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En cas de liquidation volontaire de la société, qui décide ? Le liquidateur ou le conseil d'administration ?



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In the event of voluntary liquidation of the company, who decides? The liquidator or the Board of Directors ?

The general meeting of shareholders of a public limited company may decide to terminate the company by voluntary liquidation outside bankruptcy. This decision must be taken in authenticated form (736 CO). It is the sole responsibility of the General Meeting (736 CO) and requires at least a two-thirds majority of the votes attributed to the shares represented and a majority of the values of the shares represented (704 CO).

But who does what in the event of the voluntary liquidation of a public limited company?

The Swiss Code of Obligations does not go into much detail on this subject. Only the following two provisions deal with this issue:

Article 739 of the Swiss Code of Obligations. This provision stipulates that “as long as the distribution among shareholders has not been completed, the company in liquidation retains its personality and its corporate name, to which are added the words ‘in liquidation’. During liquidation, the powers of the corporate bodies are restricted to those acts which are necessary for this operation and which, by their nature, do not fall within the remit of the liquidators”.

Article 740 paragraph 1 CO. This article states that “liquidation is carried out by the Board of Directors, unless the Articles of Association or the General Meeting appoint other liquidators”.

If the Board of Directors carries out the liquidation on its own, the question of its competence to appoint one or more liquidators does not arise.

On the other hand, if liquidators are appointed, the Board of Directors remains in office, and the question of the relationship and prerogatives of the liquidator(s) vis-à-vis the Board of Directors can be relatively complex.

In our opinion, the following principles should be observed in this context:

1. Legal situation of the company during its liquidation and distribution of powers :

1.1 In general :

Pursuant to art. 739 of the Swiss Code of Obligations (CO), as the liquidators are appointed by the Annual General Meeting, it is their responsibility to carry out all the liquidation operations described in articles 739 to 747 of the CO.

1.2. Board of Directors :

During the liquidation process, the Board's powers are restricted to all other company management operations that do not concern the liquidation. Thus, the Board of Directors continues to exercise ultimate supervision over the company and the actions of the liquidators. It must ensure that the law and the Articles of Association are complied with, particularly by the liquidators. In particular, it oversees the liquidation process and defends the Company's interests against the liquidators. The Board of Directors does not, however, have the right to give instructions to the liquidators in matters falling within their remit, but may formulate instructions for them.

The Board of Directors is also responsible for determining the organization and structure of the company. Its powers of representation are, however, limited. It can only act on behalf of the company for tasks that cannot be carried out by the liquidators, i.e. tasks that are not related to the liquidation of the company.

The Board of Directors also prepares the Annual General Meeting and implements its decisions, insofar as they do not relate to the liquidation process itself.

The Board of Directors may not dispose of the company's assets, which is the sole responsibility of the liquidators. The liquidators may or may not authorize the Board of Directors to continue operating the company during the liquidation phase.

1.3. General Meeting :

The General Meeting of Shareholders remains the supreme authority of the company, even during liquidation, and continues to exercise the powers conferred on it by the Board of Directors, albeit with the following restrictions:

- The General Meeting retains the power to amend the Articles of Association and to increase or reduce the company's share capital;
- The Annual General Meeting no longer has to approve the annual report, the financial statements, or even the appropriation of profits, which are no longer necessary in a company in liquidation;
- However, it is recommended that the liquidators submit the opening balance sheet and interim balance sheets to the

Annual General Meeting for approval;

- Nor, in principle, can the meeting decide on the distribution of dividends;
- The Annual General Meeting grants discharge to the members of the Board of Directors and to the liquidators.

An important point concerns the power of the General Meeting to take all decisions that are reserved to its competence by law and the Articles of Association. For example, pursuant to art. 743 para. 4 of the Swiss Code of Obligations, the General Meeting may prohibit the liquidators from selling some of the company's assets by private treaty.

2. Conclusion :

In view of the foregoing, it is important that the liquidator(s) bear in mind that their function does not put an end to the prerogatives of the Board of Directors and the General Meeting, but that these are redefined in the light of the company's new corporate purpose, i.e. to complete the voluntary liquidation of the company.

Source :

<https://www.wg-avocats.ch/en/actualites/company-law/in-the-event-of-voluntary-liquidation-of-the-company-who-decide-s-the-liquidator-or-the-board-of-directors/>