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Switzerland: Trends & Developments

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SWITZERLAND

Trends and Developments

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Introduction

On 1 January 2023 the revised Swiss corporate law comes into force, adapting the corporate law to today's economic conditions and needs. The revision was approved in June 2020 and, while certain topics, namely gender equality and transparency in the commodity trading sector, entered into effect as of 1 January 2021, the full revision becomes effective, finally, as of 1 January 2023.

The revised corporate law brought about numerous changes. In general, the rights of shareholders and minority shareholders were strengthened and provisions that proved impracticable under the previous law were adapted or repealed. New concepts or amendments were introduced, in particular, for share capital, flexibility in changes to share capital, reserves, dividends, shareholders' rights and corporate governance.

The following overview summarises the important changes.

Share Capital

Foreign currency for the share capital

Under the new revised corporate law a new useful amendment is the possibility of using a foreign currency for the share capital. If for a company's business a currency other than the Swiss franc is more relevant, this currency can be chosen for the share capital. The limitations are that the foreign currency must be equivalent to at least CHF100,000 for a public limited company (Ltd) or CHF20,000 for a limited liability company (LLC) at the time the company is established, or the general meeting changed the currency of the share capital to the foreign currency. The latter can be decided as per the beginning of each new financial year. The change of a currency has, however, the consequence that the accounts must be kept in the same currency.

A further limitation is the foreign currency itself, as the Swiss Federal Council has the authority to define which foreign currencies can be chosen. For the time being, only euro, US dollar, pound sterling or yen are available as approved currencies.

This new possibility can be very helpful: Swiss companies with one of these currencies as their functional currency can avoid unpleasant currency fluctuations.

Nominal share value

Another change for share capital is the denomination of shares. The new law allows any nominal value as long as it is over zero. Therefore, there is no more any minimum amount (currently CHF0.01). With this change, as many shares as necessary can be created by way of a share split without any need for a capital increase.

Capital band

One of the most important new instruments is the feature called "capital band". This useful instrument gives the board of directors the ability – subject to prior authorisation by the general

meeting – to increase and/or decrease the capital within +/- 50% of the registered share capital.

At the time of the establishment of a corporation, or any time later, the general meeting may provide in the articles of association that the board of directors is authorised to change the share capital within the defined range – the so-called capital band – within a maximum period of five years. This gives the board enhanced flexibility when managing a company's capital structure and to adjust the share capital to the actual needs in a timely manner.

The capital band is a combination of elements that already existed and new ones. It combines the authorised capital increase with the new possibility of an authorised capital decrease. The authorised capital increase embedded in the new feature "capital band" existed under the old law but with a shorter period for the length of the authorisation that could be granted, which was limited to a period of two years.

The ability of the board of directors to increase or decrease the capital or both at its reasonable discretion within the minimum and maximum amounts (set by the general meeting) is a very interesting option for Swiss companies.

Amendments to the provisions on capital increases and decreases

The revised corporate law provides for certain adjustments to the procedure for ordinary capital increase and ordinary capital decrease as well as the capital increase from conditional capital. Due to the amendments, the revised law now expressly permits the ordinary capital increase "up to a maximum amount" defined by the general meeting and states that no one may be unfairly favoured or disadvantaged, not only by the cancellation of the subscription right but also by the determination of the issue amount. Further, the revised law specifies the procedure for the capital decrease and simplifies it. Now, one debt call will be sufficient (instead of three) and the deadline set for creditors to register their claims is only 30 days (instead of two months). In addition, there is no obligation to provide security if the company fulfils the claim or proves that the fulfilment of the claim is not endangered by the reduction of the share capital. (Note: if an audit confirmation is available, it is presumed that the fulfilment of the claim is not endangered.)

Capital reserves

Swiss corporate law now distinguishes between capital reserves and retained earnings and aligns these regulations to the accounting law. Therefore, voluntary retained earnings may only be created if the company's long-term prosperity justifies it by taking into account the interests of all shareholders. Further, the revised law clarifies the distribution of capital reserves to shareholders. Now it is explicitly stated that the capital reserve comes from various capital contributions, in particular from the premium paid over and above the nominal value when new shares are issued (premium). In addition, it is now expressly provided that the legal capital reserve may be repaid to the shareholders if the legal capital and retained earnings, less the amount of any losses, together exceed half of the share capital entered in the commercial register. For holding companies the threshold is 20% of the share capital.

Distribution of interim dividends

With the revised corporate law, interim dividends are now permitted. Based on an interim financial statement, the general meeting can approve an interim dividend – under the condition, however, that the company's auditor approved the interim financial statement before the general meeting

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takes any decision. Nevertheless, no approval is needed if the company does not have an ordinary or limited audit for its financial statements or if all shareholders approve the interim dividend and the creditors' claims are not endangered.

It should be noted that the interim dividend does not solve the seller's issue that a dividend is generally taxed, whereas the sale of shares at a higher price may constitute a tax-free capital gain in the case of private individuals residing in Switzerland.

Shareholders' (General Meeting) and Board of Directors' Meetings

Virtual shareholders' meeting and circular shareholders' resolutions

During the COVID-19 pandemic the vast majority of meetings were held virtually or remotely, board meetings usually in the form of video or telephone conferences. However, for shareholders' meetings, the possibility of holding a meeting without the right of shareholders to be physically present was only available given the extraordinary provisions set out in a COVID-19 ordinance. With the revised corporate law, virtual meetings by electronic means and without an actual venue are now allowed permanently – if the articles of association provide it and, where the company is listed, the board of directors has designated an independent proxy holder.

The revised company law now expressly provides for the possibility of holding a meeting of the general meeting abroad, provided that:

- the articles of association contain a clause to that effect;
- the chosen venue does not make it in any way inconvenient for any shareholder to exercise their shareholder rights; and
- the board of directors appoints an independent proxy holder (this last requirement may be waived for non-listed companies).

In addition, it is possible to hold a meeting of the general meeting at several venues (in Switzerland and/or abroad) in parallel, provided that the votes of the participants are transmitted directly in sound and vision to all venues.

Virtual board meetings

In a manner similar to the virtual shareholders' meeting (general meeting), virtual board meetings are also possible with the revised code of obligation.

The new revised corporate law allows the board to pass resolutions:

- in a physical meeting;
- with the use of electronic means; or
- in writing or electronic form, provided no member requires an oral meeting (circular resolution).

For resolutions rendered in electronic form, no signature is necessary unless the board of directors directs otherwise.

Shareholders' Rights

Access to company-relevant information at any time

The revised corporate law provides that shareholders of non-listed companies who together represent at least 10% of the share capital or votes may request information in writing from the board of directors at any time, provided that:

- it is necessary for the exercise of shareholders' rights; and

- no business secrets or other interests of the company worthy of protection are jeopardised.

The board of directors shall provide the information within four months. The answers of the board of directors shall also be made available for inspection by the shareholders at the next general meeting at the latest. If the board of directors refuses to provide information, reasons must be given in writing.

Facilitated access to business books and files
The business books and files may now be inspected by shareholders (both of listed and non-listed companies) who together represent at least 5% of the share capital or the votes of the company, provided that:

- it is necessary for the exercise of shareholders' rights; and
- no business secrets or other overriding interests of the company conflict therewith.

Again, the board of directors shall grant such inspection within four months. Any refusal of inspection shall be justified in writing. The decision concerning a request for inspection of the business books and files now rests solely with the board of directors (previously the general meeting was responsible). This makes the response to such requests more efficient and thus facilitates shareholders' access to the company's books and records.

Right to convene a general meeting
For listed companies the threshold for convening a general meeting was reduced from 10% to 5% of the share capital or voting rights. For unlisted companies the threshold remains 10% but may be based on either the percentage of share capital held or the votes cast (previously, only the percentage of share capital held was taken into account).

The request from a shareholder must be made in writing and must contain:

- the items to be discussed; and
- the proposals.

The board of directors shall convene the general meeting within a reasonable period of time but in any event within 60 days. If the board of directors fails to act, the shareholders may file a request with the court to convene a general meeting.

Reimbursement of benefits
The revised corporate law expands the circle of possible defendants and the prerequisites concerning the restitution of remuneration, statutory capital and profit reserves or other benefits, if these were unjustifiably received. In addition, the group of persons subject to liability is expanded to include persons involved in management, members of the advisory board and persons closely related to them.

Restructuring
Threat of insolvency
The adaption of the concept of insolvency in Swiss corporate law is a further innovation of the revised corporate law. The board of directors must monitor the solvency of the company: if there is a risk of insolvency, the board of directors must take measures to ensure the company's solvency without being legally obliged to draw up a cash-flow plan. The board of directors must then take additional reorganisation measures or propose such measures to the general meeting. If necessary, the board of directors can request a moratorium from the court. Moreover,

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the reform imposes an explicit obligation on the board of directors to act swiftly.

Capital loss

The new restructuring measures of the revised law clarify the definition of capital loss: a company is in a situation of capital loss if its assets, after deduction of losses, no longer cover half of its share capital, statutory capital reserves and statutory retained earnings. In such case, the board of directors must take the appropriate measures to end the capital loss. Similar to a threat of insolvency, in the case of a capital loss the board of directors must take further reorganisation measures or propose them to the general meeting.

Over-indebtedness

The revised corporate law does retain the old concept that the board of directors must prepare interim financial statements at both going concern value and liquidation value in the event of a risk of an over-indebtedness. The interim financial statements must be audited. If the interim financial statements show that the company is actually over-indebted, the board of directors is obliged to notify the judge of the over-indebtedness. The judge then either declares the company bankrupt or imposes a moratorium. In two cases, however, the board of directors is not obliged to notify the court:

- if the claims are subordinated; or
- if there are serious reasons to believe that the over-indebtedness can be eliminated within 90 days of the preparation of the interim financial statements without jeopardising the settlement of the claims during this period.

Excessive Remuneration

The revised corporate law further includes rules against excessive remuneration in listed companies (transferred from ordinance into law only with minor changes). For listed companies these rules are mandatory (listed companies were already subject to the old ordinance against excessive remuneration) and unlisted companies are able to comply with them on a voluntary basis. According to these provisions, it is the task of the general meeting to elect a remuneration committee that prepares a detailed remuneration report related to the board members' and the executive board's remuneration. In addition, the general meeting must vote on the remuneration to be paid to the board of directors and the executive board (prospective or retrospective vote).

Statutory Arbitration Clause

Under the revised corporate law, the articles of association may provide that disputes under company law can be decided by an arbitral tribunal having its seat in Switzerland. Unless the articles of association provide otherwise, the arbitration clause shall bind the company, the organs of the company, the members of the organs and the shareholders.

The arbitration proceedings shall be governed by the provisions of Part 3 of the Swiss Code of Civil Procedure. These provisions for arbitration apply to proceedings before arbitral tribunals based in Switzerland. In order to avoid a situation where such arbitral tribunals could be based outside Switzerland by the application of Swiss Private International Law, it is explicitly not applicable.

Further Topics

Besides the changes of the Swiss corporate law reform mentioned above, the revision contains many other new modifications.

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