Swiss Corporate Law Reform: Interim dividends, acquisition of own shares, reimbursement of benefits and reserves

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This legal update is part of a series summarising 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 emailed to our newsletter subscribers and published on our website.

Overview

With regard to the topics in focus, the entry into force of the Swiss Corporate Law Reform on 1 January 2023 triggers the following changes:

- **The shareholders' meeting has the option of approving interim dividends on the basis of audited interim financial statements.**
- **The acquisition of own shares remains limited to 10% of the share capital registered in the commercial register. The higher limit of 20% continues to apply in case of acquisitions of own shares in connection with a restriction on transferability, but also applies to acquisitions of own shares in the context of averting an action for dissolution of the company.**
- **The scope of application of the claim for reimbursement is extended to include members of management, and additional benefits such as remuneration can now be subject to reimbursement.**
- **The provisions on the allocation and use of reserves will be significantly adjusted.**

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Provisions allowing the distribution of interim dividends

In practice, the question has repeatedly arisen as to whether and to what extent companies can resolve to distribute income from the current financial year to shareholders (genuine interim dividend). Although the distribution of interim dividends has not been provided for by law so far, a practice has already developed under current law – albeit one disputed in the doctrine – which allows distributions to shareholders during the current year. As part of the Corporate Law Reform, the distribution of interim dividends is now expressly permitted, provided that certain conditions are met.

Pursuant to Art. 675a of the new Swiss Code of Obligations (nCO), the shareholders' meeting has the non-transferable power to resolve the distribution of interim dividends on the basis of audited interim financial statements (IFS). However, the obligation to audit the IFS does not apply if the company is not required to have its annual financial statements subject to a limited statutory examination by an auditor, i.e. if the shareholders have decided to opt out. Likewise, there is no obligation to audit if all shareholders approve the distribution of the interim dividend, provided that no creditor claims are jeopardised by the distribution (this also applies to companies that are subject to a statutory audit or have not decided to opt out).

The requirements for IFS are now set out in Art. 960f nCO. According to these provisions, the company must prepare the IFS in accordance with the provisions governing the annual financial statements. This means that the IFS must contain a balance sheet, an income statement and notes. Simplifications and/or abbreviations are permitted in the IFS, provided this does not affect the presentation of business development.

Pursuant to Art. 731 CO the resolution of the shareholders' meeting on the distribution of the interim dividend is null and void if the IFS are not audited (although the respective company has decided to opt out) or if not all (i.e. 100% of) shareholders approved the interim dividend. In such case, the interim dividend received is subject to reimbursement pursuant to Art. 678 nCO

Acquisition of own shares

The acquisition of own shares by a company still requires that the company has sufficient freely distributable equity in the amount needed for the intended acquisition and that the total nominal value of own shares held by the company does not exceed the threshold of 10% of the share capital. The revised law further specifies that the percentage is to be calculated on the basis of the share capital registered in the commercial register.

Already under current law, companies may acquire own shares up to a maximum of 20% of the share capital if such acquisition takes place in connection with a restriction on transferability (Vinkulierung), i.e. if the company refuses to allow a purchaser to be entered in the share register and acquires the shares concerned in its own name and for its own account.

With the Corporate Law Reform, the higher limit of 20% of the share capital is also applicable in the case of an acquisition to avert an action for dissolution of the company. This to allow companies to acquire the shares of those shareholders seeking dissolution and to avert the dissolution.

The obligation to sell own shares acquired in excess of the limit of 10% of the share capital within two years or to cancel them by means of a capital reduction continues to apply, irrespective of the context in which these shares were acquired.

As under current law, voting rights and all other associated rights are suspended for own shares. This now also applies if the company transfers own shares combined with either an obligation to redeem or return those shares (e.g. in case of securities lending). Furthermore, the revised law provides for an explicit reference to the provisions on unauthorised participation in the shareholders' meeting in case voting rights of (suspended) own shares have been exercised.

With regard to groups of companies, Art. 659b nCO now refers to the definition of a group in Art. 963 CO. This clarifies that that the restrictions on the acquisition of own shares apply to all companies that are controlled by the company pursuant to Art. 963 para. 2 CO (i.e. that are part of a group of companies).

Reimbursement of benefits: Extension of the scope of application and adaptation to the new statutes of limitation

Pursuant to Art. 678 nCO, the company and any shareholder may claim for reimbursement of unjustifiably received benefits such as bonuses, other profit shares, etc. In order to prevent unjustified asset transfers more effectively and to strengthen capital protection, Art. 678 nCO extends the scope of application of the claim for reimbursement of unjustifiably received benefits as part of the Corporate Law Reform.

Firstly, the revised law extends the group of persons subject to reimbursement claims; in addition to shareholders, members of the board of directors and related parties, the claim for reimbursement of unjustifiably received benefits may also be brought against all persons involved in the management, the members of the advisory board, as well as related parties. Secondly, the claim for reimbursement of unjustifiably received benefits not only includes dividends, bonuses, profit shares and construction interest, but also remuneration, benefits from statutory capital reserves and retained earnings and other benefits.

The current requirement for reimbursement of unjustifiably received benefits, according to which the relevant benefits must have been received unjustifiably and in bad faith, does no longer apply. With the revised law, any unjustified benefit paid by a company to the designated group of persons is, in principle, subject to reimbursement. This also applies to benefits received in good faith. For the determination of the extent of reimbursement, the law expressly refers to Art. 64 CO (unjust enrichment); accordingly, reimbursement is not possible if the (bona fide) recipient is no longer enriched at the time of the benefits being reclaimed.

The obligation to reimburse unjustified benefits also applies if a company takes over assets from or enters into legal transactions with the aforementioned persons, provided, however, there is obvious disproportion between performance and consideration. This change is due to the fact that the provisions on (intended) acquisitions in kind (beabsichtigte Sachübernahme) will be removed as part of the Corporate Law Reform (see our legal update on Share Capital (Part 1)). Consequently, transactions that qualify as (intended) acquisitions of assets under the current law still require caution despite the abolition of the provisions on (intended) acquisitions of assets.

When a company asserts a claim for reimbursement it usually does so through its representatives and based on a corresponding resolution of the board of directors. The revised law expressly states that the shareholders' meeting may also decide that the company must lodge a claim for reimbursement. The resolution by the shareholders' meeting is particularly important if the claim is to be directed against members of the board of directors; in this way, the shareholders can force the company to initiate proceedings and thus also pass on the risk regarding litigation costs to the company.

As part of the reform of Art. 678a CO, the statute of limitations for claims for reimbursement is adapted to the revised statute of limitations. Under the revised law, the claim for reimbursement will become time-barred three years after the company or the shareholder has become aware of the unjustified benefit to be reimbursed (relative limitation period), but in any case ten years after the claim has arisen (absolute limitation period). In this regard, it should be noted that a special investigation ordered and carried out during the limitation period suspends the limitation period. Finally, the claim for reimbursement becomes time-barred at the earliest when the criminal statute of limitations begins to run, provided that the recipient has also committed a criminal offence through his or her conduct.

Adjustments of the provisions on reserves to accounting law

The Corporate Law Reform simplifies the provisions regarding reserves. In line with accounting law, the reformed corporate law divides the general and statutory reserve into the statutory capital reserve, the statutory retained earnings and the voluntary retained earnings.

The proceeds from the issuance of shares in excess of their nominal value and the issuance costs (premium), as well as the retained payments on cancelled shares must be allocated to the statutory capital reserve (as previously to the general legal reserve). According to the revised law, further contributions and subsidies by the shareholders to the company must be allocated to the statutory capital reserve (Art. 671 para. 1 nCO).

The current law states in Art. 671 para. 3 CO that "to the extent that it does not exceed one-half of the share capital, the general reserve may only be used to cover losses or for measures designed to sustain the company through difficult times, to prevent or to mitigate its consequences".

The Corporate Law Reform simplifies this provision; Art. 671 para. 2 nCO only states that the statutory capital reserve may only be repaid to shareholders if the statutory capital reserve and the statutory retained earnings, less the amount of any losses, exceed half (or 20 percent in the case of holding companies) of the share capital registered in the commercial register. In this context, the new provision now explicitly states that the statutory retained earnings for own shares in a group of companies (Art. 659b nCO) and the statutory retained earnings from revaluations (Art. 725c nCO) may not be taken into account when calculating these limits. Finally, the additional provisions on the use of statutory reserves, currently governed by Art. 671 CO, will be moved to Art. 674 nCO (see last paragraph below).

Furthermore, companies must allocate 5 per cent of their annual profits to the statutory retained earnings, whereby Art. 672 nCO explicitly states that companies must eliminate any loss carried forward before allocating funds to the statutory retained earnings. Unlike under current

law, companies must make allocations to the statutory retained earnings until the latter, together with the statutory capital reserve, reach half (or 20 percent in the case of holding companies) of the share capital registered in the commercial register (under the current law, companies must make allocations to the general statutory reserve until it reaches 20 percent of the paid-in share capital). On the other hand, the second allocation to the general statutory reserve of 10 percent of the amounts paid out as a share in profits after payment of a dividend of 5 percent, for which the current law provides, no longer applies.

According to Art. 673 nCO, statutory reserves or, as of 1 January 2023, so-called voluntary retained earnings, may only be formed if this is justified by the long-term prosperity of the company, taking into account the interests of all shareholders. In addition, the revised law explicitly states that the shareholders' meeting decides on the use of voluntary retained earnings, subject to the provisions on offsetting against losses.

The current provisions on the reserve for replacement purposes (Art. 674 para. 2 item 2 CO), as well as the current provisions regarding the formation of reserves for welfare purposes (Art. 673 and 674 para. 3 CO) are abolished. Furthermore, under the revised law, the provisions regarding the revaluation reserve (Art. 725c nCO) will be moved to the provisions regarding impending insolvency, capital loss and over-indebtedness (Art. 725 et seq. nCO).

Furthermore, Art. 674 nCO explicitly governs the order in which losses must be offset: Losses must first be offset against the profit carried forward, then against the voluntary retained earnings, then against the statutory retained earnings and finally against the statutory capital reserve.

There is, however, no obligation to offset losses which exceed the profit carried forward and voluntary retained earnings against the statutory retained earnings and/or the statutory capital reserve. This means that it is still possible to carry losses forward (in part or in full) to the new annual financial statements. Therefore, with regard to the statutory retained earnings and the statutory capital reserve, only the above-mentioned sequence is mandatory but not the offsetting of losses as such.

Entry into force and need for action

Once the Corporate Law Reform enters into force on 1 January 2023, the transitional period of two years for adapting the articles of association and corporate regulations to the new law will begin. After expiry of this period, provisions of the articles of association and corporate regulations that conflict with the new law will automatically cease to apply.

Accordingly, companies should review their articles of association and corporate regulations for provisions that conflict with the new law and amend them if necessary. Provisions in the articles of association and corporate regulations that do not comply with the law will remain in force until the beginning of 2025 at the latest.

In addition, directors, officers and legal services should consider the new features and assess whether they wish to take advantage of them and/or recommend them to the company’s shareholders.

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