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4. Alteration of Share Capital

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222 It is fundamental to the company limited by shares that it has at its disposal a certain amount of fixed and immutable share capital. Any increase or reduction of the share capital therefore requires an amendment to the articles of association and compliance with a formal procedure prescribed by the law (*cf.* CO 650-653i; 732-735).

4.1 Increase in Capital

4.1.1 General remarks

223 An increase in capital means that the company limited by shares issues new shares and thereby increases its share capital[1]. It thus receives additional resources of its own for the funding of new projects (*e.g.* research and development, the opening up of new markets), but also for restructuring (*i.e.* for setting off losses)[2]. Increases in capital can also be used to make additional shares available for special purposes, such as for a planned merger or demerger, for a share exchange offer to shareholders of another company considered to be worth having a share in or for the possible drawing of shares by employees as part of their remuneration package. Increases in capital can furthermore contribute to the conversion of borrowed capital into shareholders' equity, either because this can be favourable for tax reasons or because a restructuring exercise requires debts to be converted to risk bearing share capital. In addition, an increase in capital also permits to convert reserves or free shareholders' equity into share capital[3].

1 The new share capital on the liability side is matched by the new assets, *i.e.* the balance sheet total as such is increased by an increase in capital.

2 If the increase in capital is meant to lead to the creation of additional financial resources, there are alternatives worth considering, such as long-term loans, bond issues (CO 1156 et seq.; *cf.* N 199 et seq. above) or participation certificates (CO 656a et seq.; *cf.* N 194 et seq. above), voluntary additional payments by shareholders or the withholding of profits.

3 In privately held companies limited by shares, it can also occur that the majority shareholders unfairly use the increase in capital in order to force the minority to choose, by exercising their pre-emption rights, either to invest considerable additional resources into safeguarding their (already) powerless minority position or to have themselves marginalized totally.

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224 The procedure is in many respects similar to the foundation of a company limited by shares, in particular in the matter of the payment of capital contributions[4].

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Company law admits three types of increase in capital in this regard: the ordinary increase in capital (CO 650 et seq.), the authorised increase in capital (CO 651 et seq.) and the conditional increase in capital (CO 653 et seq.).

4.1.2 Ordinary and authorised increase in capital

225 The law treats the ordinary increase in capital (CO 650) as the standard method for an increase and the authorised increase in capital (CO 651 f.) as a variant of this. For an ordinary increase in capital, the general meeting makes all the essential decisions and these are merely executed by the board of directors. For the authorised increase in capital, in contrast, the general meeting only passes the resolution of principle and leaves it to the board of directors to decide whether and how the resolution will be carried out.

4.1.2.1 Ordinary increase in capital

226 The ordinary increase in capital represents the foremost practical procedure available to "private" companies limited by shares for increasing their capital. This ordinary procedure is normally chosen when all the background conditions are known; in particular who has subscribed to the new shares and at what price this has been done. The general meeting can take all the decisions itself, and the board of directors is merely required to carry them out within a period of three months (CO 650 I; *cf.* BGE 132 III 668). The resolution of the general meeting on an ordinary increase in capital requires, subject to the reservation of a contrary provision in the articles of association, the absolute majority of the votes assigned to the shares represented (CO 703). Should, however, voting shares be introduced on the occasion of the increase in capital (CO 693) or special advantages granted (CO 628 III) or pre-emption rights be withdrawn (CO 652b II) or if the increase in capital is not effected in cash[5], the law requires a qualified majority resolution, *i.e.* the consent of two thirds of the votes represented as well as the absolute majority of the nominal values of the shares represented (CO 704 I Sec. 2, 5 and 6). If the increase in capital is not registered within three months in the commercial register, the resolution of the general meeting becomes invalid (CO 650 III).

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227 In its particulars, the resolution that has to be notarised must contain the following (CO 650 II Sec. 1-9; CRO 80a I):

228 (i) the total nominal amount by which the share capital is to be increased and the amount of the capital contributions to be made in respect thereof (CO 650 II Sec. 1). In practice, however, it has also come to be accepted that only a bandwidth is specified for the increase in share capital;

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4 This strictly regulated procedure can in practice impede the efficient creation of shareholders' equity because the legislation weighted the protection of the (previous) shareholders more heavily. This has brought about actual valuation errors, especially in cases affecting the exclusion of subscription rights in authorised increases in capital (CO 652b II) as well as the exclusion of prior subscription rights in conditional increases in capital (CO 653c II), which is why the Federal Supreme Court had to take corrective action (*cf.* BGE 121 III 219).

5 As in the case of the incorporation the capital contribution for the subscribed shares can also be effected in the form of a qualified increase in capital, *i.e.* through contribution in kind or set-off with claims against the company. *Cf.* N 67 et seq. above.

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229 (ii) the number, nominal value and type of the shares as well as preferential rights attached to individual classes (CO 650 II Sec. 2);

230 (iii) the issue price or the authorisation given to the board of directors to fix the same as well as the commencement date for the entitlement to dividends (CO 650 II Sec. 3). In particular for companies quoted on the stock exchange, the regulation specifies that the general meeting does not set the issue price itself, but authorises the board of directors to do so. This allows the board of directors to adjust the increase in capital to the capital market situation and to determine the most favourable price;

231 (iv) the nature of the capital contributions, the subject matter and valuation of any contributions in kind and the name of the contributor in kind and details of the shares that he receives (CO 650 II Sec. 4);

232 (v) the subject matter of acquisitions in kind, the name of the seller and the consideration provided by the company in return (CO 650 II Sec. 5);

233 (vi) the nature and value of special privileges as well as the names of the beneficiaries (CO 650 II Sec. 6);

234 (vii) any restriction on the transferability of newly registered shares (CO 650 II Sec. 7);

235 (viii) any restriction on or withdrawal of the pre-emption right and the allocation of unexercised or withdrawn pre-emption rights (CO 650 II Sec. 8);

236 (ix) the requirements for the exercise of contractually acquired pre-emption rights (CO 650 II Sec. 9).

237 If the increase in capital is notified to the commercial registry, the commercial registrar checks to see whether the public deed on the resolution of the general meeting includes the details required by the law (CRO 80a I)[6].

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4.1.2.2 Authorised increase in capital

238 In the procedure for an authorised increase in capital, the general meeting, without resolving an increase in capital itself, authorises the board of directors to increase the share capital within a period of at the most two years (CO 651 I). Unlike an ordinary increase in capital, the general meeting merely authorises a possible increase of the share capital and authorises the board of directors to make at its own discretion the decision on the execution, the timing and the modalities of a new issue of shares within the specified time frame (BGE 121 III 219). A need for this course of action exists for example in cases where a company limited by shares might require shares in the near future in order to have at its immediate disposal adequate exchange shares for a takeover bid to be used as a means of compensating the shareholders of the targeted company, but at the present time it is not yet clear whether, when and in what numbers such shares are to be deployed effectively. The authorised increase in capital is an especially useful instrument for publicly traded companies as a means of provisionally enabling them to carry out increases in capital flexibly and at short notice, but in keeping with market conditions, since the calling of a general meeting for these companies always involves considerable expenditure.

239 The general meeting must determine via an amendment of the articles of association the maximum nominal amount by which the board of directors is allowed to increase the share capital. The authorised capital, however, may not be greater than one half of the previous share capital (CO 651 II). In addition, the authorisation in terms of the articles of association must contain the details required for resolutions on an ordinary capital increase except for particulars on the emission price, the nature of the capital contributions, acquisitions in kind and the start of entitlement to dividends, all of which

6 On the inspection powers of the commercial registrar, *cf.* N 110 et seq. above.

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can be specified by the board of directors (CO 651 III). The board of directors can in addition be authorised to make decisions on the withdrawal or the restriction of pre-emption rights (BGE 121 III 219).The general meeting's resolution on this authorisation, which must be declared in a public deed, always requires the qualified majority for important resolutions (*cf.* CO 704 I Sec. 4)[7]; it must in addition be notified to the commercial registry (CRO 81).

240 If the board of directors makes use of its authorisation, it has to pass a resolution on increasing capital, which need not be notarised or notified to the commercial register. In making the resolution, the board determines the necessary provisions insofar as they are not already included in the general meeting resolution (CO 651 IV). Following the subscription to the new shares, the board of

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directors, as in the case of an ordinary increase in capital, passes a resolution of declaration and amendment of the articles of association which must be notarised (CO 652g). This requires a double amendment of the articles of association, because, unlike an ordinary increase in capital which merely requires that the provisions of the articles on the share capital and the shares are amended, the number of shares authorised by the authorisation article and the nominal amount of authorised capital also have to be reduced accordingly, or - once the authorisation has been exhausted - they must be deleted altogether (CO 651a I).The provision on the authorised increase in capital must moreover be deleted from the articles of association by a board of directors' resolution after the expiry of the time period set down for carrying out the increase in capital (CO 651 a II).

4.1.2.3 General provisions

241 The authorised increase in capital differs from the ordinary increase in capital only in that the board of directors is not definitively instructed by the general meeting, but merely authorised to carry out an increase in capital. Both forms of the increase in capital are therefore subject essentially to the same procedural regulations (*cf.* CO 652-652h):

242 (i) *Subscription for shares*: The shares are subscribed for in a special document (the subscription form) in accordance with the rules prevailing on incorporation (CO 652 I; *cf.* also CO 630). The subscription form in this case has to make reference to the increase in capital, and it loses its binding force three months after it has been signed if it contains no time limitation (*cf.* CO 650 II and III).

243 (ii) *Prospectus*: If the shares are offered to the public, *i.e.* it is not a subscription offered to a limited group of shareholders designated in advance, the company is required to draw up a prospectus (CO 652a)[8]. This must contain the information specified by the law in respect of the company limited by shares as well as the increase in capital in order that a potential purchaser can form an objective view of the company (*cf.* CO 652a I Sec. 1-7)[9].

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7 Unlike a resolution on an ordinary increase in capital, this general meeting resolution on authorisation also amends the articles of association at the same time (*cf.* CO 651 I-III).

8 Every invitation to subscribe is public if it is not directed at a limited group of persons (CO 652a II). The rule of thumb in practice, which in no way enjoys the backing of the law, is that any number above 20 is no longer deemed to be a limited group.

9 The statutory requirements under company law on minimum contents for an issue prospectus are very limited and notably leave much to be desired in respect of actual position and future prospects of the issuer and thus provide inadequate information for the investor. In contrast to this, is the listing prospectus required for the listing of the shares on the stock exchange. This document is drawn up in accordance with the SWX and the listing rules authorised by the FBC which go considerably beyond CO 652a. Incorrect, misleading or otherwise inadequate details are subject to sanctions under prospectus liability (CO 752); *cf.* N 550 et seq. below.

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244 (iii) *Pre-emption right*: Every shareholder has the right to new shares in proportion to his previous holding (CO 652b I). The pre-emption right may be repealed only on substantial or material grounds by a resolution of the general meeting on the increase in capital (*cf.* BGE 121 III 219). In this context, substantial grounds or good cause are deemed in particular to be the takeover of a company, parts of a company or shares in it as well as the grant of a participation of the employees. The repeal of the pre-emption right must not violate the principle of equality of treatment under company law (*cf.* CO 717 II), *i.e.* it must not disadvantage or advantage anyone in any manner without good cause (CO 652b II)[10]. The limitation or repeal of the pre-emption right must be approved by a qualified majority at the general meeting (CO 704 I Sec. 6).

245 (iv) *Making the capital contributions*: The capital contributions must in principle be made in accordance with the provisions on incorporation (CO 652c; 632-635a)[11]. As well as cash and contributions in kind, the increase in capital can in particular be effected through the setting off of claims *via-à-vis* the company. Examples of cases where offsets are used include the conversion of shareholders' loans into share capital or convertible bonds that permit the obligation to contribute to be set off against the claim deriving from the bond[12]. The increase in capital can however also result from the conversion of freely available shareholders' equity (CO 652a I). By using its freely available reserves and balance sheet profit for payment in full of the shares, the company is financing the increase in capital itself[13]. It is then distributing shares free of charge to the shareholders in proportion to their prior participation[14].

246 (v) *Report on increase in capital*: The board of directors gives an account of the increase in capital in a written report; in particular it describes the

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nature and condition of investments in kind or acquisitions in kind or the withdrawal of pre-emption rights (*cf.* CO 652e Sec. 1-5).

247 (vi) *Audit confirmation*: The auditor inspects the report on the increase in capital and confirms in writing that it is complete and accurate (CO 652f I). This audit confirmation is only required when a qualified increase in capital is involved (CO 652f II). This is the case if the payment in full is effected by means of a contribution in kind, of an acquisition in kind or through an offset, if the share capital is increased through the use of own capital or if shareholder pre-emption rights are withdrawn or restricted.

248 Following the increase in capital and the writing of the report on it and, where necessary, the confirmation by the auditors, the board of directors amends the articles of association. By way of exception, the board of directors rather than the general meeting (*cf.* CO 698 II Sec. 1) has the authority to change the articles of association in these circumstances (CO 652g I). The resolution, like the declarations required by the

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10 Nor can the company use a legal restriction on the transferability of registered shares to prevent a shareholder entitled to a pre-emptive right from exercising this right (*cf.* CO 685a et seq. and CO 652b III).

11 *Cf.* N 55 et seq.; N 69 et seq.; and N 85.

12 The payment in full of shares by offsetting is also used in the case of restructuring, and it is controversial here to what extent a claim *vis-à-vis* an ailing company that has therefore little or no value can be offset by a creditor and converted to share capital. On the other hand, both the company and the creditors profit (the former because there is one debt less to be serviced, and the latter in that the amount of borrowed capital decreases).

13 The increase in share capital leads here to capital being shifted within the liability side of the balance sheet. The assets side remains unaffected and the balance sheet total remains the same.

14 These are referred to inaccurately as "gratis shares" (*Gratisaktien*). For through the issue of these new shares resources are retained in the company limited by shares and need not be distributed as dividends. Although the shareholders receive new shares free of charge, they give up their dividend. This provides the company with the advantage of being able to make further use of the resources.

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law (*cf.* CO 652g I Sec. 1-3), must be notarised (*cf.* CO 652g II and III). Following the notarisation, the board of directors gives notice of the amendment of the articles of association and its declarations relating to the effected increase in capital to the commercial register for registration (CO 652h I). The notification has to include the public deed on the resolutions of the general meeting and of the board of directors as well as the annexes and notarised copies of the amended articles of association (CO 652h II). The commercial registrar examines the documents handed in (CRO 80a; 81; 81 a). The new shares may not be issued until the increase in capital has been entered into the commercial register (CO 652h III)[15].

4.1.3 Conditional increase in capital

4.1.3.1 General remarks

249 The general meeting may approve a conditional increase in capital by granting creditors of the company or its affiliated companies under new bonds or similar debt instruments as well as employees rights to new shares (conversion or option rights) in terms of the articles of association. (CO 653 I)[16]. This increase in capital is therefore conditional because it comes about only at the time and to the extent that these conversion or option rights are exercised and the obligations

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to invest are fulfilled by offset (in the case of convertible bonds) or payment (in the case of option bonds) (CO 653 II). With this type of increase in capital, the amount by which the share capital will be increased is not known. The reason is that it depends on how many conversion or option rights are exercised. The capital is thus not increased in one go, but each time someone exercises his rights. In this regard we also speak of a "drop by drop" increase in the share capital.

250 From a functional point of view, the conditional increase in capital in itself presents no problems. The payment in full is either carried out by cash payment or through a simple verifiable offset of matching claims[17]. Other "qualified" conditional increases in capital are not possible. The need for regulation is in contrast justified by the risk of share dilution for the existing shareholders[18]. In consequence, the law contains a good number of drastic regulations, which imposes in a literal interpretation of the rules tight restrictions to the conditional increase in capital. The Swiss Federal Supreme Court has, however, intervened to correct this (*cf.* BGE 121 III 219)[19].

4.1.3.2 Requirements and methods

251 Conditional share capital may amount to a total of a maximum of one half of the share capital (CO 653a I). It proceeds on the supposition that all conversion or option rights will be made use of. The shares will also have to be paid in full (CO 653a II). In

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15 Shares issued before the increase in capital are null and void; the obligations arising from the share subscription are, however, unaffected (CO 652h III).

16 For convertibles and options as an instrument of company financing, *cf.* N 199 et seq. above. Options for employee shares permit employees to purchase shares in their company at (in most cases) less than market prices. Such options for employee shares are frequently agreed on as part of the salary.

17 Mergers and takeovers in return for new shares, on the other hand, always include a contribution in kind or acquisition in kind. For such cases the only option available in Switzerland is the authorised increase in capital with its term of validity restricted to two years (*cf.* CO 651 I).

18 This "drop by drop" increase in capital is also very difficult to reconcile with the principle of a fixed amount of capital (still) so crucial to Swiss company law (*cf.* CO 620 I).

19 This Federal Supreme Court decision stresses in particular the necessity when interpreting provisions on capital increases to take into consideration the different conditions prevailing in publicly traded companies as opposed to small and medium-sized companies (SMEs).

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addition, the basis for the conditional increase in capital must be noted in the articles of association - in the sense of a conditionally necessary article text (CO 627 Sec. 6) (*cf.* on the required details CO 653b). A qualified majority at the general meeting is required for this (CO 704 I Sec. 4). The application by the board of directors with regard to this clause on conditional capital in the articles of association is technically demanding[20]. In any case it is advisable to have the provision in the articles of association inspected first by the the commercial registrar. If conversion or option rights are granted before

registration in the commercial register of the relevant provision in the articles of association on the conditional increase in capital, they are null and void (CO 653b III).

252 In the case of a conditional increase in capital, it is absolutely necessary to exclude pre-emption rights since the new shares are destined for bond creditors or employees. In order to accommodate the shareholders here, they must be granted a prior pre-emption right to the conversion and option bonds in keeping with their participation (CO 653c I). This is necessary as a means of protecting against dilution, for it must be ensured that a shareholder can retain his percentage participation in the company. Such a prior pre-emption right can be restricted or withdrawn only when there is a good cause (CO 653c II). As in the case of ordinary and authorised increases in capital (CO 652b II), the principle of equal treatment under company law is also valid and applicable here; in particular the necessary repeal of the pre-emption right as well as the restriction or repeal of the prior pre-emption right must not be allowed to advantage or disadvantage anyone without good cause (CO 653c III). Any provisions restricting transferability can prevent the exercise of conversion or option rights only when such provisions are listed in the articles of association and in the bond prospectus (CO 653d I).

253 The exercise of the conversion or option rights is effected through a written declaration which is required to refer to the provision in the articles of association on the conditional increase in capital as well as to the prospectus when this is required by the law (CO 653e I). The contribution has to be made in cash or offset with a banking institution subject to the Federal Act on Banks and Savings Banks (CO 653e II). The shareholders' rights arise once the payment obligations have been fulfilled (CO 653e III). Subsequently, a specially qualified auditor checks at the end of the financial year to see whether the issue of the new shares conformed to the law, to the articles of association and, if this is required, to the prospectus (CO 653f I)[21]. The result of this examination is confirmed in writing by the auditor (CO 653f II). Next, the board of directors undertakes by means of a notarised deed the required step of bringing the articles of association into conformity with the effected increase in capital (increase of the share capital and corresponding decrease in conditional share capital) (CO 653g I).This public deed also confirms that the audit confirmation contains the required details on this (CO 653g II). At the latest three months after the end of the financial year, the board of directors notifies the amendment of the articles of association to the commercial registry and presents the public deed and the audit confirmation (CO 653h; CRO 82; 82a). If the conversion or the option

rights have expired, a specially qualified auditor confirms this. Here too, it is specified in a public deed that the report of the auditor contains the requisite details. Subsequently, the board of directors revokes the provision in the articles of association

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20 In BGE 121 III 219, the clause on the conditional increase in capital was found to be invalid because it contained no details (i) of the good cause for excluding the pre-emption right in the context and (ii) on the relationship of its implementation for bonds on the one hand and employee shares on the other.

21 The board of directors can also demand that the inspection be brought forward (CO 653f I).

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on the conditional increase in capital and gives notice of this to the commercial registry (CO 653i; *cf.* also CRO 82b).

4.1.4 Firm underwriting procedures

254 Companies limited by shares with large numbers of shareholders, in particular publicly traded companies, not infrequently carry out increases in capital by using a fiduciary bank or banking consortium as a go-between. In this way, the banking group first of all gives a firm undertaking to underwrite the shares, and next, it offers them at conditions agreed with the company to those entitled to receive them or to the public[22]. Until that happens, the shares are regarded as reserve shares.

255 Numerous modalities for carrying out the underwriting procedure are controversial. Especially questionable is whether underwriting procedures represent an increase in capital with or without the exclusion of pre-emption rights[23]. Some commentators take the view that underwriting the issue in this way should be regarded formally as a revocation of the pre-emption right (*cf.* CO 652b II) even though the procedure preserves the right in a substantive way for the shareholder. From this it is concluded that the formal requirements for an increase in capital with revocation of pre-emption rights must be adhered to, *i.e.* (i) the resolution must have a qualified majority (CO 704 I Sec. 6), (ii) the board of directors has to prepare a report on the increase in capital (CO 652e Sec. 4) and (iii) there must be a confirmation by the auditor (CO 652f I). The practice of the commercial registers reflects this view. In contrast, however, a different and major school of thought prioritises the material substance of the underwriting procedure arguing that in this type of indirect increase in capital the intercession of the banking consortium merely serves as a means to an end, and the end in this case is a public share issue that grants pre-emption rights. As a result of this point of view the following important consequences arise for the firm underwriting procedure: (i) mandatory prospectus; (ii) requirement to provide details to share purchasers of the subscription price as issue price; (iii) reference must be made in the resolution on capital increase that there is no

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exclusion of pre-emption rights; and (iv) a simple majority must be permitted in the general meeting (CO 703). In addition, the report on the increase in capital does not require an audit confirmation since it is a matter of a cash increase in capital with pre-emption right.

4.2 Reduction in Share Capital

4.2.1 General remarks

256 A reduction in capital means that the share capital indicated in the articles of association and entered in the commercial register is decreased. Chiefly on the grounds of capital protection, the law adheres to the principle of a fixed amount of capital (CO 620 I), and this is why the share capital is in principle immutable. A refund of resources to the shareholders at the expense of the share capital is a fundamental violation of this principle of capital protection (*cf.* CO 680 II together with 706b Sec. 3)[24]. A reduction of share capital is therefore possible only in a formal procedure,

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22 The firm underwriting must be carried out by a third party independent of the issuing company, *e.g.* by a consortium of banks provided it definitively carries the share risk in the event of the failure of the subsequent placing (BGE 117 II 290). The underwriting can be connected with both ordinary as well as authorised increases in capital.

23 It is also controversial whether these reserve shares are subject to the restrictions that exist on the acquisition of own shares (CO 659 f.); *cf.* N 158 et seq. above.

24 *Cf.* N 3; N 157 et seq. above; and also N 294; N 376; and N 446 below.

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which ensures that it is not carried out at the expense of the creditors (*cf.* CO 732 et seq.)[25].

4.2.2 Types of reduction in capital

257 Depending on economic function, there are primarily three different types of reduction in capital:

258 (i) *"Constitutive capital reduction"*: In the case of constitutive reduction in capital, the share capital is reduced through the repayment to the shareholders of their capital contribution (or through waiving their outstanding obligations for payment in full) in return for their giving up their shares for destruction or by reducing the nominal value of all the shares. This process represents the reduction of a capital surplus. The company is overcapitalised, *i.e.* it has a surfeit of capital for which it can find no use or no use producing a reasonable return or added value, and it accordingly wants to slim down its capital structure. In order to achieve this, the shareholders are "bought out", *i.e.* the company seeks to recompense the shareholders for the reduction of their participation in share capital. Through the reduction in capital - and only through this - the shareholders are given back a part of their capital contribution (or their outstanding obligations for payment in full are cancelled).

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The statutory minimum amount of share capital must not, however, be allowed to go below the fixed floor of CHF 100 000 (CO 732 V). Share capital reduced in this manner increases the returns on the remaining shares and at the same time improves the company's financial ratios. It leads in some ways to the company becoming more attractive to investors, a fact that can have a positive effect on the value of the shares or, in the case of a publicly traded company on its stock market price. This type of reduction in capital can also be used for the drop out of shareholders (by buying them out), for eliminating own shares or for carrying out a demerger. The statutory regulation for protecting creditors is primarily directed at this type of reduction in capital, as here the company is losing financial resources.

259 (ii) *"Declarative capital reduction"*: With this type of reduction in capital, when there is a balance sheet deficit, the share capital is reduced without any compensation for the affected shareholders whose shares are returned to be destroyed. The shareholders have to write off their participation accordingly. Through this reduction in capital a clearing up of the balance sheet can be brought about to eliminate the deficit balance arising from losses. This procedure causes no financial resources to flow from the company, which is why the creditors are not at risk. The law therefore also contains a special provision simplifying the procedure for this variant for reducing capital (CO 735; CRO 84 III). With the declarative capital reduction, the statutory amount of share capital again must not be allowed to fall below the required minimum of CHF 100 000 (CO 732 V).

260 (iii) *"Capital write-down"*: The reduction of capital by cutting it back, referred to as the so-called "accordion" *(Harmonika)*, produces a reduction in capital at the same time as an increase in capital to at least the previous level. This type of reduction in capital represents, over and above the declarative reduction, which merely clears up the balance sheet, a corporate restructuring measure in that the reduced ("written down") share capital is replaced by new fully paid up capital (CO 732 I). In this case, the special rules for the reduction in capital are not applicable since at the end of the procedure the capital amount remains intact and there is no outflow of resources. Consequently, a temporary reduction of the share capital to zero is permitted, for this condition lasts only for a logic second and is immediately rectified again (*cf.* BGE 121 III 420).

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[25] The provisions on reduction in capital also apply for the reduction of participation capital (CO 656a II).

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261 The company has in principle two possibilities for transferring the reduction in capital to its shares:

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262 (i) *Reduction of the nominal value of the shares*: The company can reduce the nominal value of all its shares or - while observing the principle of equal treatment or with the consent of the affected shareholders - can reduce the value of individual shares. In this case it corrects the share certificates by stamping them or exchanges them for new ones. The nominal value must amount to at least one Swiss centime (CO 622 IV).

263 (ii) *Reduction in the number of shares*: In a "private" company limited by shares it is advantageous to negotiate an amicable solution in respect of shareholders giving up their shares. A publicly traded company, however, can - insofar as it does not already have reserve shares available - buy back on the market the shares for cancellation[26]. The restriction on the acquisition of its own shares (CO 659 et seq.) is not applicable in this case since the shares acquired are destroyed within a reasonable time limit[27].

264 For these listed types of reduction in capital, both the irrevocable shareholders' rights as well as the principle of equal treatment (CO 717 II) must be taken into account. The reduction of the nominal value or the offer to take back the shares in principle apply to all shareholders. Inequality of treatment is permitted only for good cause.

4.2.3 Procedure for reducing capital

265 The procedure for reducing capital is aimed at the protection of the creditors. It must be ensured that after the reduction in capital the company still has an adequate foundation for its liabilities. In practice, the course of action is as follows:

266 (i) *Resolution on the principle*: In itself the procedure begins with a (not mentioned in the law) general meeting resolution on the principle of initiating a reduction in capital and on the basis for it[28]. In practice though, this resolution is mostly omitted or is drawn up by the board of directors alone. The board's procedure is then ratified by the general meeting in its resolution on reduction.

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267 (ii) *Special audit report*: The board of directors next appoints a specially qualified auditor (*cf.* CO 727b) to draw up a report. This report must be accompanied by the balance sheet and must confirm that the claims of the creditors are still fully covered despite the reduction in share capital (CO 732 II).

268 (iii) *Resolution on reduction*: The general meeting subsequently approves with an absolute majority (CO 703) a resolution to reduce the capital and - provided the reduction has taken place - to amend the relevant provision in the articles of association (CO 732 I). This resolution must be notarised (CO 647 I). The specially qualified auditor is required to be present at this general meeting (CO 732 II).

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26 The shareholders are, however, never required to sell their shares (CO 680 I). The buying back of their own shares by quoted Swiss companies limited by shares must be carried out in accordance with the regulations on public takeover offers under SESTA and the procedural principles laid down in Communication No. 1 of the TOB of 28 March 2000 on share buy-backs.

27 *Cf.* N 158 et seq. above (in particular N 160 in the end).

28 Under current law, there is as yet no authorised capital reduction through the granting of competence to the board of directors, by analogy with the matching special type of increase in capital (*cf.* CO 651).

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269 (iv) *Call on creditors*: A constitutive reduction in capital results in a loss of liability resources *vis-à-vis* the creditors[29]. The board of directors must accordingly publish the resolution on the reduction of share capital three times in the SOCG and in the form provided for in the articles of association. In addition, the creditors are notified that they have a period of two months after the third publication in the SOCG within which they may submit their claims and demand satisfaction or security in respect of them (CO 733)[30]. Declarative reductions in capital result in no loss of underlying resources to meet liability to the creditors since the company provides no compensation to the shareholders (*cf.* CO 735). The publication in the SOCG can therefore be omitted (*cf.* also CRO 84 III).

270 (v) *Resolution on confirmation*: After the expiry of the time limit for the call to creditors, a notary public must confirm in a notarised deed, to which the special audit report is appended, that the requirements on reduction in capital have been observed (CO 734)[31].

271 (vi) *Registration in the commercial register*: Subsequently, the board of directors gives notice of the amendment of the articles of association for entry in the commercial register (CO 734). As well as the documents required for the amendment of the articles of association, it is essential that the

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special audit report be submitted for the registration of the constitutive reduction of the share capital (CRO 84 I). Thereafter, the way is clear for carrying out the reduction, *i.e.* (in most cases) for the repayment to the shareholders.

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29 The reduction in capital does, however, leave assets intact required for meeting the demands of the creditors required, and this in itself precludes any risk to the creditors' interests. The reduction can nevertheless be problematic for creditors due to its effect on liquidity.

30 The satisfaction or securing of claims that are not due is, however, very extensive, and it is often impossible even for financially healthy companies. In practice, recourse is made to a partial securing, and this is in proportion to the outflow of resources brought about by the reduction.

31 In this public deed it must be attested that the time limit for creditors to make known their claims has expired and that these claims have been either met or guaranteed (CRO 84 II).

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