NKF Client News

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The new stock corporation law in practice

1. Preliminary remarks

On the day of the final parliamentary vote on the revised Swiss Company Law, 19 June 2020, Peter Forstmoser published Niederer Kraft Frey's first *Newsletter* on the topic with a general overview of the main elements of the reform (link). Much has been written and presented since. In view of the imminent entry into force of the new stock corporation law on 1 January 2023, this *Newsletter* provides an overview of the revision with a focus on topics of particular practical relevance.

2. More flexibility regarding company capital

2.1 Overview of the changes

One of the legislator's declared goals was to provide more flexible with regards to the company capital in the revised law. The following innovations should be pointed out in this context:

— **Share capital in foreign currencies**: With the revision, the share capital may be denominated in the foreign currency that is material for the business activity (art. 621 para. 2 of the revised Swiss Code of Obligations ["**nCO**"]; for the time being, the Federal Council allows denomination in USD, EUR, GBP and JPY).

— **Reduction of the minimum par value per share**: The minimum par value per share will be reduced from one centime to an amount greater than zero (art. 622 para. 4 nCO). This allows listed companies whose shares were previously at the minimum par value of one centime to carry out further capital reductions by way of par value reduction or further share splits.

— **Abolition of the provisions on acquisitions in kind**: Under the new law, the concepts of the acquisitions in kind and intended acquisitions in kind (capital protection measures) in connection with the incorporation or capital increase of a company are abolished.

— **Additional disclosure requirements in the articles of association**: The paying-in of share-capital by way of set-off or by converting freely disposable equity (art. 652d para. 3 nCO) trigger a disclosure requirement in the articles of association (art. 634a para. 3 nCO). In a set-off scenario, the articles of association must state the amount of the claim brought for offsetting, the name of the creditor, and the amount of shares issued to the creditor in the process.

— **Issue price**: The new law explicitly states that shareholders may not be unfairly favoured or disadvantaged either by the withdrawal of subscription rights (current wording) or by the determination of the issue price (new and additional wording; art. 652c para. 4 nCO). We believe that his is a re-statement of the existing duty to treat shareholders equally in equal circumstances and the prohibition of the abuse of rights. We believe that determining the issue price below fair market value will remain possible if there are objective reasons for doing so.

- **Streamlining of the capital reduction procedure**: With regards to the capital reduction procedure, existing legal uncertainties are eliminated and the process is shortened. In particular thanks to the clarification that the debt call may be made prior to the shareholders' resolution on the capital reduction, the capital reduction procedure will also be easier to use by listed companies for regular capital repayments to shareholders.
- **Participation capital**: Participation capital divided into participation certificates listed on a stock exchange may now amount to ten times the share capital registered in the commercial register (previously double the registered share capital; 656b nCO).
- **Reserves**: In line with accounting law, the new stock corporation law differentiates between statutory capital reserves and statutory and voluntary retained earnings. The currently required second allocation to the reserves after payment of a 5% dividend is omitted (art. 671 et seq. nCO). Furthermore, the law specifies a clear offsetting sequence for any losses. It remains permissible, however, to carry forward accrued losses (art. 674 nCO).
- **Interim dividend**: The new law expressly permits interim dividends and therewith allows quarterly or half-yearly dividends from current profits during the year. For this purpose, interim financial statements must be prepared. These interim financial statements must generally be audited (exceptions in case shareholders' generally waived the duty to perform limited audits or waive the audit of the interim financial statement to the extent permitted by law).

2.2 The capital band (art. 653s et seq. nCO)

The institute of the capital band

The new Stock Corporation Act introduces the institution of the capital band. This is one of the most fundamental changes in the new stock corporation law. The capital band combines the – on a standalone basis abolished – institute of the *authorized capital increase* with an "authorized capital reduction". The amount of nominal share capital is flexible, with the minimum capital of CHF 100,000 forming the absolute lower limit. The bandwidth may be set from minus 50% to +50% of the nominal share capital registered in the commercial register at the time of the authorisation resolution. The authorisation to alter the share capital may last for a maximum of five years.

The board of directors is authorized to increase and reduce the share capital within the defined range. Changes to the share capital within the capital band have to be ascertained by the board of directors with such resolutions being recorded in a public deed and the according changes to the articles of association and change to the nominal share capital needs to be registered in the commercial register.

The resolution authorising the capital band lapses (and needs to be renewed) if shareholders resolve on ordinary capital increases or decreases during the term of the capital band.

Conditional capital and capital band

Conditional capital can be created outside or within the capital band. If conditional capital is set outside the capital band, the limits of the capital band dynamically increase with the capital increases from conditional capital. If the conditional capital is set within the capital band, the capital increases from conditional capital claim the according parts of the capital band allowed for capital increases. The flexibility of the board of directors to increase share capital is thus restricted if the conditional capital forms part of the capital band.

Existing authorised capital

Authorised capital under previous law may be maintained and used under the new law until the expiry of a maximum of two years from the date of implementation.

3. Shareholder Rights and Shareholders' Meeting

This section provides an overview of the amended shareholder rights, followed by more detailed explanations surrounding the shareholders' meeting, the innovations of which provides more flexibility in preparing and holding shareholders' meetings.

3.1 Overview of changes concerning shareholder rights

One of the legislator's declared objectives was to strengthen shareholders' rights and to protect minority shareholders. In this context, the following changes deserve mentioning:

— Information and inspection: Shareholders' right to information as an individual right remains unchanged in principle. Under the new law, shareholders of an unlisted company who together represent 10% of the share capital or voting rights may request written information from the board of directors at any time (i.e. also outside of shareholders' meetings) about the company's affairs. The board of directors must provide the information within four months and the answers must be made available for inspection by all shareholders at the subsequent shareholders' meeting. The right of inspection is no longer an individual right and is now only available to shareholders who (jointly) represent at least 5% of the share capital or voting rights (art. 697 et seq. nCO).

— Reduction of thresholds for the exercise of shareholder rights: Thresholds for the exercise of shareholder rights are lowered for listed companies. Thus, the special investigation (previously special audit) may be requested by shareholders representing 5% of the share capital or voting rights (previously 10%; art. 699 para. 3 nCO). The same applies to the right to request that a shareholders' meeting be convened. The threshold for the right to determine agenda items has even been reduced to 0.5% (previously 10%; art. 699b para. 1 nCO). 0.5% is also the threshold for shareholders requesting the inclusion of a motion on an agenda item (art. 699b para. 2 nCO).

— Dismissal of the auditors: Under the new law, dismissal of the auditors is only possible for important reasons, and the reasons for dismissal must be disclosed in the notes to the annual financial statements (art. 730a para. 4 nCO; art. 959c para. 2 item 14 nCO).

— Preservation of the unity of the subject matter: The new law explicitly stipulates the previously implicit principle that the board of directors must ensure that items for discussion at a shareholders' meeting preserve the unity of the subject matter. This means that items on the agenda must have a material internal connection. In case of violation, resolutions are challengeable. This will also have to be kept in mind when amending the articles of association in view of the new law.

3.2 Preparation and holding of the General Meeting

Convening and announcement of the annual report

A shareholders' meeting is convened by means of notices to shareholders in the form provided for in the articles of association. If the articles of association so provide, it will therefore be possible for the convocation to be made exclusively in electronic form (e.g. by e-mail and by electronic SOGC publication or even only by electronic SOGC publication).

In the future, the annual report, the compensation report and the auditor's reports can be made available to shareholders electronically.

Written or electronic circular resolutions

The new law will allow shareholders' resolutions to be taken as circular resolution in written or electronic form (e.g. by e-mail; art. 701 nCO).

Venue and virtual shareholders' meeting (art. 701a et seq. nCO)

The current law does not contain any provisions on the venue of shareholders' meetings. The new law now codifies the admissibility and requirements for holding a meeting simultaneously at different venues. Furthermore, it is now also expressly permissible to hold shareholders' meetings outside of Switzerland (which was also practiced under current law).

Under the previous law, shareholders' meetings had to be held physically at a meeting place. The revised law allows to hold a hybrid shareholders' meeting, which allows physical or electronic participation (was already considered permissible under current law), or to even hold a purely virtual shareholders' meeting without a physical venue.

The board of directors shall determine the use of electronic means and ensure the orderly processing of virtual shareholders' meetings. If technical problems arise during the shareholders' meeting, which prevent that the shareholders' meeting may be orderly conducted, the shareholders' meeting must be repeated. However, resolutions adopted before the occurrence of the technical problems remain valid.

Both the holding of a shareholders' meeting at a venue outside Switzerland and the holding of a purely virtual shareholders' meeting require a basis in the articles of association.

Minutes of the General Assembly

The new law amends the minimum content of the minutes of a shareholders' meeting, which has to be taken into account (art. 702 nCO).

Proxy voting

With regard to proxy voting, two points in particular are worth mentioning:

— Secrecy of voting rights in listed companies: Communication between the board of directors and the independent proxy is restricted. The latter may now only provide the board of directors with general information, which includes the number of yes and no votes as well as abstentions per agenda item. This information may not be provided earlier than three working days before the General Meeting, and the information provided must be accounted for at the General Meeting. It should still be permissible without restriction to provide the board of directors with information on the granting of proxies (art. 689c para. 5 nCO).

— Restriction of proxy voting: The statutory restriction of proxy voting to other shareholders is now only permissible for companies that are not listed on a stock exchange (art. 689d CO).

4. Board of directors

The aim of the revision was also to modernize the decision-making process of the board of directors and to strengthen corporate governance. However, the revision brings little that is ground-breaking, especially in comparison with current practice. The law now stipulates that board meetings may be held purely virtually (without a meeting venue. In addition, it is now explicitly allowed to pass circular resolutions in electronic form, whereby no signature is required, which enables resolutions to be passed by e-mail or via electronic media (art. 713 nCO).

5. Financial emergency law

Another of the legislator's explicit goals was to increase the chances of successful restructurings for Swiss companies. To this end, incentives were to be created to take restructuring measures at an early stage. Furthermore, the reorganization measures were to be better coordinated with the composition proceedings. The following innovations should be highlighted in this context:

- New calibration of the "alarm system": In addition to the existing situations of financial distress, to which the law previously linked the obligation to take restructuring measures (qualified capital loss and over-indebtedness), the impending insolvency is added. Pursuant to art. 725 nCO, the board of directors now also has an express duty to monitor the company's solvency and to take countermeasures in the event of imminent insolvency. Furthermore, the new law explicitly states that only the nominal share capital and the blocked statutory capital and retained earnings form the basis for the calculation of the qualified capital loss (not all statutory reserves, as is the current practice of audit companies). Contrary to the original intention of the Federal Council, the consequence of this is, after parliamentary adjustments to initial drafts of the act, that a qualified capital loss occurs at a later stage, i.e. the first warning bell rings later than under current law (art. 725a nCO).

- Adjustment of the duties to act: The obligation to convene a shareholders' meeting when a restructuring event occurs is abolished under the new law (no mere information obligation to shareholders, which also curbs the risk of information leaks). Shareholders' meetings must only be convened if necessary to implement restructuring measures (e.g. capital increases; cf. art. 725 para. 2 nCO, art. 725a para. 2 nCO). In contrast, small companies must have their financial statements audited when a capital loss occurs, even if the audit requirement has been waived.

- Innovations in connection with over-indebtedness: The definition of over-indebtedness remains unchanged (negative equity). In this regard, however, it is new that subordination agreements must also cover interest (art. 725b para. 4 item 1), which is regrettable, as it may make it may make it more difficult to obtain restructuring loans. We believe that existing subordination agreements that do not meet these requirements remain in place in accordance with transitional law (stay of interest by operation of law after expiration of the transitional period). Furthermore, the new law explicitly stipulates the "silent restructuring", i.e. the possibility to delay the notification of the court after the determination of over-indebtedness as long as there is a reasonable prospect of a successful restructuring. The law stipulates a rigid maximum period of 90 days after the audited interim financial statements are available (no *safe harbour*).

- Abolition of stay of insolvency proceedings: The new law abolishes the institute of the stay of insolvency proceedings (art. 725a CO). The material content of the provision has largely been transferred to the composition proceedings in the Swiss debt enforcement and insolvency law.

6. Specific provisions applicable to listed companies only

In addition to the aforementioned changes, this section further highlights changes under the new law that apply specifically to listed companies.

6.1 Gender benchmarks

As of the business year 2025, listed companies are required to have a minimum representation of both genders of 30% on the board of directors and, from 2030, a minimum representation of both genders of 20% on the executive board. The *comply or explain* principle applies, according to which non-compliance must be explained in the compensation report and measures to promote the less strongly represented gender must be stated. The reporting obligation begins in 2026 or 2031 (art. 734f CO).

6.2 Compensation regulation

With the revised stock corporation law, the legislator fulfils its constitutional mandate to transfer the provisions against excessive compensation for listed compensation from the current ordinance into material law. In addition, certain amendments have been made:

— **Voting on the compensation report**: If variable compensation is voted on prospectively, the compensation report must henceforth be mandatorily submitted to the shareholders' meeting for a non-binding advisory vote (735 para. 4 nCO);

— **Restriction on the use of the supplementary compensation amount**: Contrary to the practice under current law, the revised law stipulates that the supplementary compensation amount for the compensation of the executive board may only be used for new members and no longer for promotions within the executive board. The sense and benefit of this tightening of the law are not comprehensible (art. 735a nCO).

— **Compensation for a non-competition clause**: non-competition clauses may, under the new law, only be compensated if they justifiable from a business perspective and the compensation may not exceed the average of the last three years' total compensation (art. 735c nCO).

— **Sign-on bonuses and other compensation**: Sign-on bonuses that do not compensate for a demonstrable financial disadvantage due to the acceptance of the respective position are now explicitly prohibited under the new law (art. 735c nCO).

7. Need for amendments to the articles of association and transition periods

It was a further of the legislator's declared goals that the revision should not lead to a need to amend the articles of association. This goal was missed, at least as far as listed companies are concerned. The articles of association have to be adapted in order to benefit from the flexibility provided by the new law (meeting venue, virtual shareholders' meeting). Furthermore, shareholders may not approve a delay in implementing strengthened shareholder rights. Finally, certain contradictions between the articles of association and the new law could lead to considerable legal uncertainties.

The articles of association and regulations must be adapted to the new stock corporation law within two years. Provisions that do not comply with the new law by then automatically cease to apply upon expiry of this transition period. New provisions of the articles of association that are in conflict with the provisions of the new law may no longer be introduced during the transitional period.

The general trend for listed companies is to amend their articles of association to comply with the new law at the annual general shareholders' meeting in 2023.

If you have any further questions or suggestions on this topic, please feel free to contact your regular NKF contact.

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