Swiss Corporate Law Reform: Share Capital (Part I) - Foreign currency

22.02.2021

This legal update is part of a series summarizing the most important upcoming amendments to Swiss corporate law in a condensed form as relevant for legal practitioners. Previously published legal updates can be found on our website at Swiss Corporate Law Reform 2020. New legal updates on the corporate law reform are regularly e-mailed to our newsletter subscribers and published on our website.

Key takeaways

The amended law allows for more flexibility with respect to the capital structure of Swiss companies, in particular with respect to the following:

- **The share capital can also be denominated in a foreign currency.**
- **The minimum par value of shares can be any value above zero.**
- **Listed companies have more leeway regarding the amount of participation capital (non-voting stock).**
- **Current and well-established practice becomes law, in particular regarding the requirements concerning contributions in kind (Sacheinlage) and the admissibility of debt-to-equity swaps in restructuring situations.**
- **Abolition of provisions regarding the (anticipated) acquisition of assets ((beabsichtigte) Sachübernahme).**

Amendments to the provisions on changes in share capital (increases, decreases), the new instrument of a capital band (Kapitalband) and the admissibility of interim dividends provide for further flexibility. These and other amendments that the forthcoming corporate law reform will bring are part of our series on the Swiss Corporate Law reform.

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

Introduction

On 19 June 2020, Swiss Parliament adopted the final text of the Swiss corporate law reform, which also includes a number of amendments to the provisions concerning the share capital as outlined in this legal update. These changes will be relevant for companies limited by shares (Aktiengesellschaft) and for limited liability companies (GmbH), with the exception of changes relating to participation capital, which is only permissible for share corporations. The entry into force of the entire revision of corporate law is not expected until 2023 according to current estimates by the Federal Office of Justice.

Further flexibility while preserving fundamental corporate law principles

Under the new law, Swiss companies limited by shares or limited liability companies will gain more flexibility in their capital structure, while the existing concept of fixed share capital – a long-established underlying principle of Swiss corporate law – will persist. For example, the future law will bring the possibility of an arbitrarily low par value per share or the flexibility to denominate the share capital in a (functional) foreign currency. Further, listed companies limited by shares may increase their participation capital. Some existing capital protection provisions applicable in connection with formation and capital increases will be eased or abolished.

Together with other changes (that will be summarized in subsequent Legal Updates) such as amendments to the legal framework applying to changes in the share capital; the introduction of a capital band; interim dividends; or more flexibility relating to the holding of shareholder meetings, the modernisation of Swiss corporate law described below brings a number of improvements to be welcomed by legal practitioners. The revised provisions concerning gender quotas, transparency requirements in the commodities sector and the revision of the ordinance on the commercial register, which already entered into force on 1 January 2021, are summarised in our first Legal Update of this series.

Share capital in a foreign currency

According to Swiss accounting law, a company may already today keep its financial records in the functional currency of the company. The functional currency is the currency which is essential for the business of the company, meaning the currency in which its cash flows are mainly generated. In contrast, currently, Swiss corporate law only permits share capital in Swiss francs. Hence, all capital-related aspects, such as the distribution of dividends and allocations to the reserves, must be denominated in Swiss francs. This inconsistency between accounting law and company law is now rectified by the forthcoming reform.

The new law will allow companies to denominate their share capital in a foreign currency as long as the requirements set out in Art. 621 para 2 new Swiss Code of Obligations (nCO) are met:

1. the foreign currency must be essential for the business activity the company operates in (functional currency);

2. the share capital in the foreign currency must correspond to an equivalent value of at least 100,000 Swiss francs at the time of incorporation or in the case of an already existing company, at the time the board of directors has determined that the requirements of Art. 621 para. 2 nCO are met;

3. the accounting and financial reporting must be done in the same currency; and

4. the foreign currency must be one which the Swiss Federal Council has declared as suitable for this purpose.

While the Federal Council will determine the suitability of currencies in the Commerical Register Ordinance based on objective criteria (e.g. currency stability), the company will have to subjectively assess its functional currency based on its specific circumstances. Analogously to accounting law, the assessment to determine the functional currency is generally at the discretion of the board of directors. On 17 February 2021, the Federal Council opened the consultation process for the implementing provisions, which will last until 24 May 2021. In the draft of the revised Commercial Register Ordinance, the Federal Council has selected the five most traded currencies in the world, namely Swiss Franc, US Dollar, Euro, British Pound and Japanese Yen, as permissible foreign currencies in Annex 3. The competence to finally decide on whether the company changes its share capital into such functional currency lies with the shareholders' meeting (qualified majority).

Stating the obvious, a share capital in a foreign currency will mostly be relevant and attractive for companies whose accounts are already kept in a functional currency today. If existing companies wish to change the currency of their share capital at the beginning of a financial year, the shareholders' meeting must approve such a motion with a qualified majority. Subsequently, the board of directors is responsible for implementing such a resolution of the shareholders' meeting, meaning that the articles of association have to be amended and the board of directors has to confirm in a public deed that the above-mentioned requirements are fulfilled. Such public deed must also mention the applied FX-rate. The option of having a nominal capital in a foreign currency is also available to limited liability companies (the same requirements apply as for companies limited by shares).

Minimum par value greater than zero

The minimum par value of shares and LLC-quotas can now be below the current minimum of one centime, provided the amount is above zero. With such approach, the current concept of a fixed par value for shares or quotas (Prinzip eines festen Aktien- oder Stammanteilnennwerts) is maintained, but almost the same flexibility is achieved as with no-par value shares. This makes future share splits much easier and ensures that corporations limited by shares or limited liability companies are not restricted when structuring their equity capital. This is particularly beneficial for listed companies with a high enterprise value.

Increased legal certainty when contributing capital

The incorporation or capital increase of a company limited by shares or a limited liability company requires shareholders to make contributions to pay in the share capital, either in cash, by means of a contribution in kind or by converting debt of the company with the founder or (future) shareholder as lender into equity.

In contrast to a contribution in cash, the value of an asset contributed to the company (contribution in kind) or the recoverability of a claim set off by converting liabilities into equity can be contested. Therefore, the current law provides for increased, but partly different requirements for contributions in kind on the one hand, and the conversion of existing debt to equity on the other. At present, only an increase in capital by way of a contribution in kind requires, in addition to a qualified majority at the shareholders' meeting, the publication and description of the contributed asset in the articles of association and in the commercial register. The same will now also apply for contributions made by way of converting debt to equity.

Further, the new law explicitly codifies the criteria for the permissibility of a contribution in kind, as already established in today's legal practice. In order for an asset to be eligible for a contribution in kind, the asset must qualify to be recorded in the balance sheet, be freely transferable, disposable and realizable. The asset, its valuation and the name of the contributor, the shares issued in consideration and any other benefits paid by the company have to be specified in the articles of association, all in line with the current practice of the commercial registers. These criteria not only apply in connection with the incorporation of the company, but also in case of a capital increase by way of contribution in kind.

Furthermore, the new law introduces new rules in case real properties are contributed to the company. Even if properties are located in different cantons, one public deed drawn up at the place of the registered office of the company is sufficient for the transfer (rather than a deed in each canton these properties are located). The new law follows in this respect the tried-and-tested transfer mechanics applied by the Swiss Merger Act for real property transfers.

With respect to a debt-to-equity swap, in which the shareholder's payment obligation is settled with an existing claim against the company, the new law clarifies that such offsetting is also permissible in situations in which the claim is not fully covered by assets of the company, hence is not fully recoverable. This is particularly advantageous if the company is in need of a financial restructuring; in practice, there were legal concerns on the permissibility of a debt-to-equity swap in financial distress situations. In contrast, as is the case in current practice, it is still not permissible to convert disputed claims into equity.

Deletion of the rules regarding the (anticipated) acquisition of assets

In case of an (anticipated) acquisition of assets ((beabsichtigte) Sachübernahme), the company intends or undertakes to acquire certain assets soon after its incorporation or capital increase. If the assets are acquired from a shareholder or related parties, the current law imposes a qualified majority for the shareholders' meeting and strict transparency rules. However, practice has shown that these transparency rules leave room for interpretation and lead to uncertainty in their application. For example, there may be questions as to when an acquisition meets the thresholds of a relevant acquisition of assets. This, combined with the harsh sanction of the acquisition (or even the incorporation or capital increase) being void in case of non-compliance, leads to legal uncertainty. With the corporate law reform, the rules relating to an (anticipated) acquisition of assets will be removed. Already today, sufficient measures are in place to ensure the preservation of the share capital.

Transparency provisions for acquisitions of assets remain to some extent in place if the acquisition of assets is made in connection with a contribution in kind as a so-called mixed contribution in kind and acquisition of assets, in which the shareholder makes a contribution in kind where the value of the contributed asset exceeds the shareholder’s capital contribution obligation and, in consideration, the company grants another consideration in return to the shareholder on top of issuing shares. In such cases, the respective consideration received has to be disclosed in the articles of association and in the commercial register. In this respect, the corporate law reform does not affect the applicable rules.

More leeway regarding the participation capital

The corporate law reform will allow listed companies limited by shares to provide for a participation capital (non-voting stock) up to ten times the amount of the share capital. For privately held companies the current rule continues to apply, which provides that the participation capital may not exceed twice the amount of the share capital. This differentiation between listed and non-listed companies is explained by the lack of voting rights inherent to holders of participation certificates, which is less of a restriction to such holders if the participation capital is listed and, therefore, the holder can sell its participation certificates via the stock exchange at any time.

Furthermore, the new law distinguishes between shareholders and holders of participation certificates when it comes to calculating the thresholds necessary to reach a quorum for certain decisions, such as the initiation of a special investigation, the dissolution action and the reporting obligation regarding beneficial ownership. This ensures, for example, that shareholders can initiate a special investigation if they hold at least 10% (or 5% in listed companies) of the share capital or the voting rights even if the share capital does not exceed the participation capital. However, in contrast, shareholders and holders of participation certificates can no longer join forces to reach the quorum to request the initiation of a special investigation.

Enactment and need for action

Following the enactment of the new law which, according to current information, is scheduled for 2023 at the earliest, Swiss companies will have a transitional period of two years to amend their articles of association and regulations. After this period, provisions of the articles of association that do not comply with the new law will automatically cease to apply. The changes described above, therefore, do not cause need for a mandatory amendment of the articles of association. However, the board of directors, the management or the in-house legal team should carefully consider the new provisions, changes and simplifications of the new law in order to assess whether their organization could benefit from them, and/or to recommend them to the shareholders of the company. The transitional period still leaves time, but certain amendments, such as the share capital in a foreign currency, require a proactive planning approach in order to consider potential interdependencies triggering the need for further changes (e.g. with the company's accounting).

Contributors: Beat Schwarz (Partner), Severin Roelli (Partner), Franz Schubiger (Partner), Mercedes Chiabotti (Associate) and Fabienne Früh (Junior Associate)

Update of 22 February 2021

No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this legal update.

Beat Schwarz

Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 44
beat.schwarz@pestalozzilaw.com

Severin Roelli

Partner
Attorney at law, LL.M.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 68
severin.roelli@pestalozzilaw.com

Franz Schubiger

Partner
Attorney at law, LL.M.
Co-Head Life Sciences

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 49
franz.schubiger@pestalozzilaw.com