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Swiss Corporate Law Revision 2020 – an overview of the most significant changes for private companies from a practical point of view

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1 Introduction

1.1 Background

With the adoption of the Swiss Corporate Law Revision on 19 June 2020, the National Council and the Council of States concluded what was even by Swiss standards a lengthy legislative process. As a result, provisions on gender benchmarks and transparency rules in the commodities sector entered into force on 1 January 2021. The rest of the new provisions will enter into force on 1 January 2023.[1]

1.2 Content of the revision

The Swiss Corporate Law Revision introduces numerous simplifications and options for flexibility. These primarily include: (i) more flexibility with regard to share capital and dividends, (ii) increased protection of minority shareholders, (iii) modernisation of the general shareholders' meetings, (iv) reform of Swiss restructuring law, (v) transfer of legislation on excessive executive compensation in publicly listed companies (formerly known as 'VegüV') into the Swiss Code of Obligations, and (vi) increased gender representation in the executive board and the board of directors of listed companies.

This article summarises the main amendments of the Swiss Corporate Law Revision 2020 for privately held companies. Changes that relate only or mainly to listed companies shall (with a few exceptions) not be discussed in detail.

2 Share capital

2.1 Share capital in foreign currency

Since the revision of Swiss Accounting Law, companies are allowed to keep their financial statements either in Swiss francs or in the currency required for business operations (known as the 'functional currency').[2] The board of directors has the discretion to determine the applicable functional currency.[3]

The new law will allow companies to additionally maintain the share capital in the functional currency, thus creating a synchronisation with accounting and financial reporting rules.[4] During legislative discussions, this flexibility was disputed due to creditor protection considerations. Eventually, the compromise was reached that the Federal Council would define the permissible foreign currencies separately in an ordinance. In Annex 3

[1] Federal Office of Justice, Revision of the Company Law, available at: https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/aktienrechtsrevision14.html (as of August 8, 2022).
[2] Art. 958d para. 3 CO.
[3] BSK OR II-Neuhaus/Suter, Art. 958d N 12.
[4] Art. 621 para. 2 revCO.

to the Commercial Register Ordinance (*Handelsregisterverordnung*) the Federal Council in the meantime defined (only) the following four currencies as permissible foreign currencies: Great British pound (GBP), euro (EUR), US dollar (USD) and yen (JPY).

For the sake of creditor protection, the new law provides that the share capital at a company's incorporation must be at least CHF 100,000.[5] The applicable conversion rate shall be determined at the date of the company's act of incorporation (and not at the date of entry in the commercial register).[6] The same provisions regarding the conversion into Swiss francs apply to the minimum contribution requirements[7] as well as to the capital reduction.[8]

A currency exchange with regard to the share capital must be decided by the general meeting of shareholders as of the beginning of a financial year (prospectively or retrospectively).[9] It is worth noting that this is considered an important resolution pursuant to Art. 704 para. 1 item 9 of the revised Swiss Code of Obligations (revCO), which requires a qualified majority. Further, the resolution must be implemented by the board of directors and the articles of association must be amended accordingly. Both resolutions must be publicly certified. In the respective board resolution, the board of directors shall determine the conversion rate applied.[10] This conversion rate shall not be subject to an examination by the commercial register.[11] It should also be noted that the newly denominated share capital in a foreign currency may not be rounded up or down as a result of the conversion. Instead, a rounding up or down must be carried out by means of a parallel capital increase or capital reduction (if necessary within the framework of an existing capital band pursuant to Art. 653s revCO).[12]

For tax purposes, the relevant amounts shall be converted into CHF. The net profit shall be converted using the average exchange rate for the tax period.[13] The reporting-date principle (*Stichtagsprinzip*) applies to the valuation of assets. The exchange rate at the end of the tax period is decisive in such case.[14]

2.2 Minimum nominal value

The nominal value system for shares will remain under the new law, i.e., shares must still have a mandatory nominal value. In contrast to the current law, however, there will no longer be a minimum nominal value of one centime. The only requirement under

[5] Art. 621 para. 2 revCO.
[6] Dispatch 2017, p. 481.
[7] Art. 632 para. 2 revCO.
[8] Art. 653j para. 3 revCO.
[9] Dispatch 2017, p. 482.
[10] Art. 621 para. 3 revCO.
[11] Dispatch 2017, p. 481.
[12] Dispatch 2017, p. 483.
[13] Art. 80 para. 1bis revDBG.
[14] Art. 31 para. 5 revStHG.

the new law is that the nominal value is greater than zero,[15] which means that any small subdivision of the nominal value will be possible in the future. The same rule applies to quotas in a limited liability company (GmbH/Sàrl)[16] whose minimum nominal value under the current law is CHF 100.

2.3 Payment of share capital in qualified circumstances

In connection with the payment of the share capital in qualified circumstances the new law brings, on the one hand, certain flexibilities and, on the other, additional disclosure requirements.

The new law explicitly states that in order to be considered a permissible contribution in kind, the asset contributed must be capitalisable, transferable, available and realisable.[17] As these requirements are already practice (although not codified) under the current law, the new law does not practically result in any changes in this regard. A substantive change is, however, the deletion of the provisions regarding the intended acquisition of assets (*beabsichtigte Sachübernahme*). As a result, questions frequently raised in practice in connection with intended acquisitions in kind, such as the potential consequences of nullity of not disclosed intended acquisition of assets, will become largely superfluous.

In connection with the payment of share capital by way of set-off, the new law makes it clear that the recoverability of the claim is not a prerequisite for the set-off,[18] a welcome clarification in particular in restructuring situations. However, it should be noted that under the new law, there will (in contrast to the current law) also be the obligation to make a respective disclosure in the articles of association in addition to the disclosure obligation in the commercial register. The articles of association must disclose the amount of the claim subject to the set-off, the name of the shareholder declaring the set-off and the number of shares issued in this regard.[19] A capital increase by means of set-off is considered an important resolution pursuant to Art. 704 para. 1 item 3 revCO, and will thus require a qualified majority.

2.4 Changes to the capital

2.4.1 Ordinary capital increase

On a statutory level, the new law explicitly refers to the possibility – already allowed in practice today[20] – to resolve a capital increase up to a maximum amount (compared to a fixed amount).[21] Furthermore, the new law introduces more flexibility with regard to

[15] Art. 622 para. 4 revCO.
[16] Art. 774 para. 1 revCO.
[17] Art. 634 para. 1 revCO.
[18] Art. 634a para. 2 revCO.
[19] Art. 634a para. 3 revCO.
[20] This is already permissible today at ordinance level (Art. 47 para. 1 letters a and b HRegV).
[21] Art. 650 para. 2 items 1 and 2 revCO.

the period in which an ordinary capital increase must be reported to the commercial register. This period is extended from currently three to six months.[22] The maximum period of validity of the subscription form will also be six months in the future.

As stated above, the new law provides for disclosure requirements in the articles of association for the increase of share capital by way of a contribution of assets, by way of set-off[23] and by way of the conversion of equity into share capital.[24] Furthermore, the new law clarifies that no one may be unfairly favoured or disadvantaged in case of the withdrawal and restriction of subscription rights and when setting the issue price of new shares.[25]

2.4.2 Conditional capital increase

In accordance with existing practice, the new law extends the group of addressees of option and conversion rights. Accordingly, shareholders, members of the board of directors of the company or a related company, or third parties may also be holders of options or conversion rights.[26] The existing practice with regard to mandatory convertible bonds has thus been codified.

The new law also provides additional flexibility in this context. For instance, it will no longer be necessary to make the declaration on the exercise of option and conversion rights in writing.[27] Similarly, it will no longer be necessary to involve a bank if the capital contribution is made upon conversion by offsetting of claims. Finally, the board of directors will have the possibility to cancel conditional capital if no rights have been issued[28] (and not only, as under current law, if the rights have expired).

2.4.3 Capital reduction

The provisions on capital reduction will be governed in the chapter on amendments to the company's capital, in Art. 653j et seqq. revCO. In contrast to the current legal situation, the procedure and the various forms of capital reduction will be set out in detail in the new law. The new provisions largely correspond to the current practice, aside from simplifications in the procedure regarding creditors' calls and deadlines. In the future, only a *single* creditor's call will be necessary[29] and the filing deadline for creditors to secure claims will only be 30 days (instead of the current two months).[30] The obligation to provide a security will not apply if the claim is satisfied or if proof is provided

[22] Art. 650 para. 3 revCO.
[23] Cf. section 2.3.
[24] Art. 652d para. 3 revCO.
[25] Art. 652b para. 4 revCO.
[26] Art. 653 para. 1 revCO.
[27] Art. 653e para. 1 revCO.
[28] Art. 653i para. 1 revCO.
[29] It is permissible to carry out the creditor call before or after the general meeting of shareholders.
[30] Art. 653k para. 1 and 2 revCO.

that the creditors' claims will not be jeopardised.[31] There is a presumption in favour of this proof if there is an audit confirmation available from a licensed audit expert stating that all claims are covered despite the capital reduction. As in the case of the capital increase,[32] for capital reductions it will under the new law also be permissible to provide for a maximum amount. Finally, it should be noted that, analogous to the procedure for the capital increase,[33] the capital reduction must be carried out by the board of directors within six months after the resolution of the general meeting of shareholders,[34] although the shareholders may resolve to shorten the period.[35]

2.4.4 Capital band

One of the most significant changes of the new law is the introduction of a capital band[36] in order to make a company's capital base more flexible. The capital band is a combination of both the currently existing *authorised capital increase* and the *authorised capital reduction*. Therefore, with the introduction of the capital band the authorised capital increase will be abolished under the new law.

The capital band includes the statutory authorisation of the board of directors to increase the share and participation capital up to an upper limit or to reduce it to a lower limit for a maximum period of five years. The upper and lower limits of the capital band may not exceed or fall below the share capital entered in the commercial register by more than 50%.[37]

A company has the option of introducing a capital band at the time of incorporation or at a later stage. The latter requires a resolution of the general meeting of shareholders where, pursuant to Art. 704 para. 1 item 5 revCO, a qualified majority is required.

The general meeting of shareholders may tailor the discretion of the board of directors as set out in detail in the articles of association, subject to the framework provided by law. Among other things, the articles of association must contain details of the upper and lower limits, the end date of the capital band, the restrictions and conditions of the authorisation and the restriction or cancellation of subscription rights.[38] For instance, it is also possible to solely allow a unilateral capital band (increase only or reduction only). After each increase or reduction of the share capital, the board of directors may

[31] Art. 653k para. 3 revCO.
[32] Art. 653n No. 1 revCO.
[33] Cf. section 2.4.1.
[34] As in the case of the capital increase, the application to the commercial register (and not the entry in the commercial register) is decisive in determining the end of the period.
[35] Art. 653j revCO.
[36] Art. 653s ff. revCO.
[37] Art. 653s para. 2 revCO.
[38] Art. 653t revCO.

make the necessary resolutions and amend the articles of association accordingly by means of a public deed.

Regarding creditor protection, the lower limit of the capital band, as mentioned, may not fall below 50% of the share capital entered in the commercial register and may in no event fall below CHF 100,000. For companies with opting-out clauses, i.e., companies who do not have elected auditors, there is no possibility to reduce the capital within the capital band. Further, the provisions of the ordinary capital reduction relating to the provision for securing claims, interim financial statements and audit confirmation apply by analogy. In the event of a capital reduction within the capital band by the board of directors, no further resolution by the shareholders is required. The capital band shall lapse if, during the term of an existing capital band, the shareholders decide to increase or reduce the share capital outside the capital band or decide on a different functional currency for the share capital.[39] If a capital band shall continue to exist after such a capital-changing event, the general meeting of shareholders must determine a new capital band.

If conditional capital exists in addition to a capital band, the upper and lower limits of the existing capital band are increased accordingly in the event of an adjustment of the share capital based on conditional capital.[40] Such an increase shall not take place if a conditional capital increase is resolved *within the* existing capital band.

3 Dividends and reserves

3.1 Interim dividends now explicitly governed

Under the current law, it is disputed whether interim dividends, i.e., distributions from the profit of an ongoing financial year, are permitted. The new law clarifies in Art. 675a revCO that the distribution of an interim dividend is possible if such an interim dividend is resolved based on interim financial statements. The interim financial statements must be audited, except in the case of companies with an opting-out provision (i.e., which do not need to elect auditors) or if all shareholders approve the distribution of an interim dividend and such a dividend does not jeopardise the claims of creditors.[41]

The possibility to waive the audit of the interim financial statements if all shareholders approve an interim dividend and as long as there is no risk that claims by creditors are jeopardised, causes a discrepancy compared to the rules applicable to ordinary divi-

[39] Art. 653v revCO.
[40] Art. 653g para. 2 in conjunction with 653v para. 2 revCO.
[41] Art. 675a para. 2 revCO.

dend distributions. In case of ordinary dividend distributions, audited financial statements are always required as a basis (except in the case of an opting-out) and no exception is provided if all shareholders approve the ordinary dividend distribution.

Also not specifically addressed, but still permissible, under the new law is the distribution of an extraordinary dividend, i.e., the distribution out of available equity on the basis of already approved annual financial statements on the occasion of an extraordinary general meeting of shareholders.

The new law also specifically defines the requirements for interim financial statements.[42] In principle, interim financial statements must be prepared in accordance with the provisions of the annual financial statements and thus consist of a balance sheet, profit and loss statement and the notes to the financial statements. The requirements for larger companies and groups remain in place. Furthermore, the new law stipulates that simplifications are permissible, provided that they do not impair the presentation of the company's performance. The interim financial statements are to be named accordingly. They shall contain notes to the accounts in which the purpose of the interim financial statements, the simplifications, as well as the deviations from the principles used in the last annual financial statements and other factors which influenced the financial position during the reporting period are disclosed.[43] It should be noted that, in principle, this new legal provision also applies to all ‘interim financial statements’ or ‘interim balance sheets’ to which reference is made in other provisions under company law or special legislation (so-called dynamic reference).[44]

3.2 Further changes concerning dividends

Art. 698 para. 2 item 6 revCO stipulates that the general meeting of shareholders must formally pass separate resolutions on the repayment of the statutory capital reserve[45] and on the distribution of dividends from the company's profits.

3.3 New terminology for reserves

The new law aligns the terminology used for reserves with the terminology used in Swiss accounting law. The reserves are now divided into *statutory capital reserves, statutory retained earnings* and *voluntary retained earnings.* Art. 671 revCO clarifies that share premiums, the forfeiting of profit (*Kaduzierungsgewinn*) and contributions from shareholders or participants must be allocated to the statutory capital reserves. In order to align with accounting rules, it is no longer necessary to keep reserves for a company's own shares as Swiss accounting law no longer reports these shares as as-

[42] Art. 960f revCO.
[43] Art. 960f para. 2 revCO.
[44] Dispatch 2017, p. 618.
[45] cf. Art. 671 para. 2 revCO.

sets, but as a minus position in equity capital. Likewise, the requirement to hold reserves for replacement purposes and for the creation of reserves for welfare purposes are repealed.

3.4 Changes in the allocation of retained earnings

Also under the new law 5% of the annual profit must be allocated to the retained earnings.[46] Such allocation to the retained earnings must be made until capital and retained earnings together reach 50% (instead of 20% as before) of the registered share capital.[47] For holding companies, the threshold remains at 20% of the registered share capital. Under the new law the threshold is no longer based solely on the statutory retained earnings, but on the sum of the statutory retained earnings and the statutory capital reserve. The second reserve allocation required under the current law for the distribution of profits pursuant to Art. 671 para. 2 CO will no longer apply.

The new law allows for the creation of voluntary retained earnings under the following conditions:[48] a corresponding basis must exist in the articles of association or a resolution of the general meeting of shareholders is required. If there is a provision in the articles of association, such provision will determine when and to what extent voluntary retained earnings must be created.[49] In this case, a dividend distribution is only permissible once the statutory allocation to the voluntary retained earnings has been made. According to Art. 673 para. 2 revCO, the formation of voluntary retained earnings is only permissible if the long-term prosperity of the company justifies this, taking into account the interests of all shareholders. This provision should be interpreted restrictively, since the general meeting of shareholders is entitled, at any time, without restriction, to carry forward profits as retained earnings to the next annual financial statements, which ultimately has the same effect.[50]

3.5 Changes in the set-off regime for losses

The new law clarifies that losses must be set-off in the following order:[51] 1. with the profit carried forward, 2. with the voluntary retained earnings, 3. with the statutory retained earnings, and 4. with the statutory capital reserve. The set-off of losses against profit carried forward or voluntary retained earnings is mandatory. However, instead of setting-off against the statutory retained earnings or statutory capital reserve, losses

[46] Art. 672 para. 1 revCO.
[47] Art. 672 para. 2 revCO.
[48] Art. 673 revCO.
[49] VON DER CRONE, p. 261 N 517.
[50] VON DER CRONE, p. 262 N 518.
[51] Art. 674 par. 1 revCO.

may also be carried forward in whole or in part to new account,[52] which can lead to interesting tax benefits, as it does not reduce the tax-free distributable capital contribution reserves.

4 Shareholder rights

4.1 New thresholds

The revision strengthens minority shareholder rights. In particular, various thresholds that had to be reached to exercise minority shareholder rights have been lowered. A fundamental distinction is now made between thresholds for listed and unlisted/privately held companies. The following overview sets out the changes and the newly applicable thresholds:

Shareholder rights	Current regulation	New regulation	
		Privately held companies	Listed companies
Right to information (outside the general meeting of shareholders)	Not regulated to date.	10% of the share capital or voting rights (Art. 697 para. 2 revCO).	Not applicable.
Right to inspection	Only with the explicit authorisation of the shareholders or a resolution of the board of directors (Art. 697 para. 3 CO).	5% of the share capital or voting rights (Art. 697a para. 1 revCO).	5% of the share capital or voting rights (Art. 697a para. 1 revCO).
Right to special investigation (formerly called: 'special audit')	10% of the share capital or shares with a nominal value of CHF 2 million (Art. 697b para. 1 CO).	10% of the share capital or voting rights (Art. 697d para. 1 item 2 revCO).	5% of the share capital or voting rights (Art. 697d para. 1 item 1 revCO).
Right to convene the general meeting of shareholders	10% of the share capital (Art. 699 para. 3 CO).	10% of the share capital or voting rights (Art. 699 para. 3 no. 2 revCO).	5% of the share capital or voting rights (Art. 699 para. 3 no. 1 revCO).

[52] Art. 674 para. 2 revCO.

Shareholder rights	Current regulation	New regulation	
		Privately held companies	Listed companies
Right to add items to the agenda	10% of the share capital or shares with a nominal value of CHF 1 million (Art. 699 para. 3 CO).	5% of the share capital or voting rights (Art. 699b para. 1 item 2 revCO).	0.5% of the share capital or voting rights (Art. 699b para. 1 item 1 revCO).
Right to claim dissolution of the company	10% of the share capital (Art. 736 No. 4 CO).	10% of the share capital or voting rights (Art. 736 para. 1 item 4 revCO).	10% of the share capital or voting rights (Art. 736 para. 1 item 4 revCO).

4.2 Right to information and inspection

Shareholders of privately held companies may continue to request information from the board of directors at the general meeting of shareholders on the business of the company and from the auditors on the conduct and results of their audit, to the extent that such information is necessary for the exercise of their shareholder rights. In future, shareholders who reach the threshold of 10% of the share capital or the votes may exercise this right to information in writing at any time, even outside the general shareholders' meeting. The request for information must be addressed to the board of directors, which must provide the information within four months.[53] If the board of directors refuses to provide the information, e.g., on the grounds of business secrets or company interests, it must state the reason in writing.[54] If the information is refused in whole or in part or made impossible, the shareholders may request a court order for the information within 30 days.[55]

Under current law, the right to inspect the company's accounting records and correspondences requires explicit authorisation from the general meeting of shareholders or the board of directors. In future, shareholders who reach the threshold of 5% of the share capital or votes may also request to inspect the company's account records and files at any time. The request must be submitted in writing to the board of directors,[56] which must grant access within four months.[57] The same rules apply to justification,

[53] Art. 697 para. 3 revCO.
[54] Art. 697 para. 4 revCO.
[55] Art. 697b revCO.
[56] Dispatch 2017, p. 542.
[57] Art. 697a para. 2 and 3 revCO.

refusal and the possibility of legal action as described in connection with the right to information.

4.3 Special investigation (formerly 'special audit')

The special audit procedure (*Sonderprüfung*) is now referred to as a 'special investigation' (*Sonderuntersuchung*).[58] The threshold of 10% of the share capital or the voting rights remains unchanged for privately held companies. In the request for a special investigation, it is now only necessary to credibly establish that the founders or executive bodies have violated the law or the articles of association and that this violation is *likely* to damage the company or the shareholders.[59] As a consequence, in future, the requirement to credibly establish incurred damage will be dropped.[60]

5 General meeting, board of directors and auditors

5.1 Changes concerning the general shareholders' meeting

5.1.1 Convening the meeting

Regarding the convening and execution of the general meeting of shareholders, the new law has adapted to contemporary technological standards. Accordingly, it will be sufficient if the documents required for convening the general meeting of shareholders, i.e., in particular, the annual report and the audit reports are accessible to the shareholders electronically.[61] The following further requirements do no longer need to be observed: the requirement to make the annual report and the audit report available for inspection at the company's registered office at least 20 days prior to the ordinary meeting of shareholders and the requirement to inform registered shareholders in writing and bearer shareholders by publication in the Swiss Official Gazette of Commerce (SOGC).[62] Only the shareholders' right to receive the annual report within one year after the general shareholders' meeting has been adopted from the current law, however, subject to the electronic inaccessibility of the documents.[63] In the event that electronic accessibility is not guaranteed, a shareholder may – prior to the meeting – request timely delivery of the documents.

5.1.2 Conducting the general meeting of shareholders – multiple venues, virtual meetings and electronic means

The new law also takes account of technical developments in connection with the conduct of the general meeting of shareholders.

[58] Dispatch 2017, p. 543.
[59] Art. 697d para. 3 revCO.
[60] Dispatch 2017, p. 544.
[61] Art. 699a para. 1 revCO.
[62] Art. 696 CO; Dispatch 2017, p. 550.
[63] Art. 699a para. 2 revCO.

The new law explicitly provides that the general meeting of shareholders can be held at different venues simultaneously.[64] In such case, the votes of the participants must be transmitted directly acoustically and visually to all meeting venues. If there is a corresponding provision in the articles of association, the general meeting of shareholders may also be held abroad.[65] The board of directors may provide that the rights of shareholders who are not present at the meeting can be exercised electronically.[66]

In future, the general meeting of shareholders may also be held entirely without a meeting venue and thus purely virtually, under the condition that this is provided for in the articles of association.[67] In the case of a virtual general meeting of shareholders, the board of directors shall regulate the use of electronic means.[68] The board of directors must ensure that the identity of the participants is established, that the votes at the meeting are transmitted directly, that each participant can submit motions and take part in the discussions and that the voting results cannot be falsified.[69] The law correctly leaves the choice of electronic means to the practice. If technical problems within the company's sphere of responsibility occur during the conduct of the virtual general meeting of shareholders, the board of directors must, in principle, repeat the relevant vote or election,[70] unless the technical problems had no actual impact on the results of the vote or election.[71] Resolutions passed by the general meeting of shareholders prior to the occurrence of the technical problems remain valid.[72]

5.1.3 Other changes concerning the general meeting of shareholders

The rules on passing resolutions have also been simplified under the new law. The general meeting of shareholders can also pass its resolutions by circular resolution under the new law[73], provided that no shareholder objects.[74] In the future, the general shareholders' meeting may pass its resolutions and carry out its elections by a (*simple)* majority of the votes represented, unless the law or the articles of association provide otherwise. The current requirement of an *absolute* majority has been waived.[75]

[64] Art. 701a para. 3 revCO.
[65] Art. 701b para. 1 revCO.
[66] Art. 701c revCO.
[67] Art. 701d para. 1 revCO.
[68] Art. 701e para. 1 revCO.
[69] Art. 701e para. 2 revCO.
[70] Art. 701f para. 1 revCO.
[71] Dispatch 2017, p. 560.
[72] Art. 701f para. 2 revCO.
[73] The Board of Directors can already pass circular resolutions under the current law (Art. 713 para. 2 CO), as can the shareholders in the case of limited liability companies (Art. 805 para. 4 CO).
[74] Art. 701 para. 3 revCO.
[75] Art. 703 para. 1 revCO.

5.2 Changes concerning the board of directors

In addition to the already existing right to attend and to submit motions, the board of directors and the executive management will in the future also have the right to express their views on any item on the agenda at the general meeting of shareholders.[76]

In contrast to the current law, the new law stipulates that the election of members of the board of directors, even in the case of privately held companies, must take place individually for each member of the board of directors unless the articles of association provide otherwise or the chairman of the general meeting of shareholders decides otherwise with the consent of all shareholders represented. [77]

In order to strengthen organisational flexibility, the new law no longer provides for a board secretary.[78] For the same reason, it was also decided not to introduce the office of a vice-chairman.

Circular resolutions of the board of directors can under the new law also be passed exclusively by way of electronic means (e.g., by email) and thus without a (qualified)[79] signature.[80] It remains to be seen to what extent commercial registries will accept such electronically circulated resolutions.

If shareholders request the convening of a general meeting of shareholders, the new law clarifies that the board of directors has the obligation to convene the requested meeting no later than 60 days from receipt of the request.[81] Compared to the current law, according to which the board of directors only had to act "*within a reasonable time*", this sets a clear time limit, which improves the position of minority shareholders.

5.3 Changes concerning the auditors

The revision also contains new audit procedures for the auditors, such as the audit of interim financial statements in the case of a capital increase, constitutive capital reduction or reduction within a capital band, distribution of interim dividends or in the case of over-indebtedness.[82]

According to the current law, the general meeting of shareholders may remove the auditors "*at any time with immediate effect*".[83] In the future, the auditors can only be removed "*for good cause*", whereby the reasons must be disclosed in the notes to the

[76] Art. 702a para. 1 revCO.
[77] Art. 710 para. 2 revCO.
[78] Dispatch 2017, p. 567.
[79] BSK OR II-Wernli/Rizzi, Art. 713 N 19.
[80] Art. 713 para. 2 item 3 revCO.
[81] Art. 699 para. 5 revCO; Dispatch 2017, p. 550.
[82] Cf. Art. 652d para. 2 item 2 revCO, Art. 653l ff. revCO, Art. 653u para. 3 revCO, Art. 675a para. 2 revCO, Art. 725b para. 2 revCO; FORSTMOSER/KÜCHLER, p. 421.
[83] Art. 730a para. 4 CO.

annual financial statements.[84] The Federal Council justifies the introduction of this regulation with the protection of minority shareholders and creditors.[85]

In principle, the new law does not otherwise provide for any significant changes with regard to auditors and auditing law. An expert report commissioned by the Federal Council concluded that audit law does not require any significant revision.[86]

6 Restructuring law

6.1 Imminent illiquidity as a new legal concept

Swiss restructuring law was largely revised as part of the revision. In addition to the existing cases of capital loss and over-indebtedness, the concept of imminent illiquidity (*drohende Zahlungsunfähigkeit*) was introduced. The board of directors will be explicitly required under the new law to monitor the company's solvency and, in the event of imminent illiquidity, to adopt the necessary measures to ensure liquidity.[87] The term illiquidity is not and will not be further defined by law. According to doctrine and case law, a company is illiquid if it has neither the funds to meet due liabilities nor the necessary credit to obtain these funds if necessary.[88] If further measures are required to restructure the company, the board of directors must propose these to the general meeting of shareholders, insofar as the general meeting shareholders is competent. However, the new law does not provide for a mandatory obligation to convene such a shareholders' meeting, nor does the new law specify any deadlines. The board of directors must however act in due course (*mit der gebotenen Eile*).[89]

6.2 Capital loss

In the case of a company's loss of capital, the existing threshold of the loss of half of the capital (*hälftiger Kapitalverlust*) continues to apply. The new law, however, states that if a company does not have elected auditors, in the event of a capital loss, at least a limited audit of the last annual financial statements must be performed by a licensed auditor, unless there is an application for a debt restructuring moratorium pending.[90] In such a case, the auditor may be appointed by the board of directors.

[84] Art. 730a para. 4 revCO and Art. 959c para. 2 item 14 revCO.
[85] Dispatch 2017, p. 583.
[86] Expert report of July 20, 2017 on the possible need for action in general audit and audit oversight law, available at: https://www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2017/2017-11-09.html (as of January 8, 2021); Forstmoser/Küchler p. 421.
[87] Art. 725 revCO.
[88] BGE 111 II 206 c. 1; see also VON DER CRONE, p. 850 N 1993 with further references.
[89] Art. 725 para. 3 revCO.
[90] Art. 725a para. 2 revCO.

6.3 Over-indebtedness

The criteria for over-indebtedness remain the same under the new law. Only an existing over-indebtedness is decisive for the requirement to notify the court. Under the new law, the court does not have to be notified in the following cases: (i) as under the current law, if there is a subordination in place, provided that the subordination covers the amount owed including the interest for the duration of the over-indebtedness and (ii) if there is well-founded prospect that the over-indebtedness can be remedied within no later than 90 days as of the date when audited interim financial statements are available and creditors' claims are not jeopardised any further. The criterion that during the restructuring efforts "the claims of creditors must not be jeopardised any further" remains difficult to assess. The members of the board of directors therefore continue to have a certain personal liability risk in restructuring situations.[91]

Regarding subordinations, the new law stipulates that, in the case of claims against governing bodies, claims of corporate creditors who have been subordinated behind all other creditors shall not be taken into account for the calculation of the damage.[92]

Revaluation of real estate and participations remains possible. Dissolution of such revaluation reserves is only possible by conversion into share capital or participation capital.[93]

7 Other changes

7.1 Introduction of an arbitration clause in the articles of association

Under the new law, it will be possible to submit disputes arising under corporate law to an arbitral tribunal if the articles of association provide for it. The arbitral tribunal must have its seat in Switzerland.[94]

7.2 New limitation periods for liability claims

The general meeting of shareholders can under the new law resolve that the company must sue for the damage caused to it and the general meeting of shareholders can entrust the board of directors or a representative with the conduct of the proceedings.[95] Furthermore, the new law stipulates that the right to claims of shareholders who do not consent to a resolution to grant discharge expires twelve months after the date of the corresponding resolution.[96] Under the current law, this period amounts only to six

[91] cf. also FORSTMOSER/KÜCHLER P. 410.
[92] Art. 757 para. 4 revCO.
[93] Art. 725c revCO.
[94] Art. 697n para. 1 revCO.
[95] Art. 756 para. 2 revCO.
[96] Art. 758 para. 2 revCO.

months. The claim for damages against the responsible persons will be subject to a limitation period of three years and no longer five years.

8 Transitional provisions

Simultaneously with the entry into force of the new provisions of the law on 1 January 2023, the transitional provisions will become effective as well.

Companies that are registered in the commercial register at the time the new law comes into force and do not comply with the new provisions have two years (i.e., until 1 January 2025) to amend their articles of association and regulations to reflect the new law.[97] If this is not done within the two years, the relevant provisions of the articles of association and regulations become invalid.[98]

Capital increases that have been approved or that have been made from conditional capital are subject to the current law without any time restrictions. Only the resolutions passed by the general meeting of shareholders in this regard can no longer be extended or amended.[99]

[97] Art. 2 para. 1 Transitional Provisions.
[98] Art. 2 para. 2 Transitional Provisions.
[99] Art. 3 Transitional Provisions.

Literature and materials

Literature

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