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Modernisation of Swiss Company Law

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The reform to modernise Swiss company law received final approval from Parliament on 19 June 2020, following a project that lasted nearly ten years. The Federal Council has already announced that it is expected that the legislative revisions will become effective in 2022.

The essence of the company law revision in a nutshell

- **Greater flexibility with respect to capital structure and dividend payments**
- **Modernisation of the general meeting thanks to the use of digital technology and more flexibility in its organisation**
- **Expansion of minority shareholder rights, in particular by lowering the various thresholds for exercising those shareholder rights**
- **Modernisation of the restructuring law with a new focus on solvency**
- **Replacement of the Ordinance against Excessive Remuneration in Listed Companies Limited by Shares (ERCO) by the Federal law, and introduction of gender quotas for boards of directors and executive management of listed companies**

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With the reform adopted, stock corporations (AG) and limited liability companies (GmbH), being the most popular legal forms for entrepreneurial activities in Switzerland, gain a comprehensively revised legal basis which still retains the basic principles. In addition to the popular topics discussed in the media regarding gender quotas for boards of directors and executive management and the counterproposal to the responsible business initiative, numerous other amendments were decided. These include greater flexibility with respect to capital rules, the use of the possibilities offered by technology, and the improvement of the law on restructuring.

The capital band

A key change in the company law revision is the introduction of the so-called «capital band». The capital band facilitates flexible organisation of the capital structure and thereby creates greater possibilities for action in the financing of investments and acquisitions. Now, the articles of association are able to authorise the board of directors to increase or decrease the share capital over a period of a maximum of five years within a capital band up to 50% of the share capital entered in the commercial register. The capital band thus simultaneously connects an approved increase in capital with an approved decrease of capital. Consequently, the previous provisions with respect to approved increases of capital are abolished. In addition, the general meeting may provide for additional restrictions on and conditions or requirements for any increase or decrease of the share capital. The authorisation in the articles of association for a capital decrease is, however, only permitted if the company did not waive the limited audit of the annual financial statements.

Additional flexibility in the case of share capital

In addition to the capital band, more flexibility was introduced in connection with share capital:

- Share capital may be denominated not just in Swiss francs, but also in the «foreign currency that is essential for the business activity». When the company is incorporated, it is important to note that the paid in capital in the foreign currency must have a value of at least CHF 100,000 on the date of notarisation of the incorporation. The purpose of this progressive provision is to adapt to accounting law that already permits bookkeeping and accounting in the foreign currency that is essential for the business activity. The Federal Council will establish which currencies are permitted for this.
- The minimum par value of CHF 0.01 has been abolished. The par value of a share may now be reduced to any desired fraction of a centime. The only requirement is that the par value be greater than zero.

Modernisation of the general meeting

The reform takes into account the widespread use of digital technology and, in addition, allows more flexibility with respect to holding and organising the general meetings:

- The bill provides for the possibility of holding virtual general meetings (i.e. with no physical venue) provided that the articles of association allow for this.
- General meetings at several venues are expressly permitted, but the votes of the participants must be transmitted live by means of audio and video to all venues.
- Meetings may also be held abroad provided, again, that this is entrenched in the articles of association and that no shareholders are improperly hindered from exercising their rights as a result of the venue decided upon for the meeting.
- Universal meetings may now be held both in writing and in electronic form unless a shareholder requests oral deliberation.

Simplification of incorporation and capital increases, and increase of legal certainty:

The elimination of the intended acquisition in kind and clarification with respect to the recoverability of receivables in the event of an offset payment also eliminates two swords of Democles that had been hanging over the law to date. This results in greater ease when it comes to transactions and restructuring situations.

Strengthening of shareholder rights:

The position of shareholders is strengthened as a result of the expansion of their rights and the lowering of thresholds for exercising them. This will also need to be taken into account in future when structuring shareholder agreements and will provide new latitude for structuring such agreements.

Strengthening of minority rights

A priority objective of the reform was to strengthen shareholder rights, in particular, to lower the thresholds for the exercise by minority shareholders of their rights of participation. The following new features should be highlighted:

- Right to convene meetings: The threshold for the right to convene an extraordinary general meeting is lowered, in the case of listed companies, to 5% of the share capital or votes (currently 10%). In contrast, in the case of companies limited by shares that are not listed, the previously applicable threshold of 10% of the share capital is maintained. As in the case of all previous thresholds, several shareholders together may also reach the required threshold of 10% and collectively exercise the right to convene a meeting.
- Right to include an item on the agenda and put forth motions: Shareholders who collectively hold at least 0.5% of the share capital or votes in the case of listed companies, or 5% in the case of non-listed companies, may request that items be included on the agenda (currently 10% or shares with a par value of CHF 1 million for all companies limited by shares). Under the same conditions, shareholders may request that all motions in respect of items on the agenda be included in the convocation of a general meeting.
- Right to information and inspection: The new rules now provide that shareholders of non-listed companies who represent at least 10% of the share capital or votes may put questions to the board of directors at any time. Until now, it was only possible to have questions answered at a general meeting. Shareholders of all companies limited by shares who hold more than 5% of the share capital or votes may now inspect the company books and correspondence even without authorisation of the general meeting. A requirement for granting the right to information and inspection is that this be necessary to enable the exercise of shareholder rights and that no business secrets or other priority interests of the company are compromised. The information or inspection must be provided or allowed within four months from the date of the request. Any refusal must be justified in writing.

Payment of interim dividends

To date, the payment of interim dividends was a controversial issue and there was no express legal provision governing this. To adapt to the increasing needs in practice, the revised company law now contains an express provision. According to this provision, the general meeting may decide to pay an interim dividend based on an interim account. The interim account must be audited unless the company is not subject to limited audits of its accounts or the shareholders unanimously agree to the payment of the interim dividends, and the claims of creditors of company are not compromised.

Improvements to restructuring law

In addition to the warning indicators of capital loss and overindebtedness, the focus is now also placed on any impending insolvency. The board of directors is required to monitor solvency, and in the event of any impending insolvency, it is required to take measures, with all due expediency, to ensure solvency or to request that the general meeting take such measures, provided that these fall within its competence. The requirement to convene a restructuring general meeting in the event of a half capital loss or the requirement to notify the courts in the event of overindebtedness is, under certain circumstances, relaxed.

What do you, as member of a board of directors of a company limited by shares, or as managing director of a limited liability company, currently have to do?

At the moment, there is no need for any action. In accordance with the transition provisions, the provisions of the articles of association and internal rules that are not compatible with the new law, may remain in effect for up to two years following the entry info the force of the new law. The articles of association and rules must be amended by that time. However, for reasons of legal certainty and clarity, we recommend that existing articles of association should generally be amended as soon as possible after the entry into force of the new law to conform to its partly new systems and terminology, as well as to the numerous new article numbers. As well, you should also make sure to review the newly available options for flexibility with respect to capital structure and holding general meetings and, if needed, incorporate them in the articles of association. For reasons of cost, we recommend that you forgo making amendments to your articles of association unless absolutely necessary until the entry into force of the new legislation.

Gender quotas for boards of directors and executive management of listed companies

There are now guidelines for the representation of both genders on boards of directors and executive management of listed companies that exceed the threshold relating to balance sheet totals, turnover, and number of full-time positions, although multi-year transition periods do apply. However, there are no hard sanctions for failure to meet the quotas: If there is not representation of both genders of at least 30% on the board of directors and of at least 20% in executive management, the compensation report must set out the reasons for this as well what measures are being taken to promote the representation of the least represented gender.

Other topics

- The qualified provisions regarding the (intended) acquisition in kind by shareholders and persons related to them are eliminated. In the event of a mixed contribution in kind and acquisition in kind, however, the acquisition in kind component and the corresponding consideration from the company continue to be subject to disclosure in the articles of association and commercial register.
- The answer to the previously disputed question of whether an offset payment is possible with receivables that are not recoverable or not completely recoverable is now expressly in the affirmative. The articles of association must in all cases specify the amount of the offsetting receivable, the name of the shareholder, and the shares to which the shareholder is entitled.
- The articles of association may now provide for corporate law disputes to be decided by an arbitration tribunal with seat in Switzerland.
- In line with the applicable EU regulations, the bill provides that duly audited commodity companies must also prepare a special annual report on all payments to government agencies (group payment report).
- After intensive debate, the introduction of loyalty shares was scrapped. The topic remains current, however: the Federal Council was tasked with having a review conducted of the advantages and disadvantages of loyalty shares.
- Implementation of «Lex Minder» regarding compensation in the case of publicly-traded companies is enshrined in legislation, with certain amendments.

The majority of the legislative changes will likely enter into force at the beginning of 2022. The provisions with respect to gender guidelines for management positions, as well as the transparency rules for commodity companies, entered into force on 1 January 2021 already.

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