

## NO MULTIPLE USE OF AN “UP-TO” CAPITAL INCREASE (MUNICH, HIGHER REGIONAL COURT, ORDER DATED 22 SEPTEMBER 2009 – 31 WX 110/09)

With its order dated 22 September of last year, the Munich Higher Regional Court addressed questions concerning legislation governing capital increases by stock corporations that are of importance in the context of establishing the liability of companies.

I. In simple terms, the decision was based on the following facts: the shareholders of a stock corporation adopted a resolution to increase the share capital of the company by up to EUR 50,000.00 from EUR 120,000.00 to up to EUR 170,000.00 at their annual shareholders' meeting held in the summer of 2008. Almost four months later, the resolution concerning this capital increase and its execution in the amount of EUR 21,250.00 were submitted for recording in the commercial register and the entry was subsequently also registered. The supervisory board amended the company's bylaws accordingly.

In June of 2009, the company then submitted a second entry to the effect that its share capital had been increased by a further EUR 13,500.00 under the same resolution. With what is referred to as an interim order, the responsible commercial register notified the company that the entry could not be recorded because the capital increase that had been approved by the shareholders had already been effected and was therefore obsolete.

The notary involved objected, arguing that the resolution dated 28 August 2008 contained no restriction of the capital increase to a single procedural step. The Regional Court rejected the appeal. The Munich Higher Regional Court confirmed this decision following a further appeal.

II. With its opinion to the effect that a regular capital increase cannot be carried out in several phases, the Munich Higher Regional Court adhered to the line of reasoning prevailing in the scholarly literature. In reaching its order, the Court addressed the difference between a capital increase within the meaning of sections 182 et seq. of the Stock Corporation Act (capital increase in the form of contributions) and what is referred to as authorized capital within the meaning of sections 202 et seq. of the Stock Corporation Act.

A capital increase in the form of contributions to capital requires a resolution by shareholders to amend the company's bylaws. In order to avert the eventuality of failure of a capital increase that has been approved because the capital cannot be raised, resolutions frequently include a minimum or maximum amount, which, according to prevailing opinion, is also permissible. The number of shares issued is then determined by the amount of the capital increase to be recorded. The only requirement is that the minimum amount be reached and the maximum amount not exceeded.

On the other hand, a shareholders' resolution pertaining to authorized capital within the meaning of section 202 of the Stock Corporation Act allows management a specific period (a maximum of five years) during which share capital may be increased by a specific nominal amount through the issue of new shares against cash payment. Although management has for the most part the freedom to decide to acquire fresh capital and, according to prevailing opinion, may also do so in a series of steps, the situation is different in the case of a shareholders' resolution approving a capital increase in the form of contributions. In this case, management is essentially limited to implementing the content of the resolution.

In order to establish a clear-cut distinction between these two procedures, the Court rightly found that the management of a company may not have several capital increases recorded on

the basis of the same shareholders' resolution. The capital increase pursuant to the resolution was therefore effected with the submission and registration of the first capital increase in this case. As a result, a further increase would have necessitated a new resolution. The Munich Higher Regional Court made it clear at the same time that a resolution to carry out a capital increase containing a minimum or maximum amount must also specify the time frame for implementation. Otherwise, management would be able to determine, at its sole discretion, the time of subscription of the new shares and as a result the actual amount of the capital increase. In view of the necessity of maintaining the distinction from authorized capital, this time limit may not be overly generous.

III. If the intention is to find the most flexible means possible of acquiring capital, authorized capital within the meaning of sections 202 et seq. of the Stock Corporation Act should be created by an appropriate shareholders' resolution. In the case of resolutions approving a capital increase in the form of contributions, it is necessary to specify a time frame for implementation and in doing so, to avoid an excessively long period. A time frame of up to six months is, however, likely to be permissible. In the event the governing corporate bodies exceed this time frame, the shareholders' resolution may be contestable or even void.

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