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Flexibilization of the capital and incorporation provisions in the new company law

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1. Introduction

One of the key goals of the preliminary draft for the revision of the company law adopted by the Swiss Federal Council in November 2016 is to make the capital and incorporation provisions simpler and more flexible. The most important changes from a practical point of view in these areas are addressed below.

2. Share capital in foreign currency

Under the existing law, the share capital must be denominated in Swiss francs. In accordance with the revised law on the financial reporting, the new law allows for the share capital to also be denominated in a foreign currency essential to the business activity. Thus, it will now be possible e.g. for Swiss subsidiaries of international groups of companies to adopt a capital structure conforming to the group standard. If the share capital is denominated in a foreign currency, this currency is controlling for key capital-related aspects of the business activity. Thus, for example, dividends must be paid in the selected currency. Accounting and financial reporting must also be done in the currency of the share capital.

A prerequisite for selecting a foreign currency is that the equivalent value of the share capital at the time of incorporation must be at least CHF 100,000. After that, for reasons of transparency, the exchange rate must be shown in the deed of incorporation. For existing companies, a currency exchange is possible. This may be done at the start of a business year but shall not result in a concealed capital increase or reduction. The equivalent value of the share capital must be at least CHF 100,000 at the time of the currency change, and the exchange rate must be shown in the notarized document amending the articles of association.

3. Simplified incorporation provisions

3.1 Abolition of the provisions on (intended) acquisition in kind

The (intended) acquisition in kind will no longer constitute a case of a qualified incorporation. This means that the obligation to draw up an often time-consuming incorporation or capital increase report, and to obtain an audit confirmation, as well as the corresponding publicity in the articles of association and the commercial registry no longer applies. However, it will first have to be shown to what extent these reforms actually provide a simplification from an administrative point of view. Indeed, the provisions on (intended) *acquisition in kind* constitute nothing but a legally sanctioned circumvention of the provisions of the *contribution in kind*. The latter provisions will remain unchanged. However, circumventing the law is prohibited in all cases. If a transacttion is classified as a circumvention of the provisions on contributions in kind, it thus cannot be ruled out that the commercial registers or courts will deny their validity also under new law because the formal provisions on contributions in kind were not complied with.

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Nonetheless, in future, the protection of the capital in case of the circumvention of the regulations on contributions in kind shall be guaranteed especially through the liability claim and the restitution claim, as well as the reorganization law, the law on financial reporting and the criminal law. Whether the risk of erosion of the share capital is actually sufficiently insulated by this ex-post control remains to be seen.

3.2 Selective waiver of the notarization obligation

For simply structured capital companies, the obligation to have the documents relevant for the incorporation, dissolution and liquidation of the company as well as for the amendment of the articles of association legalized by a notary public will be waived. This will lead to financial discharge and to an acceleration of the proceedings. Companies are considered as "simply structured" if their articles of association show exclusively the legally prescribed minimum content, if their share or nominal capital is denominated in Swiss francs and if the contributions were fully paid in at the time of the incorporation.

4. Reserves and dividends

4.1 Repayment of legal capital reserves to the shareholders

In the doctrine, it was partly controversial whether the distribution of the legal capital reserve (e.g. share premiums) to the shareholders is permitted. The Federal Court answered this question in the affirmative in a recent decision (decision of the Swiss Fed. Sup. Ct. 140 III 533, consideration 6.2, p. 547 et seq.).

The revised law now explicitly stipulates, in accordance with the prevailing practice, that legal capital reserves (incl. share premiums) may be paid back to the shareholders if the legal capital reserves and retained earnings exceed 50% (or 20% for holding companies) of the share capital entered in the commercial register. In addition, a resolution of the general shareholders' meeting is required. A formal capital reduction procedure is however not required.

4.2 Possibility of distribution of interim dividends

Already today, interim dividends whose admissibility is in dispute in the doctrine and in practice are repeatedly distributed all the same. A need for interim dividends especially exists for purposes of redistributing liquidity within a group of companies.

In the new legislation, it will be explicitly permitted to distribute dividends to shareholders during the current business year (so-called interim dividends). A prerequisite for this is that the articles of association expressly provide for this possibility and that an audited interim balance sheet is prepared. Since funds flow out during the current business year even though the annual result is not yet known, for reasons of creditor protection, the restricted audit of the annual financial statement must not be waived.

5. Introduction of a capital spread, facilitated capital reduction

In the existing law, the general shareholders' meeting may authorize the board of directors to increase the share capital (authorized capital increase). The new law, however, provides that the board of directors may utilize a "capital spread" to increase *or* reduce the share capital within a range stipulated by the general shareholders' meeting for a period of at most five years. The capital spread may fall below or exceed the capital entered in the commercial register by no more than 50%.

In the case of a constitutive capital reduction, instead of three debt calls, only a single one takes place, and the time limit to register the claims is reduced from two months to 30 days. The notice to the creditors may be issued before the resolution of the general shareholder's meeting on the capital reduction; this step will also expedite the procedure.

6. Conclusion

The new company law will entail numerous elements which will provide more flexibility and new structuring options in terms of the capital and incorporation provisions.

EY advises to continue to actively monitor the reform and to review potential adaptations as a whole.

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