The capital band – a new and flexible instrument in Switzerland

Adjusting share capital faster

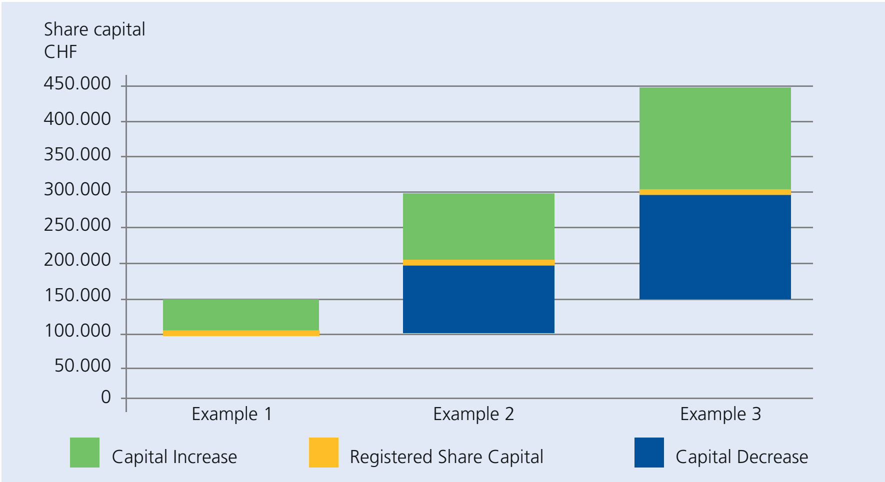
For many years now, there has been a plan to revise Switzerland's corporate law on companies limited by shares (corporations). One new feature of the coming legislation, which is currently planned to come into force in 2023, is what is known as the "capital band". It represents more flexible rules on company foundation and capital. The new possibilities which will come with the capital band aim to change the existing mechanisms on how corporations can change their share capital and adjust to economic developments quickly. **By Dr Wolfgang Müller, Dr Alexander Vogel, Marc Baumberger**

Concept

Currently, the share capital of a company is fixed at the time of incorporation and can be changed later by means of an ordinary, authorised or conditional capital increase or a constitutional/ordinary or declarative capital decrease. In the future, at the time of the establishment of a corporation or any time later, the general meeting may decide through an authorisation in the articles of association that the board of directors is authorised to change the share capital within a defined range – the capital band – over a maximum period of five years. This gives the company the possibility to manage its capital structure flexibly and to adjust the share capital to the company's needs in a timely manner.

There are three options of the capital band: the general meeting may authorise the board of directors to increase or decrease the capital within a certain range, or it may combine the two options. The capital band, which combines the possibility of an authorised capital increase (which existed already under the current law but only for a period of two years) with the possibility of an authorised capital decrease, is a new instrument in Switzerland.

Capital Band



Source: MLL Meyerlustenberger Lachenal Froriep AG

Implementation

A new company can implement the capital band in its articles of association at the time of its establishment or at a later point through a shareholders' decision, which requires a qualified majority of (cumulative) two-thirds of the votes represented and a majority of the par value of the shares represented.

The minimum content of the statutory provision is, depending on which option has been chosen, the upper and/or lower limit of the capital band, the term as well as the number, the nominal value and the type of shares covered. Additionally, the authorisation of the board of directors may be specified with further restrictions, requirements, and conditions. This gives the general meeting a tool to regulate the scope of action of the board of directors. For instance, it could define a specific use for changes of the capital or define the number of or set conditions for capital changes within the capital band. In relation to the capital decrease, it is also important to mention that this option is only available if the company does not have an opting-out

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and is subject to a limited or full audit. The protection of creditors is thus still assured.

Limitations

When introducing the capital band, as mentioned, the lower and/or upper limit of the capital band is to be specified. The upper limit of the capital band may not exceed the share capital entered in the commercial register by more than half and the lower limit may not fall below it by more than half. However, since share capital must always amount to CHF 100,000, this amount is the lowest possible limit of a capital band.

An uncertainty arises in connection with the capital decrease through the acquisition of own shares. In accordance with the law, a company can only repurchase 10% of its own shares with unrestricted transferability. A deviation from this rule is possible if the repurchased shares are intended to be cancelled in a capital decrease. Decreasing the share capital within the capital band could result in a repurchase of more than 10% of a company's own shares and it has not yet been decided how this conflict will be solved. The duration for which the board of directors has received the authorisation of a capital change within the capital band is limited to a maximum of five years. However, changes and extensions to the provision of the capital band in the articles of association may be made by the general meeting at any time, even before the expiry of the authorisation period. The duration of the authorisation begins with the resolution of the general meeting and must be recorded in the articles of association with a reference to the end date.

Use of the capital band

Once the capital band is adopted in the articles of association, the board of directors can increase and decrease the share capital several times, within the limits set by the general meeting.

If the board of directors increases or decreases the share capital, it does so by means of a public deed and an amendment to the articles of association. In case of a capital increase the board conducts the increase in accordance with the regulations of an ordinary or conditional capital increase. If the general meeting has not defined the method of the subscription of the new shares, the board can take such decision. In case of a capital decrease the board conducts the decrease in accordance with the regulations of an ordinary or declarative capital decrease or by a capital reduction.

Following the capital increase or decrease, the board of directors must file the new amount of the share capital with the Commercial Register within six months from the respective resolution.

Protection of shareholders and creditors

The shareholders have a subscription right with respect to capital increases within the capital band in accordance with their previous stake. If the subscription right is to be restricted or withdrawn, the respective authorisation must be stated in the articles of association and the important reasons for which the board of directors may restrict or withdraw the subscription right must be specified.

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A capital decrease within the capital band reduces the liability substrate, which is why creditor protection provisions must be observed. However, the capital decrease can be decided by the board of directors, and it can only go below the registered share capital if the creditors have been invited to file their claims and an audit certificate is available.

Conclusion

The capital band allows a company to give its board of directors the flexibility to adjust its share capital within a range defined by the general meeting. The delegation of competences from the general meeting to the board of directors gives the company the possibility to adapt its share capital faster to the company's needs. It is expected that the capital band will be a most welcome instrument for many companies. ■