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Revision of Swiss Corporate Law

While a few provisions have already entered into force as of 1 January 2021 (such as the provisions regarding gender diversity and the transparency requirements of commodity trading companies), the major revision of Swiss corporate law will enter into force on 1 January 2023. Essentially, the revision is intended to adapt Swiss corporate law to today's economic circumstances and needs. Furthermore, shareholder and minority rights are to be strengthened, and provisions that proved impracticable under the old law are to be adapted or eliminated. This newsletter provides an overview of the most significant changes (and required actions resulting from such changes) for listed and non-listed corporations *(AG, SA)* as well as LLCs *(GmbH, Sàrl, Sagl)*.

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Overview

The revision of Swiss Corporate Law includes many amendments and new features, in particular by introducing new flexible share capital rules, enhancing shareholders' rights, providing more flexibility in relation to shareholders' meetings and also more clarity regarding board members' duties in case of financial distress. Furthermore, the revision also integrates certain provisions that apply to listed companies only, such as remuneration restrictions, as well as provisions pertaining to gender representation quotas in respect of the board of directors and executive management.

In light of the amendments and new features introduced by this corporate law revision, the following **action items** in particular must be considered by listed and non-listed Swiss corporations and LLCs:

- The need to review and revise their **articles of association**
- The need to review and revise their **organizational regulations**
- The need to review and revise the **chairman scripts, minutes of and invitations to their shareholders' meetings**
- The need to review and adjust the **preparation and holding of their annual general shareholders' meeting**
- The need to review and revise their **shareholders' agreements** (i.e. in order to align these with the new law, the revised articles of association and the revised organizational regulations)

Please note: We are at your disposal for any questions regarding the new law and for any assistance in the implementation of the aforementioned action items.

1. New features and changes related to the share capital

1.1. Share capital in foreign currencies

The revised Swiss Code of Obligations (**CO**) brings greater flexibility with regard to share capital, notably allowing companies' share capital to be held in a foreign currency, thus eliminating the existing divergence with financial reporting law, the latter already allowing bookkeeping in foreign currencies. Share capital operations will be possible without having to convert foreign currencies into Swiss francs. However, not all foreign currencies are allowed: the share capital can only be in **British Pounds, Euros, US Dollars and Yen**. If a company wishes to change the currency of its share capital, it can do so as of the beginning of a financial year, by modifying its articles of association. The company will then have to keep accounts and file financial reports in the same foreign currency. These changes are also applicable for the quota capital of limited liability companies (**LLCs**) (*GmbH, Sàrl, Sagl*).

1.2. Abolishment of the minimum par value of shares of one Swiss centime (CHF 0.01)

Under the current law, each share must have a par value of at least one Swiss centime (CHF 0.01). In the future, shares may have **any par value above zero**. This should facilitate share splits.

1.3. Capital band (Kapitalband, marge de fluctuation du capital, margine di variazione del capitale)

One of the most significant changes is the replacement of the authorized share capital with the introduction of a capital band mechanism, *i.e.* an instrument that will provide greater flexibility for capital increases and decreases. The articles of association may authorize the board of directors to **increase and/or decrease the share capital within a certain range (capital band)** for a maximum period of five years. The limits within which the board of directors may increase and decrease the share capital must be defined in the articles of association. The upper limit for a capital increase under the capital band is 150% of the share capital, while the share capital may be reduced down to 50% of the share capital (in each case calculated based on the share capital as registered at the time of the authorizing shareholders' resolution). Accordingly, the maximum increase possible under the capital band is by 200% (if first reduced by 50% and then increased to the maximum level possible). However, a decrease within the capital band is only possible for companies that have not opted-out from the require-

ment to conduct a limited audit, and for every capital decrease carried out within the capital band, the company must respect the provisions applicable to the ordinary capital decrease regarding securing claims, interim accounts and the audit report. While the authorized share capital has been abolished, the shareholders' meeting may limit the authorization to capital *increases* only.

1.4. Changes to the provisions regarding capital increases and decreases

The revised CO delineates some **adjustments to the procedure** of the ordinary capital increase (*Ordentliche Kapitalerhöhung, augmentation ordinaire du capital-actions, aumento ordinario del capitale azionario*) and the ordinary capital decrease (*Ordentliche Kapitalherabsetzung, réduction ordinaire du capital-actions, riduzione ordinaria del capitale azionario*) (also applicable to LLCs) as well as for the conditional capital increase. The **deadline** for the board of directors to register the ordinary capital increase and the ordinary capital decrease with the commercial register **is extended to six months** (from the current three). The law also explicitly allows the **ordinary capital increase up to a maximum amount** and states that no one may be unfairly advantaged or disadvantaged not only by the restriction or cancellation of the pre-emptive subscription rights, but also by the determination of the issue price. The **capital decrease procedure** is more detailed in the revised CO, and it is also **quicker**. In the future, only one creditors' call will be required, instead of three, which can be also made before the shareholders' meeting is held. The deadline for the registration of claims by creditors to be satisfied or secured after the call is also shortened from two months down to 30 days. The company will not have to secure claims if it can show that the relative claim is not jeopardized by the decrease of the share capital. Such is presumed if an audit report is available.

With regard to the **conditional capital increase**, the new law provides for a larger pool of individuals which may receive and exercise options for new shares, also offering such possibility to existing shareholders, members of the board of directors and even third parties.

1.5. New provisions for contributions in kind and by set-off

The revised CO **repeals the provisions on the intended acquisition of assets**, and furthermore foresees new provisions regarding contributions in kind (*Sacheinlagen, apports en nature, conferimenti in natura*) and contribution by set-off, also applicable to LLCs. In particular, the criteria used in practice for the qualification of an asset as a contribution in kind (*Sacheinlagefähigkeit*) are now explicitly codified.

1.6. Reserves: Greater clarity and agio distribution

Among other changes, the new law introduces a **distinction between capital reserves (*Kapitalreserve, réserve légale issue du capital, riserva legale da capitale*) and retained earnings (*Gewinnreserve, réserve légale issue du bénéfice, riserva legale da utili*)**, aligning such definitions to the provisions on financial reporting. In the future, voluntary retained earnings may only be formed if they are justified for the long-term prosperity of the company, taking into account the interests of all shareholders.

The new law sheds light on the distribution of capital reserves to shareholders. The capital reserve originates from different kinds of capital contribution, in particular from the premium paid on shares (*agio*). It was controversial whether the *agio* could be distributed to shareholders until the Swiss Federal Supreme Court rendered a landmark decision in 2014. The revised CO codifies the practice in place since that 2014 landmark decision and explicitly states that **the capital reserve may be distributed back to shareholders** under the condition that the retained earnings and the capital reserve, after deduction of any losses, are together greater than half of the total share capital. The respective threshold for holding companies is 20% of the share capital. These clarifications also apply to LLCs.

1.7. Explicit permission of interim dividends

The revised CO offers clarity on whether a company may declare and pay interim dividends (i.e. from the profit of the current year). Under the current law, dividends may only be paid from the disposable profit (i.e. from the profit of the previous year(s)) and from reserves formed for this purpose. Therefore, Swiss legal authors in the past denied the permissibility of the declaration and payment of interim dividends. In recent years, a considerable part of legal authors argued for the admissibility of interim dividends, if such dividends were approved based on audited interim financial statements. Even the Big Four have accepted this approach for a number of years. The revised CO resolves this issue, explicitly **allowing (also for LLCs) the declaration and payment of interim dividends**: the shareholders' meeting resolves on the interim dividends based on the interim financial statements. Such interim financial statements must be audited, unless the company has opted out from the requirement to perform a limited audit.

1.8. Reverse share splits

The consolidation of shares (or reverse share split; *Zusammenlegung von Aktien, regroupement d'actions, riunione di azioni*) requires, under the current law, the approval of all shareholders. This amounts to a virtually impossible hurdle for **listed (or non-listed) companies** with a broad shareholder base. The new law introduces a facilitation for listed companies: in the future, a resolution of the shareholders' meeting regarding a reverse share split can be **adopted by a qualified majority** (as per art. 704 CO). For non-listed companies, all *affected* shareholders have to agree on the

consolidation (being in particular those whose shareholdings decrease in terms of percentage).

1.9. Participation certificates and participants

Under the current law, the participation capital (*Partizipationskapital, capital-participation, capitale di partecipazione*) must not exceed an amount equal to double the share capital. For **participation certificates listed on a stock exchange, such a limit is now raised up to ten times the share capital.** The current regime remains in place for non-listed companies. Regarding the rights of participants, certain thresholds, such as those for the initiation of a special audit in the event that a corresponding request is rejected by the shareholders' meeting, will be calculated separately for shareholders and participants. As a result, shareholders and participants will no longer be able to join forces to make such requests.

2. Strengthened shareholders rights

The revised CO brings amendments aiming at improving shareholders' rights and in particular minority shareholders' rights.

2.1. Access to corporate information at any time

Under the current law, shareholders of non-listed companies only have limited access to up-to-date information on the company and may only request to receive information during the shareholders' meeting. The new law entails an important change as it provides that shareholders of non-listed companies representing at least 10% of the share capital or the voting rights may **request business information from the board of directors**, in writing, **at any time**, and insofar as (i) it is necessary for the exercise of the shareholders' rights and (ii) it does not compromise trade secrets or other corporate interests that require protection. The board of directors shall **reply to this request within four months** and the response from the board of directors shall be made available to the other shareholders at the latest during the following shareholders' meeting. In case the board of directors refuses to disclose information, it shall justify in writing the reasons of said refusal.

2.2. Facilitated access to books and records

Books and records may be accessed by shareholders (of both listed and non-listed companies) representing **at least 5% of the share capital or voting rights** of the company, in so far as (i) the information is necessary for the shareholders to exercise their shareholders' rights and (ii) it does not jeopardize trade secrets or other interests warranting protection. **Access to the books and records shall be granted within four months** by the board of directors and the explanation for any refusal of access must be given in writing. The competence to rule on a request to access books and records was shifted from the shareholders' meeting to the board of directors, allowing the processing of such requests to be more efficient and thus increasing the shareholders' access to books and records of the company.

2.3. Special audit proceeding

The right to request a court that a special audit be ordered, after a shareholders' meeting has itself rejected the corresponding motion, has been made more flexible. First, the **threshold to file a special audit request has been lowered**. Shareholders of listed companies representing 5% of the share capital or voting rights and shareholders of non-listed companies representing 10% of the share capital or voting rights may file the request. Second, while the requesting shareholder(s) still need to demonstrate that the founders or the corporate bodies violated the law, the new law no longer requires that said violation has caused a damage to the company or to the shareholders but merely that the violation is *likely* to cause damage to the company or to the shareholders. This amendment shall allow shareholders to **use the special audit proceeding in a preventive manner**. The new law has further codified the case law rendered by the Swiss Federal Supreme Court, without bringing substantive changes.

2.4. Right to convene a shareholders' meeting

For listed companies, the **threshold** for shareholders to convene a shareholders' meeting **is lowered from 10% to 5% of the share capital or the voting rights**. For non-listed companies, the threshold remains 10% but can be met by using either the share capital or the voting rights, whereas the threshold under the current law was set solely on the share capital. The request shall be made in writing and shall contain (i) agenda items and (ii) proposals relating to the agenda items. The board of directors shall convene the shareholders' meeting within an appropriate period of time but in any case, within 60 days. If the board of directors fails to do so, the shareholders may file a request before the court.

2.5. Right to place an agenda item or to make proposals

The thresholds to request both (i) the inclusion of an agenda item or (ii) the inclusion of a proposal, **are lowered** to 0.5% of the share capital or voting rights for listed companies and to 5% of the share capital or voting rights for non-listed companies. Should the board of directors refuse the request, the shareholders may ask the court to include an agenda item or proposal in the shareholders' meeting's invitation. The new law further states that during the shareholders' meeting, **any shareholder may make proposals in relation to agenda items**, in accordance with the view expressed by prevailing scholars.

2.6. Right to be represented at the shareholders' meeting

The new law entails substantive amend-

ments regarding independent proxies notably by implementing the provisions currently contained under the Ordinance against Excessive Compensation in Listed Corporations (*VegüV, ORAb, OReSA*).

2.7. Extended information in invitations to shareholders' meetings

In the future, the board of directors will have to assure that the invitation contains all information necessary for a decision-making by the shareholders and, in addition, has to structure the agenda items and motions such that cohesion of subject matter (*«Einheit der Materie», «principe d'unité de la matière», «principio dell'unità della materia»*) is preserved. These two requirements are explicitly set forth under the revised CO. While the company may have certain discretion in this respect, the notion of factual and neutral information in the invitation will become more important than in the past.

3. Board of directors' duties in case of financial distress

The revision is essentially intended (i) to focus more on the existing and future liquidity of the company and (ii) to introduce more precise and additional duties to act for the company (i.e. for its board of directors) so that restructuring steps are taken as early as possible.

3.1. Risk of illiquidity (inability to pay)

The revision introduces an explicit **duty of the board of directors** to monitor the company's liquidity and to take appropriate action to ensure the company's ability to pay debts as they fall due. If necessary, the board of directors must take or propose **additional restructuring measures** to the shareholders' meeting, or **apply for a debt restructuring moratorium.**

3.2. Duties in case of capital loss and over-indebtedness

In addition to the newly introduced explicit duties about liquidity monitoring, the existing balance sheet-based duties of the board of directors in the event of capital loss (i.e. if the net assets cover less than half of the aggregate of the share capital and the legal reserves) or over-indebtedness (i.e. if the company's debts are no longer covered by its assets) remain in place with certain clarifications and amendments. In particular, the following main changes should be noted:

- In case the latest annual financial statements show a **capital loss (*Kapitalverlust, perte de capital, perdita di capitale*)**, the financial statements need to be **reviewed by an auditor** before they are approved by the shareholders' meeting (except if the board of directors files for a composition moratorium) **even in case the company has opted out** of the audit requirement. On the other hand, the duty to immediately convene a shareholders' meeting, if the latest annual financial statements show a capital loss, has been abolished.
- The new law expressly stipulates that in the event of **over-indebtedness (*Überschuldung, surendettement, eccedenza dei debiti*)** the board of directors does **not have to notify the insolvency court if there is a reasonable prospect of restructuring** within a reasonable period of time, but no later than 90 days after the (audited) interim financial statements are available, provided the creditors' claims are not additionally jeopardized. Such deadline cannot be extended and is likely to put significant pressure on the board of directors and its efforts to raise funds.

4. Modernization of shareholders' meetings

The revised CO provides for new features regarding the shareholders' meeting, in particular by allowing the use of electronic media. LLCs will also benefit from these new features.

4.1. Broader choice of venues of shareholders' meetings

The revised CO explicitly foresees the possibility to hold a **shareholders' meeting abroad**, provided that the articles of association include a corresponding clause and that the chosen location does not make it unreasonably harder for any shareholder to exercise its shareholders' rights. Furthermore, it is possible to hold a **shareholders' meeting simultaneously in several locations** (in Switzerland and/or abroad), provided that speeches are broadcast live, by audio-visual means, in each concurrent venue. If held abroad, the board of directors must designate an independent representative (non-listed companies may waive this requirement). If the shareholders' meeting is held abroad, the board of directors should consider the risk of creating a forum abroad or the potential constraints for other participants (e.g. the auditor or the notary public when required). A major change is the **introduction of circular resolutions**, allowing shareholders to pass shareholder resolutions in writing, unless a shareholder requests an oral discussion.

4.2. Use of electronic media and virtual shareholders' meetings

The revised CO introduces new modern features, allowing **the use of electronic media** in shareholders' meetings. Shareholders unable to attend may vote electronically, and **shareholders' meetings may be held virtually**. The articles of association have to include a related provision and the board of directors has to designate an independent representative (shareholders of non-listed companies may waive this latter requirement). If held virtually, the board of directors must ensure that: (i) each participant is identified; (ii) speeches are broadcast live; (iii) each participant is able to make proposals and take part in the debates; (iv) the voting results cannot be distorted. All participants in a virtual meeting must be able to take part and vote simultaneously at the virtually held shareholders' meeting; a shareholders' meeting by e-mail is not admissible. However visual interaction (video) is not required. If the meeting

does not take place as prescribed due to technical issues, it must be recorded as such in the minutes and must be reconvened. Decisions taken prior to the occurrence of such issues remain valid.

5. Additional changes applicable to listed companies only

5.1. Say on pay and other compensation rules

As part of the revision of Swiss corporate law, the provisions currently included in the Ordinance against Excessive Compensation in Listed Corporations, which came into force in 2014 as a result of the so-called «Minder Initiative», are to a large extent transferred to the CO. The main differences between the revised law and the current Ordinance are the following:

- **Sign-on bonuses**: Under the new law, they are only permissible if they compensate a provable financial disadvantage incurred in connection with a change of employment.
- **Value of non-compete covenants**: The new law also contains restrictions on payments based on non-compete clauses. It is required that such payments do not exceed the average annual compensation of the past three years and are commercially justified.
- **Compensation payments in connection with a previous engagement as a member of a board of directors or a management body**: Such payments are not allowed to the extent they are not in line with market practice.

5.2. Gender diversity

The revised law introduces a «**comply or explain**» rule for listed companies exceeding the relevant thresholds for an ordinary audit. Unless at least 30% of the board of directors and at least 20% of the executive management is **represented by each gender**, the reasons for such under-representation must be explained in the compensation report along with the measures taken to promote the less represented gender. The obligation to disclose such information in the compensation report shall be fulfilled at the latest as of the financial year beginning five years after the corporate law reform is effective (i.e. as of 1 January 2028), with regard to the board of directors, and ten years after (i.e. as of 1 January 2033), with regard to the executive management.

6. Other notable changes

6.1. Restitution of benefits

The revised CO brings amendments to the conditions pertaining to claiming the restitution of benefits received by members of the board of directors, executives, and people close to them. Under the current law, the above-mentioned individuals shall reimburse to the company the benefits they have (i) unduly received (ii) when in bad faith. The new law no longer requires the reception of such benefits to be in bad faith. In addition, other benefits that are blatantly disproportionate to the consideration given by the company shall be returned. The additional requirement pursuant to which the benefit shall be disproportionate to the company's economic situation is no longer applicable. The amendments thus extend the duty to return to more situations thereby improving shareholders' rights.

6.2. Arbitration clauses in articles of association

The revised CO provides for an amendment, which is also applicable to LLCs, pertaining to a new dispute resolution mechanism allowing the inclusion in the articles of association of an **arbitration clause for disputes on corporate law matters**. The resolution of the shareholders' meeting adopting the arbitration clause requires a qualified majority as per art. 704 CO. The arbitration proceeding shall be governed by Part 3 of the Swiss Civil Procedure Code and the articles of association may further provide for specific modalities notably by reference to arbitration rules. The Swiss Arbitration Centre is currently drafting a special set of rules for the upcoming arbitration proceedings resulting from the reform.

6.3. Transparency requirements of commodities companies

The revised law also requires major companies in the natural resources industry **to disclose payments to public authorities.** The reports on such payments are intended to contribute to improving transparency. A trend towards more transparency has emerged internationally in recent years, which has led to pressure on Switzerland to adopt such provisions.

Contact persons

If you require legal advice on matters relating to the revision of Swiss Corporate Law, please do get in touch with your usual contact person at Walder Wyss or send an e-mail to project-revco-mark@walderwyss.com.

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