

Briefing January 2021

Modernisation of the Commercial Register

On 1 January 2021, the new Commercial Register Ordinance ("**Ordinance**") came into force. Thanks to this modernisation, the Commercial Register can continue to fulfill its important function to service and support the security and efficiency of legal transactions. In addition, the economy will benefit from lower fees. Certain provisions under the Swiss Code of Obligations ("**CO**") and the Ordinance with regard to the central database of persons had already begun to apply during 2020.

Background

The changes in the CO associated with the modernisation of the Commercial Register have made it necessary to adapt the Swiss Federal Commercial Register Ordinance. Numerous provisions have been transferred from the Ordinance to the CO. As a result, the revised Ordinance has become leaner and is now limited to implementing provisions.

Entry into Force

The revised Ordinance and the amended Commercial Register Ordinance on Fees ("**Fee Ordinance**") entered into force on 1 January 2021.

In order to facilitate the implementation of the central database of persons, the relevant provisions of the CO and the Ordinance had already begun to apply from 1 April 2020.

Overview over the Revisions

Execution of Applications

The circle of persons who may file an application for a legal entity has been extended. In the period up to the revision, Commercial Register applications could be executed exclusively by members of the board of directors, or – as the case may have been - the managing officers of an entity. As of 1 January 2021, all individuals authorised to represent a legal entity, i.e. all individuals registered with a signing authority, will be able to sign and file applications for registration. In addition, a third party with due authorisation from the legal entity, e.g. a notary, lawyer or trustee will, henceforth, also be able to sign and file applications. However, the power of attorney authorising such a third party will still have to be signed by a member of the highest management or administrative body of a legal entity with individual signing authority or by two members with collective signing authority by two. Such power of attorney must be filed as a separate

document and may not be combined into other corporate acts, such as say meeting minutes or written resolutions. A simple copy of the power of attorney is sufficient for filing purposes, as it does not represent a formal Commercial Register exhibit. For the purposes of the Commercial Register, the power of attorney does not need to bear legalized signatures.

Effectiveness of Entries

The revised Ordinance no longer contains a provision under which entries in the Commercial Register had previously and retroactively become legally effective as of the date of their entry into the journal, once the approval of the Swiss Federal Office for the Commercial Register ("**EHRA**") had been obtained. As a result of this change, entries — both from an external (towards the public) and internal (within the company) perspective – will henceforth not become effective before their publication in the Swiss Official Gazette of Commerce ("**SOGC**"). Such publication typically occurs three business days after the journal entry. As a consequence of this, no valid extracts from the Commercial Register can be issued prior to publication in the SOGC (after the EHRA's approval). This lengthens the registration process, which could previously have been abbreviated to a single business day for certain important transactions (Hyperexpressverfahren). It therefore impedes on the feasibility of transactions which need to be implemented within tight timescales, as well as on certain capital market transactions (e.g. IPOs) and registrations of listed entities.

No More Temporary Blocking

In the past, art. 162 of the ordinance allowed third parties, who did not necessarily have to be shareholders, to make a direct objection to a specific register entry to the Commercial Register without stating their motives. Upon such objection, the Commercial Register would temporarily block such entry for a period of ten days, during which time the claimant would have to provide evidence that they had sought super-provisional measures from a court.

As part of the revision, art. 162 of the Ordinance was abolished with effect from 1 January 2021. Parties

seeking to prevent a register entry will therefore no longer be able to initiate the process in front of the Commercial Register and will instead have to seek super-provisional measures directly from the competent court. This slightly raises the bar in that a blocking process will henceforth always require a motivated filing.

Central Database for Individuals

Given that the personal data in the Commercial Register is recorded remotely in the respective cantonal Commercial Register offices, it is not yet possible to determine at a national level which individual is entered in the Commercial Register or which functions or indeed which signing powers a particular individual may have in various legal entities. To remedy this effect and generate the ability to identify registered individuals easily throughout Switzerland in the future, a central database is currently being created for the Commercial Register. This will be based on the social security (AHV) numbers of the registered individuals. So that the implementation process of this database was able to progress ahead of the revisions, the relevant provisions in the CO and the Ordinance came into force on 1 April 2020.

Free access to articles of association and foundation deeds

The revised art. 936 para. 2 CO provides that, among other, the articles of association of entities and the foundation deeds of foundations registered in Switzerland have to be made available online free of charge. Previously, such documents had only been freely available in isolated cantons, such as Zurich, Basel-City, Vaud and Geneva. In other cantons, the documents in question could be requested in writing subject to payment of a clerical fee. For technical reasons, it is likely that not all cantons will be able to make the documents mandated by the revised statutory provision available for direct download. Under the applicable directives of the EHRA, cantons lacking such ability will have to implement a simple order process, whereby such documents – in non-legalized form - can be obtained free of charge upon request to the competent Commercial Register.

Further Changes

In addition to the changes mentioned above, the so-called "Stampa Declaration" as a separate document has been abolished. Instead, its contents now have to be ascertained by the relevant corporate body and recorded in the underlying corporate acts.

Under the new regime, the cost coverage and equivalence principle will apply without restriction to the Commercial Register. This provides that the total amount of the fees collected may not exceed the total costs of the competent cantonal Commercial Register office in question, or at most slightly exceed them. In order to comply with these requirements, the fees have been reduced by about one third. The Federal Council has approved the corresponding amendment to the Fee Ordinance and has set 1 January 2021 as the effective date.

In addition, procedures which are initiated directly by a Commercial Register office have been standardised (e.g. due to organisational deficiencies) and the revised Ordinance now contains an explicit legal basis for correcting incorrect entries and for recording supplements to incomplete entries.

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