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New Swiss Corporate Law - First Experiences

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Key Take-aways

1.
The new Stock Corporation Law was well-received in practice and has not created any major issues. However, for now, the practice of the commercial registers appears restrictive to certain new features.

2.
To date, the capital band and the possibility to permit electronic resolutions (incl. virtual shareholder meetings) have been introduced the most.

3.
By 1 January 2025 provisions in the articles of association that are contrary to the new law will become invalid. Hence, companies should update their articles in the 2024 shareholders' meeting.

1 Introduction

The new Swiss Corporate Law entered into force on 1 January 2023. After the first season of shareholder meetings, many companies have amended their articles of association to comply with and make use of the new law. In this newsletter, we assess the status of the new law's implementation.

For an overview of the new law, please refer to our newsletters of October 2020, October 2022, December 2022, and January 2023.

2 Share capital

2.1 Capital Band and Conditional Share Capital

The deadline to implement an ordinary share capital increase after an affirmative shareholders' resolution of a Swiss stock corporation was extended to six months. Still, however, a staggered implementation is not allowed by the commercial registers. In contrast, the new capital band offers such flexibility. It empowers the board of directors to increase and/or decrease the share capital by a maximum of 50% from its base capital over a period of up to five years. The lower and upper limits of shares to be issued must be specified in the articles – greater flexibility by mentioning a mere percentage in relation to the registered share capital is not possible.

Most listed companies that used authorized share capital before the reform replaced such with a capital band. However, **the restrictive view of many foreign proxy advisors had a chilling effect**: As a rule of thumb, **listed companies only introduced a capital band of +/- 10% of the share capital**. In some instances, the time limit was set below five years. Further, as anticipated, restrictions were placed on the purpose of the issuance of shares as part of the capital band (e.g. only for acquisitions). After all, the board was usually authorized to restrict or withdraw statutory subscription rights of the shareholders to increase flexibility.

With regard to the **coordination between the capital band and conditional capital**, the majority of companies introduced conditional capital **independently of the capital band**. As a consequence, the limits of the capital band are adjusted accordingly when shares are issued based on conditional capital. Only a few listed companies introduced **conditional capital as part of the capital band**. If done so, the capacity of the capital band is consumed to the extent shares from conditional capital are issued.

2.2 Publicity when Shares are Issued against Offsetting Claims

It has always been permissible to pay the share issue price by offsetting claims against the company. Aligning with established practice, the new law now clarifies that an offset satisfies legal requirements even if the claim against the company is no longer (fully) covered. However, it is now also **mandatory to disclose the offsetting in the articles**, including the claim being offset, the name of the subscribing shareholder, and the shares issued. Consequently, this information becomes public.

Since private companies and their shareholders typically do not desire such publicity, alternative arrangements are explored in practice. Presently, the focus revolves around the use of (a) conditional share capital or (b) a fiduciary. In scenario (a), both practice and doctrine assume that the contribution by offsetting a claim based on conditional share capital does not result in publicity (otherwise the conversion of convertible bonds and similar instruments of listed companies would, in fact, not be possible, as the issuers regularly do not know the personal details of all bondholders). In scenario (b), only the name of the fiduciary is disclosed. It would be desirable if commercial registers were to meet the needs of practitioners through a more liberal practice allowing for collective designations (such as "all creditors of a series of convertible loans"). Swiss stock corporations intending to issue securities convertible into shares (options, convertible loans, etc.) or otherwise plan to issue shares based on an offset transaction should contemplate this new aspect. In many cases, it will be advisable to maintain conditional share capital.

The new Swiss Stock Corporation Law and its additional flexibility were well-received in practice.

2.3 Nominal Share Capital in EUR, USD, GBP or JPY

Besides using a foreign functional currency for accounting purposes, Swiss stock corporations are newly permitted to maintain their share capital in EUR, GBP, USD, or JPY, rather than CHF, provided the designated currency is material for its business operations. This alleviates problems stemming from accounting in a foreign currency while having a fixed share capital in CHF (e.g., reduced dividend capacity due to (purely virtual) currency translation losses).

Up until now, very **few listed Swiss companies have leveraged the option to alter the currency of their nominal share capital**, with UBS Group AG (to USD) being a notable exception. Similarly, private companies have rarely changed the currency of their share capital, although it is premature to provide a conclusive assessment; many subsidiaries of international groups are expected to consider this new option. When a company maintains - or plans to maintain - its accounts in a foreign currency, choosing to change the currency of the share capital - or incorporating using a foreign currency - is recommended. As long as the change does not involve altering the capital structure (capital increase or decrease), **according to experience a change can be implemented efficiently**.

The change can be instituted retroactively from the start of the current financial year or can be scheduled to become effective at the beginning of the next year. However, it is crucial to note that, as per prevailing commercial register practices, **a prospective change can only be recorded in the register after the start of the new financial year**, since the conversion rate may not be predetermined.

3 Resolutions

3.1 Virtual and Hybrid Shareholder Meetings

The reform has introduced a liberalization of the forms of shareholder meetings. Beyond the option of conducting hybrid meetings - which encompass both an in-person gathering and the possibility of virtual participation - **companies' articles can now incorporate provisions for exclusively virtual meetings as well**.

A **substantial majority of companies listed on the SMI have implemented the option of conducting purely virtual shareholder meetings**, with some companies having already hosted such meetings this year. However, it is notable that numerous **foreign proxy advisors maintain a degree of scepticism** regarding virtual shareholder meetings, as they have resulted in diminished shareholders' rights in other jurisdictions. Such concerns are not relevant in Switzerland due to the prevailing legal principle of directness. In Switzerland, a virtual shareholders' meeting is structured to reflect a physical meeting, thus guaranteeing full participation rights for shareholders. Nevertheless, Swiss-listed companies have responded to these concerns in a variety of manners, including offering assurances and, in some instances, incorporating provisions in their articles limiting virtual meetings to exceptional circumstances or imposing a time limit on the authorization to hold such meetings. Such constraints are typically absent in private companies, where the administrative convenience afforded by virtual meetings is generally regarded as positive.

The capital band is quite popular and frequently introduced by Swiss stock corporations.

3.2 Written and Electronic Shareholder Resolutions

Shareholders' resolutions can now be passed in writing, provided that no shareholder demands an oral debate.

In the case of a **resolution in writing on paper**, shareholders exhibit their consent to both the resolution and the procedure by signing a circulated document. While foregoing an oral debate must be a unanimous decision - necessitating the response of all shareholders - a majority decision suffices for the resolution matter.

Given each shareholder's right to call for an oral debate, a written resolution is generally only feasible for companies with a smaller shareholder base or for standard agenda items. In such instances, however, the case for a written resolution is unambiguous.

Under the new law, the enactment of a purely **electronic (written) resolution** is also permissible. Nonetheless, some uncertainties exist surrounding formal requirements. We believe that a qualified electronic signature is not required to vote; a simple textual confirmation (e.g., email) should be sufficient. Until unresolved queries about formalities have been clarified, it is advisable to specify such in the company's articles.

Regardless of the format, once the votes have been cast, it is the board's responsibility to tally the results and document them in a **distinct board resolution**. Such a resolution also serves as proof for the commercial register, eliminating the need to disclose the identities and votes of the shareholders.

Certain shareholder resolutions have to be verified by the board in a new form of resolution.

3.3 Electronic Board Resolutions

The law now unequivocally stipulates that **board resolutions do not require a signature**. Hence, electronic resolutions - whether communicated via **email or chat applications** - are valid if in textual form.

An authorization in the company's articles is not a prerequisite for the board to pass electronic resolutions. However, some companies opted to incorporate such authorization in their articles. For procedural clarity, it is prudent to delineate the acceptable modalities for passing resolutions in the organizational regulations. Additionally, to meet their archival obligations, Swiss stock corporations must have the ability to access the communication channels used for passing resolutions.

3.4 Public Notarization

The process for acquiring **notarization for virtual or electronic resolutions** by the shareholders or the board is still awaiting clarification. In some Swiss Cantons, notaries and commercial registers have indicated that certifying such resolutions complies with cantonal notarization laws, while deliberations on this matter continue in other Cantons. A conclusive resolution is still awaited. For companies aspiring to use the new methods of resolution, it is prudent to clarify the procedure with the notary and the commercial register in advance. If necessary, individuals should avail themselves of their liberty to freely choose a notary. Alternatively, the hybrid meeting format has proven effective. In such meetings, the chairman and the notary are physically present at a meeting location, while shareholders or board members who prefer not to attend in person can participate electronically (e.g., via video conference).

4 The Shelf Warmers

Certain innovations have thus far garnered minimal enthusiasm:

— The option to conduct a **shareholders' meeting abroad** has been scarcely used by listed as well as private companies. The instruments of virtual and hybrid sharehold-

er meetings already offer ample flexibility. Even private companies permitting meetings abroad in their articles are hesitant in actual usage. This reluctance may be due, in part, to logistical difficulties and individual legal and tax risks.

– The **statutory arbitration clause** has also found few users to date; no listed Swiss company has incorporated such a clause. The lack of adoption may be attributed to the general efficacy of the Swiss court system, negating a pressing need for it. Potentially, companies might opt to introduce such instrument at a later phase, once more experience has been accrued with it.

5 Conclusion

The adjustment to the new Swiss Stock Corporation Law is generally advancing positively, with numerous companies having already revised their articles of association. Given the **expiration of the transitional period on 1 January 2025** – after which any non-compliant provisions in the articles of association will become invalid – this development is reassuring. For those companies yet due for the update, it is advisable to proactively align with the new Swiss legal framework at their ordinary shareholders' meeting in 2024. Doing so will prevent potential ambiguities and enable them to leverage the innovative tools and flexibilities introduced.

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