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What does the revision of the company law mean for unlisted companies?

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After a long back-and-forth, the revision of the company law has been approved at the end of the referendum period on 8 October 2020. Although it does not lead to a fundamental change in company law, there are some notable changes that are particularly important for unlisted companies. These include, for example, the introduction of the capital band, the admissibility of virtual general meetings and significant changes to the law on restructuring. In the following, the most important changes from the point of view of non-listed companies are presented and, in the sense of a planning aid, the need for action is outlined.

The Federal Council has not yet determined when the changes will come into force. This can realistically be expected in early 2022. However, some amendments to the Federal Commercial Register Ordinance that are relevant in practice have already entered into force on 1 January 2021.

1. Status quo and entry into force

The revision of company law has been underway for 20 years now. It already started back in 2001, but was slowed down by the "fat-cat" salaries initiative and has since been almost completely abandoned. After almost 20 years and a long period of political confusion, the revision is now a reality and has been adopted by the parliament.

In terms of content, the amendment covers the entire range of the law of stock corporations, LLCs and cooperatives. The amendments will probably not come into force before summer 2021. Listed companies will have to comply with the new provisions on gender quotas as early as 1 January 2021, and stricter transparency rules will also apply to raw material-producing companies from that date.

2. The novelties at a glance

Although the revision contains numerous provisions that only affect listed companies, the following comments focus on the impact for unlisted companies. As will be shown, the audit should not be underestimated for such companies in particular.

2.1 Share capital

Under current accounting legislation, companies can already keep their accounts in a foreign currency. As an adjustment to this, share capital in a foreign currency is now also permitted, provided it is worth at least CHF 100'000 at the time of incorporation. The conversion is effected by means of a publicly notarized resolution of the general meeting of shareholders including an amendment to the articles of association. The Federal Council will determine the permissible currencies. Anyone who decides to do so - which is particularly useful for companies with a foreign parent company - must keep both the share capital and the accounts in the same foreign currency. This is the only way to avoid cumbersome conversions, for example when forming reserves and paying dividends. Consequently, a company which has participation certificates must also keep them in the selected foreign currency.

The shares themselves must now only have a par value "larger than zero" and not, as previously, above CHF 0.01. This will make it possible to create significantly more shares with a capital of CHF 100'000 and will greatly simplify future share denominations. Since many companies already refrain from issuing physical share certificates, there will be no need to exchange the old certificates when a new denomination is issued.

In addition, treasury shares are no longer recorded on the assets and liabilities side of the balance sheet, but, in accordance with the new accounting law, only as a negative item under equity on the liabilities side.

2.2 Changes in capital

One of the main innovations is the introduction of the "capital band", a combination of capital increase and reduction. The introduction of such band requires a qualified majority of the general meeting (GM). As a new feature, the GM can authorize the Board of Directors (BoD) to increase or reduce the share capital within a certain range for a maximum of five years, although it can also be determined that only an increase or a reduction is possible. The upper and lower limits are limited to a maximum of half of the share capital. In fact, the existing "authorized capital increase" is thus extended from 2 to 5 years and an "authorized capital reduction" is introduced.

Once resolved by the GM, the actual increase or decrease does not require a new GM decision. The protection of creditors continues to be maintained, as the provisions on the securing of claims (creditor call), interim financial statements and audit confirmation by an auditor also apply by analogy.

The procedure for a capital increase has also been simplified. The deadline for its implementation and registration has been extended from three months (which is too short) to six months. In this context, the disclosure of intended acquisitions in kind has also been abolished, which has so far unnecessarily complicated the process of incorporation and capital increase. On the other hand, the set-off of liabilities and the increase from equity capital must now be disclosed.

2.3 Interim dividends

In the past, the permissibility of interim dividends has repeatedly been the subject of debate. Now, interim dividends are explicitly permitted if audited interim financial statements and a GM resolution are available. The audit can be dispensed with if all shareholders agree to the distribution at the GM and the creditors' claims are not jeopardised as a result.

However, interim financial statements must always be available and dividends from current profits that are not recorded in interim financial statements remain inadmissible. The payment of an interim dividend does not require a statutory basis and can be decided relatively "spontaneously" at an extraordinary GM.

These changes will simplify the distribution of liquidity, especially in group structures, as well as in companies with shareholders who are accustomed to paying quarterly dividends due to their origin, as it is common practice in the USA or England.

2.4 Shareholders' rights

The revision of the company law generally brings about a reinforcement of shareholder rights. While the thresholds for convening the GM, for a special investigation and for actions for dissolution of unlisted companies remain unaltered, the following changes should be highlighted:

shareholder right	**current law**	**revised law (unlisted companies)**
right to set agenda items	nominal value of CHF 1 Mio. or 10% of the share capital	5% of the share / participation capital or the votes
right to information outside the general meeting	n/a	10% of the share capital or the votes
right to inspect the company ledgers	no threshold	5% of the share capital or the votes

In particular, the right to information outside the GM has been a practical problem for shareholders up to now, since in contrast to listed companies, information was often not provided on a regular basis. Now, shareholders representing collectively at least 10% of the share capital or votes can request information from the BoD, which must give its opinion within four months. These answers must be made available for review by the remaining shareholders at the next GM.

2.5 General Meeting

An important innovation is the "virtual" GM. GMs can now also be held electronically, provided that there is a relevant provision in the articles of association. In the case of unlisted companies, the appointment of an independent proxy for virtual GMs is not mandatory, but may be useful in practice. The details should also be set out in the organisational regulations.

As the protection of shareholders' rights at the GM is key, the BoD must ensure that an "average shareholder" can participate in the GM without major technical obstacles. The BoD must also guarantee that the identity of the participants is established, that the votes at the GM are transmitted directly, that each participant can submit motions and participate in the deliberations, and that the voting results cannot be distorted. For example, a GM using Zoom/Microsoft Teams or similar applications would be possible, provided that the prerequisites described above (identity, right to submit motions etc.) are met.

In addition, the BoD will have to specify details of the formalities in the invitation to attend the GM. Although the fully virtual "live" GM will initially only be used by listed companies due to the considerable technical effort involved, this could also be of interest to unlisted companies in the era of COVID-19. The GM can take place, for example, via an electronic shareholder portal or by means of a special application. Some companies have already gained initial experience in this respect during the COVID-19 pandemic during the current year.

It is now permissible for the GM to take place at different venues at the same time, provided that the votes of the participants are transmitted directly in audio and video to all venues. This mix of physical and virtual GMs makes sense especially for international companies where the participants are located in different countries. In addition, the GM can also take place abroad or, thanks to the possibilities offered by the different meeting venues, abroad and in Switzerland.

Finally, a written GM by means of a (1) circular resolution or (2) ballot is introduced. While the circular resolution is merely a choice between accepting or rejecting the respective proposals, the ballot also allows for new proposals. Previously, only resolutions of the BoD were permissible by circular resolution.

Provided that no shareholder requests oral deliberation, the resolutions can be passed in writing on paper or in electronic form, which makes it considerably easier to hold the GM in smaller or group companies. The time-consuming process of first obtaining powers of attorney from all shareholders in order to then hold the general meeting is thus eliminated.

In addition, the general meeting held by circular resolution can be held without observing the notice period of 20 days. The resolution is passed with the signature of all shareholders. In contrast to the GM by circular resolution, as already mentioned, a ballot can also be held.

Since this is only very concise rudimentarily regulated by law, it is advisable to specify the details in the articles of association, especially with regard to the submission of new motions. As these motions must be communicated to the other shareholders, it is advisable to set a deadline for their submission in order to subsequently announce the final agenda items and motions.

2.6 The Board of Directors

Now the members of the BoD of unlisted companies must be elected individually as well, unless the articles of association prescribe otherwise or all shareholders waive individual election. In order to adapt the resolutions of the BoD to modern times, they can now be made purely electronically, i.e. without a signature, for example by chat, SMS, e-mail, DocuSign or other applications. Since there is now an explicit provision in the law, there is no need to amend the articles of association in this respect.

2.7 Liability law

In this context, the possibility for the GM to force the company, i.e. the BoD or another representative, to bring a liability action should be underlined. Practice will have to clarify the numerous uncertainties in this context, e.g. whether the representative may also enter into a settlement or whether he will have to obtain the approval of the GM again.

2.8 New restructuring law

The entire "early warning system" has been reorganized, thus increasing the chances of successful restructuring. In addition to the existing facts of capital loss (1st stage) and over-indebtedness (2nd stage), the "threat of insolvency" has been explicitly included in the law as a preliminary stage. The BoD must monitor the solvency of the company and take appropriate measures to ensure it.

Under current law, a capital loss is deemed to exist if "half of the share capital and legal reserves are no longer covered". Until now, it was questionable whether the entire or only the blocked legal reserves should be taken into account. The revision provides clarity here and states that only the non-refundable legal (profit) reserves are to be included. Contrary to the applicable law, the BoD does not necessarily have to convene a GM, but is free to decide which restructuring measures to take. If the company does not have an auditor (opting out), the last annual financial statements before their approval by the GM must be subject to a limited audit unless the BoD has submitted a request for a debt-restructuring moratorium.

With regard to over-indebtedness, i.e. where there is good cause that the company's liabilities are no longer covered by assets, the judge must still be notified, provided that there is no subordination of creditors. However, an absolute deadline of 90 days is now set within which the over-indebtedness must be remedied, which is relatively short. The notification of the judge is unpopular because the financial situation of a company is made public. Compared to the current law, a "silent restructuring" with the new regulations is more promising.

2.9 Arbitration clauses in articles of association

The long disputed question of the effectiveness of arbitration clauses in articles of association has now been finally resolved. A provision of the articles of association is permissible, according to which in the event of disputes between the company and shareholders or organs, a private arbitration tribunal based in Switzerland rather than a State court is competent. The scope of the arbitration clause may be limited as required and, for example, may apply only to certain legal relationships or certain claims.

In today's business world, arbitration as an alternative dispute resolution mechanism is very popular, especially in international relations, because of its flexible procedure, specialised judges, the speed of the proceedings and the strict confidentiality. Arbitration clauses in articles of association can also be very useful for unlisted companies. In Germany and Austria the settlement of intracompany disputes by means of arbitration already plays a major role. The introduction of an arbitration clause in the articles of association requires a qualified majority decision by the GM, as this implies a waiver of legal protection by state courts. The commercial register must then refer to the provision of the articles of association so that new shareholders are also informed transparently.

2.10 Revision of the Commercial Register Ordinance (CRO) to 1 January 2021

In the context of the discussion on the revision of company law, it is often overlooked that the amendments to the CRO have come into force on 1 January 2021, which has the practical consequences described below for unlisted companies.

Now, instead of two members of the BoD, commercial register applications can be signed by all persons authorized to sign or even by a power of attorney (e.g. a lawyer, notary public or trustee). All entries, articles of association and foundation deeds are now mandatory publicly accessible electronically and can be obtained online, which was previously only possible in a few cantons. All other registration documents (e.g. registration) can still be viewed at the respective commercial register office or, depending on the canton, may also be made available electronically. The exception to this is correspondence (including copies of passports, income statements, balance sheets, annual reports, etc.), which is

submitted for exemption from the obligation to audit (opting-out). Entries in the commercial register become effective upon publication in the Swiss Official Gazette of Commerce (SOGC) and not, as previously, with reference to the date of entry in the daily register. The "express registry procedure" is therefore no longer applicable.

As the personal data contained in the cantonal commercial registers has been managed in a decentralized manner up to now, a "central database of persons" is now being set up to determine uniformly throughout Switzerland which person is registered with which function and signatory power at which company. According to the current state of information, however, the database will only be open to the cantons and the Federal Government in order to avoid duplication in the cantons and to identify a person unambiguously.

In addition, the notorious "Stampa declaration", according to which it was previously necessary to confirm in the case of incorporations or capital increases that there were no other contributions in kind, acquisitions in kind or special benefits shall be discontinued. This information now only belongs in the public deed; a separate document is no longer required.

In the case of transfers of quotas between quotaholders in a limited liability company, the assignment agreement and the capital increase act no longer need to contain any reference to the rights and obligations under the articles of association associated with the quotas. The quotaholders are expected to know their articles of association.

Finally, the possibility to block any changes directly at the commercial registry has also been abolished. This can now only be applied for at the competent court, i.e. an application must be made for the relevant commercial registry to make an entry or to refrain from making an entry as a precautionary measure.

3. Conclusion

Although the revision of the company law does not involve fundamental changes, the above-mentioned amendments provide welcome specifics and additional flexibility for Swiss companies. Small and middle sized companies are also well advised to review their articles of association and regulations early on before the changes come into force and to carve out opportunities and options. We would be happy to support you in this. The amendments to the Commercial Register Ordinance, which already came into force on 1 January 2021, bring some useful simplifications in practice.

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