

BULLETIN JANUARY 2022

The Capital Fluctuation Margin under new Swiss Corporate Law

I. INTRODUCTION

The Parliament has adopted a new bill regarding Swiss corporate law on June 19, 2020. This new legislation is expected to enter into force in 2022. The reform is aimed at modernizing the Swiss corporate law. A series of publications shall provide an overview of the main aspects of the reform, each of which dealing with a specific topic. This bulletin will outline a new tool available to the board of directors (BoD), namely the capital fluctuation margin (marge de fluctuation de capital / Kapitalband) provided for in the future articles 653s to 653v of the Swiss Code of Obligations (CO).

We will refer to the new amendments yet to come into force as “the **New Law**” or “**PCO**”, whereas the currently applicable law will be referred to as “the **Current Law**” or “**CO**”.

II. GENERALITIES

By means of a new provision in the articles of association, the General Meeting of Shareholders (GM) will have the faculty to delegate to the BoD the capacity to increase and/or reduce the share capital within a certain range (the capital margin).

Under the capital margin provisions, the current authorized capital increase (art. 651-651a CO) – which will be removed when the PCO enters into force – will be combined with an authorized capital reduction (art. 653s PCO).

The capital margin will be particularly interesting for companies with an atomized ownership, those wishing to readily access new capital for investment purposes, or those wishing to reduce their equity.

III. CONSIDERATIONS & MISALIGNMENT

The flexibility provided by the capital margin can exacerbate misalignment between board members and shareholders since the BoD will be given additional autonomy and be less subject to the shareholders’ strict control. This may modify the existing balance of powers with the shareholders.

Furthermore, creditors can no longer assume that the registered share capital represents the limit of the voluntary distribution out of the equity side of the balance sheet. In addition, they can no longer rely on increases made under a capital margin, for those could be temporary only. The actual limit will be the reduced amount of share capital remaining after the capital margin has been fully utilized.

IV. CORPORATIONS CONCERNED

With respect to the opting-out, no limitations will be imposed under the capital margin provisions in the event of a capital increase. However, the BoD cannot be authorized to reduce the capital under the articles of association if the limited audit of annual accounts is waived (art. 653s para. 4 PCO).

V. LIMITS OF THE CAPITAL MARGIN

The authorization granted to the BoD will be valid for a period not exceeding 5 years after the resolution is passed by the GM (art. 653s para. 1 PCO).

The capital margin will then fluctuate within a “nominal” limit. Said limit can reach up to one and a half times (1.5x) the share capital registered at the commercial registry when the GM resolution is passed, and it can be reduced by half (0.5x) (653s para. 2 PCO).

Finally, some limits can be imposed to the BoD in the articles of association (art. 653s para. 3 PCO and 653t para.1.3 PCO). The capital margin provision inserted in the articles of association may thus (i) provide for a capital increase only and/or (ii) impose restrictions, burdens and/or conditions on the authorization given to the BoD.

VI. PROVISION IN THE ARTICLES OF ASSOCIATION

The items to be included in the articles of association are listed in art. 653t para. 1 PCO. The relevant provision can authorize the BoD to issue participation certificates, preferred shares or even shares with an increased voting right (art. 653t para. 1.4 PCO).

The capital margin provision can be inserted into the articles of association at any time, either upon the company’s incorporation (unanimous resolution of the founders) or subsequently, by way of a resolution of the GM (in this event, a qualified majority is required under art. 704 para. 1.5, i.e. two-thirds of the votes cast and a majority of the nominal value attached to the shares represented).

VII. PREFERENTIAL SUBSCRIPTION RIGHT

In the event of a share capital increase, the shareholders have a preferential subscription right (art. 652b para. 1 CO). As for an ordinary increase of the share capital, the

preferential subscription right can be restricted or removed in the event of a capital increase within the capital margin.

VIII. INCREASE/REDUCTION OF THE SHARE CAPITAL WITHIN THE CAPITAL MARGIN

Both the provisions relating to the ordinary increase of the share capital or the increase from the contingent capital and those relating to the reduction of the share capital will apply *mutatis mutandis* to increases/reductions within the capital margin.

Within the limits of the authorization given by the GM, the BoD may in principle increase and reduce the share capital at its discretion. In the absence of instructions, the BoD shall have residual authority.

Ordinary Increase

For the ordinary increase of the share capital within the capital margin, the BoD must first pass an increase resolution in accordance with art. 653u para. 2 PCO. Said resolution must include the provisions needed for the capital increase as listed under art. 650 para. 2 PCO.

Contingent Increase

The GM can authorize the BoD to increase the share capital within the capital margin by using contingent capital (art. 653t para. 1.9 PCO).

Relationship between contingent capital outside and inside the capital margin

The contingent capital (outside margin) and the capital margin can coexist. The subsequent introduction of contingent capital by the GM will raise the pre-existing upper and lower limits of the capital margin accordingly upon issuance of the underlying shares.

Withdrawal of the authorization

Art. 653v para. 1 PCO summarily provides that the capital margin provision contained in the articles of association will lapse if the GM increases or reduces the share capital or changes the currency in which the share capital is fixed.

However, what will lapse under art. 653v para. 1 PCO is the authorization given to the BoD to issue the conversion rights or the option (the **Instruments**), which are backed by

contingent capital, and not the capital margin itself (which includes contingent capital), if such Instruments have already been issued by the BoD. In the latter case, the contingent capital within the capital margin will have to be kept in a sufficient amount in order to preserve the exercise of the Instruments; this could be provided in the articles of association by way of a specific contingent capital provision.

Beneficiaries of Instruments

The circle of beneficiaries of Instruments will be extended to shareholders, holders of debt or similar obligations, employees, board members of the company or of another company of the group, or third parties. (art. 653 PCO).

Duty of transparency

The duty of transparency (art. 634a, para. 3 PCO) should not apply to contingent increases of the share capital by way of a set-off of claims. The same should apply to the contingent capital included in the capital margin.

IX. TAXATION

The basis of the tax consideration will be the amount by which the share capital has been increased ("net") at the end of the capital margin.

X. CONCLUSION

The capital margin interestingly gives additional flexibility to the BoD, which will nonetheless have to be accurately defined in the articles of association.

A more detailed contribution expands on the capital margin issues outlined in this bulletin and proposes a clause to be inserted in the articles of association.

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