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RECHT I STEUERN

New Stock Corporation Law as of January 1, 2023: Many New Possibilities and Need for Adaptation of the Articles of Association

After the first attempt to revise stock corporation law in 2007, the new law ("nCO") will finally come into force at the beginning of 2023.

First of all, the most pressing questions: Do existing articles of incorporation and bylaws need to be amended, and if so, by when? In principle, the provisions of the new law will apply to all existing companies immediately after their entry into force (January 1, 2023). Statutory or regulatory provisions that do not comply with the new law will remain in force for a **transitional period of** two years from the date of entry into force, i.e. **until the end of 2024,** but will become invalid upon expiry of the deadline. Since many articles of incorporation and bylaws are likely to contain passages from the law that will be amended with the revision (e.g. shareholders' rights, see para. 4 below), it is recommended to review them before the expiry of the transition period for this reason alone. A timely amendment of articles of incorporation or bylaws is particularly advisable if a company wants to make use of some or all of the features of the new law and have them clearly regulated (see in particular paras. 1-3 below).

The revision represents a modernization of the previous stock corporation law ("CO") and offers numerous new regulatory possibilities for stock corporations ("AG"), limited liability companies ("GmbH") and other corporate forms. This article is intended to provide a (non-exhaustive) overview of practical aspects of the new law and is divided into the following topics:

- **Board of Directors** (more under para. 1)

  From 2023, the Board of Directors ("BoD") will be subject to new provisions that increase and clarify its financial responsibility, particularly in the case of restructuring. In addition, there are new regulations on the election procedure and the term of office of the BoD with pitfalls, on electronic meetings and resolutions, and on the transfer of management. The law also contains new obligations to act in the event of conflicts of interest.

- **General Meetings of Shareholders** (more under para. 2)

  Depending on the provisions of the articles of incorporation, a General Meeting of Shareholders ("GM") can now be held abroad, at several meeting locations, completely virtually or by circular. Furthermore, as of 2023, lower thresholds will apply for shareholders' rights to convene a GM, to add items to the agenda and to submit motions. The new law also grants the GM new powers in connection with share listing and liability actions. Other changes relate to the exercise of shareholders' rights by proxy.

- **Dividends and Capital Structure** (more under para. 3)

  As of January 1, 2023, it will be possible to pay dividends during the current financial year and to carry share capital in a limited selection of foreign currencies. New possibilities and simplifications also arise for changes in capital and nominal share values as well as acquisitions in kind.

- **Shareholders' Rights and Corporate Governance** (more under para. 4)

  Shareholders' rights are strengthened overall under the new law by extending their rights to information, expanding inspection rights, lowering the thresholds for special investigations and providing for more comprehensive restitution claims.

- **Other Company Forms** (more under para. 5**)**

  While most of the new regulations concern stock corporations, there are also legal changes for other types of companies such as limited liability companies, cooperatives, foundations and associations; mostly, however, not for all of them, with regard to the holding of meetings as well as financial responsibility.

1. Board of Directors

Increased and more clearly regulated financial responsibility (art. 725 et seq. nCO)

The new company law requires the BoD to monitor the solvency of the company and to take measures to ensure it and, if necessary, to restructure the company, without having to convene a GM and propose restructuring measures to it in every instance, as was the case under the previous law (art. 725 para. 1 CO). The financial responsibility of the BoD is increased in the law insofar as it now does not only have to act in the event of an adverse balance (half of the share capital is no longer covered), but must already initiate steps if the company is in imminent risk to become insolvent (art. 725 para. 2 nCO). As of January 1, 2023, even in the event of over-indebtedness (liabilities no longer covered by assets), the BoD may, at its own discretion and on its own responsibility, refrain from notifying the court, which notification is in principle mandatory, if there is a reasonable prospect of reorganization within 90 days of obtaining the required interim financial statements, and if there is no additional risk to creditor claims (art. 725b para. 4 no. 2 nCO).

Pitfalls in election procedure/term of office (Art. 710 nOR)

What is already applicable law for listed stock corporations now also applies to non-listed companies (without introducing a provision in the articles of association to the contrary): The BoD members have to be elected individually and not in groups. The provision of the Ordinance against Excessive Compensation in Listed Stock Corporations according to which the term of office of BoD members of listed stock corporations ends with the conclusion of the next ordinary GM is now integrated into the nCO.

Irrespective of any listing, the most recent decision of the Federal Supreme Court must be observed for all stock corporations, according to which the office of a BoD member ends six months after the end of the relevant financial year and the term of office (even if the articles of association state otherwise) if no GM has been held by then or the election of the BoD has not been included on the agenda (BGer 4A_496/2021 of December 3, 2021, E. 3.4 et seq.). In other words, there is **no tacit extension of BoD mandates**, which can quickly lead to an organizational deficiency (BoD not properly constituted) and, as a consequence, to null and void BoD and GM resolutions (the latter e.g. when a GM is convened by BoD members who are not [anymore] elected). An organizational deficiency may also occur if the office of the Chairman of the BoD is vacant, but the BoD may remedy this deficiency itself by appointing a new Chairman. In addition, the articles of association may provide for other rules to remedy the organizational deficiency (art. 712 para. 4 nCO). The inclusion of such rules in the articles of incorporation is recommended, especially in light of the possible absence of re-elections or new elections of the BoD.

Electronic meetings and passing of resolutions (art. 713 para. 2 and 3 nCO)

As with the GMs, BoD meetings can now also be held explicitly by electronic means. Circular resolutions are also possible by electronic means (e.g. via e-mail, messenger apps such as Whatsapp/Threema/Signal and the like) and no signature of the individual BoD members is required unless a member requests otherwise, or the BoD has stipulated a different arrangement in writing, or the resolution is to be submitted as a document to the Commercial Registry Office. These adjustments not only offer opportunities, but also entail risks for the decision-making of the BoD (e.g. problems of proof and discussions due to unclear resolutions in group chats), which is why a clear regulation for such resolutions in the bylaws is recommended. **Nevertheless, written minutes of a physical meeting** must still be kept and signed by the chairman and the secretary.

Paradigm shift for the transfer of management (art. 716b para. 1 nCO)

Even before the revision, the BoD could delegate management to individual members of the BoD or to other natural persons by means of bylaws. Previously, this required a basis in the articles of incorporation. Now the opposite principle applies, whereby delegation of management is always possible unless the articles of incorporation provide otherwise.

Duties to act in the event of conflicts of interest (art. 717a nCO)

If members of the BoD or the executive management have a conflict of interest, the law now stipulates that they must inform the (entire) BoD immediately and in full. In addition, the new stock corporation law stipulates that the BoD must take measures to safeguard the interests of the company, but leaves open what these measures could be (conceivable, for example, would be the recusal or a two-stage vote).

2. General Meetings of Shareholders

The new (and old) forms for conducting a GM (art. 701a et seq. nCO)

Perhaps not (anymore) everyone is aware of the fact that, prior to the Corona pandemic, general meetings of a stock corporation, apart from the possibility of proxy voting, had to be held as events with physical presence at the place of the meeting (in contrast to a limited liability company, where circular resolutions of the shareholders have been possible for a long time). Swiss stock corporation law did not know any other forms of holding a GM. It was not until COVID 19 Ordinance 2 that the legislator introduced alternative ways of conducting a GM (in writing, electronically or with an independent proxy). On the basis of COVID 19 Ordinance 3, these options still apply until the new stock corporation law comes into force and will be incorporated into law in the main features with the revision. **Newly added are mixed forms of holding** a GM (physical meeting location with the option of electronic participation, several meeting locations or a meeting location abroad).

Thus, as of January 1, 2023, the following forms are permitted by law to hold a GM:

- with a physical meeting place
  - in Switzerland or abroad
  - in several places
  - according to a decision of the BoD to additionally allow electronic participation for persons not physically present (often referred to as hybrid GM)
- without a physical meeting place
  - with virtual participation through electronic means (in real time)
  - with participation by circular letter (time-delayed; in writing or electronically), if none of the shareholders request an oral discussion

If a GM is to be held **virtually or** at a **venue abroad**, the **articles of association** must be **amended** accordingly in advance (art. 701b and art. 701c nCO). The other forms of conducting a GM are permissible after the entry into force of the new law without a basis in the articles of association, provided that the respective legal requirements are met.

Decision on the form of conducting a GM

As before, the decision on the form of conducting a GM is to be made by the BoD. The shareholders have no say in the matter or any claim as to how their voting rights are to be exercised. The new law only stipulates that the determination of the venue for the meeting must not make it unreasonably difficult for anyone to exercise their rights at the GM (art. 701a para. 2 nCO).

Reduction of the thresholds for the right to convene meetings, to request the inclusion of items on the agenda and to propose motions (art. 699 para. 3 and art. 699b para. 1 f. nCO)

In the case of listed companies, shareholders holding 5% or more of the share capital or votes may now request that a GM be convened; for all other companies, the threshold remains at 10% of the share capital or votes.

Previously, a nominal share value of CHF 1 million was required in order to be able to request the inclusion of items on the agenda or to submit motions in advance. now,

- for listed companies 0.5 % of the share capital or votes and
- for all other companies 5% of the share capital or votes

are required.

Access to the annual report and the auditor's report (art. 699a nCO)

It is now sufficient to make the annual report and the auditors' report **available electronically** 20 days prior to the ordinary GM, so that it is no longer necessary to make them physically available for inspection at the company's registered office.

New competencies

As of January 1, 2023, a delisting of shares requires the approval of the GM (art. 698 para. 2 no. 8 CO) and the GM itself may decide to bring an action for return of benefits or for loss caused to the company, and to entrust the BoD or a representative with the conduct of such proceedings (art. 678 para. 5 and art. 756 para. 2 nCO).

Extension of resolutions with two-thirds majority quorum (art. 704 para. 1 nCO)

Under the new law, additional resolutions are subject to a two-thirds majority quorum. These include, in particular, resolutions on features that may be adopted under the revised law (e.g. to hold a GM with a venue abroad, to introduce a capital band, or to delist equity securities).

Exercise of participation rights through proxy (art. 689b et seq. nCO)

The proxy voting rules of the previous law have undergone a fundamental editorial revision; they are now much more detailed and lead to a system change for proxies **without instructions**: If there is no instruction to vote, proxies must now **abstain from** voting (art. 689b para. 3 and art. 689e para. 3 nCO). Previously, the principle applied that in the absence of instructions, the proxy had to follow the BoD's proposal (art. 689d para. 2 CO). Proxy forms kept by companies should therefore be thoroughly checked and, if necessary, adapted. The possibility of appointing an independent proxy, which was already introduced for non-listed companies in the context of the Corona pandemic, is retained in the new law.

3. Dividends and Capital Structure

Interim dividends (art. 675a para. 1 nCO)

As of January 1, 2023, interim dividends may even be distributed from profits of the current fiscal year based on interim financial statements.

Share capital in foreign currency (art. 621para. 2 nCO)

Newly established companies, but also existing ones, may keep their share capital in their functional currency, i.e. the currency that is essential for their business activity. According to Annex 3 of the revised Commercial Register Ordinance (AS 2022 114), the following currencies are

permitted: **EUR, USD, GBP and JPY**. A change of the currency of the share capital can be decided by the GM at the beginning of a business year (art. 621 para. 3 nCO). This leads to a simplification especially for all those companies that have already chosen a corresponding foreign currency for accounting and financial reporting in the wake of the revision of the accounting law.

Possibility of a so-called capital band (Aart. 653s et seq. nCO)

The GM can now approve a capital band of a maximum of ±50% of the registered share capital, within which the BoD can increase or decrease the share capital within a maximum of five years. The capital band replaces the former authorized capital, which only allowed capital increases for a maximum of two years, and gives the BoD significantly more flexibility in adjusting the capital structure.

Reduction of the limit for nominal share values (art. 622 para. 4 nCO)

The nominal value of shares may now also be smaller than the previous minimum of CHF 0.01, as long as it is greater than zero.

Simplifications for (intended) acquisitions in kind: The previous provisions are deleted without replacement

In the case of an (intended) acquisition in kind, the company undertakes to acquire assets from a related party in the context of an incorporation or a capital increase. Now, such acquisitions in kind no longer require an incorporation report or an audit report by a licensed auditing expert, nor do they have to be referenced in the articles of incorporation and entered in the Commercial Registry, stating the object and the consideration. The previous provisions, however, remain in force for contributions in kind.

4. Shareholder Rights and Corporate Governance

Extended right to information (art. 697 para. 2 nCO)

Shareholders of unlisted companies holding at least 10% of the capital or voting rights may now request information on the company's affairs from the BoD at any time (instead of only at the GM as was previously the case).

Extended rights of inspection (art. 697a para. 2 nCO)

As of January 1, 2023, shareholders holding at least 5% of the capital or voting rights may request access to the company's books and correspondence (whether listed or not) even without authorization by the GM, provided that the company's interests worthy of protection are not jeopardized.

Reduction of the limit for special investigations (art. 697c et seq. nCO)

Now, the same participation quotas are required for a special investigation (new term; previously "special audit") as for convening a GM (5% of the share capital or votes for listed companies and 10% for all others).

More comprehensive restitution obligations (art. 678 f. nCO)

Based on the revised stock corporation law, not only shareholders or the Board of Directors, but also members of the management or the Advisory Board as well as persons closely related to them are obliged to return to the company basically all benefits (previously limited catalog) which they have received *unjustifiably*; and this without proof of bad faith. If the benefit received forms part of a legal transaction, the only decisive factor for the obligation to repay is whether there was an obvious disproportion to the consideration; the economic situation of the company at the time of the transaction is no longer relevant. The GM can resolve that the company brings an action of restitution and can entrust the BoD or a third party with the conduct of the proceedings.

5. Other Forms of Companies

GmbH

The provisions of the new stock corporation law on the holding of a GM, the currency of the capital, the minimum par value of the shares, interim dividends and the impending insolvency, loss of capital and overindebtedness are applicable to the GmbH accordingly. The (former) provisions on acquisitions in kind also no longer apply to the GmbH. However, following the legal system of the nCO, the possibility to introduce a capital band is reserved for the AG (art. 782 para. 4 CO).

Cooperative

The incorporation and amendments to the articles of association must now be notarized. The provisions of the new stock corporation law regarding the holding of a GM, impending insolvency, loss of capital and overindebtedness are applicable to the cooperative accordingly.

Foundations (art. 84a f. nCC)

Now, in the event of imminent insolvency or overindebtedness, the supreme governing body of the foundation no longer has to prepare an interim balance sheet, but, instead of the auditors, it has to notify the supervisory authority directly. Furthermore, the provisions of the stock corporation law on the determination of overindebtedness also apply to foundations.

Associations

For associations, reference is only made to the corresponding provisions of the new stock corporation law with regard to impending insolvency or overindebtedness (art. 69d nCC). There is no reference to the conduct of the GM. After associations were also able to hold their meetings in writing, electronically or by proxy during the Corona pandemic on the basis of COVID 19 Ordinances 2 and 3, these options are likely to lapse in the absence of a corresponding reference to the stock corporation law (art. 29 COVID 19 Ordinance 3). Thus, in accordance with the new law, associations basically only have the option of the physical presence meeting (art. 66 CC). If requested, it should be examined whether associations can include other meeting rules in their articles of association similar to those of the new stock corporation law.

If you have any questions or would like us to check whether adjustments to your existing articles of association or bylaws are necessary, please do not hesitate to contact us.

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