New company law – share capital in functional foreign currency and the implications

The new company law due to come into force at the beginning of 2023 introduces a certain extent of flexibility as far as capital is concerned, including the possibility to hold share capital in a foreign currency. In the article, we explain what has to be taken into account when founding a company with share capital in a foreign currency or when subsequently converting the share capital into a foreign currency, and what effects this has on the company's annual financial statements.

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The new regulation, stating that share capital can be denominated in a foreign currency if this currency is essential to the company's business activities, eliminates the previous inconsistencies between accounting, financial reporting and tax law, and clarifies the provisions of company law regarding the share capital currency.

In order to change the share capital from Swiss francs into a foreign currency, the following requirements must be met cumulatively:

- The foreign currency must be essential to the company's business activities.
- At the time of establishment, the equivalent value of the share capital must be at least CHF 100,000
- The accounting records and financial statements must be kept in the same currency.
- The currency must be a permissible currency as determined by the Federal Council.

The notion of essential is not defined in the law. However, it can be deduced that it should be the currency that represents the economic situation of the company in such a way that third parties can form a reliable judgement. Following other accounting standards, the currency essential to the company's business activities can be compared with the concept of functional currency. The functional currency of a company is the currency of the primary economic environment in which the company operates and in which the cash flows mainly occur.

No arbitrary choice of currency

Both the accounting records and the financial statements must be in the currency chosen for the share capital. The following principle applies: the currency in which the share capital is denominated cannot be chosen arbitrarily. As of 1 January 2023, the Commercial Register Ordinance will allow only the following currencies: British pound (GBP), euro (EUR), US dollar (USD) and Japanese yen (JPY).

The conversion of the company's share capital and accounting to a foreign currency will ensure consistency between financial management internally and financial reporting externally. At the same time, it should be noted that converting the accounting records or software to a new currency is time-consuming and involves additional costs.

Change in share capital currency
The General Meeting may resolve to change the currency in which the share capital is denominated at the beginning of a financial year.

The change can be made either prospectively at the beginning of the next financial year or retrospectively at the beginning of the current financial year. In both cases, the Board of Directors must amend the articles of incorporation accordingly. In doing so, it establishes that the above-mentioned requirements for holding the share capital in the relevant currency have been met and records the conversion rate applied. The resolutions of the General Meeting and the Board of Directors must be publicly certified, but there is no requirement for an audit.

When share capital is denominated in a foreign currency, all aspects relating to the capital (e.g. dividends, reserves, over-indebtedness and taxes) must be assessed according to the corresponding foreign currency. Tax-privileged capital contribution reserves will then only kept by the Federal Tax Administration (FTA) in the currency of the nominal capital and will no longer be recorded in Swiss francs.

A company's tax declaration may sometimes also be submitted in the chosen foreign currency. However, taxes must still be paid in Swiss francs.

Effects on the statutory financial statements
One of the conditions for converting the share capital to the functional currency is that the accounting records and financial statements must be kept in the same foreign currency. Consequently, the annual financial statements must be prepared in the functional currency in future. It should be noted that this change and its effect must be disclosed in the notes to the financial statements. Since the conversion can only be carried out at the beginning of a financial year, the comparative period in the financial statements should only concern the opening balance.

Art. 958d para. 3 CO has not been changed in the new company law. If a company's annual financial statements are denominated in a foreign currency, it is therefore still mandatory for the values to be stated in the national currency in parallel. The exchange rates applied must be disclosed in the notes and explained where appropriate.

CONCLUSION
The possibility to convert the share capital into a currency other than the Swiss franc (permissible foreign currencies are the British pound, euro, US dollar or Japanese yen) can be interesting for companies operating in an international environment because dividends, reserve allocations or tax calculations etc. will no longer be denominated in Swiss francs in future, but in the functional currency in which the relevant company "thinks" and is managed. However, for the change in currency to be successful, there are a number of issues that need to be addressed and evaluated early on.