

Swiss company law – New developments

Introduction

From January 1, 2008, important amendments to Swiss company law will become effective. In particular, rules governing Limited Liability Companies (Sàrl - GmbH) will be substantially changed to make that type of structure more attractive to small and medium-sized businesses. New ways of structuring an Sàrl will be offered and it will now be possible to form an Sàrl with one founder only¹. Other amendments to company law relate to Limited Companies (Société Anonyme (SA - AG)) and the Cooperative company ("Coop"), and not for profit structures such as associations and foundations. Finally, a new federal Act on the Supervision of Audit Companies (together with an implementing ordinance), which entered into force on September 1, 2007, will impact on a number of legal structures.

The purpose of this newsletter is to summarize the main features of the new legislation. By nature, this newsletter cannot cover all situations and should therefore not be regarded as a legal opinion.

1) The Limited Liability Company (Sàrl - GmbH) : main new features

a. Incorporation

As from January 1, 2008, it will be possible for one single person to incorporate an Sàrl (Art. 772 CO). The minimum share capital remains CHF 20'000 (Twenty thousand Swiss Francs) but the current cap in the share capital (CHF 2 million) will no longer apply. The minimum par value of each share will be reduced to CHF 100 (Art. 774 CO). The share capital will now have to be fully paid in. Any member will now be authorized to own more than one share.

Transfer of shares will be eased : an agreement in writing between the parties will be sufficient and it will no longer be necessary to proceed by means of a notarial deed.

Given that the share capital will have to be fully paid in from formation, members' liability for any unpaid part of same has been abolished. It will however be possible to agree in the by-laws of the company for an obligation of the members to make additional financial contributions to the Sàrl, capped at twice the amount of the par value of the shares held by the relevant member. The by-laws may also now impose an obligation on the members to provide ancillary services (such as the delivery of certain goods) that serve the purpose of the company, such as assist in maintaining its independence or the composition of its members.

b. Representation

An Sàrl may be represented by a person domiciled in Switzerland. There is no requirement as to the nationality of that person, who may be a non member.

The members meeting can remove powers of representation.

c. Right of veto

The by-laws may confer a right of veto to some or all members against decisions taken at the members meeting. It is also possible to provide in the by-laws that the management must refer certain specific decisions to the members meeting for its approval.

d. Audit

The new law also introduces the obligation for Sàrl's to have external auditors where any two of the following three conditions are fulfilled during two consecutive years (Art. 727 ch. 2 CO) :

- Total balance sheet: CHF 10 million
- Turnover: CHF 20 million
- Employment: 50 full time employees during a year

If the company has more than 10 employees but the other conditions of Article 727 CO are not fulfilled, only a limited audit of the accounts must be carried out.

The main difference between the ordinary and the limited audit lies in the obligation, for the audit company carrying out an ordinary audit, to be better qualified and more independent and submitted to more stringent obligations than audit companies making a limited audit only. Also, where the company is subject to full audit, the auditor may not carry out his duties for more than seven consecutive years.

An Sàrl having less than 10 employees can be fully exempted from the audit obligation.

e. Exclusion or exit of a member

The exclusion or exit of a member for important reasons was already admitted in legal literature and case law. As from January 1, 2008, the new law will specifically provide for that possibility where provided so in the by-laws.

¹ See in European Law, the Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies OJ L 395, 30.12.1989, p. 40–42.

2) The “Société anonyme “

The law on limited companies (Société anonyme (SA – AG)) has also been amended in line with the new legislation covering Sàrls. An SA may therefore also be incorporated by one single person or company. The members of the board of directors no longer need to be shareholders. One of the board members or of the managers must have his domicile in Switzerland and have the power to represent the company. Hence, the condition of Swiss domicile and Swiss or EU/ EFTA nationality of the majority of the Board is abolished. The Swiss domicile of a board member or of a manager having the power to represent the company will be sufficient regardless of nationality. This will reduce the costs of incorporating Swiss companies, given that “fiduciary” board members will no longer be required.

The rules on audit mentioned above with respect to Sàrls will also apply to SAs. However, public companies, such as listed companies or companies having issued bonds (Art. 727 § 100) will now have to be audited by a special audit company subject to the supervision of the state.

3) Associations

Rules governing associations have also been amended. This follows some minor amendments which became effective in 2005 (Articles 71 and 75a Swiss civil code).

Before the 2005 amendments, the members of an association whose Articles of association did not provide for the mandatory payment by members of annual dues could be held personally liable for the debts of the association. From January 1, 2005, personal liability only exists where expressly provided for in the Articles.

Under the current regime (until 31st December 2007), associations may register with the register of companies where decided so by the members meeting, and must do so where they carry out a commercial activity (Art. 61 CC).

From January 1, 2008, associations must be registered where they fall under the obligation to have auditors, i.e. where they meet the requirements mentioned in paragraph 1.d) above².

Associations must also carry out a limited audit if one member subject to personal liability or under an obligation to make additional financial contributions so requires (Art. 69b § 3 CC).

4) Transitional provisions

The new provisions apply immediately to new companies or structures incorporated as from January 1, 2008.

For existing companies, a period of two years is granted to adapt the Articles of incorporation or by-laws and the internal regulations. The unpaid part of the share capital of existing Sàrls will have to be fully paid within two years as well. Provisions of the new legislation regarding audit will however become effective in 2008, even for existing companies.

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² Foundations will also have to introduce a revision of their balance sheet under certain conditions (Art. 83b C).