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New Company Law ante portas – Instant end of current Articles of Association?

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Key Take-aways

- 1.** The new company law of 19 June 2020 will enter into force on 1 January 2023. A transition period of two years is applicable for the adaptation of existing articles of association to the new law.
- 2.** In order to maintain the status quo under the existing articles of association or to avoid an unintended continuation of the current company law, an accelerated revision of the articles of association may be necessary.
- 3.** Depending on the subject matter and content, amendments to the articles of association relating to the new law may be approved before 1 January 2023, but may possibly only be filed for registration in the commercial register thereafter.

1 Introduction

On 1 January 2023 the **new company law** will come into force (excluding the provisions regarding gender guidelines and transparency rules in the commodities sector contained in the same revision and already in force). The overriding goals of this reform are an increase in flexibility of company law, its alignment with the financial reporting rules and the adoption of the provisions of the Ordinance Against Excessive Remuneration in Listed Stock corporations into the Code of Obligations. Finally, the revision is also intended to improve corporate governance within stock corporations (see the overview of the most important changes in our [Newsletter from October 2020](#)).

In view of the upcoming entry into force of the new company law, the question arises whether, how and from when there is a need for Swiss stock corporations (AG; SA) to adapt their articles of association and regulations. This question arises equally for limited liability companies (GmbH; Sàrl), whose legal framework is being amended in parallel with the revision of the company law. However, the following considerations are limited to statutory amendments required for stock corporations.

The articles of association of stock corporations **newly incorporated** after 1 January 2023 must be in line with the provisions of the new company law from the outset. In contrast, existing articles of association may be adapted to the new company law within a transitional period of two years after its entry into force. The current articles of association will therefore generally remain in force until 31 December 2024 at the latest, and within their framework the old company law will thus continue to apply. Only upon expiration of this transitional period will all provisions of the articles of association that are incompatible with the new law be nullified by virtue of law. Thus, the new company law will only apply without any limitations as from 1 January 2025.

2 Amendments to the Articles of Association to maintain the Status Quo

As mentioned in the introduction, stock corporations that wish to maintain the unchanged **status quo of their articles of association** can, in principle, keep their current articles of association until the end of 2024 and, within this framework, rely on the existing company law.

However, there are certain exceptions to this principle, where a prior amendment of the articles of association may be required given the specific circumstances and needs of the stock corporation concerned and its shareholders.

2.1 Explicit regulation instead of previous conscious silence

Firstly, cases should be mentioned in which a corporation has so far refrained from including a so-called conditionally necessary provision in its articles of association, thus deliberately preventing a statutory mechanism from coming into play.

For instance, under current law, the **delegation of management** from the board of directors to individual board members or to an executive board is only permitted subject to the requirement that the articles of association expressly allow

for such a delegation. This requirement will no longer apply under the new company law: as from 1 January 2023, the board of directors will by operation of law, i.e. even without a basis in the articles of association, be authorized to delegate management, unless the articles of association explicitly provide otherwise.

Companies that have not previously permitted delegation of management by the board of directors and wish to continue not to permit such delegation, will therefore, as a result of this reversal of the statutory default rule, be under pressure: instead of silently waiving a corresponding authorization in the articles of incorporation, they will have to amend their articles of incorporation in this respect and explicitly exclude or restrict such a delegation option.

The new company law will only apply without any limitations as from 2025.

2.2 Explicit regulation of what has so far been implicitly valid

A second exception to the unchanged continuation of the current articles of association for the purpose of maintaining the *status quo* concerns cases which, under current company law, did not, but which in the future will, require an explicit basis in the articles of association.

For example, a stock corporation that has previously held its **general meeting abroad** may only continue to do so after 1 January 2023 if this is explicitly provided for in the articles of association.

Similarly, the holding of **general meetings via electronic means under the exclusion of the right to on-site participation** falls into the same category: Due to the special COVID legislation still currently in force, this is permissible without a corresponding basis in the articles of association. However, stock corporations that wish to continue making use of this option after the end of 2022, will be required to first amend their articles of association accordingly and to waive a physical meeting venue, if applicable.

3 Amendments to the Articles of Association to implement the novelties of the new company law

The new company law provides for numerous **novelties**, the implementation of which requires a corresponding basis in the articles of association. If a stock corporation wants to use these new means, it must therefore revise its articles of association accordingly.

For example, the following novelties fall under this category:

3.1 General Meeting of the Shareholders

As already mentioned, the new company law allows for a general meeting to be held at a **venue abroad** or **entirely electronically without a physical venue**. However, both of these options will only be available to a Swiss stock corporation from 1 January 2023 if the articles of association contain a corresponding authorization to do so.

Furthermore, in order to avoid deadlock situations in the general meeting, the new company law allows for a **casting vote by the chairperson of the general meeting**. However, also this option will only be available if the articles of association expressly provide for it.

There is no fundamental need for Swiss stock corporations to immediately amend their current articles of association, but ...

3.2 Share Capital

The new company law contains significant new means that allow for a **more flexible capital structure**, but a stock corporation may also only benefit from these if it amends its articles of association accordingly:

- The **share capital** may be denominated in a **foreign currency** (if essential for the business operations and declared permissible by the Federal Council), provided that it corresponds to an equivalent value of at least CHF 100,000 at the time of implementation. The foreign currencies that may be used for this purpose are, at this time, the following: GBP, EUR, USD and JPY.
- Furthermore, the **minimum par value of a share** is only required to be higher than zero and can thus be lower than the previous minimum amount of CHF 0.01.
- With the **new concept of the capital band**, the board of directors can be authorized in the articles of association to increase or reduce the share capital within a defined range. This renders the previous authorized share capital obsolete. However, stock corporations that have currently provided for an authorized capital increase in their articles of association may still carry out such authorized capital increases until 31 December 2024 in accordance with the provisions of the current legal framework.

3.3 Arbitration Clause

Under the new company law, stock corporations may stipulate in their articles of association that all **disputes under company law** are not to be settled by a state court, but by an **arbitral tribunal**. The articles of association may specify the details of the arbitration proceedings in more detail or refer to specific arbitration rules.

Such an arbitration clause in the articles of association shall – unless otherwise stated – apply to all corporate law disputes not only of the stock corporation concerned but also of all its bodies and their members as well as its shareholders.

4 Amendments to the Articles of Association to avoid an unintended continuation of the current Company Law

In practice, articles of association regularly reproduce certain provisions of the law more or less *verbatim*. If the underlying legal provisions are materially amended within the scope of the revision of the company law and if the relevant provisions of the articles of association remain unchanged, the latter reflecting the current law generally take precedence until the expiry of the two-year transitional period, even if they are inconsistent with or even in contradiction to the new company law. If applicable, this may lead to an unintended postponement of the application of the new company law for the company concerned.

Sooner or later no stock corporation can avoid to amend its articles of association.

The provisions concerning the **exercise of individual shareholder rights** can be used as an example:

- Many stock corporations have incorporated in their articles of association, for the sake of completeness, the current legal provisions according to which shareholders representing at least 10 per cent of the share capital may **request the convocation of a general meeting**, and shareholders representing shares with a nominal value of at least CHF 1 million have the **right to request the inclusion of an item on the agenda** of the general meeting.
- Under the new company law, these two thresholds are modified and lowered to 5% and 0.5%, respectively, of the share capital or the votes for listed stock corporations on the one hand, and to 10% and 5%, respectively, of the share capital or the votes for non-listed stock corporations, on the other hand.
- If these modified thresholds are to be applied without delay, the relevant provisions of the articles of association must therefore first be adapted to the new company law, otherwise the current thresholds referenced therein will still apply until 31 December 2024 at the latest.

Thus, also under this aspect, a review of the existing articles of association regarding their compatibility with the new company law is imperative in any event, so as to identify and

possibly eliminate in due course any unintended discrepancy between the current legal framework of the company concerned on the one hand, and the new company law on the other hand.

5 From when can the Articles of Association be adapted to the new Company Law?

Depending on the subject matter and content, certain amendments to the articles of association in line with the new company law may already be adopted and notified for registration in the commercial register before 1 January 2023 (e.g. the authorization to hold virtual general meetings). On the other hand, certain other amendments (e.g. the conversion of the share capital to a foreign currency) may also be adopted prior to the entry into force of the new company law, but may only be filed for registration with the commercial register after the entry into force of the new law. In both cases, one must consider

and ensure by means of an appropriate wording that the new company law does not take effect before 1 January 2023.

6 Conclusion

Before and immediately after the coming into force of the new company law on 1 January 2023, there is generally no fundamental and urgent need for Swiss stock corporations to amend their current articles of association to comply with the new company law, given the two-year transitional period. However, as outlined above, the use of the new means introduced by the revision as well as, in particular, the preservation of the *status quo* in the articles of association or the avoidance of an unintended continuation of the current company law may nevertheless require an accelerated, and possibly also urgent, amendment of the articles of association. Consequently, no Swiss stock corporation can avoid an analysis of the new company law and – sooner or later – an alignment of its current articles of association to the new legal framework.



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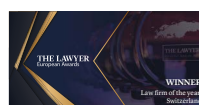
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