

Newsletter No.

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CO and CRO | Modernisation of the Law on Commercial Registers - Impact on Practice:

The modernisation of the law on commercial registers leads to some changes. Commercial register procedures are simplified and made less costly. Under the new law, an authorised representative (including a third party) can validly sign the commercial register application in certain cases. Furthermore, the commercial register can now only be blocked by means of precautionary measures by a civil court. The Old Age and Survivors' Insurance (OASI or AHV) number will be used to identify persons, so that a personal database can be created. This newsletter summarises the most important alterations. It briefly outlines the changes and their impact on practice.

Overview



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The commercial register law is finally modernised. This revision is necessary to meet the needs of the commercial register users. Not only the Commercial Register Ordinance (CRO) will be revised, but also the Code of Obligations (CO) and the Ordinance on the fees for the Commercial Register. This does not only lead to material, but also to formal changes. Under the changed law, it is possible in most cases for proxies to sign the application for a registration into the commercial register, the competent court must be requested to block the entry of the commercial register, the so called «Stampa Declaration» is no longer a separate document and the fees are reduced, thereby relieving the economy of an estimated CHF 14 million.

Application to the Commercial Register

Traditionally, the commercial register allowed only two (in rare cases three) members of the supreme management body or the board of directors with joint signature, or one member with single signature, to sign the application to the commercial register. The new law slightly extends the group of persons entitled to sign the application form. Proxies (such as attorneys, notaries and trustees) can sign the application form under the new law, in order to simplify the application procedure, but it is subject to individual exceptions. It should be noted that the proxy must be signed by one or more members of the supreme governing body authorised to sign on behalf of the company. The proxy cannot be given orally or via e-mail. The power of attorney can be submitted as a simple copy. It must be designed as a separate document, it is subject to the publicity of the commercial register and must be attached to every application. There is no requirement either to verify the identity of the proxy, nor to certify the proxy's signature. An open question is the admissibility of general or substitute powers of attorney. It is to be expected that the commercial registries will take a rather restrictive legal stance and therefore not allow such powers of attorney. However, the scope for the signature of an authorised representative will be very

limited, as the signature of the supreme governing body of the legal entity will still be required for various applications, e.g. for capital increases or for transactions according to the Swiss Merger Act. Fortunately, Parliament has already decided to amend (most of) the relevant provisions in the CO to the effect that its provisions will no longer be hostile to representation when the revision of company law comes into force (probably in 2022).

Due to the new legal provisions, the entry in the commercial register will only become legally effective upon publication in the Swiss Official Gazette of Commerce (SOGC). It is still possible to request a so-called "hyperexpress approval" from the Swiss Federal Commercial Registry Office (EHRA) in the case of capital changes of at least CHF 20 million, or in the case of entries of listed companies. However, this approval does not change the legal validity of the entry. Thus, the new law might lead to delays compared to former procedures: e.g. regarding the release of funds paid into a blocked account in case of incorporations or capital increases, because we fear that banks will no longer release the funds based on a so called advance extract (*Vorabauszug*).

«Stampa Declaration»

The new law has replaced the so called «Stampa Declaration» - in which the founders previously declared that there are no other contributions in kind, acquisitions in kind and intended acquisitions, cases of set-off or special privileges other than those mentioned in the supporting documents - with the requirement to mention these statements in the founding act or in the capital increase report. The same applies to changes of the articles and to subsequent payments.

Assignment of Capital Contributions

In addition, the new law simplified the assignment of capital contributions (*Stammanteile*) of limited liability companies (*GmbH*) between two company members. The Assignment agreement does no longer have to include references to the statutory rights and duties, if the assignee already holds stock in the company. The legislator has finally recognised that, in such cases, no further protection is needed.

Blockade of the Commercial Register

The revision also has an effect on the possibility of blocking entries in the commercial register. According to the previous law, it was possible to request a blockade of the commercial register directly at the competent commercial registry without giving reasons. This has changed with the new law. The application now must be filed to the competent court and must be justified in accordance with the Swiss Civil Procedure Code. Only if the request is granted, the court will instruct the commercial registry to block the register for changes. This application can be either in the form of an interim (*provisorisch*) or an ex-parte interim measure (*superprovisorisch*), whereby no hearing is necessary in the second case. Hopefully, the involvement of a further instance will not lead to long delays in the register blocking procedure, which is

usually very time-sensitive, and that ex-parte interim measures will only be granted in clearly justified exceptional cases; otherwise the now abolished blockade of the commercial register would live on through the back door.

Central Data Base for Persons

A further novelty is the use of the OASI (AHV) insurance number for the identification of natural persons among authorities. This number will not be made public. Its only use will be for the purpose of identifying a person throughout Switzerland. Therefore, the authorities work on a central data base for private persons and each registered natural person is assigned a number, which is public and, once assigned, must also be indicated in future registrations. This database should allow for a person search in the future, similar to the already existing search for a registered legal entity.

A few new norms have been in force since April 1st, 2020 to speed up this project. These new norms mainly concern the information procurement of the authorities and do not have a noteworthy effect on the legal practice.

Reduced Costs

In addition to the changes in the Ordinance, the schedule of fees for the commercial registries has been revised as well. The new law follows the unrestricted cost covering and the equivalence principle (Art. 941 Abs. 3 CO). This will reduce the total amount of the levies collected and thereby the total costs of the administrative body concerned. The set goal will be achieved through a reduction of the fees charged by one third. It is estimated to result in a financial discharge of the economy in the amount of CHF 14 mio. p.a. The cost reduction will be noticeable for the founders of companies. The new fees entered into force on January 1st, 2021.

Abolition of the Institution of Ownership in Undivided Shares

The legal institution of ownership in undivided shares (*Gemeinderschaft*, Art. 336 et seq. CC) is no longer available under the new law, because Swiss civil law foresees enough suitable alternatives (such as the simple partnership, the general partnership, the commercial partnership or the foundation).

Conclusion

The new provisions came into force on January 1st, 2021. They bring relief for the legally entitled person to file an application for registration, as well as in terms of the provisions regarding the assignment of capital contributions. The abolition of the «Stampa Declaration» as a separate document facilitates the founding act. The abusive use of blocking the commercial register is no longer possible under the new law. At the same time, the blockade is made more difficult in justified cases because of the introduction of the courts as an additional step, prior to successfully blocking the commercial register. The creation of a central data base for private persons registered in the commercial register brings more wanted, or unwanted, transparency. Now, it will be easily possible to find out in which entities a person is registered. Finally, we welcome the fact that the costs for registrations are significantly reduced.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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