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# KEY ASPECTS OF SAFEGUARDING OF SHAREHOLDERS WITH REGARD TO AUTHORIZED CAPITAL

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## 1. INTRODUCTION

With regard to increase of subscribed capital, the safeguards arising from the mandatory passing of an appropriate general meeting resolution are further enhanced by additional safeguards aimed at preserving the basic share in the subscribed capital of a stock company, and the safeguarding of shareholders from (commercial) dilution of their rights.[1] The statutory pre-emptive right to subscribe new shares is a key institution in the shareholder safeguarding system, since the pre-emptive right entitles any shareholder to a pre-emptive subscription of new shares in the amount corresponding with his share in the (existing) subscribed capital (first paragraph of Article 337 of the Companies Act; hereinafter: ZGD-1[2]). In case their pre-emptive right is disapplied (excluded), shareholders are exposed to the risk of dilution of rights and dilution of the value of their shares. The provisions of Article 337 of ZGD-1 must therefore be applied *mutatis mutandis* to authorized capital as well (first and second paragraph of Article 354 of ZGD-1), which is considered a most flexible form of subscribed capital increase, allowing management or supervisory bodies of a corporate entity to quickly respond to current circumstances by exercising their powers and authorities granted by the corporate charter (Article 353 of ZGD-1) of a company.

[1] The article is based on the PhD thesis entitled Safeguarding of Shareholders and Creditors when changing the Subscribed Capital of Stock Company I have successfully defended in January 2015 at the University of Maribor, Faculty of Law.

[2] Companies Act, Official Journal of the Republic of Slovenia, No. 42/2006 with subsequent amendments and revisions.

Providing a contribution is the basic (and, most often, the only) obligation of a shareholder (Article 222 of ZGD-1). The law also governs special circumstances when shareholders are called to contribute in-kind contributions. Assets contributed as in-kind contributions shall be transferred to a corporate entity in a correct manner (cf. third paragraph of Article 191 of ZGD-1), since the value of an in-kind contribution must correspond to the amount of the newly acquired share and the power of the ownership right. The latter is also the reason why in-kind contributions are, with certain narrow restrictions, subject to mandatory audit.

The position of a shareholder is further safeguarded by provisions restricting the subscribed capital increase from a quantitative perspective. By instituting the aforementioned restrictions, the law safeguards the shareholders from excessive infringement of their rights, and prevents excessive infringement of the autonomy of the general meeting. The subsidiary nature of the capital increase mechanism (third paragraph of Article 354 of ZGD-1) with regard to authorized capital is similar to the nature of the ordinary subscribed capital increase. For clarity purposes, the article first touches upon the principles and regulations governing the ordinary increase of subscribed capital, and later compares the similarities and differences with regard to authorized capital.

## 2. THE PRINCIPAL OBLIGATION OF THE SHAREHOLDER

While the second and third paragraph of Article 168 of ZGD-1 exclude the liability of a shareholder with regard to liabilities of the corporate entity towards its creditors ("outwards" exclusion of liability), Article 222 also limits the liability of a shareholder within the scope of the relationship between himself and the company ("inwards" limitation of liability). In addition to limiting the liability, the aforementioned provision also limits the risks assumed by a shareholder, since the only obligation of a shareholder is thus to provide a contribution, the amount of which is determined by the issue price of a share (Article 173 of ZGD-1). The majority of what the shareholder shall contribute to a stock company is governed by Article 222 of ZGD-1 (the supplementing, optional part is governed by Article 228 of ZGD-1). There are neither corporate law nor corporate charter provisions stipulating the obligation of a shareholder to provide additional contributions.[3] The upper limit of a shareholder's obligation is equal to the (upper) limit of the issue price. The lower limit is stipulated by means of a ban on issuing shares under par (first paragraph of Article 173 of

[3] Cf. E. Bungeroth in Münchener Kommentar (2008), § 54, line number (hereinafter: l. no.) 7, 21; M. Lutter in Kölner Kommentar (1988), § 54, l. no. 2; U. Hüffer, op. cit., § 54, l. no. 5.

ZGD-1). The lower limit is thus determined as the nominal amount of a share, or corresponding amount in case of no-par value shares, whereas the law refers to the lower limit as the "Minimum Issue Price" (first paragraph of Article 173 of ZGD-1). With nominal amount shares, the issue price is equal to nominal (par) amount (second paragraph of Article 172 of ZGD-1) or the amount increased by the capital surplus ("Agio"), whereas with no-par value shares, the issue price is equal to the corresponding amount (third paragraph of Article 173 of ZGD-1) or the amount increased by the capital surplus ("Agio"; second paragraph of Article 173 of ZGD-1).

## 3. IN-KIND CONTRIBUTIONS

Article 356 of ZGD-1 governs the issue of shares in exchange for in-kind contributions with regard to authorized capital. The regulation is very similar to the regulation of ordinary subscribed capital increase (Article 334 of ZGD-1) and conditional subscribed capital increase (Article 345 of ZGD-1). The authority granted to subscribed stock capital increase shall stipulate the provision of in-kind contributions (first paragraph of Article 356 of ZGD-1), as well as selected mandatory elements (second paragraph of Article 356 of ZGD-1). The contributions usually need to be audited (third paragraph of Article 356 of ZGD-1). The issue of new shares in exchange for in-kind contributions requires consent of the supervisory board (first paragraph of Article 356 of ZGD-1). The fifth paragraph of Article 356 of ZGD-1 governs an exemption with regard to the contribution provided by means of pecuniary claims, arising from the workers' right to participate in profit-sharing. In the latter case, the second and third paragraphs of Article 356 of ZGD-1 do not apply. Article 356a of ZGD-1 governs a special circumstance, where the audit of the contributions provided in the capital increase is not mandatory, despite the contributions being provided in-kind. The aforementioned provision is modelled after the regulation of ordinary subscribed capital increase (Article 334a of ZGD-1), with minor adjustments suited to the characteristics of authorized capital.

Shares may be issued in exchange for in-kind contributions only if stipulated by the underlying authorization (first paragraph of Article 356 of ZGD-1). The authorization may be general, i.e. without special details and characteristics stipulated by the second paragraph of Article 356 of ZGD-1 (e.g. the authorization may stipulate that new shares may be issued in exchange for cash or in-kind contributions).[4] The authorization may, however, be limited to a particular in-kind contribution, to in-kind contributions of a certain type or to a

[4] Cf. W. Bayer in Münchener Kommentar (2011), § 205, l. no. 10; R. Veil in Schmidt/Lutter AktG, § 205, l. no. 4.

predetermined quantity of new shares or certain part of the authorized capital.[5] Moreover, the legislation also allows for the full authorized capital to be allocated for the issue of new shares in exchange for in-kind contributions.[6]

In order for a company to be allowed to issue new shares in exchange for in-kind contributions, certain elements and criteria (as with ordinary subscribed capital increase pursuant to the first paragraph of Article 334 of ZGD-1) need to be determined in advance, such as the subject of the in-kind contribution, person or entity from whom the corporation will acquire the subject of the contribution, number of shares to be issued and, in case of nominal value shares, the nominal value of shares to be provided in exchange for a contribution. The aforementioned elements and criteria may be determined by the general meeting as part of the authorization, or, if not determined by the general meeting, by the management of a company (second paragraph of Article 356 of ZGD-1).

### 3.1. Audit and simplified subscribed capital increase

The issue of shares in exchange for in-kind contributions as part of the utilization of available authorized capital shall be, in principle, audited by a single or several auditors. As in the case of ordinary subscribed capital increase (Article 334 of ZGD-1), the law calls for the *mutatis mutandis* application of provisions governing the formation of a company (third paragraph of Article 356 of ZGD-1).

The institution of simplified subscribed capital increase by means of in-kind contributions where no mandatory audit of the shares issued in exchange for in-kind contributions is prescribed follows the basic pattern of ordinary subscribed capital increase (Article 334a of ZGD-1). The intent and purpose of such a regulation is to allow stock companies to increase their subscribed capital by means of in-kind contributions without an (time-consuming and costly) audit, providing the correct value of in-kind contributions may be determined in another (correct) manner.[7] Even when new shares are issued on grounds of available authorized capital, mandatory auditing may be waived only in the three cases, which are expressly stipulated by the first paragraph of Article

[5] W. Bayer, op. cit., § 205, l. no. 10.

[6] Ibid; R. Veil, op. cit., § 205, l. no. 4.

[7] Cf. Point (3) of the preamble to the Directive 2006/68/EC: "Member States should be able to permit public limited liability companies to allot shares for consideration other than in cash without requiring them to obtain a special expert valuation in cases in which there is a clear point of reference for the valuation of such consideration. Nonetheless, the right of minority shareholders to require such valuation should be guaranteed." (Directive 2006/68/EC of the European parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital).

194a of ZGD-1. Moreover, in case with regard to authorized capital, additional publicity requirements are mandatory. Whenever authorized capital is formed by means of changes or amendments to the corporate charter (second paragraph of Article 353 of ZGD-1), the agenda of the general meeting, convoked to decide on the formation of authorized capital, shall state that the issue of shares in exchange for in-kind contributions needn't be audited (first sentence of the second paragraph of Article 356a of ZGD-1). The same statement shall be included in the proposal passed by management or supervisory bodies (second sentence of the second paragraph in relation with the third paragraph of Article 356a of ZGD-1). Since the authority with regard to authorized capital is an integral part of the corporate charter (second paragraph of Article 353 of ZGD-1), the aforementioned statement will also be reflected in the authority itself. Unlike with ordinary subscribed capital increase, authorized capital does not require the resolutions of the general meeting (and authority per corporate charter) to include elements and requirements stipulated by the second paragraph of Article 356 of ZGD-1, even when the issue of new shares needn't be audited (cf. second paragraph of Article 356a of ZGD and second paragraph of Article 334a of ZGD-1). The subject matter is thus governed by provisions of the second paragraph of Article 356 of ZGD-1 as well.

Since it is mandatory for the general meeting resolution to include the stipulation that the issue of new shares in exchange for in-kind contributions needn't be audited, the authority to decide on the omission of auditing is thus necessarily vested in the general meeting. Even though the institution of authorized capital denotes the authority of the management to decide on an increase of subscribed capital, the decision to omit auditing in cases where new shares are issued in exchange for in-kind contributions is (already) taken by the general meeting. The management namely does not have the authority to omit auditing.

The characteristics of authorized capital, from which new shares in exchange for in-kind contributions without an audit may be issued, are especially at the forefront in relation to a special notification passed by management or supervisory bodies prior to the actual provision of in-kind contributions (the notification is envisaged only with regard to authorized capital), and in relation with the statement of management or supervisory bodies after the handover of the in-kind contribution. Members of management or supervisory bodies shall issue a special notification no later than five business days prior to the handover of the subject of the in-kind contribution, which shall include the date of the resolution confirming the issue of shares, and other relevant data stipulated by Indents 1 through 4 of the fourth paragraph of Article194a of ZGD-1. Pursuant to the first sentence of the fourth paragraph of Article 356a of ZGD-1, management or supervisory bodies shall present the notification

(no later than five business days prior to the handover of the subject of in-kind contributions) to the registrar, and publish the notification on the AJPES website, as well as in the newsletter or electronic medium of the company. Furthermore, management or supervisory bodies shall present to the registrar and publish in the aforementioned public records a statement that no new circumstances have arisen since the first notification which may materially affect the value of the contribution in-kind (second sentence of fourth paragraph of Article 356a of ZGD-1). The aforementioned statement shall be published and presented no later than one month after the handover of the subject of the in-kind contribution.

As with ordinary subscribed capital increase, in case of in-kind contributions as referred to in Indent 2 or 3 of the first paragraph of Article 194a of ZGD-1, shareholders are given the option to file a motion to appoint an auditor, who will audit the issuance of shares executed in exchange for in-kind contributions. Shareholders may file the motion until the day of the handover of the subject of the in-kind contribution (second sentence of the fifth paragraph of Article 356a of ZGD-1). In case the issue of shares is audited, the statement of management or supervisory bodies, which is mandatory after the handover of the subject of the in-kind contribution in the absence of an audit (fourth sentence of the fifth paragraph of Article 356a of ZGD-1), need not be passed.

## 4. CONTRACTS ON IN-KIND CONTRIBUTIONS ENTERED INTO PRIOR TO THE REGISTRATION OF A COMPANY IN THE COURT REGISTRY

Article 357 of ZGD-1 governs the situation when contracts on in-kind contributions have been entered into prior to the registration (formation) of the company in the court registry. The situation arises from the expectation of a future subscribed capital increase from authorized capital, the authority for which is already stipulated by the corporate charter (first paragraph of Article 353 of ZGD-1). The purpose of the provisions referred to in Article 357 of ZGD-1 is to prevent the circumvention of provisions which govern the formation of a company by means of in-kind contributions.[8] Without the aforementioned safeguard, management or supervisory entities could execute a concealed formation by means of in-kind contributions.[9]

The safeguard stipulated by article 357 of ZGD-1 may be a bit superfluous, since the audit of in-kind contributions is also governed with regard to authori-

[8] Accord W. Bayer, op. cit., § 206, l. no. 1, for § 206 of the German AktG (»Aktiengesetz«).

[9] Cf. W. Bayer, op. cit., § 206, l. no. 1.

zed capital. Provisions governing the formation of a company (third paragraph of Article 356 of ZGD-1) should namely be applied *mutatis mutandis* also to the aforementioned audit. The same applies also to the issuance of new shares in exchange for in-kind contributions which need not be audited (Article 356a of ZGD-1). The crucial meaning and safeguard of Article 357 of ZGD-1 is thus reflected in the stipulations on the issue of shares in exchange for in-kind contributions referred to in the corporate charter, which denote a restriction of powers and authorities of management bodies, as well as in certain additional obligations arising from the *mutatis mutandis* application of provisions governing the formation of a company (e.g. mandatory report, etc.).

What Article 357 of ZGD-1 fails to elaborate, however, is who shall perform the obligations arising from the mandatory *mutatis mutandis* application of provisions governing the formation of a company. A *mutatis mutandis* application of Articles 193 through 197 of ZGD-1 suggests the obligation to take additional actions, primarily the obligation to draw up a "formation report" which, pursuant to the first paragraph of Article 193 of ZGD-1, needs to be drawn up by the founders, whereas the members of management or supervisory shall, pursuant to the first paragraph of Article 194 of ZGD-1, determine the compliance of formative procedures. However, pursuant to the first paragraph of Article 196, (founding) auditors are entitled to request additional clarification and proof from the founders. In order to find an answer, one needs to turn to § (Section) 206 of the German *Aktiengestz* (AktG), which served as a model for Article 357 of ZGD-1. According to Section 206, the tasks of the founders are to be understood as the obligations of the management board, whereas the action of applying for and registering the company shall be understood as the action of applying for and registering the subscribed capital increase.

### 4.1. Relevant provisions in the corporate charter

If any contracts referred to in the previous paragraph have been entered into prior to the registration (formation) of the company in the court registry, the authority stipulated by the corporate charter (first paragraph of Article 353 of ZGD-1) shall allow for the issue of shares in exchange for in-kind contributions (first paragraph of Article 356 of ZGD-1), and provide information on in-kind contributions stipulated by the second paragraph of Article 356 of ZGD-1 (subject of the in-kind contribution, person from whom the company will acquire the subject, number of shares and, with nominal value shares, the nominal value of shares to be provided in exchange for the contribution). If no audit of the issue of shares is expected, Article 194a of ZGD-1 shall be applied *mutatis mutandis* (second sentence of Article 357 of ZGD-1).

In case the corporate charter does not include the prerequisite stipulations regarding in-kind contributions, contracts on in-kind contributions are null and void in relation to the company (*mutatis mutandis* first sentence of the third paragraph of Article 187 of ZGD-1). If the execution of subscribed capital increase is nonetheless registered in the court registry, the subscribed capital is, in fact, considered increased, however, the new shareholder shall pay the issue price in cash (*mutatis mutandis* second sentence of the third paragraph of Article 187 of ZGD-1).

### 4.2. Performance of additional obligations

A *mutatis mutandis* application of Articles 193 through 197 of ZGD-1 suggests that, in the utilization of authorized capital, management board members are obligated to draw up a report on the increase of subscribed capital,[10] which is modelled after the Formation Report (Article 193 of ZGD-1). Moreover, the capital increase shall be examined and reviewed (*mutatis mutandis* Article 194 of ZGD-1) by management or supervisory bodies (in a two-tier governance system also by the management board[11]) and (external) auditors, unless the capital increase was executed by means of in-kind contributions referred to in the first paragraph of Article 194a of ZGD-1. The auditors may request from the management to provide any and all explanations and proof (*mutatis mutandis* first paragraph of Article 196 of ZGD-1).

## 5. PRE-EMPTIVE RIGHT TO ACQUIRE NEW SHARES

The first paragraph of Article 337 of ZGD-1 (found among provisions governing ordinary subscribed capital increase) grants every shareholder a pre-emptive right to subscribe new shares in accordance with his participation in the subscribed capital. The pre-emptive right is a basic property right, which is independent from respective share classes.[12] By exercising the pre-emptive right, a shareholder is able to preserve his (proportional) share of the company, while also preventing the dilution of his shareholder's rights. Provisions of Article 337 of ZGD-1 need to be applied *mutatis mutandis* also to authorized capital (first and second paragraphs of Article 354 of ZGD-1). In the European legal framework, the pre-emptive right to acquire new shares is governed by Article 33 of Directive 2012/30EU.[13]

[10] Term adopted after W. Bayer, op. cit., § 206, l. no. 11.

[11] Cf. U. Hüffer, op. cit., § 206, l. no. 5.

[12] M. Kocbek/S. Prelič in ZGD-1 (2007), p. 606-607.

[13] Directive 2012/30/EU of the European parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members

A pre-emptive right may be fully or partially disapplied (first sentence of third paragraph of Article 337 ZGD-1). However, by disapplying the pre-emptive right, (existing) shareholders are exposed to significant risk which may negatively affect their ownership position, since the disapplication may, on one hand, result in the dilution of ownership rights and, on the other hand, cause the dilution of the value of their shares.[14]

By not being able to pre-emptively subscribe such a volume of new shares which would correspond with their incumbent share in the subscribed capital, shareholders will generally not be able to preserve their proportionate share (since the share will be necessarily reduced). It is also fact that the voting powers will undergo a certain shift.[15] Moreover, shareholders may lose the (previously existing) blocking minority and even lose minority rights, which require a certain threshold to be effective (e.g. third paragraph of Article 263, second paragraph of Article 276, third paragraph of Article 295, second paragraph of Article 399 of ZGD-1). If new shares are assigned to a third party shareholder or a new large shareholder, the company may become dependent or, if already dependant, the dependence may increase.[16] The disapplication of pre-emptive rights may also result in the dilution of property rights, since, e.g. the participation of shareholders in distributable profit is determined in proportion to their share in the subscribed capital (first paragraph of Article 231 of ZGD-1). Shareholders are also exposed to the risk of dilution of the value of their shares[17] if the issue price of new shares is disproportionately low. In the aforementioned case, a shareholder (whose pre-emptive right has been disapplied) is not able to use the benefit of a low issue price, and thus unable to

and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. Unlike Slovene law, the first paragraph of Article 33 of Directive 2012/30/EU stipulates a pre-emptive right to acquire new shares only in cases when the capital is increased by considerations in cash. For the compliance of a broader regulative framework, which expands the effects of a pre-emptive right also to capital increase by in-kind contributions, with Directive 2012/30/EU see only M. Habersack/D. A. Verse, op. cit. (2011), § 6, l. no. 84.

[14] The double-dilution effect is referred to also by N. Samec, op. cit., p. 132. Also M. Habersack/D. A. Verse, op. cit. (2011), § 6, l. no. 79, 82.

[15] Unless subscribed capital is increased only with the issue of priority shares without voting rights. However, even in the latter case, there is still a danger of the voting rights shifting, if such shares are later assigned voting rights pursuant to the second paragraph of Article 315 of ZGD-1.

[16] R. Veil, op. cit., § 186, l. no. 24.

[17] In other words, shareholders are exposed to the risk of dilution of the value of their ownership rights (cf. U. Hüffer, op. cit., § 255, l. no. 2).

maintain his share in the company at this lower price (at the lower selling price of new shares).[18] A legal remedy available to mitigate the aforementioned risk is stipulated by the second paragraph of Article 400 of ZGD-1 – special appeal against a general meeting resolution on capital increase.

The legislative framework governing the safeguarding of shareholders against the forgoing risks is mostly focused on formal (procedural) requirements, which need to be fulfilled in order to disapply the pre-emptive right. Substantive (material) assumptions, however, are only hinted at in the second sentence of the fourth paragraph of Article 337 of ZGD-1 (justified reasoning, justified issue price).[19] Substantive requirements are a balancing act between the following interests: safeguarding of (minority) shareholders on one hand, and the interest of a company in obtaining financing on the other, with the aim of not restricting the interests of a company to an excessive extent. [20]

Formal requirements may be summarized in three groups: (i) correct publication of the subject matter on which the general meeting shall decide (first sentence of the fourth paragraph of Article 337 of ZGD-1), (ii) general meeting resolutions (third paragraph of Article 337 of ZGD-1), (iii) management report (second sentence of the fourth paragraph of Article 337 of ZGD-1). The fact that a disapplication of the pre-emptive right requires the fulfilment of substantive requirements is nowadays a generally accepted fact.[21] In other words, the disapplication of a pre-emptive right needs to be substantively justified.[22] Substantive justification is provided (i.e. substantive requirements are met), if the disapplication of the pre-emptive right serves a purpose and objective which is in the best interest of the company, if the disapplication is appropriate and necessary for the company to achieve said objective, and if the disapplication is proportionate to the desired objective.[23]

### 5.1. Disapplication of the pre-emptive right to new shares with regard to authorized capital

Similar to the forgoing, shareholders are ensured a statutory pre-emptive right to acquire new shares also with authorized capital, which, as referred to before,

[18] Cf. R. Veil, op. cit., § 186, l. no. 24; M. Schwab in Schmidt/Lutter AktG, § 255, l. no. 1.

[19] Cf. M. Kocbek/S. Prelič, op. cit., p. 605-606.

[20] Cf. R. Veil, op. cit., § 186, l. no. 25.

[21] Cf. only M. Kocbek/S. Prelič, op. cit., p. 611.

[22] M. Kocbek/S. Prelič, op. cit., p. 611.

[23] U. Hüffer, op. cit., § 186, l. no. 25. Substantive requirements for the disapplication of the pre-emptive right have been instituted in German law by legal theory and case law, most notably with the breakthrough in the "Kali und Salz" case (BGHZ (German Federal Court of Justice ("Bundesgerichtshof ") civil case rulings) 71, 40).

may be excluded as well. However, with authorized capital, it is imperative to differentiate between two situations: a pre-emptive right may be disapplied already with the authority stipulated by the corporate charter (first paragraph of Article 354 of ZGD-1), so that the management does not have the power to deliberate on the disapplication when deciding on the utilization of available authorized capital (pre-emptive right necessarily disapplied); on the other hand, the authority to decide on the disapplication of pre-emptive rights may be granted to the management (second paragraph of Article 354 of ZGD-1), who, when deciding on the utilization of authorized capital, may decide to execute a capital increase by allowing the shareholders to exercise their pre--emptive right, or decide to disapply the right beforehand. In case the management exercises its powers and decides to disapply the pre-emptive right of shareholders to acquire new shares (i.e. disapply the pre-emptive right), the decision requires mandatory consent of the supervisory board (second sentence of the first paragraph of Article 355 of ZGD-1). The supervisory board shall also give consent to the utilization of available authorized capital in cases where the pre-emptive right has been disapplied previously (directly) by the general meeting (*mutatis mutandis* second sentence of the first paragraph of Article 355 of ZGD-1).[24]

It is clear in both aforementioned cases that, most commonly, a subscribed capital increase will not be executed immediately after the formation of authorized capital, but rather after a certain period of time (the maximum admissible period is 5 years after the registration in the court registry – first paragraph and and first sentence of second paragraph of Article 353 of ZGD-1). Until then, the business position and circumstances of a company may change in comparison with the situation which existed at the time of formation of authorized capital. This immediately triggers the question of how to translate the legal concept and regulation of disapplication of the pre-emptive right, an institution designed specifically for ordinary capital increase, to the special characteristics of authorized capital. In resolving the matter, it is important to focus on two elements, namely (i) whether and when the management of a company should present the shareholders with a report on the disapplication of the pre-emptive right, and (ii) how much importance and gravitas should be assigned to substantive requirements, and who and when will determine whether they have been properly met. In the analysis, I will introduce selected notions and findings of the German legal environment, where the case law

[24] Accord in German law: G. Krieger in Münchener Handbuch - Aktiengesellschaft, § 58, l. no. 46; W. Bayer, op. cit., § 204, l. no. 23.

was formed mostly through the cases *Holzmann*[25], *Siemens/Nold*[26], *Mangusta/Commerzbank I*[27], and *Mangusta/Commerzbank II*[28].

## 5.2. Obsolete assumption (Holzmann)

With its decision in the *Holzmann* case in 1982, the German BGH ("Bundesgerichtshof") represented the opinion[29] that the authority granted to the management to disapply pre-emptive rights as per the second paragraph of Section 203 of the German AktG (after which the second paragraph of Article 354 of ZGD-1 is modelled) shall be subject to the same substantive requirements as an (direct) disapplication of the pre-emptive right by means of general meeting resolution in ordinary capital increase. The management board was able to exercise its authority only if it was convinced that the disapplication is an appropriate and most suitable means to achieve the interests of the company. Moreover, "diligent substantive assessment of relevant subject matter" is necessary already at the point when the general meeting is deciding whether the management board should have the authority to execute such gross infringement of shareholders' rights. A blank authorization, i.e. without any relevant cause or reason, was ruled inadmissible, since a certain indication that the management board, during the duration of its term, will potentially be forced to execute a capital increase and disapply the pre-emptive rights in order to best protect the interest of the company, should have been established already at the point of decision of the general meeting. With regard to the forgoing, a general meeting resolution, adopted as per the second sentence of the second paragraph of Section 203 of the German AktG required relevant substantive justification, for which the company was required to provide relevant reasoning. In the formation of authorized capital, there had to be at least concrete indication for the subsequent disapplication of the pre-emptive right, which also had to allow room for the representation of the shareholders' interests.

As for the report on the reasons for the disapplication of the pre-emptive right, the aforementioned interpretation meant that, in case the authority of the management board was limited at origin to predetermined and foreseeable measures, both per type and subject of measure, the company was obligated and able to immediately present a report on the reasons for leaving the management board to decide on the disapplication of the pre-emptive right. However, if there was any uncertainty on whether the management board will exercise its

[25] BGHZ 83, 319.

[26] BGHZ 136, 133.

[27] BGHZ 164, 241.

[28] BGHZ 164, 249.

[29] Illustrated mostly after W. Bayer, op. cit., § 203, l. no. 97-98.

authority and at what circumstances, the reasons for a potential disapplication of the pre-emptive right needed to be disclosed on a best-effort basis, i.e. to an extent made possible by existing circumstances, and to an extent which would not reveal previously undisclosed plans to the detriment of the company. An abstract description or simple enumeration of theoretical reasons supporting a potential disapplication of the pre-emptive right, the execution of which was not even likely at that particular point, was deemed insufficient. On the contrary, the management board was obligated to provide sufficient relevant facts for the general meeting to be able to shape an opinion on the justifiability of the request to be granted the authority to disapply the pre-emptive right.

### 5.3. The turning point (Siemens/Nold)

In the *Siemens/Nold* case, the management board of the defendant (*Siemens*) was authorized to execute a capital increase by means of cash contributions up to a nominal value of DEM 500 million with the issue of either ordinary and priority shares or ordinary shares only (authorized capital I), and up to a nominal value of DEM 300 million with the issue of ordinary shares in exchange for either cash or in-kind contributions (authorized capital II). The management board disapplied the pre-emptive right of shareholders for authorized capital II. In the report to the general meeting, the management board, in relation to authorized capital II, stated as follows:

> "*The requested authorization for the issuance of authorized capital II - Agenda Item 7 – should again allow the management board to have own shares of the company available without having to resort to the stock market. The utilization of the requested authorized capital II will be limited to two cases only. First, it should be made possible, as it had been done in previous years, to offer the shares to the workers. Furthermore, the company should have an option to obtain shares in exchange for releasing ordinary shares of Siemens Inc. in selected and appropriate cases. This shall be made available by the proposed exclusion of shareholders' pre-emptive rights to acquire new shares.*"[30]

A shareholder (*Nold*) filed a lawsuit requesting nullification of both resolutions.

[30] "In dem der Hauptversammlung erstatteten Bericht führte der Vorstand zu dem genehmigten Kapital II folgendes aus: »Die beantragte Ermächtigung zur Ausgabe des genehmigten Kapitals II – Punkt 7 der Tagesordnung – soll den Vorstand erneut in die Lage versetzen, ohne Beanspruchung der Börse eigene Aktien der Gesellschaft zur Verfügung zu haben. Die Ausnutzung des erbetenen genehmigten Kapitals II soll auf zwei Fälle beschränkt werden. Zunächst sollen Aktien den Arbeitnehmern wie in den vergangenen Jahren angeboten werden können. Ferner soll die Gesellschaft die Möglichkeit haben, in geeigneten Einzelfällen Beteiligungen gegen Überlassung von Stammaktien der Siemens AG erwerben zu können. Ihm trägt der vorgeschlagene Ausschluß des Bezugsrechtes der Aktionäre Rechnung." (BGHZ, 136, 133, 134).

The court (BGH) ruled as follows:

> *"a) With regard to authorized capital, a general meeting may exclude the pre-emptive right of shareholders or authorize the management board to exclude the pre-emptive right of shareholders, if the measure for which the management board had previously been granted appropriate powers and authority is in obvious interest of the company, and the interest had previously been disclosed to the general meeting in abstract and general form (deviation from BGHZ 83, 319).*
>
> *b) The management board is entitled to exercise its authority to execute a capital increase and exclude the pre-emptive right only, if the specific intent and purpose of the measure corresponds with the abstract description of the measure, and if the realization of the measure is still in obvious interest of the company at the point of realization. The aforementioned circumstance shall be subject to diligent assessment as part of the mandatory entrepreneurial judgement of the management board."*[31]

The decision caused varied reactions and interpretations in the German legal environment.[32] The following overview and elaboration of regulations governing the disapplication of the pre-emptive right with regard to authorized capital is based on a very broad understanding of the institution in the German legal environment.

## 5.4. Requirements and assumptions for the disapplication of the pre-emptive right

Both with direct disapplication of the pre-emptive right (stipulated by the authorization to increase the subscribed capital), and the authority of the management to decide on the disapplication of the pre-emptive right, the capital measure for which the management has been authorized shall serve the best interest of the company.[33] The existence of other substantive requirements re-

[31] "a) Im Rahmen des genehmigten Kapitals kann die Hauptversammlung das Bezugsrecht der Aktionäre dann ausschließen oder den Vorstand zu dem Bezugsrechtsausschluß ermächtigen, wenn die Maßnahme, zu deren Durchführung der Vorstand ermächtigt werden soll, im wohlverstandenen Interesse der Gesellschaft liegt und der Hauptversammlung allgemein und in abstrakter Form bekannt gegeben wird (Aufgabe von BGHZ 83, 319 ). b) Der Vorstand darf von der Ermächtigung zur Kapitalerhöhung und zum Bezugsrechtsausschluß nur dann Gebrauch machen, wenn das konkrete Vorhaben seiner abstrakten Umschreibung entspricht und auch im Zeitpunkt seiner Realisierung noch im wohlverstandenen Interesse der Gesellschaft liegt. Er hat diesen Umstand im Rahmen seines unternehmerischen Ermessens sorgfältig zu prüfen." (BGHZ, 136, 133).

[32] Cf. only the summary of W. Bayer, op. cit., § 203, l. no. 109, 113-115.

[33] BGHZ, 136, 133; G. Krieger, op. cit., § 58, l. no. 16; U. Hüffer, op. cit., § 203, l. no. 11, 27.

levant to a valid and admissible disapplication of the pre-emptive right with regard to ordinary subscribed capital increase (adequacy and necessity, proportionality) needn't be determined.[34] As a result the deliberation of the general meeting, both with regard to direct disapplication of the pre-emptive right and the authority of the management to disapply the pre-emptive right, is focused on determining whether the disapplication or authorization really serve the best interest of the company. The final decision of the general meeting on the disapplication of the pre-emptive right is thus not based on the deliberation of substantive justification of the disapplication, and never reaches the extent and scope of deliberation applied when deciding on the disapplication of the pre-emptive right with regard to ordinary subscribed capital increase.[35] The discretion available to the general meeting is thus much broader.

Further deliberation (review) of substantive justification of the disapplication of the pre-emptive right is postponed to a subsequent decision of the management on exercising of the authority for capital increase with disapplication of the pre-emptive right. When utilizing available authorized capital, the management is obligated to adhere to the assumptions and conditions set by the general meeting. In addition to statutory requirements (e.g. period of effect of authority to increase capital, amount of capital increase), the element most relevant to this analysis is the extent of the limitation of the authority for subscribed capital increase, which only allows the disapplication of the pre-emptive right for predetermined intents and purposes. Such a restrictive effect may also be stipulated by the management report, and the management is subsequently obligated to adhere to it.[36] Furthermore, the management is obligated to determine the circumstances relevant to the disapplication. With direct disapplication of the pre-emptive right, the authority for increasing the subscribed capital may only be exercised if the capital increase with disapplication of the pre-emptive right is substantively justified. If the management has the authority to decide on the disapplication of the pre-emptive right, it is obligated to determine whether the disapplication is substantively justified. In both cases, substantive justification is determined by applying the substantive requirements and assumptions applied in the case of ordinary subscribed capital increase (interest of the company, adequacy and necessity, proportionality).[37] If, in case of direct disapplication of the pre-emptive right, the aforementioned requirements have not been met, the management is not allowed to exercise the authority for increasing subscribed capital. If, in case the management is

[34] U. Hüffer, op. cit., § 203, l. no. 11, 27.

[35] Cf. W. Bayer, op. cit., § 203, l. no. 128.

[36] G. Krieger, op. cit., § 58, l. no. 15.

[37] G. Krieger, op. cit., § 58, l. no. 44; W. Bayer, op. cit., § 203, l. no. 127.

authorized to decide on the disapplication of pre-emptive rights, the requirements have not been met, the management is obligated to either execute a capital increase by preserving the pre-emptive right, or to refrain from executing a capital increase.

The management is obligated to present to the general meeting a written report on the reasons for the disapplication of the pre-emptive right, or on the authority for the disapplication (first and second paragraph of Article 354 in relation with the second sentence of the fourth paragraph of Article 337 of ZGD-1). In the report the management may disclose detailed information on the intended measure, however, it is not obligated to do so. The report may be limited to a general data about measures which would support the disapplication of the pre-emptive right, why such measures are in the interest of the company and the reasons why the disapplication is proposed.[38] Even though with authorized capital the pre-emptive right are either disapplied or the management has the authority to decide on the disapplication, the general meeting needn't determine the issue price of new shares, and may leave the aforementioned decision to the management. In the aforementioned case, the report detailing the reasons for disapplication needn't include any information or justification of the expected issue price.[39]

The management need not present any special (additional) report on the reasons for the disapplication of the pre-emptive right prior to exercising the authority for the disapplication.[40] The management is, however, obligated to report on the details of the action it had taken in the (next) general meeting.[41] The mandatory report is provided in the first upcoming general meeting as per the third paragraph of Article 294 of ZGD-1.[42] The forgoing notwithstanding, it may also occur that the utilization of authorized capital, or the exercising of the authority to disapply the pre-emptive right, results in the establishment of terms and conditions, which, as per rules governing the financial instruments

[38] G. Krieger, op. cit., § 58, l. no. 18. Cf. BGHZ 136, 133, 139; U. Hüffer, op. cit., § 203, l. no. 26.

[39] Cf. G. Krieger, op. cit., § 58, l. no. 23; BGHZ 136, 133, 142; U. Hüffer, op. cit., § 203, l. no. 26.

[40] Mangusta/Commerzbank I, AG 2006, p. 36; G. Krieger, op. cit., § 58, l. no. 45; U. Hüffer, op. cit., § 203, l. no. 36-37. Criticism by W. Bayer, op. cit., § 203, l. no. 155-160.

[41] Mangusta/Commerzbank I, AG 2006, p. 36; BGHZ 136, 133, 140.

[42] In Mangusta/Commerzbank I the court ruled that the management board, after exercising the authority to increase subscribed capital and disapply the pre-emptive right, is obligated to report in the next "ordinary" general meeting on the details of its actions, and provide adequate defence and reasoning of the actions. A parallel to the German "ordinary" general meeting (Ordentliche Hauptversammlung, § 175 et seq. of the German AktG) is the general meeting referred to in the third paragraph of Article 294 of ZGD-1.

market, call for a disclosure of relevant information on the utilization or exercising of the auhtority (cf. Article 106, Article 373 and Article 386 of ZTFI).[43]

## 5.5. Remedies available to a disapplied shareholder (and Mangusta/ Commerzbank II)

In the *Mangusta/Commerzbank I* case, the BGH confirmed its ruling in the *Siemens/Nold* case. In the *Mangusta/Commerzbank II* case, it provided a detailed breakdown of remedies available to a disapplied shareholder (shareholder whose pre-emptive right to acquire new shares has been disapplied without appropriate grounds) to which it had previously referred in the *Siemens/Nold* case.[44]

In *Mangusta/Commerzbank II* the court based its interpretation and subsequent ruling on the assumption that the application of Section 241 of the German AktG ("*Nichtigkeitsgründe*") et seq. is not admissible for management or supervisory board resolutions which are in contravention of the law, since allowing an annulment lawsuit or legal challenge which would enable a shareholder to intervene and thus affect the actions taken by the management with formative effect would denote a systemic collapse of the applicable corporate law system in which the management board is entrusted with the governance of a company, the supervisory board is entrusted with supervisory tasks, whereas the general meeting (leaving aside cases and circumstances regulated by the law) does not have the power to participate in or influence management-related decisions. However, the court did not leave the shareholder unprotected, on the contrary. In addition to the previously referred to report in the next (ordinary) general meeting, the court referred to a shareholder's ability to deny discharge, his right to file recourse and civil lawsuits, his right to file a preventive suspensive appeal to the intended registration in the court registry, and his right to file a general declaratory lawsuit regarding the non-complian-

[43] Market in Financial Instruments Act, Official Journal of RS, No. 67/2007 with subsequent amendments. Cf. R. Veil, op. cit., § 202, l. no. 23; W. Bayer, op. cit., § 203, l. no. 154.

[44] In Siemens/Nold the BGH stated: „Nach § 204 Satz 2 AktG bedarf die Entscheidung des Vorstandes über den Bezugsrechtsausschluß der Zustimmung des Aufsichtsrates. Soweit er von der ihm erteilten Ermächtigung Gebrauch gemacht hat, ist er gehalten, über die Einzelheiten seines Vorgehens auf der nächsten ordentlichen Hauptversammlung der Gesellschaft zu berichten und Rede und Antwort zu stehen. Ihm kann bei Verletzung der ihm obliegenden Pflichten die Entlastung verweigert werden. Hat er sich unter Verletzung seiner Amtspflichten nicht an die Vorgaben des Ermächtigungsbeschlusses gehalten, kann er ferner gemäß § 93 Abs. 2 AktG zur Leistung von Schadensersatz herangezogen werden. Ferner muß er damit rechnen, daß die Pflichtwidrigkeit seines Verhaltens zum Gegenstand einer Feststellungs- oder – soweit noch möglich – einer Unterlassungsklage, die beide gegen die Gesellschaft zu richten sind, gemacht wird (vgl. BGHZ 83, 122, 125, 133 ff.)." (BGHZ, 136, 133, 140-141).

ce of actions of corporate bodies with their obligations. The latter is based on procedural (not corporate) rules (Section 256 of the German ZPO), whereas a declaration of nullity of decisions taken by the management and supervisory board does not affect the capital increase, its registration in the court registry or shareholders' rights arising from the changes to the capital.

The ruling in *Mangusta/Commerzbank II* may also be applied to analyse the situation of a disapplied shareholder in the Slovene legal environment, most notably in cases when the general meeting transfers its original authority to decide on subscribed capital increase (cf. first paragraph of Article 293 of ZGD-1) to management or supervisory bodies (first and second paragraphs of Article 353 of ZGD-1), who, in the utilization of available authorized capital, unjustifiably disapply the pre-emptive right of shareholders to acquire new shares. The analysis should be based on the fact that the decision on capital increase and issuance of new shares with regard to authorized capital is a management decision,[45] which requires consent of the supervisory board (cf. Articles 353 through 356 of ZGD-1). If the management (in exercising its powers and authorities of management) were to exceed (violate) the authority to disapply the pre-emptive right, the Court of Registry may reject the motion for the registration of the subscribed capital increase in the court registry. However, since the aforementioned circumstance is considered only a deficiency in management, these deficient (internal) management decisions do not have any external effects on the subscribers of new shares who acted in good faith[46], meaning that the (potential) registration of the subscribed capital increase in the court registry will nonetheless have a constitutive effect, the subscribed capital will be considered increased[47] and the increase will not be affected in the future.[48]

[45] Cf. W. Bayer, op. cit., § 202, l. no. 86.

[46] Cf. R. Veil, op. cit., § 204, l. no. 12-13.

[47] G. Krieger, op. cit., § 58, l. no. 58; B.-A. Dissars in Münchener AnwaltsHandbuch: Aktienrecht, § 37, l. no. 35. Cf. Mangusta/Commerzbank II, AG 2006, p. 40: "Vor allem aber steht es der Zulässigkeit der Feststellungsklage nach § 256 ZPO - anders als etwa der vorbeugenden Unterlassungsklage - nicht entgegen, dass die Kapitalerhöhung mit der Eintragung in das Handelsregister wirksam geworden ist (§ 203 Abs. 1 AktG i.V.m. § 189 AktG). Zwar berühren nichtige Entscheidungen des Vorstands und des Aufsichtsrats einschließlich einer Verletzung des Bezugsrechts der Aktionäre die Wirksamkeit der durchgeführten und eingetragenen Kapitalerhöhung und der damit entstandenen neuen Mitgliedschaftsrechte nicht (Lutter in KölnKomm/AktG, 2. Aufl. 1995, § 204 AktG Rz. 25, 27, m.w.N.)."

[48] Cf. M. Lutter in Kölner Kommentar (1995), § 204, l. no. 27: "Auch eine Verletzung des Bezugsrechts der Aktionäre (insbesondere unwirksamer Ausschluß durch die Verwaltung) berührt die Wirksaimkeit der Kapitalerhöhung nach Eintragung der Durchführung im HReg. nicht.".

A shareholder whose rights have been infringed (due to his pre-emptive right to acquire new shares being disapplied without appropriate grounds) can be granted legal remedies and means both *ex ante* (prior to the registration of the capital increase in the court registry) and *ex post*, which are aimed at safeguarding his position. The shareholder has an *ex ante* option to file a motion for the omission of the motion to register the capital increase in the court registry, as well as the option to file a declaratory motion in order for the resolution of management or supervisory bodies to be declared null and void. The shareholder may also intervene during the court registration process (cf. first and third paragraph of Article 31 of ZSReg[49]). Shareholders are entitled *ex post* (after the registration of the capital increase in the court registry) to request to be provided with the management report, entitled to request a special audit (Article 318 of ZGD-1) and still entitled to file a declaratory motion in order to achieve annulment of resolutions passed by management or supervisory bodies.[50] The management report, special auditor's report and a declaratory ruling annulling the resolutions may assist the shareholders in filling subsequent motions and lawsuits, most notably civil lawsuits, whereas members of management or supervisory bodies may be held liable pursuant to Article 263 of ZGD-1. Moreover, shareholders may deny discharge of management or supervisory board members, or recall members of the supervisory or management board.[51,52] However, a motion for the annulment of the capital increase is (in here discussed matter) not available.

[49] Court Registry of Legal Entities Act, Official Journal of RS No. 13/1994 with subsequent amendments and revisions.

[50] Cf. A. Galič in ZPP, p. 148: "With regard to legal relationships which did or did not exist in the past, legal theory and case law allow a declaratory motion to be filed, providing the effects of such a relationship still exist in the present".

[51] The decision of the management on the subject matter of rights pertinent to shares, and the terms and conditions for the issuance of shares requires consent of the supervisory board. The consent is considered a condition precedent for the management decision to take effect (first sentence of the first paragraph of Article 355 of ZGD-1; cf. U. Hüffer, op. cit., § 204, l. no. 6). Consent of the supervisory board is also a condition precedent for the effect of the management decision on the disapplication of the pre-emptive right to acquire new shares (second sentence of the first paragraph of Article 355 of ZGD-1; cf. U. Hüffer, op. cit., § 204, l. no. 7). For the admissibility of a lawsuit filed by a shareholder in order to claim annulment of resolutions passed by management or supervisory bodies, see Supreme Court of RS, case No. III Ips 243/2008.

[52] For the adequacy of nullity, see B. Bratina in Nadzorni sveti, p. 222-225, most notably: "The opinion of the majority is that a supervisory board resolution is considered null and void, if the passing of the resolution denotes a material violation of the law or corporate charter, either with regard to the procedure or subject matter." Cf. also Mangusta/Commerzbank II, BGHZ 164, 249, 253-254; Mangusta/Commerzbank II, BGHZ 164, 249, 260-261.

## 6. STATUTORY QUANTITATIVE RESTRICTIONS

The amount of authorized capital shall not exceed one half[53] of subscribed capital (third paragraph of Article 353 of ZGD-1). Equal to the regulation of the conditional capital increase, the law restricts excessive utilization of capital in this institution as well, even though the legal concept of authorized capital generally preserves shareholders' pre-emptive rights to acquire new shares. Since the decision on a subscribed capital increase and its substantive elements is thus transferred to the sphere of management or supervisory bodies, the law does safeguard shareholders from excessive infringement of their ownership rights, and safeguards the autonomy of the general meeting in the decision-making on major changes to the subscribed capital.[54]

### 6.1. Relevant point in time

Unlike conditional increase of subscribed capital where the point in time relevant for the deliberation on the volume of conditional capital is the point of decision of the general meeting on a conditional capital increase, the amount of authorized capital "[…] *shall not exceed one half of the share capital available at the time authority is granted* […]" (first sentence of the third paragraph of Article 353 of ZGD-1). This awkward wording should not lead one to believe that (as is the case with conditional capital increase) the relevant point in time is the general meeting decision, since the authority relating to authorized capital, which was granted by amendment of the corporate charter (second paragraph of Article 353 of ZGD-1), becomes effective only with the registration of the amendment to the corporate charter in the court registry (third paragraph of Article 332 of ZGD-1). If authorized capital is formed already by the corporate charter, the authority becomes effective as at the point of registration (formation) of the company in the court registry (cf. Indent 1 Article 201 of ZGD-1). Therefore the relevant point in time for the deliberation on the volume of authorized capital and the amount of the subscribed capital is the point of registration of the company (if authorized capital is formed by the corporate chapter) or point of amendment of the corporate charter (if authorized capital is formed by amendment of the corporate charter) in the court registry.[55]

[53] Certain exceptions may be found in specialized regulations, e.g. first sentence of the eighth paragraph of Article 28 of the Banking Act (ZBan-2, Official Journal of RS No. 25/2015).

[54] Cf. M. Kocbek in ZGD-1 (2007), p. 643; W. Bayer, op. cit., § 202, l. no. 65; M. Lutter, op. cit., § 202, l. no. 12.

[55] Accord in German law. See e.g. U. Hüffer, op. cit., § 202, l. no. 14; W. Bayer, op. cit., § 202, l. no. 66.

## 6.2. Amount of subscribed capital

The relevant amount of subscribed capital is the amount as at the day when the authority becomes effective, i.e. the day when the company or amendment of corporate charter is registered in the court registry. When determining the amount of subscribed capital, it is necessary to observe the current subscribed capital and any and all previous changes to subscribed capital which have been registered in the court registry on the same day as the authority (at the latest) and have thus entered into force.[56] It is also necessary to observe any subscribed capital increase which entered into force with the issue of shares from conditional capital increase (Article 351 of ZGD-1). The conditional capital prior to the issue of shares, and an approved yet unexecuted and thus unregistered ordinary capital increase,[57] are irrelevant, as is a potential unutilized (remaining) authorized capital. An ordinary subscribed capital reduction, which has already been approved but (resolution on the reduction in the subscribed capital) not yet registered in the court registry, is not relevant either.[58]

If the authority extends to the right to issue priority shares without voting rights, the restriction stipulated by the second paragraph of Article 178 of ZGD-1 needs to be observed. In the aforementioned provision, the relevant point in time is not the moment when the authority becomes effective, but rather the moment when it is exercised.[59]

## 6.3. Amount of authorized capital

The amount of authorized capital shall not exceed one half of subscribed capital. The relevant amount is the nominal amount of authorized capital referred to in the general meeting resolution underlying the formation of authorized capital, or the nominal amount of authorized capital stipulated by the (formation) corporate charter. The aforementioned cap requires the observance of potential existing yet unutilized authorized capital, since the sum total of both shall not exceed one half of subscribed capital.

## 6.4. Consequence of violations

If the general meeting resolution violates the provision stipulated by the first sentence of the third paragraph of Article 353 of ZGD-1, it is considered null

[56] W. Bayer, op. cit., § 202, l. no. 66.

[57] M. Lutter, op. cit., § 202, l. no. 12.

[58] W. Bayer, op. cit., § 202, l. no. 66.

[59] Ibid, l. no. 67; G. Krieger, op. cit., § 58, l. no. 8.

and void pursuant to Indent 3 Article 390 of ZGD-1. The right of the general meeting to decide on changes to subscribed capital may only be transferred in a predetermined and restricted extent. Moreover, the general meeting is not able to waive the aforementioned right.[60] Subsequent validation pursuant to the second paragraph of Article 391 of ZGD-1 is possible, however, in such a case the amount of authorized capital stipulated by the general meeting resolution does not apply, but is replaced by the statutory maximum of authorized capital as stipulated by the first sentence of the third paragraph of Article 353 of ZGD-1.[61]

### 6.5. Authorized and conditional capital

The amount of both the authorized and conditional capital is limited to 50% of subscribed capital. Both types of capital can co-exist, meaning that the sum total of both types may be equal to the full (100%) subscribed capital.

## 7. SUBSIDIARITY OF SUBSCRIBED CAPITAL INCREASE

Pursuant to the fifth paragraph of Article333 of ZGD-1, subscribed capital cannot be increased until all current contributions have been paid in full, unless the unpaid amount is insignificant. The provision classifies the (ordinary) increase of subscribed capital as subsidiary in nature (i.e. as an auxiliary means to collect fresh capital), if the existing (subscribed) capital has not yet been provided (paid), i.e. if the shareholders have not yet provided their contributions in full, giving the company a right to claim the payment of the outstanding part of contribution. The purpose of the fifth paragraph of Article 333 of ZGD-1 is to prevent the company from increasing the subscribed capital and burdening the capital market if there is no real need for the company to do so.[62] Furthermore, the purpose of this provision is to safeguard existing shareholders for whom an increase of subscribed capital presents a risk of dilution of their shares.[63]

The notion of outstanding contributions refers mostly to those parts of contributions which, pursuant to the third paragraph of Article 191 of ZGD-1, may only be provided after the registration of the capital increase in the court registry, and denote a maximum of 75% of the nominal or corresponding amount (third sentence of the third paragraph in relation with the fourth paragraph

[60] M. Lutter, op. cit., § 202, l. no. 12.

[61] In German law cf. M. Lutter, op. cit., § 202, l. no. 12; U. Hüffer, op. cit., § 202, l. no. 14; R. Veil, op. cit., § 202, l. no. 18.

[62] Cf. K.-N. Peifer in Münchener Kommentar (2011), § 182, l. no. 58; M. Lutter, op. cit., § 182, l. no. 32.

[63] K.-N. Peifer, op. cit., § 182, l. no. 58. Contra R. Veil, op. cit., § 182, l. no. 5 ("Ein Schutz der Altaktionäre vor den Folgen einer Kapitalerhöhung ist nicht intendiert.").

of Article 191 of ZGD-1). However, as per the fifth paragraph of Article 333 ZGD-1, outstanding contributions may also refer to amounts which, contrary to Article 191 ZGD-1, have not been contributed prior to the registration of the capital increase in the court registry. Thus even an unpaid *Agio* may be considered an outstanding contribution.[64] Outstanding contributions are also claims of a company arising from the right of compensation for inadmissible payments pursuant to Article 233 of ZGD-1, and claims arising from the shares forfeiture procedure. Since in-kind contributions shall be handed over prior to the registration of the subscribed capital increase in the court registry (third paragraph of Article 191 of ZGD-1), the possibility of classifying in-kind contributions as "outstanding contributions" should be only theoretical, if that.[65]

## 7.1. Own shares

The acquisition of own shares may also result in the subsidiarity of the stock capital increase and lead to a prior establishment of a claim of the company, arising from outstanding contributions, on the shareholders. The acquisition of shares is admissible only under very narrow terms stipulated by the first and second paragraphs of Article 247 of ZGD-1. However, a violation of the aforementioned restrictions does not result in the acquisition of own shares being declared invalid (fourth paragraph of Article 247 of ZGD-1).[66] With regard to own shares, it is necessary to distinguish between three different situations:

a) Regardless of whether the acquisition of own shares was admissible (i.e. in accordance with the law) or not, the company cannot hold any rights from own shares (Article 249 of ZGD-1). Moreover, the company cannot owe the contribution to itself,[67] therefore, even if a company were to acquire own shares which had not yet been paid in full, the missing part of the contri-

[64] K.-N. Peifer, op. cit., § 182, l. no. 59.

[65] ZGD-1 has no provision equal to the second sentence of the second paragraph of § 36a of the German AktG: "Besteht die Sacheinlage in der Verpflichtung, einen Vermögensgegenstand auf die Gesellschaft zu übertragen, so muß diese Leistung innerhalb von fünf Jahren nach der Eintragung der Gesellschaft in das Handelsregister zu bewirken sein." Cf. also second paragraph of Article 9 of Directive 2012/30/EU ("However, where shares are issued for a consideration other than in cash at the time the company is incorporated or is authorised to commence business, the consideration must be transferred in full within five years of that time."), and the first paragraph of Article 31 of Directive 2012/30/EU ("Where shares are issued for a consideration other than in cash in the course of an increase in the subscribed capital the consideration must be transferred in full within a period of five years from the decision to increase the subscribed capital.").

[66] Details by M. Kocbek, op. cit., p. 265-266; id. in Korporacijsko pravo, p. 541-543.

[67] Accord M. Lutter, op. cit., § 182, l. no. 33. Cf. J. Oechsler in Münchener Kommentar (2008), § 71 b, l. no. 15-16.

bution is not considered an outstanding contribution[68] which, pursuant to the fifth paragraph of Article 333 ZGD-1, should be collected prior to the capital increase becoming admissible.

b) If the terms and requirements for the acquisition of own shares are not fulfilled, the obligatory law-based transaction is null and void (fourth paragraph of Article 247 of ZGD-1). If the company nonetheless paid the consideration for own shares, the payment is considered a prohibited repayment of contribution, which shall subsequently be refunded to the company pursuant to the first sentence of the first paragraph of Article 233 of ZGD-1.[69] The claim of the company for the refund of the prohibited payment (Article 233 of ZGD-1) is thus fully comparable to the claim of a company arising from the shareholder's obligation to pay the contribution, and therefore calls for a *(mutatis mutandis)* application of the fifth paragraph of Article 333 of ZGD-1.[70]

c) If the company acquired own shares in an admissible manner (i.e. in accordance with the law), the payment of the consideration for the acquisition of shares is not considered a prohibited repayment of the contribution (second Indent of second paragraph of Article 227 of ZGD-1), and own shares acquired in the described manner cannot be classified as outstanding contributions *per se*. The company is able, after all, to gain (with selling these shares) effects equal to the effects gained by increasing the subscribed capital. On grounds of the forgoing, the *mutatis mutandis* application of the fifth paragraph of Article 333 of ZGD-1 is thus fully justified.[71] However, an exception needs to be allowed if the reason to acquire own shares, declared admissible by the law, still exists and the due date for the disposal of shares stipulated by the second paragraph of Article 250 of ZGD-1 has not yet expired.[72]

## 7.2. Exceptions from subsidiarity of subscribed capital increase

An increase of subscribed capital is admissible in two instances, even if the contributions have not yet been paid in full. The wording of the fifth paragraph

[68] M. Lutter, op. cit., § 182, l. no. 33; K.-N. Peifer, op. cit., § 182, l. no. 61.

[69] For details on the claim held by the company, see M. Kocbek in Korporacijsko pravo, p. 543-544.

[70] Cf. M. Lutter, op. cit., § 182, l. no. 34; K.-N. Peifer, op. cit., § 182, l. no. 62.

[71] Cf. U. Hüffer, op. cit., § 182, l. no. 27; M. Lutter, op. cit., § 182, l. no. 35; K.-N. Peifer, op. cit., § 182, l. no. 63. Contra (disagreement with mutatis mutandis application of the fourth paragraph of § 182 of the German AktG) T. Busch, op. cit., p. 430; G. Krieger, op. cit., § 56, l. no. 3.

[72] In German law, by reference to disposal due date stipulated by the second paragraph of § 71 c of the German AktG, as per M. Lutter, op. cit., § 182, l. no. 35.

of Article 333 of ZGD-1 directly suggests only a single instance, however, it is also necessary to account for the situation when owed contributions cannot be collected anymore.[73]

### 7.3. Inability to obtain owed contribution

In the spirit of the fifth paragraph of Article 333 of ZGD-1, a contribution cannot be obtained, if it can be neither collected from the shareholder (debtor) nor obtained by means of shares forfeiture procedure (Articles 225 and 226 of ZGD-1).[74] However, for the aforementioned situation to occur, it is first necessary to exhaust all available legal means, including execution, unless it is obvious that execution would clearly be ineffective.[75]

### 7.4. Insignificance of unpaid amount

If the amount of unpaid contributions is so low as to be deemed insignificant, it does not prevent the subscribed capital increase. The law fails to elaborate on the amount to which outstanding contributions need to be compared: the planned amount of the subscribed capital increase, the amount of the previous subscribed capital increase or the sum total of multiple previous subscribed capital increases, the amount of the current (actual) subscribed capital, or perhaps to the amount of contributions paid thus far, including a potential *Agio*. The latter is the correct assumption[76], since the amount of unpaid contributions shall be compared to the sum total of already paid contributions. *Agio* is also observed in determining the total amount of outstanding contributions, which, contrary to Article 191 of ZGD-1, have not been paid prior to the registration of the subscribed capital increase in the court registry. Since the fifth paragraph of Article 333 of ZGD-1 refers to "[…] *until the existing contributions have been paid up in full […]*", "*an insignificant sum*" thus necessarily refers to the sum total of all contributions, including a potential *Agio*. The law also fails to distinguish between an unpaid amount and an unpaid lowest issue price.[77] In order for the subscribed capital increase to be deemed permissible,

[73] Fourth paragraph of § 182 of the German AktG, which the fifth paragraph of Article 333 of ZGD-1 attempts to copy, is more precise, since the wording itself already allows for a different possibility ("[…]… ausstehende Einlagen auf das bisherige Grundkapital noch erlangt werden können").

[74] Cf. M. Lutter, op. cit., § 182, l. no. 37; K.-N. Peifer, op. cit., § 182, l. no. 60.

[75] K.-N. Peifer, op. cit., § 182, l. no. 60; U. Hüffer, op. cit., § 182, l. no. 27.

[76] Accord T. Heidel, op. cit., § 182, l. no. 52; M. Lutter, op. cit., § 182, l. no. 38; U. Hüffer, op. cit., § 182, l. no. 28.

[77] Cf. T. Heidel, op. cit., § 182, l. no. 52.

the sum total of unpaid contributions shall thus be insignificant in comparison with the sum total of paid contributions, whereas the paid contributions already contain a potential *Agio*.

The law also fails to elaborate on the term "insignificance", therefore this abstract legal notion should necessarily be determined and specified on a case-by-case basis. According to legal theory and available literature, the specification is determined by applying a percentage which differs with regard to the amount of subscribed capital. In case of companies with a subscribed capital of (approximately – author's note) EUR 250.000, "insignificance" would refer to outstanding contributions the sum total of which does not exceed 5% of total contributions paid up thus far, whereas in case of companies with higher subscribed capital, the criterion would fall to of 1%.[78]

## 7.5. Violations of the fifth paragraph of Article 333 of ZGD-1

Violations of the fifth paragraph of Article 333 of ZGD-1 do not result in nullity of the general meeting on ordinary increase of subscribed capital, they do, however, present grounds for voidability pursuant to the first point of the first paragraph of Article 395 of ZGD-1.[79]

A general meeting resolution on ordinary subscribed capital increase that violates the provisions of the fifth paragraph of Article 333 of ZGD-1 does not obligate members of management or supervisory bodies to propose the registration of such resolution in the court registry and to execute such resolution.[80] Furthermore, the court of registration shall not allow the registration of such a resolution in the court registry. The deliberation on the existence of impediments to registration is based on requirements stipulated by the second paragraph of Article 335 of ZGD-1.

## 7.6. Authorized capital

A parallel in the regulation of authorized capital is somewhat suggested by the third paragraph of Article 354 of ZGD-1, according to which new shares shall

[78] See K.-N. Peifer, op. cit., § 182, l. no. 66; M. Lutter, op. cit., § 182, l. no. 38; U. Hüffer, op. cit., § 182, l. no. 28; G. Krieger, op. cit., § 56, l. no. 5. In certain sources, the amount of subscribed capital is still referred to in DEM, therefore it needs to be observed that the DEM – EUR exchange rate was 1 EUR for 1,95583 DEM. K.-N. Peifer, op. cit., § 182, l. no. 66; G. Krieger, op. cit., § 56, l. no. 5; T. Heidel, op. cit., § 182, l. no. 52 refer to (rounded up) subscribed capital amount of EUR 250.000.

[79] On the position and various opinions in German law see only K.-N. Peifer, op. cit., § 182, l. no. 69; U. Hüffer, op. cit., § 182, l. no. 29, § 243, l. no. 7.

[80] Accord for a general meeting resolution violating the fourth paragraph of § 182 of the German AktG K.-N. Peifer, op. cit., § 182, l. no. 71; M. Lutter, op. cit., § 182, l. no. 41.

not be issued until all outstanding contributions to the existing subscribed capital have been paid in full. However, if the amount of outstanding contributions is relatively low (i.e. insignificant), new shares may be issued. The motion to execute a subscribed capital increase shall disclose the unpaid contributions to the existing subscribed capital, and the reasons why they have not yet been paid. We may therefore conclude that the increase of subscribed capital by means of utilization of available authorized capital is also classified as being of a subsidiary nature, however, the aforementioned provision also observes the specific legal characteristics of this particular type of subscribed capital increase, most notably the timespan during which management or supervisory bodies may exercise the authority to increase the subscribed capital (cf. first and second paragraph of Article 353 of ZGD-1). This is also the reason why the third paragraph of Article 354 of ZGD-1 refers to the issuance of shares.

The issuance of shares referred to in the third paragraph of Article 354 of ZGD-1 shall be understood as an increase of subscribed capital (first paragraph of Article 354 in relation with Article 339 of ZGD-1), however, not as an actual issuance of shares, but rather as the conclusion of a subscription agreement. In addition to the wording of the third paragraph of Article 354 of ZGD-1, the understanding that the third paragraph of Article 354 of ZGD-1 refers to the actual issuance may be somewhat supported by the first paragraph of Article 354 of ZGD-1, which references the second paragraph of Article 333 of ZGD-1[81], however such an understanding cannot be based on any justifiable substantive grounds. The third paragraph of Article 354 of ZGD-1 namely stipulates when an increase of subscribed capital is considered subsidiary in nature, and when new contributions shall not be "tendered", since the option of collecting the owed (old) contributions still exists. The issuance of new shares (as securities) is executed only after the execution of the increase of subscribed capital (first paragraph of Article 354 in relation with paragraph one of Article 339 of ZGD-1) and the registration of the capital increase in the court registry (first paragraph of Article 354 in relation with Article 342 of ZGD-1), which denotes the point when the capital increase becomes effective (first paragraph of Article 354 in relation with Article 340 of ZGD-1). In other words, the issuance of shares as securities is not an element (integral part) of the execution of the subscribed capital increase.[82,83] However, an effective and valid subscripti-

[81] The first sentence of the second paragraph of Article 333 of ZGD-1 stipulates that subscribed capital may only be increased with the issuance of new shares.

[82] Cf. M. Lutter, op. cit., § 188, l. no. 2, 8; K.-N. Peifer, op. cit., § 188, l. no. 7.

[83] On the obligation of a company to issue shares in book-entry form after the registration of the increase of subscribed capital in the court registry see N. Plavšak in ZGD-1 (2007), p. 119-121, 131.

on agreement, binding (future) shareholder to provide an appropriate contribution prior to the filing of the motion to register the capital increase in the court registry, is considered a material element of the execution of the capital increase.[84] On grounds of the forgoing, the issuance of shares as per the third paragraph of Article 354 of ZGD-1 needs to be understood as the conclusion of a subscription agreement.

It is therefore necessary to conclude that, with authorized capital, outstanding contributions are not an impediment to the formation of authorized capital pursuant to Article 353 of ZGD-1, nor an impediment to management or supervisory bodies passing a resolution on the utilization of authorized capital. Outstanding contributions are, however, an impediment to the conclusion of subscription agreements. The second sentence of the third paragraph of Article 354 of ZGD-1 stipulates an exception to the latter, providing the sum total of outstanding contributions is proportionally low (i.e. insignificant). The aforementioned criterion needs to be understood in the same manner as with ordinary subscribed capital increase. An additional exception is stipulated by the fourth paragraph of Article 354 of ZGD-1 with regard to issuing shares to workers of the company.

## 8. INTENT AND PURPOSE OF ARTICLE 400 OF ZGD-1

Article 400 of ZGD-1 applies only to the challenging of resolutions on subscribed capital increase. The first paragraph of the provision is mostly of an explanatory nature, since it only reiterates that a resolution may be challenged in accordance with the basic arrangement stipulated by Article 395 of ZGD-1. The essence of Article 400 of ZGD-1 is contained in the second paragraph, which extends the grounds for challenge beyond the grounds stipulated by Article 395 of ZGD-1. The second paragraph of Article 400 of ZGD-1 safeguards the shareholder from the dilution of his ownership position or, to be more precise, from the dilution of value of rights arising from the shareholder's ownership rights, which may occur if new shares are issued in exchange for contributions which do not correspond with the value of the ownership share.[85] In case of disapplication of the pre-emptive right to acquire new shares, the shareholder is not able to subscribe new shares in the subscribed capital in accordance with his ownership share, and is thus unable to receive the benefits which other persons who were able to subscribe new shares will receive, namely the benefit to acquire new shares at a (too) low issue price. By not being able to subscribe new shares, the shareholder is not able to preserve his ownership share in the

[84] Cf. K.-N. Peifer, op. cit., § 188, l. no. 8-9.

[85] Cf. U. Hüffer, op. cit., § 255, l. no. 2.

company. A disapplied shareholder is thus given unequal treatment in comparison with persons who are able to subscribe and subsequently acquire new shares.[86]

The second paragraph of Article 400 of ZGD-1 applies to ordinary increase of subscribed capital (Article 333 et seq. of ZGD-1). If, during ordinary increase of subscribed capital, shareholders are not granted, either a direct or an indirect (fifth paragraph of Article 337 of ZGD-1) pre-emptive right to acquire new shares, the duty of the general meeting is to set an appropriate issue price or the lowest possible price.[87] With authorized capital, a general meeting resolution (by means of which the general meeting grants authority to increase subscribed capital) may be challenged pursuant to the second paragraph of Article 400 of ZGD-1, providing the resolution stipulates a concrete issue price or lowest possible price. In case the issue price is set by the management, it is obligated to adhere to criteria stipulated by the second paragraph of Article 400 of ZGD-1.[88] With regard to substantive requirements for the disapplication of the pre-emptive right, it is imperative to observe the purpose and intent (as well as the power) of the fourth paragraph of Article 353 of ZGD-1. In case of issuance of shares to company workers, substantive justification is provided *per se*, since the disapplication of the pre-emptive right of shareholders to acquire new shares due to the issuance of shares to workers is (according to the intent and purpose of the fourth paragraph of Article 353 of ZGD-1) always in the best interest of the company, and a control of whether substantive requirements have been met is not applicable.[89] This means that whenever a general meeting resolution on the increase of subscribed capital is supported by sufficient majority of votes and the pre-emptive right of shareholders is subsequently disapplied due to the issuance of shares to workers, the interest of minority shareholders in the preservation of their ownership share must give way to the interest of the company in enhancing the ties to its workers, as well as the interest of workers in becoming shareholders of "their own" company.[90, 91]

[86] Cf. M. Schwab, op. cit., § 255, l. no. 1; U. Hüffer, op. cit., § 255, l. no. 2-2a.

[87] Cf. K.-N. Peifer, op. cit., § 182, l. no. 47.

[88] Cf. M. Schwab, op. cit., § 255, l. no. 7; U. Hüffer, op. cit., § 255, l. no. 14.

[89] Cf. R. Veil, op. cit., § 202, l. no. 27; M. Lutter, op. cit., § 202, l. no. 28; W. Bayer, op. cit., § 202, l. no. 102; U. Hüffer, op. cit., § 202, l. no. 27; N. Samec, op. cit., p. 283.

[90] Cf. M. Lutter, op. cit., § 202, l. no. 28. German legal theory emphasizes that an infringement of shareholders' position is admissible only to an appropriate extent. See M. Lutter, op. cit., § 202, l. no. 28; W. Bayer, op. cit., § 202, l. no. 102; U. Hüffer, op. cit., § 202, l. no. 27.

[91] The conclusions and regulation of the subject matter by ZGD-1 is supported also by Directive 2012/30/EU, as per the first paragraph of Article 45: "Member States may derogate from the first paragraph of Article 9, the first sentence of point (a) of Article 21(1) and Articles 29, 30 and 33 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings." As previously

An additional relief brought forth by this regulation is that such a corporate charter provision (authority per corporate charter) allows for the setting of a lower issue price than it would be possible to set if, at the disapplication of the pre-emptive right, new shares would be issued to third parties. To a certain extent, instances referred to in the fourth paragraph of Article 353 of ZGD-1 thus allow for derogation from criteria stipulated by the second paragraph of Article 400 of ZGD-1.[92] Even though the second paragraph cannot be directly applied in case subscribed capital is increased by means of in-kind contributions, it does call for a *mutatis mutandis* application also in such instances.[93]

## 8.1. Assumptions of challengeability of general meeting resolution on increase of subscribed capital

A logical assumption for the application of the second paragraph of Article 400 of ZGD-1 to the ordinary increase of subscribed capital and authorized capital is a valid and admissible disapplication of the pre-emptive right. In case the disapplication is considered void or inadmissible, the entire resolution on the ordinary increase of subscribed capital is void as well, as is, in instances referred to in the first paragraph of Article 354 of ZGD-1 (direct disapplication of pre-emptive right) the entire resolution on the formation of authorized capital.

## 8.2. Isolated voidness with authorized capital

If, with regard to authorized capital, the management is authorized to decide on the disapplication of the pre-emptive right (second paragraph of Article 354 of ZGD-1), the resolution on the formation of authorized capital may be declared partially void, whereas the voidness is limited to the disapplication of the pre-emptive right, meaning that the authorized capital and associated pre-emptive right remain in effect (cf. second sentence of the second paragraph of Article 354 of ZGD-1, which does not refer to the third paragraph of Article 337 of ZGD-1).[94] In such circumstances, all shareholders have a pre-emptive right to acquire new shares. It is thus necessary to determine whether authorized capital with a pre-emptive right to acquire new shares is at all reasonable

referred to, Article 33 of Directive 2012/30/EU governs the pre-emptive right to acquire new shares.

[92] Cf. U. Hüffer, op. cit., § 202, l. no. 27; W. Bayer, op. cit., § 202, l. no. 103; M. Lutter, op. cit., § 202, l. no. 29; R. Veil, op. cit., § 202, l. no. 29.

[93] Cf. M. Schwab, op. cit., § 255, l. no. 9; U. Hüffer, op. cit., § 255, l. no. 1, 11; F.-J. Semler in Münchener Handbuch - Aktiengesellschaft, § 41, l. no. 126.

[94] In German law see U. Hüffer in Münchener Kommentar (2011), § 255, l. no. 6, 9; U. Hüffer, op. cit. (2010), § 203, l. no. 32; G. Krieger, op. cit., § 58, l. no. 26.

and whether it carries independent intent and purpose, i.e. whether the authority to decide on the disapplication of the pre-emptive right is only a means of expanding the powers and authorities of the management.[95] If authorized capital, due to its purpose-specific nature, may only be utilized with a simultaneous disapplication of the pre-emptive right, partial voidness is not possible.[96]

## 8.3. Disproportionally low issue price

The basic premise for the adequacy of the issue price is the full (internal, real) value of a share.[97] In order to determine the issue price, the management will, if necessary, apply various valuation methods.[98] However, in line with the intent and purpose of the second paragraph of Article 400 of ZGD-1, the issue price is not considered disproportionally low simply due to the fact that it does not reach the full price of a share. Declaring the issue price disproportionally low requires an objective element, i.e. the notion that it is objectively not acceptable for a shareholder that the full price of a share was not reached.[99] The justifiability of minor deductions arises from the fact that, by applying minor deductions, the subscription and payment of new shares become lucrative and commercially attractive.[100] The decision on an adjustment which is still considered acceptable for shareholders needs to be taken on a case-by-case basis. It is also imperative to observe whether the company might, despite all circumstances, be interested in acquiring new shareholders and collecting their contributions (especially in case of in-kind contributions).[101] However, a deduction from the full value of shares, made only due to the fact that a large shareholder, in favour of whom the pre-emptive right has been disapplied, could take advantage of a difficult economic position of the company, is not admissible.[102]

Legal theory and literature do not provide a unified opinion on the effects of the stock market price on the issue price with regard to the aforementioned

[95] U. Hüffer, op. cit. (2011), § 255, l. no. 6; U. Hüffer, op. cit. (2010), § 203, l. no. 32.

[96] U. Hüffer, op. cit. (2010), § 203, l. no. 32.

[97] M. Schwab, op. cit., § 255, l. no. 3; cf. U. Hüffer in Münchener Kommentar (2001), § 255, l. no. 15, 18; Peifer, op. cit., § 182, l. no. 46.

[98] On the commercial value of a company and methods of determining commercial value see N. Plavšak in ZGD-1 (2006), p. 365-370. On the commercial value of a share, see N. Plavšak, op. cit., p. 370.

[99] M. Schwab, op. cit., § 255, l. no. 3; U. Hüffer, op. cit. (2001), § 255, l. no. 15, for unquoted companies.

[100] M. Schwab, op. cit., § 255, l. no. 3; U. Hüffer, op. cit. (2001), § 255, l. no. 16, for unquoted companies.

[101] Cf. U. Hüffer, op. cit. (2010), § 255, l. no. 7; M. Schwab, op. cit., § 255, l. no. 3.

[102] M. Schwab, op. cit., § 255, l. no. 3; BGHZ 71, 52 ("Kali und Salz").

issue of challengeability of general meeting resolutions.[103] However, there is a high volume of consensus that slight downwards deviations are admissible in order to encourage the subscription of new shares.[104] In literature, a significant disparity exists also on the relation between the stock market price and the internal value of shares.[105] The truth regarding the observance of the market price of shares when determining an adequate issue price is to be found in the discovery that a functioning organized financial instruments market generally reflects the full price of a share.[106] However, if the latter does not hold true, the stock market price cannot be the only relevant criterion to determine an adequate issue price, but rather only one of the determining elements which should be applied according to relevant circumstances.

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[103] Cf. U. Hüffer, op. cit. (2010), § 255, l. no. 8; M. Schwab, op. cit., § 255, l. no. 4; F.-J. Semler, op. cit., § 41, l. no. 127.

[104] Cf. M. Schwab, op. cit., § 255, l. no. 4; F.-J. Semler, op. cit., § 41, l. no. 127; K.-N. Peifer, op. cit., § 182, l. no. 46.

[105] Cf. M. Schwab, op. cit., § 255, l. no. 4; U. Hüffer, op. cit. (2010), § 255, l. no. 8.

[106] Cf. U. Hüffer, op. cit. (2010), § 255, l. no. 9; U. Hüffer, op. cit. (2011), § 255, l. no. 21; K.-N. Peifer, op. cit., § 182, l. no. 46; N. Plavšak in OZ, p. 338-339.

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# KLJUČNI VIDIKI VARSTVA DELNIČARJEV PRI ODOBRENEM KAPITALU

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Odobreni kapital je zelo fleksibilna oblika povečanja osnovnega kapitala. Podobno kot pri rednem povečanju osnovnega kapitala je tudi pri odobrenem kapitalu varstvo delničarjev usmerjeno predvsem v ohranitev njihovega deleža v osnovnem kapitalu in v varstvo pred (ekonomsko) razvodenitvijo vrednosti delničarjevih članskih pravic. Ključni institut, namenjen njihovemu varstvu, je zakonska prednostna pravica do novih delnic, ki vsakega delničarja upravičuje do prednostnega vpisa takega deleža novih delnic, ki ustreza njegovemu deležu v (dosedanjem) osnovnem kapitalu. Njena izključitev lahko vodi do neželenih posledic za delničarje, npr. premikov v razmerjih glasovalne moči, izgube manjšinskih pravic ali blokadne manjšine, do okrepitve družbine odvisnosti, razvodenitvi premoženjske vrednosti njihovih delnic (premoženjskemu razvrednotenju njihovih članskih pravic) pa so delničarji izpostavljeni, če je emisijski znesek novih delnic nesorazmerno nizek. Pravila o zakonski prednostni pravici do novih delnic, izoblikovana za redno povečanje osnovnega kapitala, je treba smiselno uporabiti tudi pri odobrenem kapitalu, ko povečanje osnovnega kapitala praviloma ne bo izvedeno neposredno po ustanovitvi odobrenega kapitala, temveč v določenem času po tem, do takrat pa se lahko okoliščine, v katerih posluje družba, spremenijo, glede na položaj, ki je obstajal, ko je bil odobreni kapital ustanovljen. Poleg splošnih značilnosti prednostne pravice do novih delnic avtor v prispevku analizira oba načina njene izključitve pri odobrenem kapitalu in utemelji posebne predpostavke, ki morajo biti izpolnjene za njeno veljavno izključitev. V zvezi s slednjimi svojo analizo osredinim na dva ključna elementa, namreč poročilo poslovodstva o izključitvi prednostne pravice in materialne predpostavke za izključitev prednostne pravice. Pri tem analiziram tudi razvoj sodne prakse v zvezi z izključitvijo prednostne pravice do novih delnic v primerjalnopravnem prostoru.

Z izključitvijo prednostne pravice do novih delnic je tesno povezana ureditev izpodbojnosti sklepa skupščine iz 400. člena Zakona o gospodarskih družbah (ZGD-1), ki varuje delničarja predvsem pred premoženjskim razvrednotenjem njegovih članskih pravic, do katerega pride, če so nove delnice izdane, brez da bi za to prispevani vložki ustrezali vrednosti članstva. Delničar, katerega prednostna pravica je bila izključena, ne more izkoristiti ugodnosti nizkega emisijskega zneska in ohraniti svojega deleža v družbi po tej nižji ceni. Na podlagi analize namena določbe četrtega odstavka 353. člena ZGD-1, ki ureja izdajo delnic delavcem družbe, menim, da se morajo v določenih primerih

interesi manjšinskih delničarjev po ohranitvi njihovega deleža umakniti interesom družbe, da veže delavce nase, in interesom delavcev, da postanejo imetniki delnic »svoje« družbe. V izvornem prispevku analiziram tudi možnost delne neveljavnosti sklepa skupščine o ustanovitvi odobrenega kapitala, ko je neveljavnost omejena le na izključitev prednostne pravice, odobreni kapital pa ostane veljaven s prednostno pravico delničarjev.

V prispevku so analizirana tudi pravila, ki urejajo stvarne vložke pri odobrenem kapitalu. Pozornost je namenjena predvsem »poenostavljenemu povečanju osnovnega kapitala« in položaju, ko so pogodbe o stvarnih vložkih sklenjene še pred vpisom (ustanovitve) družbe v sodni register, in sicer z ozirom na bodoče povečanje osnovnega kapitala na podlagi odobrenega kapitala, ko je pooblastilo zanj vneseno že v ustanovitveni statut. V prvem primeru (poenostavljeno povečanje osnovnega kapitala) revizorju ni treba pregledati izdaje delnic, za katere se prispevajo stvarni vložki, namen take ureditve pa je omogočiti družbam, da povečajo osnovni kapital s stvarnimi vložki brez revizije, če je mogoče pravilno vrednost stvarnega vložka ugotoviti na drug način. Revizijo je mogoče opustiti le v treh izrecno določenih primerih iz prvega odstavka 194.a člena ZGD-1, izpolnjene morajo biti posebne publicitetne zahteve, značilnosti odobrenega kapitala pa pridejo še posebej do izraza v zvezi s posebnim obvestilom članov organov vodenja ali nadzora pred prispevanjem stvarnega vložka, ki je predvideno le pri odobrenem kapitalu, in v zvezi z njihovo izjavo po izročitvi predmeta stvarnega vložka. V drugem primeru želi zakon preprečiti zaobid določb, ki veljajo za ustanovitev družbe s stvarnimi vložki, in prikrito ustanovitev s stvarnimi vložki. Ta varovalni namen je sicer, glede na druge določbe, ki urejajo odobreni kapital, nekoliko nepotreben.

Po ZGD-1 znesek odobrenega kapitala ne sme preseči polovice osnovnega kapitala, s čimer sta omejena njegova prekomerna uporaba in poseg v članski položaj delničarjev, prav tako pa je varovana avtonomnost skupščine pri odločanju o večjih spremembah osnovnega kapitala. Poleg te omejitve v prispevku analiziram tudi subsidiarnost povečanja osnovnega kapitala. Gre za zakonsko ureditev, ki kvalificira povečanje osnovnega kapitala kot zgolj pomožen način zbiranja svežega kapitala, če delničarji še niso v celoti prispevali svojih vložkov in jih je zato mogoče terjati, naj prispevajo še izostali del vložka. Tudi ta institut je namenjen varstvu položaja delničarjev, ureditev v določbah o odobrenem kapitalu pa je podobna tisti pri rednem povečanju osnovnega kapitala. Zato najprej obrazložim ureditev, ki velja za redno povečanje osnovnega kapitala, potem pa izpostavim razlike pri odobrenem kapitalu. V zvezi s subsidiarnostjo povečanja osnovnega kapitala analiziram pomen lastnih delnic ter kdaj njihova pridobitev vodi do subsidiarnosti povečanja osnovnega kapitala in do predhodne uveljavitve terjatve družbe za prispevanje izostalih vložkov.

Pri analizi posameznih institutov izpostavim tudi posledice kršitev zakonskih določb in možnosti delničarjev za uveljavljanje takih kršitev.

*Izvirni znanstveni članek* UDK: 334.722.8:347.72.031:330.14

**DRNOVŠEK, Gregor: Ključni vidiki varstva delničarjev pri odobrenem kapitalu**

**Pravnik, Ljubljana 2015, let. 70 (132), št. 5-6**

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**DRNOVŠEK, Gregor: Key Aspects of Safeguarding of Shareholders with Regard to Authorized Capital**

**Pravnik, Ljubljana 2015, Vol. 70 (132), Nos. 5-6**

Authorized capital is considered a most flexible form of subscribed capital increase. Similar to an ordinary subscribed capital increase, the system of safeguarding of shareholders with regard to authorized capital is mostly aimed at preserving the shareholders' basic subscribed capital share, and safeguarding the shareholders from (commercial) dilution of their rights. Shareholders are safeguarded also in case of capital increase with contributions in-kind, with special provisions governing quantitative restrictions of authorized capital, and with a special regime governing the voidability of general-meeting resolutions.