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FAQ on the Revised Corporate Law (non-listed corporations): to the Point and Implementable

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Overview: Entry into Force, Required Action, Possibilities

1. Which laws have changed with regard to the revised corporate law as of 1 January 2023?

The revised corporate law is primarily to be found in the revision of the Code of Obligations (**CO**): The amendments concern the provisions on corporations (i.e., a company limited by shares), the limited liability company, and the cooperative. However, the corporate law revision also affects numerous other laws and ordinances:

- Civil Code (**CC**): The amendments pertain to associations and foundations.
- Merger Act (**MA**): The amendments primarily affect merger possibilities in the event of a loss of capital or over-indebtedness, and the securement of claims in the event of a spin-off.
- Code of Civil Procedure (**CCP**): The amendments pertain to regulations on special investigation and matters subject to summary proceedings.
- Federal Act on Debt Collection and Bankruptcy (**DEBA**): The amendments primarily concern bankruptcy suspension and deferment.
- Criminal Code (**SCC**): The amendments are primarily on the criminal liability of members of management and the board of directors of listed companies, as well as on the consequences of the violation of provisions concerning the reporting of payments to government agencies, non-financial matters, minerals and metals ensuing from conflict areas, and child labour.
- Tax legislation: The changes are primarily related to the capital band *(see question 14)* and the conclusion of transactions in a foreign currency.
- Further laws: The corporate law revision also led to amendments in the Federal Law on Occupational Retirement, Survivors' and Disability Pension Plans (**LOB**), the Collective Investment Schemes Act (**CISA**), the Banking Act (**BA**) and the Insurance Supervision Act (**ISA**).
- Ordinances: Amendments were also made to various ordinances, namely the Commercial Register Ordinance (**CRO**).

2. When do the amendments of the revised corporate law become applicable?

The revised corporate legislation entered into force on 1 January 2023. Therefore, the provisions of the CO are applicable to existing companies as of 1 January 2023. Special transitional periods apply for the adjustment of the articles of association and other corporate documents *(see question 6)* as well as for pre-existing authorised and contingent capital *(see questions 11 and 13)*.

3. What immediate action is required?

Beyond the observance of the new provisions of the amended laws as of 1 January 2023 *(see question 1)*, there is no immediate need for action. The articles of association and regulations will continue to apply for two years. There is sufficient time to adapt corporate documents to the new legislation *(see questions 2, 6 and 9)*.

4. What must be kept in mind in regard to the next ordinary general meeting?

For the previous two years under the COVID-19 Ordinance, general meetings could be held by written or electronic means without the need for an in-person meeting venue. The revised corporate law has replaced the COVID-19 Ordinance:

- If the next annual general meeting in 2023 is to be held as a virtual event without a venue, the articles of association must priorly be amended accordingly *(see question 24)*.
- The general meeting may pass written resolutions, either on paper or in an electronic form *(see questions 21 and 22)*.

It would be advisable to propose the adaption of the articles of association to accommodate the corporate law revision at the next annual general meeting *(see question 6)* and, if desired, to make use of the new share capital structuring possibilities *(see questions 10 and 14)*.

5. What new organisational possibilities are there under the new corporate law?

Among others, the revised corporate law has introduced more flexible regulations and new structuring options:

- Share capital in a foreign currency *(see question 10)*;
- Minimum share nominal value: This must now correspond to an amount greater than zero;

- No second allocation in the case of dividend distributions *(see question 16)*;
- Admissibility of interim dividends *(see question 15)*;
- Flexible increases and decreases of share capital within the scope of the capital band *(see question 14)*;
- General meeting can adopt resolutions in writing or via electronic means *(see questions 21 and 22)*; and
- Hybrid general meetings which may be virtual and/or held abroad *(see questions 19, 22 - 26)*.

Corporate Documents (Articles of Association, Organisational Regulations, etc.)

6. Do the articles of association and the organisational regulations need to be adapted to the revised corporate law?

The articles of association and regulations are required to be adapted to the revised corporate law within two years. If these documents are not adapted, provisions which are incompatible with the revised corporate law will cease to have effect as of 1 January 2025. For reasons of legal certainty and transaction security, but also in order to benefit from various legal modernisations and simplifications *(see question 5)*, we recommend that the articles of association, the organisational regulations, and the other corporate law documents be amended as soon as possible *(see question 9)*. Adaption is required for the following reasons:

- Existing articles of association do not contain the newly stipulated mandatory content for the articles of association, or not in its entirety.
- Pre-existing articles of association and pre-existing organisational regulations contain legal institutions or provide for structuring options that are no longer permissible under the revised corporate law.
- Pre-existing articles of association contain provisions which are no longer necessary under the revised corporate law and/or which no longer correctly reflect mandatory or dispositive corporate law due to its amendment.
- Various of the new modernisations and flexibility options provided in the new corporate law require a basis in the company's articles of association for their applicability.

7. Do the articles of association of a corporation that is a group subsidiary have to be adapted at all to the revised corporate law?

An amendment to the articles of association is not mandatory, but as of 1 January 2025, provisions in the articles of association that violate the revised corporate law will cease to have effect. Articles of association containing provisions that are no longer in force lead to legal uncertainty. In addition, the articles of association often also serve as a form of a directive for corporate procedures. It is therefore advisable to amend the articles of association of entirely owned subsidiaries. Furthermore, an amendment of the articles of association is necessary if certain of the newly available flexibilities and modernisations are to be enacted *(see questions 21 - 24)*.

8. How is the adaptation of the articles of association to be implemented?

The amendment of the articles of association requires a publicly certified resolution of the general meeting. When preparing the items for discussion, it is important that the principle of the unity of the subject matter be observed *(see question 20)*:

- A substantive total revision of the articles of association may be voted on as a single item of business. A material total revision is deemed to occur if a substantial number of provisions of the articles of association are materially amended (rule of thumb: ten).
- A formal total revision of the articles of association may be voted on as a single item of business. A total revision is of a formal nature if solely editorial and not material changes are undertaken (e.g., updating of references to legal provisions).
- In the case of a combined formal and substantive revision of the articles of association, the editorial and the substantive amendments are to be voted on separately. For the material part, individual votes regarding the amendments are to be held if they do not collectively constitute a total revision. Individual items of business and subsequent votes are also recommended if a qualified quorum is required for a resolution. This third category is likely to be relevant in most cases of amendments to the articles of association being made due to the corporate law revision.

9. What other corporate law documents should be adapted?

The focus is on the adaptation of the articles of association and the organisational regulations *(see question 6)*. We recommend to additionally check whether further corporate law documents require revision, e.g.:

- board committees' regulations (Committee Charters);
- a code of conduct, (e.g., concerning the handling of conflicts of interest);
- templates for board of directors' and general meeting resolutions and minutes;
- general meetings invitation templates;
- protocol for the general meeting.

Share Capital and Pay-Outs

10. What needs to be observed if the share capital currency is to be changed?

The following should be noted:

- The share capital may only be held in a permissible foreign currency that is material to the company's business. Permissible currencies are currently: British Pound, Euro, US Dollar, and Yen.
- Accounting and financial reporting must be done in the same currency as the share capital.
- At the time of the currency exchange, the equivalent value of the share capital must reach at least CHF 100,000.
- The currency change is to take place at the beginning of the current or following business year.

11. The company holds contingent capital. Can this still be used?

Increases arising from contingent share capital continues to be possible in the future. If the company possesses contingent capital, which was resolved upon prior to 1 January 2023, it can continue to be used; in this case the former corporate law regulations continue to apply. The pre-existing contingent capital, however, can only be amended if the amendments are permissible under the revised corporate law.

12. The company would like to introduce authorised capital. Is that possible?

No. As of 1 January 2023, corporations can no longer enact authorised capital. The introduction of the capital band *(see question 14)* led to the elimination of the institution of authorised capital.

13. The company holds authorised capital. Can this still be used?

Yes. Authorised capital introduced before 1 January 2023 may continue to be used up until its expiry. The time caps stem from the articles of association, or rather the former corporate law restrictions, and amount to a maximum of two years. As of 1 January 2023, the pre-existing authorised capital may no longer be adjusted or extended (subject to necessary adjustments due to capital increases from the authorised capital). If the company requires room to enact capital change manoeuvres, the introduction of the capital band (and the simultaneous dissolution of the pre-existing authorised capital) is recommended *(see question 14)*.

14. How does the capital band work in basic terms?

The articles of association may authorise the board of directors with the flexibility to increase or decrease the company's capital, within a predefined range, for a maximum period of five years. The maximum range being a 50% increase or decrease of the capital entered in the commercial register (e.g., CHF 300,000 and CHF 100,000 for CHF 200,000). However, the share capital may never be reduced below CHF 100,000. An introduction of a capital band requires a qualified quorum of the general meeting (two thirds of the votes and a majority of the nominal share value to be represented).

15. Can the company pay out interim dividends?

Yes, the general meeting of shareholders may now, based on interim financial statements, decide on an interim dividend pay-out, a basis in the articles of association is not required. Interim financial statements are required even if the annual financial statements were prepared less than six months ago. If the company financial statements are subject to a limited

or regular audit, the interim financial statements must likewise be audited. However, the audit may be waived if all shareholders approve the interim dividends, and creditor claims are not jeopardised.

16. Does a second allocation have to be made when the dividend is paid?

No. As of 1 January 2023, 5% of the annual profit must be allocated to the statutory retained earnings. The statutory retained earnings must be allocated until, together with the statutory capital reserves, it reaches 50% of the share capital entered in the commercial register; for holding companies, the limit is 20% percent. A second allocation is no longer required.

17. What has changed in regard to the accounting and distribution of capital reserves?

As of 1 January 2023, a distinction will be made between statutory capital reserves, statutory retained earnings *(see question 16)* and voluntary retained earnings. The agio (issue amount minus nominal value and issue costs), the retained deposit on defaulted shares, and shareholder contributions are to be allocated to the statutory capital reserve. Losses must also be offset against the profit carried forward, the voluntary and statutory retained earnings and the statutory capital reserves (in said order) if these are not carried forward to the new financial statements. The statutory capital reserves may be distributed to the shareholders if the statutory capital reserves and retained earnings, minus the amount of any losses, exceed half of the share capital recorded in the commercial register (for holding companies: 20%).

18. What changes apply to offsetting, contributions in kind and acquisitions in kind?

As of 1 January 2023, all possible forms of payment of shares are now exhaustively regulated by law: cash payment, contributions in kind, offsetting, and conversion of freely usable equity capital. The articles of association must provide certain information regarding the share payments if the share capital was not paid in via cash payment. The (intended) acquisition of assets is no longer subject to disclosure. However, the so-called mixed contributions in kind/acquisitions remain subject to disclosure.

General Meeting

19. How may a general meeting newly be held per the revised corporate law?

A general meeting may now be held as follows:

- with one or more different conference venues;
- electronic means without a meeting venue (virtual general meeting);
- with a physical venue as well as virtually (hybrid);
- with a meeting venue abroad; and
- in writing, on paper or in electronic form.

None of the forms mentioned above may impede the exercise of shareholder rights in an improper manner. In addition, certain additional requirements must be observed *(see questions 21 - 27)*.

20. What must the board of directors consider when convening the meeting with regard to the items of business?

The revised corporate law sets out which aspects must be stated within the notice of the meeting. In addition, all information must be presented to the general meeting which is necessary for the adoption of resolutions. The board of directors must further ensure that the principle of the unity of the subject matter is observed; this requirement is intended to protect shareholders from having to accept a proposal which they partially oppose, because they are only able to vote on the matter in the form of an overall proposal which they only wish to accept in part. Items that thematically belong together may be voted on as a unit. Items which thematically do not belong together must individually be voted upon *(see question 8)*.

21. When can the general meeting adopt resolutions by written or electronic means?

This possibility is always given as long as no shareholder or their representative requests oral deliberation. A basis for passing resolutions by written or electronic means in the articles of association is not required *(but see question 22)*.

22. How does the adoption of resolutions by the general meeting in writing on paper or in electronic form work in practice?

The revised corporate law does not stipulate any specific rules for the general meeting adopting resolutions in writing, either on paper or in electronic form. We therefore recommend that the procedure be clearly regulated in the articles of association. In our opinion, a distinction may be made between the circular resolution and the ballot:

- Circular resolution: A pre-prepared resolution is sent to the shareholders for approval either via hard copy on paper or in an electronic form. In order to prove that no shareholder or their representative requested oral deliberation, all shareholders or their representatives are to respond to the circular resolution. They must state whether they vote in favour of the resolution or are merely indicating that they are waiving oral deliberation. In our view, a signature is not required. This view is, however, controversial.
- Ballot: In our view, a ballot vote remains admissible in the future. The shareholders are sent an invitation to cast their vote in advance. The stipulations regarding the invitation of the general meeting are applicable analogously. We recommend that shareholders be given a period of time in which (counter) motions may be submitted before the voting documents are to be sent out. After the expiry of this period, the voting documents with the inclusion of the ballot are to be sent to the shareholders. The completed voting form must be returned by the shareholders within a set period of time. Failure to return the ballot shall subsequently be deemed a waiver of participation in the ballot and consent to the procedure. In the event of civil proceedings, however, the burden of proof shall lie with the company. After receipt of the voting documents, the chairman and the secretary of the board are to count the votes and notify the shareholders of the ballot results.

For resolutions concerning a transaction which must be entered in the commercial register, or a resolution which must be submitted to the commercial register as a supporting document, written resolutions are not recommended. Should the company nevertheless opt for the enactment of written resolutions, it is recommended that the resolutions be priorly submitted to the presiding commercial register for preliminary examination.

23. What must be observed if the company holds a general meeting abroad?

The following should be noted:

- A basis within the articles of association is required, the introduction of which prerequisites a qualified quorum.
- Within the notice of the meeting's convening, the board of directors must designate an independent proxy. The appointment, provided that all shareholders agree, of an independent proxy may be waived in cases of non-listed corporations.
- The general meeting may be held abroad even if one or more resolutions require public certification. In this case, the Commercial Register Ordinance stipulates special form requirements which are to be observed.
- Consideration should further be given to whether holding the general meeting abroad may result in any tax consequences under foreign tax laws.

24. What must be observed when the company holds a virtual general meeting?

The following should be kept in mind:

- A basis in the articles of association is required.
- Within the notice of the meeting's convening, the board of directors must designate an independent proxy. The appointment of an independent proxy may be waived in cases of non-listed corporations. The waiver requires a basis in the articles of association, the introduction of which requires a qualified quorum.
- The board of directors must regulate the use of electronic means and see that certain aspects of the meeting are ensured (establishment of identity, immediate transmission of votes, possibility of interaction, no falsification of the voting result).
- The general meeting may be conducted entirely virtually, even if one or more resolutions must be publicly certified. However, restrictions stemming from cantonal notary laws may arise *(see question 28)*.

25. What must be observed when the company holds a hybrid general meeting?

The company may hold the general meeting physically and allow shareholders who are not present at the venue to exercise their rights electronically (hybrid meeting). As with solely virtual general meetings, the board of directors must

regulate the use of electronic means and certain aspects of the meeting are to be ensured (establishment of identity, immediate transmission of votes, possibility of interaction, no falsification of the voting result).

26. What should be done if technical problems occur during a virtual or hybrid general meeting?

If technical problems occur during the general meeting, so that the general meeting cannot be conducted properly, it must be repeated; in this case, the invitation period does not have to be observed (however, there are different opinions on this in the doctrine). Resolutions passed before the occurrence of the technical problems are valid and do not have to be repeated.

A general meeting is deemed not to have been properly conducted if the passing of resolutions and the exchange of opinions (including the exercise of the rights to propose motions) cannot be carried out correctly. If individual shareholders have difficulties with their hardware and software or if there are connection difficulties due to a telecommunication company, there is no technical problem (however, there are different opinions on this in the doctrine). An exception exists if the connection fails across the board.

If the board of directors has knowledge of a source of error, it must immediately be checked whether a technical problem in the aforementioned sense exists. It is therefore recommended that an IT expert accompanies virtual general meetings with a large number of participants and that the board of directors inform the shareholders that the IT expert must be contacted immediately in the event of technical problems. The IT expert himself should be available shortly before and during the general meeting by telephone, e-mail and possibly by chat.

If technical problems occur, we recommend the following procedure:

- If a technical problem is only temporary, it should be resolved immediately and the general meeting should then continue. The discussion and resolution of business conducted or passed during the technical problem must be repeated. The procedure shall be recorded in the minutes.
- After a temporary technical problem has been solved, we recommend asking the shareholders whether they can attend the general meeting again without a technical problem. In a smaller group of participants, the questioning can be done orally, the result must be recorded in the minutes. In the case of a larger group of participants, it is advisable to conduct a short electronic vote, the result of which must be recorded in the minutes.
- If there is a technical problem that is not only of a temporary nature, the general meeting must be repeated or reconvened on a different date (without observing the invitation period; however, see the note above regarding the different doctrinal opinions on this).

27. Can the chairman of the general meeting have the casting vote?

Yes. The articles of association may stipulate that the chairman of the general meeting has the casting vote in the event of a tie. The introduction of this basis in the articles of association requires a qualified quorum.

28. Can general meeting resolutions that require notarisation also be adopted by written, electronic or hybrid means?

General meeting of the shareholders resolutions that are to be notarised may also be adopted by written, electronic, or hybrid means if no restrictions arise from the applicable cantonal notarisation law. In each case, the certification procedure should be individually coordinated with the competent notary in advance, and pre-checked by the presiding commercial register.

Board of Directors' Duties

29. What has changed with regard to the board of directors' duties?

As of 1 January 2023, the CO explicitly stipulates that members of the board of directors must immediately and fully disclose any conflicts of interest to the board of directors. In addition, in the event of conflicts of interest, necessary measures must be taken to safeguard company interests *(see question 30)*.

Furthermore, the board of directors must continuously monitor the company solvency (liquidity). If the company is in danger of becoming insolvent, the board of directors must take measures to ensure solvency *(see question 31)*.

30. What needs to be considered regarding conflicts of interest?

The following should be noted:

- There is a duty to inform *(see question 29)*, this duty also applies to members of the executive management.
- The board of directors must take the necessary measures to safeguard company interests. We recommend that the board of directors issue general rules for dealing with conflicts of interest - regulations on this are currently already frequently found within company organisational regulations.
- If a general and comprehensive recusal is not possible, a double resolution should be passed (with and without the participation of the conflicted board members).

31. How must the board of directors proceed in the event of the company's insolvency?

If the company is in danger of becoming insolvent, the board of directors must take measures to ensure solvency:

- Measures to ensure liquidity: e.g., liquidity plan, realisation of assets, optimise debtor management, spending freeze;
- Restructuring measures: e.g., subordination declarations, revaluation of real estate and participations; to the extent that the restructuring measures fall within the competence of the general meeting, propose said measures to the general meeting (e.g., implementation of a capital increase); and
- Judicial measure: apply for a (provisional) debt-restructuring moratorium.

32. Does the board of directors have to immediately convene a general meeting to approve the restructuring measures?

No. The board of directors is to act with due haste and must foremost take measures to safeguard the company's liquidity if insolvency is imminent *(see question 31)*. If the board of directors wishes to take reorganisation measures to eliminate an impending insolvency or capital loss that fall within the competence of the general meeting, it may propose the corresponding measures to the general meeting.

Further information:

Federal Council Dispatch of 23 November 2016 on the Amendment of the Code of Obligations

Parliamentary documents on the revised corporate law

Practice Note EHRA 3/22 of 19 December 2022: Issues in connection with the entry into force of the new corporate law

The Corporate & M&A practice group of MLL Legal will be happy to answer any questions you may have on the revised corporate law.

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