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General Meetings of Stock Corporations in light of the Revised Swiss Code of Obligations

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The following article is intended to outline the changes in relation to the general meeting of stock corporations under the revised Code of Obligations. The formal framework of the stock corporation remains unchanged, but the reform brings increased flexibility and administrative simplification in various areas, in particular by allowing the use of electronic means of communication. It will even be possible to hold a general meeting entirely by electronic means as a virtual general meeting.

That this virtual concept works in practice has been confirmed in times of COVID-19. Due to the pandemic, the Swiss Federal Council has temporarily permitted virtual meetings based on a special legal basis, the COVID-19 Ordinance 2. However, although this test was successfully passed, virtual general meetings will under the new law – for practical reasons – presumably be reserved to small companies with only a few shareholders. For publicly listed companies with a large number of shareholders, the concept of physical general meetings will remain de facto the only method of holding a meeting of shareholders.

One controversial issue arose in the final stage of the parliamentary debate of the reform relating to a practice of the independent proxy holders to inform the company or its Board of Directors in advance confidentially on the instructions received. The revised law presents a compromise in this respect.

By Peter Forstmoser / Thomas Hochstrasser

1) Overview of the Reform regarding the General Meeting

The bulk of stock corporation law remains intact, but with an increased differentiation between private and listed companies. On the one hand, the new law continues the trend of the last decades to implement uniformity on the issues with the same economic impact (this according to the principle "same business, same risks, same rules"), even if different forms of companies are concerned. On the other hand, the revised law differentiates within the law of stock corporations according to the size or economic importance of a company. In particular, the special provisions for publicly listed companies have been further extended, especially with regard to the powers of the general meeting to determine the salaries of executive management and boards of directors. It should be mentioned, however, that these rules are not new. Indeed, they were already introduced in the Ordinance against Excessive Remuneration, with which the Federal Council temporarily implemented the requirements according to the so-called "Popular Initiative against Rip-Off Salaries" and which now will be converted into a law in the formal sense.

2) Modernization and increased flexibility of the provisions for the general meeting

a) Providing for the use of electronic means of communication

The rules for the general meeting will be modernized, in particular by allowing the use of electronic means of communication (art. 701c CO). In the future, it will be possible to participate in and pass resolutions of the general meeting electronically in the context of an otherwise physical meeting, and it will even be possible to hold a general meeting entirely by electronic means as a virtual general meeting (art. 701d CO).

The revised law makes explicit reference to the following possibilities of using electronic means of communication:

- The agenda items may be presented in summary form only in the convening notice if further information is made available to the shareholders "by other means" or "in an appropriate manner" (revised art. 700 (4) CO), which will generally correspond to electronic access to the information.
- Shareholders may request the delivery of annual and audit reports on paper only if these documents are not made available to them electronically (revised art. 699a CO).
- The adoption of resolutions at a universal meeting of shareholders is now also possible not only in writing (which is also new), but also electronically (revised art. 701 (3) CO).
- Participation in the general meeting may be made possible by electronic means (revised art. 701c CO) and the general meeting as a whole may be held by electronic means (virtual general meeting) (revised art. 701d CO).
- The general meeting may be held at several meeting places at the same time ("In this case, the votes of the participants must be transmitted directly in sound and vision to all meeting places", revised art. 701a (2) (3) CO).

The use of electronic means of communication is strictly optional, with the exception of the provisions on the electronic issuing of a power of attorney and of instructions to the independent voting proxy in listed companies (revised art. 689c (5) CO). These mandatory requirements result from the already mentioned implementation of the content of the Ordinance against Excessive Remuneration at the level of a formal law.

Whether and how the proposed innovations will actually be used and whether they will bring about savings in time and money remains to be seen.

b) Flexibility in the form of holding the general meeting

Despite these new rules, the concept of the general meeting per se will not be impacted. In the case of publicly listed companies with many small shareholders, this means that the "Landsgemeinde"-concept remains in place, i.e., the fiction of shareholders gathering in a meeting, exchange their ideas and positions and then take an informed decision. In reality, the results are known in advance and cannot be changed in the meeting because – as mentioned before – the independent proxy usually exercises the majority of the votes, and this in accordance with the instructions given to him by the shareholders well in advance.

The question of whether it should be possible to hold the general meeting of a Swiss company abroad has led to Homeric discussions in Parliament. As a compromise, it is now stipulated that this is permissible, but only if the articles of association provide it and if an independent proxy is appointed (art. 701b CO). Furthermore the location of the meeting must not make it objectively difficult for any shareholder to exercise his rights (which also applies to general meetings held in Switzerland).

The choice of a foreign venue might be particularly useful for wholly owned Swiss subsidiaries of foreign groups, which will be able to hold their general meetings at the headquarters of the parent company as the sole shareholder.

c) Confidentiality duty of the independent proxy?

In the late phase of parliamentary deliberations, a common practice of independent proxies, which is legally not unproblematic, came to light and was the subject of intensive discussion. This practice involves independent proxies informing the companies or their board of directors prior to the general meeting on the instructions received. Since, as mentioned, the majority of votes is almost always exercised through the independent proxy, the Board knows in advance what the outcome of the votes will be. This practice was defend by Boards, arguing that this information is necessary in order to prepare the meeting adequately. Opposing shareholders, on the other hand, qualified this advance information as an unjustified advantage for the company and its board.

As a compromise the revised law now states that the independent proxy may "provide the company with general information on the instructions received", but not earlier than three working days before the general meeting. At the general meeting itself, the independent proxy must disclose what information was given to the company. This will put an end to the grey area that heretofore existed.

3) Further aspects

a) Extension of the competences of the General Meeting

Strengthening the position of shareholders as owners of the company was a central goal of the reform. For publicly listed companies, this was implemented by shifting powers from the board of directors to the general meeting, a shift which as mentioned, has already taken place on the level of the Ordinance against Excessive Remuneration issued by the government. The reform of the Swiss stock corporation law will raise the provisions of the Ordinance to the level of a formal law.

According to these provisions, the general meeting of a listed company (and not the board of directors, as was previously the case for all corporations and will remain valid for private companies) is responsible for determining the total remuneration of the board of directors and of the executive board (as well as that of an advisory board if such a body exists which has become rare). In addition, the general meeting is mandatorily entitled to elect the chairman of the board of directors, the members of the compensation committee (which must be composed of members of the board of directors) and of the independent proxy. Finally, a one-year period of mandate is mandatory for the members of the board of directors of listed companies, whereas in the previous practice, three- or even four-year terms of office existed. Being (re) elected every year may be inconvenient for board members, but presumably, nothing will change in practice, reelection being a matter of routine and deselection being possible in every meeting (after a prior announcement) anyway.

b) Ordinary quorum for decisions remains, topics requiring a qualified quorum are extended

The Federal Council had proposed that, contrary to the current non-mandatory rule of art. 703 CO, in a vote of the general meeting only the yes and the no votes should be taken into account and abstentions should no longer be counted (relative majority). This could have led to more random majority decisions, especially in the case of publicly traded companies.

Both the National Council and the Council of States, however, decided that decisions will in the future as until now be taken by an absolute majority of votes represented at the general meeting (revised art. 703 CO). Abstentions thus continue to have the same effect as "no" votes, thus allowing a polite way of saying "no". As under current law corporations may provide another quorum by statutory provision.

In the current law, eight points are defined as so called important decisions within the meaning of art. 704 CO, for which a qualified quorum is required. In the future law nine additional topics are enumerated: (i) the consolidation of shares, insofar as this does not require the consent of all shareholders concerned, (ii) the conversion of participation certificates into shares, (iii) the introduction of a capital band or the creation of reserve capital, (iv) the change of the currency of the share capital, (v) the introduction of the chairman's casting vote at the general meeting, (vi) a provision in the articles of association for holding the general meeting abroad, (viii) a delisting, (viiii) the insertion of an arbitration clause in the articles of association and (ix) the waiver of the appointment of an independent proxy to hold a virtual general meeting for companies whose shares are not listed on a stock exchange.

c) Comparison with the COVID-19 General Meeting

The current pandemic and the measures following the outbreak also affected general meetings. The COVID-19 Ordinances, as amended several times throughout the pandemic, provided a legal basis for companies to conduct their general meeting virtually. Although somewhat similar, the COVID-19 rules on general meetings differ from the possibilities under the revised CO. As the matter was time-sensitive, the virtual general meeting under the COVID-19 Ordinances does not require a respective base in the articles of association and there is no requirement of appointing an independent proxy. However, it is not possible to fully conduct the general meeting virtually, as it will be according to the revised CO. A physical meeting at a defined place on a defined date is still required, i.e. – in case of certain decisions to be taken such as changes of the articles of association – with a notary public present. Nevertheless, the current pandemic might have initiated a digitization process regarding the general meeting helping the newly introduced virtual general meeting according to art. 701d CO to actually be applied as soon as the revised CO enters into force. The exemption for COVID-19 general meetings based on the COVID-19 Ordinances was extended by the Federal Council until the end of 2021 and it is expected that the bulk of listed companies will make use of the exemptions next year also.

4) Summary

The reform brings much-welcomed flexibility and administrative simplification for general meetings, but the formal framework of the shareholder meetings remains basically unchanged. Stock corporations will be able to benefit from the opportunities provided by digitalization without being obliged to do so, especially when dealing with the shareholders.

The revised law makes an increased distinction between private and listed companies. At the same time, the revised law continues the trend of providing for the same rules and requirements for equivalent economic situations irrespective of the formal legal structure of an entity (the principle "same business, same risks, same rules").

An important innovation under the revised law is the possibility of holding a virtual general meeting.

As a rule, no amendments to the articles of association are necessary, as the new possibilities under the revised law – which may require a basis in the articles of association – are optional. However, if a company wants to hold its general meeting abroad, which might be useful in particular for groups with a parent company abroad and subsidiaries in Switzerland, the articles of association must provide for this possibility.

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Changes affecting Shareholders' and Minority's Rights

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One of the main objectives of the corporate law reform was to strengthen shareholders' rights. And indeed, the reform will, albeit to a limited extent, strengthen the rights of shareholders, and those of minority shareholders' in particular, in a number of ways. Most notably, certain threshold requirements for the exercise of minority rights are lowered, while in turn a two-thirds majority vote requirement will be introduced for certain important resolutions. Perhaps most notably, information and participation rights for minority shareholders in both listed and non-listed companies are made more accessible and to some extent likely more effective.

By Remo Decurtins / Jonas Hertner

This article outlines the upcoming changes to Swiss corporate law with respect to the protection of the rights of shareholders generally and minority shareholders more specifically.

1) Changes to Information and Participation Rights

a) New Threshold Requirements

Several threshold requirements for the exercise of minority rights will be lowered as a result of the reform. Unlike the threshold requirements in the current law, which is based on capital alone, the new threshold requirements are calculated based on capital or voting rights. A distinction is generally made between listed and non-listed companies:

– The *right to convene a General Meeting* will require 5% of capital or voting rights in listed companies and 10% in non-listed companies. Current law requires 10% of capital for all companies.

– The *right to demand that an item be placed on the agenda of a General Meeting* will require 0.5% of capital or voting rights or participation capital. Current law requires a stake with a nominal value of at least CHF 1 million or 10% of capital for all companies.

– The *right to ask a court to order a Special Audit (Special Investigation)* will require 5% of capital or voting rights in listed companies and 10% in non-listed companies. Current law requires 10% of capital for all companies.

In turn, the *right to inspect the company ledgers and business correspondence* will require 5% of capital or voting rights. No threshold requirements for the exercise of this right exists in current law but inspection is made subject to approval by the General Meeting or the Board of Directors. Under the new law it will be for the Board of Directors alone to grant the exercise of this right.

Finally, the threshold requirement for the *right to apply to a court to request the dissolution of the company* will remain at 10% of capital or voting rights (article 736 (1) nCO; whereas currently law requires 10% of capital). The same is true for the existing *right to request that an ordinary audit be conducted* (article 727 (2) CO).

b) Changes to Information Rights

The reform will introduce several changes to *rights to receive information* from the Board of Directors. In non-listed companies, shareholders (or a group of shareholders) with at least 10% of capital or voting rights may request that the Board of Directors provide information in writing within four months of the request. If the Board of Directors denies the request it must give reasons for doing so in writing (the right can be exercised during a General Meeting but also throughout the year; article 697 (2) nCO). This change, allowing shareholders to request information from the company at any time, is likely to affect the strategies of shareholder claimants with interests opposed to the those of the Board of Directors.

As in current law, the right to information will remain subject to overriding interests of the company (article 697 (4) nCO). The legislative message ("Botschaft") noted in particular that shareholders shall be entitled to receive additional information on the compensation of members of the Board of Directors and of the management to the extent such information is required for the exercise of shareholders' rights.

A four-months' deadline also applies with respect to the right to inspect the company ledgers and business correspondence. If the Board of Directors denies a request for inspection, shareholders may apply to a court to enforce the right. Such action must be brought within 30 days of the denial of the right (article 697b nCO).

c) Changes to Participation Rights

Under the current regime, one or more shareholders representing together at least 10% of capital can *request that a General Meeting be convened*. If the Board of Directors fails to grant such a request within "*reasonable time*", defined as a maximum of 60 days, the shareholder or group of shareholders can ask a court to order that a General Meeting be convened (article 699 (3) and (5) nCO).

d) Changes to the Special Audit

The reform will rename the "*Special Audit*" in "*Special Investigation*". Along with this, seemingly irrelevant, change in name come two changes in substance, which may well alter the way the Special Investigation is going to be used by shareholders.

First, a new article 697d (2) will specify and thus attempt to clarify the scope of a Special Investigation: the request that a Special Investigation be ordered by a court, in the event that the General Meeting rejected such request, may cover all questions, which were the subject of a prior request for information or inspection or which were addressed in the General Meeting in the course of the deliberations on the request for the Special Investigation, to the extent the response to these questions is necessary for the exercise of shareholders' rights.

Second, and more importantly, the reform will do away with the requirement under current law that the shareholder requesting a Special Audit must credibly establish that the company or the shareholders have incurred damage. Instead, a new Article 697d (3) nCO will require merely that the requesting shareholder credibly demonstrates that a violation of the Articles of Association or of statutes is capable of causing damage to the company or to shareholders. It will therefore be possible for a shareholder to request a Special Investigation as a preventive measure, before a potential damage materialised.

The remainder of the provisions currently governing the Special Audit will only undergo minor changes primarily to reflect changes in the wording in related provisions.

e) Removal of the Auditor for Good Cause

Under the current law, the General Meeting was explicitly allowed to remove the auditor at any time with immediate effect (article 730a (4) CO). The reform will restrict the General Meeting's freedom to do so, only allowing a removal of the auditor for good cause. The change will mean that article 404 CO no longer applies to the legal relationship between the company and the auditor. The auditor in turn will still be allowed to resign at any point.

In the event of a removal of the auditor for good cause, the respective reasons will have to be disclosed in the notes to the accounts (article 959c (2) (14) CO).

This change is rooted in the legislator's aim to increase *Corporate Governance* requirements by fortifying the position of the auditor in situations where a majority of shareholders may have an incentive to remove the auditor against the interests of a minority, creditors and other third parties who may rely on the auditor.

In light of a growing focus on the work of auditors it will be interesting to observe how this change is going affect the relationship between company and auditor in practice and how case law will develop with respect to such *good cause* required for dismissal and to the liability of the auditor generally.

2) Other Relevant Changes

In addition to the changes to information and participation rights, the reform will introduce a number of further changes that will or may also affect the position of minority shareholders.

a) Liability Actions

The reform will significantly alter certain material and procedural aspects of liability actions. Most notably:

- Subordinated claims against the company will not be taken into consideration for the calculation of damage in a liability action (article 757 (4) nCO). This change is intended to correct the jurisprudence of the Federal Tribunal requiring that subordinated claims constituted damage to the company, which sometimes complicated the taking of certain restructuring measures. This provision is likely to be the subject of litigation given that subordinated claims against a company do result in actual damage to the company.

- Shareholders who opposed a resolution to grant discharge will be able to file a liability action within twelve months (previously six months). This deadline will be interrupted if a court is asked to order a Special Investigation, pending the court proceeding and, if ordered, the Special Investigation (article 758 (2) nCO). This change is unlikely to change the current practice of potential claimants taking steps to interrupt the running of the prescription period if necessary.

- The relative prescription period (ie the period starting on the date on which the person suffering damage learned of the damage and of the person liable for it) will be shortened from five years under the current law to three years (article 760 (1) nCO), while the absolute prescription period remains ten years. As is the case under the current law, the absolute prescription period starts on the date on which the harmful conduct took place or ceased. Both relative and absolute prescription periods are interrupted if a court is asked to order a Special Investigation, pending the court proceeding and, if ordered, the Special Investigation. This change, too, is unlikely to change the current practice of interrupting the prescription period if necessary.

– The General Meeting will be able to compel the company to initiate a liability action (article 756 (2) nCO). When doing so the General Meeting may entrust the Board of Directors or an agent with conducting the litigation. This provision in particular is likely to raise various questions in practice, such as when the agent's assessment of the merits of the contemplated lawsuit differs from the assessment that led the General Meeting to compel an action.

b) Action for the Return of Benefits

The reform will expand in a number of ways the existing obligation to return benefits that were unduly received (article 678 et seq. CO):

– The scope of the obligation will be expanded to include not only shareholders and members of the Board of Directors but also any actual and *de facto* governing officer (article 678 (1) nCO).

– No consideration will be given to the financial state of the company. Thus, an obligation to return unduly received benefits may also arise in companies that are in good or very good financial shape. This change stresses the importance of the duties of care and loyalty of members of the Board of Directors towards the company. The test under the new law will ask whether there was a clear discrepancy between performance and consideration with respect to a benefit paid out.

– In a further change to the provisions governing the return of benefits a general reference to article 64 CO regarding the obligations of an unjustly enriched party is made. As a result, the enriched party may argue that there is no obligation to return benefits if the recipient can establish that he or she is no longer enriched at the time the claim for restitution is brought, unless he or she alienated the benefits in bad faith or in the certain knowledge that he or she would be bound to return them.

c) Cost Allocation in Court Proceedings regarding liability or restitution claims

Pursuant to a new article 107(1bis) Code of Civil Procedure, which will enter into force on 1 January 2021, a court will have discretion to allocate costs of the procedure (court costs and legal fees) in the event of a rejection of an action based on corporate law, which seeks damages on behalf of the company, to the company and the claimant. This provision will therefore allow the court to deviate from the loser pays principle set out in article 106 (1) Code of Civil Procedure and distribute such costs between the company and the claimant, somewhat reducing the cost risk for the claimant.

d) Changes affecting the powers, organization and execution of General Meetings

In its attempt to improve the *Corporate Governance* of both listed and non-listed companies, the reform will introduce a set of changes affecting the powers, organization and execution of General Meetings. Some of these changes will directly or indirectly strengthen the position of the individual shareholder:

- The resolution to delist a company will require a two-thirds majority in the General Meeting (article 698 (2) (8) and 704 (1) (12) nCO). Under the current law the delisting decision is for the Board of Directors to take. The change will give shareholders an opportunity to challenge the respective resolution by the General Meeting.

- The Board of Directors will need to grant shareholders a period of at least ten days between the distribution of the annual report before closing the agenda and convening the General Meeting (article 699a nCO). This change is intended to give shareholders time to assess whether to request additional agenda items on the basis of the annual report. The annual report and related materials may be made available electronically.

- The Board of Directors will have to comply with increased requirements regarding proposals submitted to the General Meeting. Most notably, reasons and background information must be provided together with the proposals (see article 699b (3), 700 (2) and (3) nCO).

Further changes include the confidentiality of votes submitted through an independent representative of voting rights towards the listed company up until 3 working days before the respective General Meeting (article 689c (5) nCO) (the independent voting rights representative must give account to the General Meeting about his communication with the company), and the right of shareholders to access the minutes of a General Meeting within 15 days in listed companies and within 30 days in non-listed companies (article 702 (4) and (5) nCO)[1].

e) Conclusion

The corporate law reform emphasizes the importance of the General Meeting within the system of checks and balances of a company. One of the main objectives of the reform was the strengthening of the rights of shareholders and good *Corporate Governance* more generally. Indeed, probably most of the changes in one way or another are aimed at protecting the shareholders' interests.

1 For further information on changes affecting the General Meeting please refer to our colleagues' contributions in this issue.

In several ways, the reform is specifically aimed at strengthening the rights of minority shareholders, the guiding principle being the realisation of "*shareholders' democracy*". A functioning democracy on the one hand requires that everyone, no matter the size of the stake, has a say but on the other hand it also requires that majority decisions are accepted and implemented. Similarly, in determining the "right" level of minority rights in a company, a balancing must be struck between what rights should be granted to an individual shareholder and where such rights should be limited, for the sake of operational efficiency of a company (which, in turn, should benefit all shareholders). Thus, numerical thresholds for the exercise of shareholders' rights must not be prohibitively high but must not be too low either.

Against this background, it is understandable and probably a good thing that in terms of protecting minority rights the reform is not a revolution. Rather, it is the result of a balancing act of the function of certain shareholders' rights and the corresponding threshold requirements. Still, as a general statement, one can note that the new corporate law will be more shareholder and, specifically, minority shareholder friendly than the current one. As described in some detail in this article, several thresholds for information and participation rights were lowered, certain features such as a "special audit" or an action for reimbursement according to article 678 CO are facilitated in order to make it more practical and accessible, and some of the hurdles for shareholder lawsuit are lowered. It remains to be seen whether in practice this reform will have a noticeable effect, and in particular, whether it will, as some groups seem to expect, lead to more shareholder activism and shareholder lawsuits.

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Changes for Listed Companies under the Corporate Law Reform: Gender Quotas and Say-on-Pay

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The corporate law reform brings about numerous revisions to the law affecting both private and listed companies as well as a number of revisions that apply to listed companies only. The following article provides an overview of certain changes for listed companies not described elsewhere in this issue of CapLaw.

By Daniel Raun / Annette Weber

1) Introduction

On 29 June 2020, Parliament adopted the final bill of the Swiss corporate law reform. This brought to a conclusion a process that had been formally initiated in November of 2016 with the submission of an initial draft bill by the Federal Council, but was preceded by years of discussion and a failed reform attempt in 2013. The Federal Council has yet to determine when the new law will enter into force. 1 January 2022 is a probable effective date.

While the reform preserves the fundamental underlying principles of Swiss corporate law, there are a number of features that will partially reshape and modernize the corporate legal landscape in Switzerland, often paving the way for more flexibility on the part of companies and their boards of directors. Apart from these genuine changes the reform also serves to formalize certain concepts already applied as a matter of practice and/or endorsed in legal doctrine or to implement provisions currently contained in other acts. While some changes universally apply to companies, whether private or public, other provisions bind listed companies only.

In this article we describe the rules on gender quotas that will be newly introduced into Swiss law as part of the reform. We also provide an overview of certain new rules on compensation and related matters.

2) Rules on Gender Quotas

With the introduction of gender quotas for board of directors and executive management (article 734f of the revised Code of Obligations (CO)), Switzerland follows other European jurisdictions, but has its own regime. Although not explicitly stated, these rules aim to increase the number of women on boards of directors and executive managements of larger Swiss companies. The rules instead refer to the underrepresented gender, using a gender neutral language.

The obligation to comply with the rules on gender quota is only applicable to listed companies crossing the thresholds set out in article 727 (1) (2) CO defining the scope of application for companies subject to an ordinary audit. As the rules should only apply to larger companies under exclusion of SME, the legislator chose to use the existing thresholds for the ordinary audit.

In the case that the board of directors of subject companies does not consist of at least 30% or the executive management of subject companies of at least 20% of members of the underrepresented gender, the respective company must disclose in its compensation report the reasons and state the measures implemented to promote the underrepresented gender. Hence, the rule is not a rule on gender quota *strictu sensu* and as used in certain other jurisdictions, but rather a disclosure obligation combined with an obligation to take action in case the thresholds are not met. The law does neither set any requirements as to the content of the explanation nor the measures which a non-compliant company has to take.

The new rule does not provide for an explicit basis for a claim in case of a violation or omission of the above-outlined duties. In case of non-compliance, it will be very difficult in practice to assert a claim against the non-compliant company as the non-compliance will typically not result in a measurable loss. In the light of the comply-or-explain approach, the five-year (for board of directors) and ten-year (for executive management) transition periods are generous, allowing companies to adopt slowly.

If we compare the new rules with the regimes of other jurisdictions, it is striking that they have much stricter regimes. For example, Germany requires that at least 30 % of a supervisory board's positions must be allocated to the underrepresented gender. An election which violates this principle is void and the positions which would need to be filled by the underrepresented gender remain vacant. Norway introduced a threshold of 40 % for members of the board of directors of corporations already in 2008. Companies not complying with this threshold may even be dissolved after several warnings. In contrast to the Swiss regime, these and other jurisdictions require strict compliance with the quota and impose heavy sanctions in case of non-compliance.

The Federal Council justified the comply-or-explain approach by arguing that it is proportionate and will not excessively interfere with the organizational freedom of corporations. The explanation provided by the Federal Council stands in contradiction to the main reason for the necessity for gender quota rules: the belief that mandatory rules are necessary to have more gender balanced boards and executive managements. A lax regime, which is limited to larger companies – of which many are exposed to a higher scrutiny of the public – allowing corporations to escape relatively easy from the regime will likely not be a key enabler for gender equality.

3) Rules on Compensation and Related Matters

In 2013 the Federal Council enacted the Ordinance against Excessive Compensation (OaEC) following the approval of the so-called Minder initiative earlier that year. The OaEC increased shareholders' say on a number of corporate governance matters and, most importantly, introduced an annual binding vote on executive compensation ("say on pay"). The provisions came into effect on 1 January 2014. The corporate law reform will now see the transfer of these provisions to the CO along with the introduction of a number of new provisions. While some of these new rules lead to genuine changes (albeit not fundamental ones), other provisions mostly serve to put into formal law views that have already been expressed in legal doctrine or practices applied by many companies. A number of more restrictive proposals have been abandoned in the course of the legislative process leading up to the final bill. The new provisions are described below.

a) Compensation for non-compete covenants

The new provisions comprise an express rule governing compensation for non-compete covenants of members of boards of directors, executive management and advisory boards. While under the current law there seems to be a general consensus that paying a compensation in exchange for a non-compete undertaking by an executive should be possible under certain conditions, the lack of any specific rules combined with the potential criminal sanctions in case of payments of certain prohibited types of compensation often caused insecurity in practice. It was often stated in legal doctrine that the payment is permissible if it is in the interest of the company that a leaving member of the executive be bound to a non-compete and to the extent the compensation paid to the executive is within the range of compensation previously paid to the relevant individual. However, there were no conclusive answers to a number of very relevant questions in practice, including whether in using the past compensation of an executive as a benchmark for the non-compete compensation may also include variable compensation.

The reform will clarify two aspects in this regard. First, it specifies that a non-compete may only be compensated if the non-compete is commercially justified, something which seems rather obvious given that directors would potentially expose themselves to liability when paying (or receiving) a compensation for which there is no commercial justification. Second, the compensation may not exceed the average of the compensation for the last three business years. As the provision does not limit this to the base salary the relevant average amount includes any compensation components, including any short- or long-term variable compensation. The new provision will not restrict the duration of non-compete covenants as such but only the amount that can be paid to compensate the individual. It is therefore possible, for example, to agree on an 18 months non-compete provided that the aggregate compensation for the entire duration does not exceed the three-year average.

b) Sign-on bonuses

The reform will also introduce a rule specifically addressing sign-on bonuses. Under the new law, sign-on bonuses will be prohibited if they do not compensate for a demonstrable financial disadvantage. In other words, a company may grant to a new executive replacement awards or pay a cash sign-on bonus if and to the extent the executive as a result of changing his employment has incurred a financial disadvantage, typically through a loss of entitlement to a cash bonus or share award received under his previous employment contract. This is generally in line with views held in legal doctrine today already.

c) Off-market compensation in connection with previous engagements

The OaEC requires that compensation paid directly or indirectly to a former member of the board of directors, executive management or advisory board in connection with previous activities or that are not customary in the market be disclosed in the compensation report. The reform will introduce an outright ban of payments that are connected to a previous engagement as a member of a corporate body *and* are off-market. Where the compensation is connected to the previous engagement but is in line with market practice, disclosure must be made in the compensation report.

d) Prospective shareholder vote on compensation

Initially, the draft proposal sought to prohibit prospective voting by shareholders on variable compensation (i.e., shareholder votes for future periods, typically the following business year). Under the final bill prospective voting remains permissible but the company is required to submit the annual compensation report to an advisory vote. This is already common among many companies with prospective voting and considered good practice.

e) External mandates

Under the provisions of the OaEC a listed company's articles of association must state the maximum number of positions on the supreme governing or administrative bodies of entities that require registration in the Swiss commercial register or a corresponding foreign register that members of its board of directors, executive management or advisory board may hold. As outside management functions are not considered to be mandates in a supreme governing or administrative body, these are not captured by the OaEC and listed companies do not have to impose any limit in their articles of association in this regard. This will change once the reform comes into effect. The articles of association will then need to set a limit for comparable functions in other enterprises that pursue a commercial purpose, which includes serving on the management of another company. Roles in not-for-profit organizations and foundations and associations etc. that do not pursue commercial objectives will be out of scope. Any necessary changes to articles of association have to be made within a transitional period of two years from the effective date of the reform.

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The Capital Structure of Stock Corporations in Light of the Revised Swiss Code of Obligations

Reference: CapLaw-2020-56

The following article will provide a brief overview of the most relevant revisions of the CO regarding the share capital. Having provided an overview, we will comment on the implications that these provisions will have on companies from a practical standpoint.

By Peter Forstmoser / Reto Seiler

1) Overview of the Revision regarding the Share Capital

The revision of the stock corporation law does not change the basic principle that the fixed capital of a company can only be changed by way of a formal procedure. However, it will provide companies with more flexible opportunities to alter their share capital as well as some specific clarifications regarding the capital structure.

What could have become the introduction of no-par-value shares as a next logical step since the last revision of the stock corporation law has now (almost) been achieved by simply requiring a minimum nominal value of greater than zero. As a pragmatic solution, this achieves the flexibility of no-par-value shares without requiring an overhaul of all the references to the nominal value of shares by the current system of a fixed share capital divided into fixed partial sums. In practice, companies will be able to conduct additional share splits at their discretion, in case the price of their shares on the stock market is too high and they already carry a nominal value of CHF 0.01 (presently the minimal nominal value).

On an administrative level, it is notable that according to the revised art. 650 para. 3 CO the board of directors will have a six months period compared to the current three months to carry out an ordinary capital increase and enter the increase in the commercial register. Furthermore, following the principle in art. 70 para. 2 of the Federal Merger Act, the contribution in kind in the form of multiple properties being situated in different cantons will require only one public deed (art. 634 para. 3 CO). Also, the requirement to call on creditors three times in the Swiss Official Gazette of Commerce in case of a capital reduction or dissolution will no longer be required, as a single call will be sufficient in the future.

The new stock corporation law permits a share capital in a foreign currency provided that the latter one is essential for its business activities. It also clarifies the permissibility of interim dividends. Both amendments are discussed elsewhere in this issue of CapLaw. Regarding the capital structure the new concept of the capital band and the reorganization of the capital decrease under art. 653j seqq. CO are the most prominent changes.

2) Capital Band

A true innovation can be seen in the introduction of the so-called capital band. The newly introduced concept in art. 653s seqq. CO replaces the current authorized share capital, which has been widely used since its introduction in 1991. The capital band further eases the strict rules that have been the result of the concept of a fixed share capital. In its fundamental understanding, the traditional concept allows a change in the capital structure only by a resolution of the shareholders as the owners of the company. The authorized share capital eased this rigid concept as it allows for an authorization of the board of directors to increase the share capital. This flexibility will be expanded with the introduction of the capital band by also providing the opportunity to authorize the board of directors to reduce the share capital.

Over a period of up to five years, the shareholders' meeting can authorize the board of directors to not only increase the share capital by a margin of up to 50% of the existing share capital, as it has been possible with the authorized capital, but to also decrease the share capital of the company in the same amount.

According to art. 653s of the revised CO the shareholders' meeting can implement the authorization of the board of directors to the articles of association according to their specific requirements. It is possible to limit the authorization of the board of directors in the capital band to the opportunity to only decrease or to increase the capital as well as allowing both. And of course the period of authorization and/or the margin can be limited at will.

a) An (un)necessary Flexibility?

In essence, the capital band therefore supplements the possibility to authorize the board of directors to increase the share capital with the authorization to decrease the share capital. Furthermore, the future law prolongs the maximum authorization period from two to five years.

In general, the introduction of the capital band represents a welcome adaption of the current legal regulation to the economic reality as it provides the shareholder's meeting with the opportunity to grant the board of directors the required flexibility regarding changes of the capital structure. This leaves the board of directors with more opportunities to react to business developments without a prior amendment of the articles of association by a decision in a shareholders' meeting.

Nevertheless, it could be argued that the period of up to five years is not long enough to make the capital band available for additional applications, e.g. in connection with the issuance of convertible bonds, which often carry longer maturity dates. On the other hand, one could ask whether there is a practical need for a period of five years since there is annually a shareholders' meeting where a capital band can be prolonged.

But the shareholders have the possibility to provide a shorter period or to terminate the authorization any time. It remains to be seen, whether the capital band will find additional use cases compared to the existing authorized share capital.

b) Who will benefit from the Capital Band?

The flexibility of the capital band might be used in the full range by smaller companies. In particular, young companies could profit from the opportunity of authorizing the board of directors to change the share capital in a flexible manner.

Larger companies on the other hand might be less likely to benefit from this new flexibility in its full amount as this would shift the control over the share capital to the board of directors in an unwanted extent. They might, however, provide for a tailor made authorization.

3) Contingent Capital – a Need for Clarification

The contingent capital remains largely unchanged by the revision of the stock corporation law. Only selected details are amended in order to adjust the legal regulation of this instrument to the long-established practice.

The future law will explicitly confirm that conversion and option rights may not only be issued to creditors of bonds or similar debt instruments and employees, but also to members of the board of directors and to third parties. Additionally, it is clarified that the discharge of the contribution obligation by set-off does not have to be made through a banking institution – as this has not been practiced anyway. However, the future law has failed to specify the options to discharge the contribution obligation regarding the contingent capital in order to provide legal certainty in some instances like the discharge by the company itself or a related company.

Furthermore, the introduction of the capital band also raises the question of the interaction with a contingent capital. Art. 653v para. 2 of the revised CO states that in case the shareholders' meeting introduces a contingent capital while a capital band exists, the range of the capital band will in general be adjusted according to the contingent capital increase. However, the shareholders' meeting can also decide on an authorization of the board of directors to resolve a capital increase based on contingent capital within the range of the existing capital band. Companies are well advised to clearly formulate this authorization in their articles of association in order to avoid any uncertainties.

4) Capital Reduction

In the revision of the stock corporation law the provisions dealing with a capital reduction are transferred from art. 732 seqq. to art. 653j seqq. of the revised CO.

Furthermore, the procedure is amended in favor of the corporations: They have to call on creditors by publication once only instead of three times and the creditors have to register their claims to be satisfied or secured within 30 days of the publication, instead of the current two months. Capital reductions can thus be done in a more efficient manner. This is also supported by the provision that companies may omit the securing of creditor claims if they can show that the reduction of the share capital will not endanger the claims. This is assumed if a licensed audit expert issues a corresponding confirmation.

The future law also provides certainty regarding the fact that the rules on creditor protection do not apply if the share capital is reduced and immediately increased again to at least the same amount (so-called *Harmonika*).

5) Advice

In light of the revision of the stock corporation law, companies should review their capital structure and decide whether and to what degree they want to make use of the increased flexibility the new law offers.

If a company intends to expand the authority of the board of directors, the authorization in accordance with art. 653t of the revised CO should be thought through to avoid any potential conflict arising from unclear provisions in the articles of association. This is especially important if a contingent capital co-exists with the capital band.

According to art. 3 of the transitional provisions the current statutory provisions will apply to authorized and contingent capital increases, which have been authorized before the new law enters into force but cannot be prolonged after that date. Therefore, companies with authorized and contingent capital should think about amendments before the new law enters into force which will be presumably in 2022.

6) Final Remark

While the new law will not bring radical changes in general and in particular with regard to the capital structure it modernizes the regulations and contains appreciated amendments and an increased flexibility. It remains to be seen to what degree and in what form practice will make use of these new possibilities and one can certainly expect surprises. To cope with new and unexpected developments will be a challenge for both practice and theory.

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Revised Corporate Law to Facilitate Accounts in Non-Swiss Currencies and Interim Dividends

Reference: CapLaw-2020-57

On 19 June 2020, the Swiss Parliament, after a lengthy legislative process, adopted a bill on a comprehensive corporate law reform that, *inter alia*, permits a share capital denominated in certain non-Swiss currencies and introduces the option for interim dividends and distributions. Both of these aspects are of particular importance for multinational groups with subsidiaries located in Switzerland. In the following, we take a closer look into each of these two new Swiss corporate law features and address the respective requirements, consequences and potential need for action.

By Patrick Schärli / Patrick Sattler

1) Share Capital Denominated in a Non-Swiss Currency

a) Legal Regime Currently in Force

Under the corporate law currently in force, the share capital of corporations or the quota capital of limited liability companies[1] must be denominated and registered in the Commercial Register in Swiss francs (CHF). Likewise, other capital-related provisions refer to CHF as well. This concerns, for example, the creation of capital reserves, approval of financial statements, resolution on the appropriation of retained earnings (including the amount of any dividends and other distributions), distribution of share premium and insolvency-related aspects such as the determination of a capital loss or over-indebtedness. As a result, even though the Swiss accounting laws already today allow a company to keep records and prepare the accounts in the functional non-Swiss currency, CHF continues to be the relevant currency for all of the above-mentioned corporate law matters. Swiss companies were thus required to have at least a parallel accounting in CHF in addition to their accounts in a non-Swiss functional currency. This inefficiency particular in the context of Swiss subsidiaries of multi-national corporate groups is now addressed in the context of the recent Swiss corporate law reform.

b) Establishing a Company with a Share Capital Denominated in a Non-Swiss Currency

The revised corporate law follows a liberal and cost-saving approach to resolve the inconsistencies with the current accounting law. In particular, the share capital of corporations or limited liability companies can now be denominated in a non-Swiss currency, provided such non-Swiss currency is also the company's functional currency (*i.e.*, the one of the company's primary economic environment) and declared eligible

1 Unless stated otherwise, the explanations concerning corporations analogously apply to limited liability companies (*cf.* article 773 (2) CO). Also, as used herein, the term "share capital" addresses both the share capital of a corporation as well as the quota capital of a limited liability company.

by the Federal Council (article 621 (2) CO[2]). The relevant currency will also have to be reflected in the company's articles of incorporation in addition to the total amount of the share capital (article 626 (1) (3) CO). If the articles of incorporation also provide for participation capital (consisting of non-voting shares), such participation capital must be denominated in the same currency as the share capital in order to prevent different parts of the equity capital being denominated in different currencies (article 656a (1) CO).

The minimum amount of the share capital denominated in a non-Swiss currency must be equivalent to at least CHF 100,000 in the case of corporations – or CHF 20,000 in the case of limited liability companies – at the time of the company's establishment. Thereafter, a company may only reduce its share capital below these thresholds if it simultaneously replaces it by a capital amount equivalent to the respective threshold in CHF at the time of the simultaneous increase (article 653j (3) CO).

The minimum share capital must be distinguished from the minimum capital contribution to be paid in by the shareholder(s). In the case of corporations, such contribution shall amount to at least 20% of the nominal value per share or CHF 50,000 in each case (article 632 CO). With respect to limited liability companies, the minimum share capital needs to be paid in full. Thus, if the share capital of corporations is denominated in a non-Swiss currency, the minimum capital contribution denominated in a non-Swiss currency must be equivalent to at least CHF 50,000 (article 632 (2) CO). In this respect, the revised corporate law also clarifies the possibility already accepted by the Commercial Register to pay in capital contributions not only in the currency of the share capital, but also in other currencies freely convertible into the share capital even if the share capital is denominated in CHF. Considering the clearly diverging wording of article 633 (3) CO, we take the view that such freely convertible currency does not need to be a currency declared eligible by the Federal Council as required for the denomination of the share capital.

Note that the contribution in other currencies freely convertible into the share capital is considered a genuine cash contribution, and not a contribution in kind. In terms of currency conversion, things may become slightly more complicated if the share capital is denominated in the functional non-Swiss currency and the capital contribution is paid in yet another non-Swiss currency. In this case, the founders will eventually have to apply two exchange rates for determining the above thresholds. In addition, it is advisable to inform the bank providing the capital deposits account accordingly so that the bank may include both exchange rates in the confirmation.

2 Unless stated otherwise, the articles refer to the *revised* legal text of the Code of Obligations (CO) as adopted by the Swiss Parliament.

If the share capital is denominated in a non-Swiss currency and/or shareholder contributions are paid in a currency other than that of the share capital, the actual daily exchange rate(s) must be included in the public deed regarding the incorporation of the relevant company (article 629 (3) CO). Considering this provision and the corresponding legislative materials, the date of establishment on which the equivalence to CHF is fixed corresponds to the date of the public deed (*i.e.*, the date of the constitutive meeting held by the founders). Thereafter, currency fluctuations eventually leading to a shortfall in the minimum share capital or minimum capital contributions by the time of the effectiveness of the incorporation (which is the publication in the Swiss Official Gazette of Commerce) should not affect the valid incorporation. It should be noted, however, that currency fluctuations might still occur between the date the capital contribution is deposited with a bank (article 633 CO) and the date of the public deed. Thus, the shareholder contribution should include an appropriate financial cushion to weather any currency fluctuations during that period.

Once fixed in the public deed, the competent Commercial Register lacks the authority to examine the capital coverage or the correctness of the exchange rate applied at the time of entry in the Commercial Register. It only has to verify whether the public deed includes the exchange rate and the minimum capital threshold is met by applying the exchange rate stated in the public deed. The legislative materials suggest, however, that the competent Commercial Register has to intervene as a backstop if an obviously incorrect exchange rate was applied.

c) Currency Change for Already Established Companies

The revised corporate law also allows already established companies to change the denomination into the functional non-Swiss currency. In order to do so, the shareholder meeting must approve the change with a qualified quorum of at least two-thirds of the votes represented and the majority of the aggregate nominal value of the shares represented (article 704 (1) (9) CO). The change in currency will have to take effect as of the beginning of a financial year. Following approval by the shareholders, the board of directors shall amend the articles of incorporation, determine that the above-mentioned requirements are fulfilled (*i.e.*, that it is the functional and eligible currency and that the capital requirements are met) and state the exchange rate applied (article 621 (3) CO). The respective resolutions of both the shareholder meeting and the board of directors require notarization by a notary public. Again, we take the view that the date of the public deed marks the time after which currency fluctuations eventually leading to a shortfall in the minimum share capital or minimum capital contributions should not affect the validity of the relevant resolutions. In instances other than those described above (*i.e.*, the company's establishment, capital reduction or change of currency) and given the lack of specific rules requiring ongoing compliance with minimum capital levels, we take the view that a company is not required to increase its share capital up to the minimum threshold solely because intermediate currency fluctuations lead to a shortfall.

d) Consequences of a Share Capital Denominated in a Non-Swiss Currency

There are several consequences if a company chooses to have a share capital denominated in an eligible non-Swiss currency. First, the company will have to keep records and prepare the accounts in the non-Swiss currency as otherwise the difficulties and expenses would remain. Thus, it is not permissible, for example, to have a share capital in USD but to keep accounts and render accounts in CHF. Second, the company may determine all capital-related aspects in the chosen non-Swiss currency. This results in basically full coherence between corporate law and accounting law. Third, although taxes continue to be levied in CHF, the companies may simply apply the rule of three: the taxable net profit and equity must be converted into CHF by applying the average exchange rate (sale) of the tax period.

If a company identifies potential efficiency gains of having a share capital denominated in an eligible non-Swiss currency – which might be the case for subsidiaries of multinational groups located in Switzerland – the board of directors or the shareholder(s) may propose to the shareholder meeting to change the currency in accordance with the statutory provisions and articles of incorporation. The board of directors should be aware, however, that if a shareholder meeting resolves to change the currency, any previous resolution on the so-called "capital band" – an authorization of the board of directors for a maximum of five years to increase and reduce the share capital within an upper and lower limit – is nullified (article 653v (1) CO). The board of directors will have to amend the articles of incorporation accordingly and cancel the capital band. Hence, any such proposal to the shareholder meeting should include provisions on how to deal with any previously existing capital authorizations in order to avoid any unpleasant surprises.

2) Interim Dividends

a) Legal Regime Currently in Force

The corporate law currently in force does not contain any specific provisions on interim dividends, *i.e.*, dividends distributed during a financial year out of the earnings of the current year and not based on financial statements of a closed financial year. Therefore, the question as to whether interim dividends are permitted, and if so, in which form, has been controversially debated, with the majority taking the view that genuine interim dividends are not permitted under the corporate law currently in force. This despite businesses clearly expressing the need to allow interim dividends, in particular for the purpose of intra-group redistribution of liquidity and companies whose (non-Swiss) shareholders are used to quarterly dividends.

Legal practice developed certain mechanisms that try to mimic "genuine" interim dividends. First, a company could decide at a later date to use free reserves and/or retained earnings created in previous, closed financial years (so-called extraordinary dividends). Second, a company could distribute "dividends on account" (*i.e.*, an advance payment of future dividends). Legally speaking, such a dividend is a loan that is offset against the dividend paid out at a later stage. Third, a company could reduce its capital in a staggered way. However, all of these mechanisms are subject to various legal problems and, thus, do not fully correspond with the concept of a genuine interim dividend.

b) Permissibility of Interim Dividends under the Revised Corporate Law

Under the revised corporate law, interim dividends are now expressly permitted, provided interim financial statements have been prepared. It is not necessary to include specific provisions on interim dividends in the articles of incorporation. The interim financial statements provide the board of directors with the necessary information including current and reliable figures on the course of business, so that the board of directors is in a position to decide whether to propose to the shareholder meeting a distribution of an interim dividend in line with its duty of care (article 717 CO). The shareholder meeting approves the interim financial statements, if necessary, and resolves on the distribution of interim dividends (article 698 (2) (5) CO). For the sake of clarity, the revised corporate law does not prevent the annual shareholder meeting to resolve on dividend distributions based on already approved financial statements (extraordinary dividends). As explained above, such distributions are not genuine interim dividends, but rather staggered distributions from the balance sheet profit of previous financial years.

The interim financial statements need to be audited for reasons of creditor protection, unless the company lawfully waived the requirement for a limited audit (opting out) or if all shareholders approve the distribution of the dividend despite no audit having been conducted and the creditors' claims are not jeopardized by such dividend (article 675a CO). The second exemption (*i.e.*, if all shareholders approve the distribution) should simplify intra-group distributions by a wholly-owned Swiss subsidiary, though it remains to be seen how legal doctrine and requirements will develop with respect to the criteria of "no jeopardy to creditors' claims". In this respect, the revised corporate law does not provide any further guidance as to when creditors' claims should be regarded as jeopardized. In practice, the board of directors will have to determine whether the creditors' claims are not jeopardized in compliance with its duty of care and subject to any potentially discharging approval by the shareholder meeting.

In sum, the revised corporate law mainly facilitates interim dividends to be distributed intra-group by subsidiaries subject to audit obligations, which do not have free capital reserves or retained earnings from previous financial years (which could be distributed via extraordinary dividends), but generated additional profits outside the ordinary course of business, so that the auditor can efficiently examine the respective proposal of the board of directors.

If interim financial statements need to be prepared, simplifications or shortenings are permitted if they do not impair the presentation of the course of business (article 960f (2) CO). As a minimum, the heading and subtotals of the last financial statements need to be disclosed. Furthermore, the notes must contain the purpose of the interim financial statements, the simplifications and shortenings (including any changes to the accounting principles), and other factors that had a material effect on the economic situation of the company during the reporting period, especially with regard to seasonality.

For all other aspects, the provisions on "regular" dividends apply (article 675a (3) CO). In particular, if a company fails to provide the shareholder meeting with an audit report, any resolutions of the shareholder meeting on the distribution of interim dividends are void (article 731 (3) CO). If a shareholder nevertheless receives dividends based on an underlying resolution that is void, the shareholder will be subject to a refund obligation (article 678 (1) CO).

3) Entry into Force / Transitional Period

The Federal Council will decide when the revised corporate law becomes effective. Entry into effect by 1 January 2022 appears probable, but an earlier date is not excluded. The transitional rules include an adjustment period of two years to make the necessary amendments to the articles of incorporation and regulations.

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Corporate Restructuring and Insolvency under Revised Swiss Corporate Law

Reference: CapLaw-2020-58

On 19 June 2020, the Swiss Parliament adopted the most important revision of Swiss corporate law in years, thus concluding a process started almost two decades ago. The revision also comes with a number of changes which, in particular, aim at clarifying certain aspects relating to insolvency triggers and bankruptcy filing obligations. Such clarification complements the major revision of Swiss insolvency law (*Sanierungsrechtsrevision*) which entered into force in 2014 and had introduced a new, facilitated debt moratorium regime.

By Tanja Luginbühl / Anja Affolter Marino

1) Legal Framework prior to Revision

a) Limited and Fragmentary Statutory Rules

The statutory corporate insolvency regime pursuant to Swiss corporate law as currently in force is rather fragmentary. It is, essentially, limited to two provisions, articles 725 and 725a CO (as well pertaining references thereto for legal entities other than stock corporations). Consequently, there are numerous issues not addressed in statutory law, some of which have been answered by case law, whereas others are disputed in legal doctrine. The uncertainty arising as a result thereof is a major burden for the board of directors, given the increased risk of potential personal liability in a financial distress situation and the pertaining pitfalls members of the board face in such a scenario. Some (but not all) of these open questions have been addressed and answered in the revised CO, as outlined in more detail in Section 2 below.

b) Balance-sheet Based Test for Filing Obligations in Financial Distress Scenario

The corporate restructuring provisions of the "old" CO provide for certain obligations of the board of directors of a company in financial difficulties. Such obligations are triggered if certain thresholds in the company's capital and liability structures are exceeded, *i.e.* determined based on a pure balance sheet test. Specifically, the board of a Swiss company must act if the relevant balance sheet shows (i) the persistence of a so-called capital loss (*hälftiger Kapitalverlust*) or (ii) that the company's liabilities are no longer covered by its assets (over-indebtedness, *Überschuldung*). In the latter case, the board is obliged to file for bankruptcy, except only for where there are deeply subordinated loans (*Rangrücktritte*) in an amount sufficient to cover the over-indebtedness plus foreseeable losses or (ii) there are good prospects that a financial restructuring of the company can be achieved in a reasonably short period (*stille Sanierung*).

c) No Specific Regime in Case of Liquidity Issues

While the CO in its current form provides for certain balance-sheet based insolvency tests, liquidity aspects (*e.g.* cash flow issues, difficulties to pay debts when due) are not directly taken into account for such purposes. That said, over-indebtedness may result from illiquidity where, as a result, the going concern assumption is no longer sustainable and, thus, accounting will have to be made at liquidation values.

2) Corporate Restructuring and Insolvency Filing Rules under the Revised CO

The revision has introduced a number of amendments relating to the obligations of the board of a company in financial distress. The most relevant changes are outlined below.

a) Illiquidity (*Zahlungsunfähigkeit*)

In view of the absence of any direct actions related to liquidity issues under the current regime, one of the goals of the revision of articles 725 et seq. CO aimed at expanding board duties relating to the "early warning system" in case of illiquidity and impending insolvency. A first draft proposed by the Federal Council included rather extensive obligations in case of illiquidity (*Zahlungsunfähigkeit*), *e.g.* the preparation and audit of a liquidity plan. However, such intention faced a considerable amount of scepticism during the legislative process and has, ultimately, been implemented only in part.

The final provision adopted by the Swiss Parliament, article 725 revCO, now provides that the board has to monitor the company's solvency and must adopt measures to ensure liquidity in case there is a risk of imminent illiquidity (*drohende Zahlungsunfähigkeit*) or propose such measures to the shareholders' meeting if within the latter's competence (*e.g.* capital increase). The term "illiquidity" is used for the first time in articles 725 et seq. CO. Unfortunately, the revised CO does not provide for a definition of such term, something that would have been helpful in practice. There is, however, at least some guidance in the explanatory statement (*Botschaft*) of the Swiss Federal Council, pursuant to which illiquidity shall persist if a company is no longer able to meet its liabilities as they fall due (on a continuous basis, not as a one-time incident) or obtain the means necessary to cover its debts.

At first glance, the new article 725 revCO could be seen as an actual novelty as there is no equivalent provision in the previous law. However, on further review, it ultimately only expressly spells out what is generally considered to form part of the directors' non-transferable and inalienable duty of financial control and overview. The same holds true for the note in article 725 (3) revCO providing that directors shall act "without delay" which, in substance, codifies what is generally covered by the directors' duty of care.

b) Capital Loss

Pursuant to the new article 725a (1) revCO, if the last (audited) annual financial statements show that half of the sum of *(i)* the share capital and *(ii)* the legal capital and profit reserves of the company which are blocked for shareholder distribution are no longer covered by the net assets – thus that there is a so-called capital loss (*hälftiger Kapitalverlust*) – the directors must adopt measures in order to eliminate such capital loss or allow for a restructuring of the company. To the extent necessary, the directors submit a request to the shareholders' meeting for any measures within the shareholder meeting's competence.

The wording of the new article 725a (1) revCO as set out above brings some helpful changes and clarifications, *in concreto*:

- **Calculation of capital loss**: The current wording of the CO does not specify to what extent the legal reserves must be taken into account for purposes of the calculation of the capital loss. In particular, it was disputed in legal doctrine whether such calculation shall include the entirety of the reserves or whether only the "blocked" part – *i.e.* the amount exceeding 50% of the nominal share capital (20% for holding companies) – shall be considered. The revised provision now answers this question as it clearly states that only the reserves which cannot be distributed to the shareholders shall be taken into account when calculating whether the balance sheet shows a capital loss.

- **Shareholders' Meeting**: The current article 725 (1) CO obliges the board of directors to convene a so-called restructuring shareholders' meeting (*Sanierungsversammlung*) in case of a capital loss. In practice, such meetings rarely provided any benefit and, on the contrary, constituted an unnecessary complexity. Such circumstance has been accounted for in the context of the revision, with the convening of a restructuring shareholders' meeting no longer being mandatory pursuant to the new article 725a CO.

- **Audit requirement**: Article 725a (2) revCO requires that the balance sheet forming the basis of the capital loss calculation be audited prior to its approval by the shareholders' meeting, even if an opting-out has been declared for the company. Such audit requirement does not apply if the board of directors files a request for a debt restructuring moratorium with the competent court (article 725a (3) revCO).

c) Over-Indebtedness

While the revised law does not alter the substantive concept of the obligations of the board in case of over-indebtedness, it provides for certain clarifications and, formally, includes a new, separate article for such topic (art. 725b revCO). The most notable changes can be summarized as follows:

- **Interim Financial Statements**: Under the law as currently in force, in case of reasoned concern of an over-indebtedness (*begründete Besorgnis der Überschuldung*), the board has to draw up a balance sheet at both going concern and liquidation values. Under the revised law, a balance sheet alone will no longer suffice and the board will have to prepare full financial interim statements, *i.e.* not only a balance sheet but also a profit and loss statement and notes. Furthermore, article 725b (1) revCO now expressly refers to the going concern assumption (*Fortführungsannahme*) and states that if such assumption persists and there is no over-indebtedness at going concern values, no interim statements at liquidation values are required. In contrast, in case the going concern assumption can no longer be sustained, it is sufficient to draw up interim statements at liquidation values.

- **Deep Subordination**: If the (audited) interim financial statements show that the company is over-indebted at both going concern and liquidation values, the directors must file for bankruptcy without delay. There are two exceptions to such obligation, with the one most used in practice consisting in the deep subordination of creditor claims (*Rangrücktritt*). The revised CO brings some clarifications in this context and, in particular, provides that interest payments must also be included in a deep subordination (which was not specifically addressed under the previous law).

- **Deep Subordinations and Directors' Liability**: As a result of a decision of the Swiss Federal Supreme Court some years ago, a creditor who declares a deep subordination typically waives the claim in case of a bankruptcy or a composition liquidation as such claims would otherwise be included in the calculation of the damage caused by the delay of bankruptcy (*Konkursverschleppung*) for directors' liability purposes. The new law has introduced a much welcomed clarification for board members, expressly stating in article 757 (4) revCO that any claims for deep subordination declared by creditors shall not be taken into account when calculating the damage in a directors' liability claim.

- **Silent Restructuring**: The second exception to the board's notification obligation consists in a so-called silent restructuring within a "reasonably short period". Such exception is not defined in the CO as currently in force and has been developed in case law and legal doctrine. While there is no uniform practice regarding the term "reasonably short period", it is typically interpreted as being somewhere between four and six weeks but ultimately needs to be assessed on a case-by-case basis. The revised law now expressly mentions the silent restructuring in article 725b (4) (2) revCO which states that the board may abstain from notifying the court in case *(i)* there is well-founded prospect that the over-indebtedness will be eliminated within due course, however by no later than 90 days as of the date on which audited financial statements are available, and *(ii)* creditors' claims are not jeopardized any further. Such provision has been heavily disputed during parliamentary hearings, with the 90-days-period considered as being too short. It remains to be seen to what extent the now codified "silent restructuring" exception will have an impact in practice.

3) Abolition of Postponement of Bankruptcy

The pre-revision legal framework allows the board of an over-indebted company to ask the competent court to postpone the opening of bankruptcy proceedings if there is a prospect of restructuring (*Aussicht auf Sanierung*). Such possibility – very rarely used in most parts of Switzerland – has been abolished in the context of the revision. Consequently, the debt restructuring moratorium will constitute the only court-sanctioned restructuring procedure. In order to account for this circumstance, the minimum term for the provisional debt-restructuring moratorium has been extended from four to eight months. During such period, companies will be able to carry out the moratorium on a silent basis, *i.e.* with no publication in the relevant official gazettes.

4) Entry into Force

The revised CO as adopted by the Swiss Parliament on 19 June 2020 was subject to a so-called voluntary referendum which has expired unused on 8 October 2020. It is expected that the new law will enter into force in early 2022. As an exception thereof, the Swiss Federal Council anticipated the entry into force of the extension of the maximum duration of the provisional debt restructuring moratorium from four to eight months, enacting the provision with effect as of 20 October 2020. Such earlier date is a consequence of the ongoing COVID-19 pandemic and the expiry of the emergency law provisions which had, under certain circumstances, temporarily exempted executive bodies of Swiss companies from their notification obligations in case of over-indebtedness.

5) Conclusion

In summary, while the revision of the Swiss corporate insolvency and restructuring regime will not lead to any groundbreaking changes, it comes with some clarifications and a more distinct structuring of the various scenarios of relevance. It does, however, not answer all open questions for which there have been legal uncertainties based on case law and legal doctrine.

On a more general level, the revision of articles 725 et seq. CO has the potential to complete and enhance the revision of the in-court restructuring instruments of Swiss insolvency law. Finally, while not being a major change in itself, the new corporate restructuring and insolvency law rules form part of a comprehensive revision of Swiss corporate law which, from an overall perspective, will bring a welcomed clean-up and modernization of the corporate law provisions of the CO.

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Nestlé's Issuance of an aggregate of USD 4 Billion Notes through an Institutional (Rule 144A) Offering in the US

Reference: CapLaw-2020-59

On 15 September 2020, Nestlé Holdings, Inc. successfully completed its issuance of USD 1.15bn 0.375% Notes due 2024, USD 750m 0.625% Notes due 2026, USD 1.1bn 1.000% Notes due 2027 and USD 1bn 1.250% Notes due 2030. The Notes are guaranteed by the Nestlé group's Swiss parent company Nestlé SA. The offering of the Notes was conducted in reliance on Rule 144A and Regulation S under the U.S. Securities Act.

ADC Therapeutics SA's Follow-on Offering on the New York Stock Exchange

Reference: CapLaw-2020-60

On 23 September 2020, ADC Therapeutics SA (NYSE: ADCT), a Swiss-based late clinicalstage oncology-focused biotechnology company pioneering the development and commercialization of antibody drug conjugates, announced the pricing of its upsized follow-on public offering of shares in the United States, thus raising gross proceeds of approx. USD 204m. In addition, certain existing shareholders had granted the underwriters an option to purchase additional shares for an aggregate amount of up to USD 30.6m.

Placement of EUR 1.85 Billion Sustainability-Linked Bonds by Novartis

Reference: CapLaw-2020-61

Novartis Finance S.A., a subsidiary of Novartis AG, issued EUR 1.85bn sustainability-linked bonds due 2028 with an interest rate of 0.000%. The bonds are the first of its kind in the healthcare industry and the first sustainability-linked bonds incorporating social targets, with bondholders entitled to receive a higher amount of interest if Novartis fails to meet its targets for expanding access to its innovative medicines. The Bonds are guaranteed by Novartis AG. They have been provisionally admitted to trading at the SIX Swiss Exchange and are expected to be listed there as well. Barclays Bank PLC, HSBC Bank plc, J.P. Morgan Securities plc and Société Générale acted as Joint Lead Managers and BNP Paribas, Credit Suisse Securities (Europe) Limited, Deutsche Bank Aktiengesellschaft and Mizuho Securities Europe GmbH as Co-Managers.

Zürcher Kantonalbank's Issuance of CHF 275 Million 1.75% AT1 Write-Down Notes

Reference: CapLaw-2020-62

On 30 September 2020, Zürcher Kantonalbank successfully placed CHF 275m 1.75% AT1 Write-Down Notes. The notes qualify as both additional tier 1 capital as well as going concern capital under Swiss regulations for systemically relevant banks. This transaction was the first transaction in Switzerland done in reliance on the exemption in the new prospectus regime of the Financial Services Act to have a prospectus that is pre-approved by a Swiss reviewing body.

Idorsia's CHF 535.5 Million At-market Rights Offering

Reference: CapLaw-2020-63

On 21 October 2020, Idorsia announced that it completed its at-market rights offering consisting of a of 23,800,000 new shares. 15,825,319 new shares were subscribed to by existing shareholders in the rights offering and 7,974,681 new shares were placed with investors in the bookbuilding process. Idorsia expects to raise gross proceeds of CHF 535.5m based on the offer price of CHF 22.50 per new share. Idorsia will use the net proceeds of approximately CHF 520 million from the capital increase to support the regulatory filing and, if approved, commercial launch of daridorexant and to fund the further development of its diversified pipeline.

Dufry's CHF 820 Million Right Offering

Reference: CapLaw-2020-64

On 20 October 2020, Dufry AG announced that it had successfully concluded its rights offering. The offer price of the new shares was set at CHF 33.22 per share, corresponding to the volume weighted average price of the existing shares as of market close on 19 October 2020. All 24,696,516 offered shares were sold in the offering, resulting in expected gross proceeds of CHF 820 million. 10,612,024 new shares were subscribed by existing shareholders as part of the rights offering. 9,178,033 new shares have been allocated to Advent International and 4,906,459 new shares have been allocated to Alibaba Group, each based on equity investment commitments received by Dufry ahead of the launch of the offering. Immediately following the closing of the offering, Advent International will own a stake of 11.4% in

Dufry and Alibaba Group of 6.1%. Advent International and Alibaba Group have agreed to a lock-up period of six months following the first day of trading of the new shares.

Concurrently with the rights offering, Dufry and Alibaba Group have agreed a term sheet under which Alibaba Group shall invest CHF 69.5 million in Dufry via mandatory convertible notes. For this purpose, Dufry shall issue 3-year mandatory convertible notes with a 4.1% coupon per annum to Alibaba Group, convertible into approximately 2.1 million ordinary shares of Dufry at CHF 33.22 per Dufry share.

Issuance of CHF 265 Million Bonds by Athene

Reference: CapLaw-2020-65

Athene Global Funding issued CHF 265m Bonds in the form of a GIC bond. Credit Suisse AG acted as lead manager, together with BNP Paribas (Suisse) SA and Deutsche Bank AG London Branch, acting through Deutsche Bank AG Zurich Branch. The Bonds will be listed on the SIX Swiss Exchange.

CHF 18.6 Million Rights Offering of Kuros Biosciences

Reference: CapLaw-2020-66

On 23 October 2020, Kuros Biosciences, a life science company focusing on the development and marketing of orthobiologics, completed a capital increase by way of a rights offering to its shareholders. 50.2% of the shareholders of Kuros Biosciences exercised their subscription rights in the rights offering. The remaining 4,192,530 offered shares were placed in the market and an additional tranche of 1,915,203 shares was sold to Optiverder B.V. The offer price was set at CHF 1.80 per share.

Asset Management XIV
(*Vermögensverwaltung XIV*)

Wednesday, 18 November 2020, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event.aspx?WPParams=43A9B2A7C6D4E0E8AAB08D92A797A5

7th Conference on Compliance in the Financial Services Sector
(*7. Tagung zu Compliance im Finanzdienstleistungsbereich*)

Thursday, 26 November 2020, Lake Side, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event.aspx?WPParams=43A9B2A7C6D4E0E8AAB08D92A795A5

Schulthess Corporate Law Convention 2021
(*Schulthess Forum Aktienrecht 2021*)

Wednesday, 13 January 2021, SIX Convention Point, Zurich

https://www.aktienrecht-tagung.ch