SWITZERLAND'S NEW CORPORATE LAW – WHAT STARTUPS AND INVESTORS NEED TO KNOW

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The revision of the Swiss corporate law is finally here! - Bringing with it a host of updates and modernizations to the legal framework governing corporations. The new provisions will not substantially affect the startup community overall. There are, however, a few key changes that are certain to have a significant impact:

Share Capital in Yen and Billions of Shares?

Whereas the minimum share capital for a Swiss corporation remains CHF 100,000, a company may now denominate its share capital in a foreign currency, namely GBP, EUR, USD and Yen, if such currency is essential for its business operations. Regardless of this, it is obviously still possible for startups to conduct financing rounds where the issue price of shares is set and paid in a currency that differs from that of the share capital, provided that the nominal value of the shares is fully covered.

Going forward, the nominal value of a share must be greater than zero, but it can be below one Swiss centime. For startups, which often have complex and dynamic shareholder structures, a tiny nominal value and the corresponding vast number of shares may add an additional (unnecessary) layer of complexity when managing their cap tables, however.

Capital Band – a Game Changer or Non-Starter?

The introduction of the capital band gives companies more flexibility to adjust their capital within a specified range. This concept allows for increases in the share capital to up to 150% of the current amount and decreases down to 50% (provided that it remains above CHF 100,000) over a period of up to five years. Companies that have opted out of the requirement to conduct a limited audit, as is often done by early-stage startups, are not permitted to implement capital decreases based on a capital band. In addition, the strict creditor protection measures applicable in ordinary capital decreases will also have to be observed when decreasing the share capital within the capital band.

Under tax law, the amount of the newly created capital reserves and of the stamp duty is assessed upon the end of the capital band only (net perspective). It is thus certainly advisable to assess whether unwanted tax consequences are triggered, in particular if the capital band should also permit capital decreases. Given these drawbacks and limitations, it remains to be seen whether the capital band and its new features will be successful in practice. Chances are that it will only be used to replicate the concept of an authorized share capital as used to date.

The End to Convertible Loans as we know them?

It is common practice in the Swiss venture ecosystem to convert outstanding convertible loans into equity through an ordinary or authorized capital increase (now: capital band) with the issue price of the shares being paid through set-off. The most significant and far-reaching change introduced in this regard, is that companies have to disclose information about the set-off in their articles of association. This includes details regarding the person acquiring shares, the claim that was set off and the shares issued in exchange. This re-

quirement may be seen as a threat to the secrecy that is vital to many startups and investors in relation to investments and financing rounds. It can thus be assumed that convertible loans will be structured differently in the future to avoid such disclosure in the articles.

Shareholders' and Board Meetings in the Four Corners of the Earth?

The revision has led to a substantial simplification of shareholders' meetings and now provides for the possibility to conduct meetings virtually or abroad. While the venue can be anywhere in the world, it still needs to be objectively chosen, which in practice limits the options. The use of electronic media is subject to certain requirements that shall ensure the integrity and transparency of the electronic meeting and the voting process. If technical issues arise during a virtual meeting, the meeting must be reconvened. For this reason, it is advisable to already announce a substitute date in the original invitation. Lastly, resolutions may now also be passed in writing or electronic form if no shareholder requests oral deliberation. In order to make use of these new possibilities, the articles of association will have to be amended accordingly.

For the board of directors, virtual meetings and circular resolutions were already practice under the previous law. It has now been clarified that circular resolutions may also be taken in electronic form. This means that also resolutions by virtue of SMS, WhatsApp and e-mail are generally possible. Startups should keep in mind that resolutions should be carefully documented for evidentiary purposes and that they may need to disclose these resolutions to third parties at a later stage. The approval of the new business plan in the WhatsApp group of the company's last Christmas party may probably not leave the best impression with potential investors conducting a due diligence. In addition, resolutions that will have to be filed with the commercial register must be executed in (hand-)writing by the relevant persons, in order to comply with the Commercial Register Ordinance.

Will the Fundraising be completed in time? The Clock is ticking in Case of financial Distress

Under the revised provisions governing financial distress, companies are required to act more quickly to take restructuring measures to avoid bankruptcy. In particular, the obligations of the board of directors in relation to the monitoring and securing of the liquidity of a company are now governed more explicitly.

If the latest annual financial statements show a capital loss, they must now be reviewed by an auditor before they are approved by the shareholders' meeting. This also applies to companies which have opted out from the requirement to conduct a limited audit, in which case an ad hoc auditor must be appointed by the board of directors. If this is omitted, the shareholders' meeting may not validly approve the financial statements. Chances are, that especially companies that have not appointed auditors may not even be aware of a capital loss. Also considering that the financials of startups, due to the high burn rate and low revenues, often show a capital loss, this certainly is a potential pitfall for startups in particular.

If the company is over-indebted, the board of directors must notify the court that will either open bankruptcy proceedings or initiate proceedings for a debt restructuring moratorium. A notification of the court may be omitted, if creditors subordinate their claims in the extent of the overindebtedness. Such subordination needs to cover the amount owed plus now also explicitly the interest due during the period of overindebtedness. As the relevant provision will also apply to already existing contracts and to ensure that the relevant subordination clauses remain valid, it is strongly advisable to review, and if required, amend, existing agreements. This of course includes any contracts for subordinated convertible loans taken out by a startup.

In addition, no notification of the court must be made, for as long as there are reasonable prospects that the overindebtedness will be remedied within a reasonable period of time, which may not exceed 90 days, and that the claims of the creditors will not be further jeopardized. This was already practice under the previous law, but there was no set deadline. In practice, a period of 4-6 weeks was generally considered acceptable, but there were also advocates for (considerably) longer periods. The 90-day-period cannot be extended and will certainly create a great deal of pressure on startups to complete a possible fundraising in time.

Looking for more insights on this topic? Don't hesitate to connect with me or any other expert at Walder Wyss – we would be delighted to discuss this with you! ■