate its concerns on the political stage. As one recent example, the Canton of Zurich has been criticised for its wealth taxation of start-up entrepreneurs. To the extent a start-up has undergone a financing round with external investors, the implicit price paid had been used as a basis of valuation, often causing the founders to be confronted with a significant wealth tax burden on their illiquid investment. After several rounds of discussions, the Canton of Zurich has issued a ruling dated 1 November 2016 according to which start-up companies can be valued based on substance value until the end of the start-up-phase. Start-up companies are defined as "Corporations with an innovative (usually technology-driven) and scalable business model, which is under construction".

Corporate Tax Reform III

One of the most important topics for Switzerland's overall attractiveness for corporations has been the Corporate Tax Reform III that aimed to abolish some heavily criticised

preferential tax regimes and replace them with OECD-compliant regimes. On 12 February 2017 the Swiss electorate rejected the reform. As a result,

- the cantons are not allowed to abolish the existing preferential tax regimes.
- the notional interest deduction and the patent box will not be implemented.
- the partial taxation of dividends will not be increased to a minimum 60% for qualifying dividends.

The Swiss Federal Council will likely propose a new reform package by June 2017. Various parties have already announced their expectations but it is difficult to predict how the new proposal will look like. It needs to be monitored whether OECD and the EU will allow Switzerland more time to come up with a new proposal or whether they will take countermeasures (e.g. blacklisting). The Swiss cantons will have to decide whether they will go ahead with the announced reduction of tax rates. It is likely that many cantons will delay tax rate cuts until a new tax reform is implemented.

BEPS – Multilateral Instrument (MLI) and Non-CIV proposal

The international developments in connection with the OECD-Project on “Base Erosion and Profit Shifting” (BEPS) continues to be a hot topic as various jurisdictions are implementing measures based on the BEPS recommendations.

One of the milestones of the BEPS implementation is the development of a multilateral instrument to modify bilateral tax treaties. This instrument will translate the main BEPS-measures into the bilateral tax treaties and will hence have a major impact on topics like permanent establishments, anti-hybrid rules and many more. In 2016 about 100 jurisdictions have concluded negotiations and a first signing ceremony will be held in June 2017 with ratification and implementation to follow.

In addition, in spring 2016 the OECD has issued a draft proposal on the treaty access of vehicles that do not fall under the definition of collective investment schemes (“Non-CIVs”). This Non-CIV regulation is especially important for private equity vehicles that do not qualify as widely held and diversified. In January 2017 the OECD has issued another discussion draft covering the proposed application of the principal purpose test to three example structures: Regional holding company, securitisation vehicle and real estate funds.

SECA will monitor the outcome of this discussion round and its impact on the Swiss private equity managers and investors.

This is a glimpse of the past and ongoing initiatives of the Legal & Tax Chapter. We continue to strive to improve the regulatory and fiscal environment for the private market industry. This is an up-hill battle in a number of respects in view of the current trends of ever more stringent regulation and of fiscal tightening. Bear with us and please let us have your comments and suggestions.

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