

Wilhelm Gilliéron

AVOCATS

DROIT DES SOCIÉTÉS

Carences dans l'organisation de la société anonyme (art. 731b CO) – comment éviter ce piège et/ou remédier à la situation de blocage



Auteur: Yanick Corminboeuf | Le : 26 August 2024

Defects in the organization of a public limited company (art. 731b CO) - how to avoid this pitfall and/or remedy a deadlock situation

In many of Switzerland's smaller limited companies, annual general meetings are not held on a regular basis. In fact, it is not uncommon for a general meeting not to be held for two or three consecutive years. What happens in such a case if the company's articles of association stipulate that members of the Board of Directors are elected for a one-year term, and that directors' terms of office end on the day and at the close of the next ordinary general meeting (art. 710 para. 2 CO)? The author attempts to answer this question, which is of major importance in practice.

Members of the Board of Directors are elected by the annual general meeting in accordance with Art. 698 para. 2 no. 2 of the Swiss Code of Obligations. This is a non-transferable right of the general meeting. The Board of Directors, consisting of at least one member (art. 707 para. 1 CO), represents the company externally and confers on the corporation the capacity to act as a legal entity (art. 54 CC). It is therefore essential for a public limited company to have a regularly elected Board of Directors at all times.

In ruling 4A_496/2021 of December 3, 2021, the Federal Supreme Court ruled that members of the Board of Directors who are not re-elected within six months of their last term of office are no longer (legally) in office. The Federal Court also explicitly ruled out any tacit renewal of a director's term of office, even in cases where, in practice, directors continue to hold office beyond the end of their statutory term. The main argument was that tacit renewal contravened the general meeting's non-transferable power to appoint members of the Board of Directors, and entailed the risk that directors would not convene the General Meeting in order to obtain tacit renewal of their mandates. In the light of federal case law, it must therefore be accepted that the failure of the shareholders' meeting to re-elect the directors at the end of their term of office constitutes a shortcoming in the organization of a public limited company within the meaning of art. 731b of the Swiss Code of Obligations.

However, when the company's organization is deficient, such as the absence of a validly elected Board of Directors, each shareholder is entitled to request the court at the company's registered office to take the necessary measures (art. 731b para. 1 CO).

It is then up to the court to take the measures that, depending on the circumstances, seem appropriate to remedy the deficiency in question.

Art. 731b para. 1bis CO lists, by way of example, some of the measures that the court may take in such a case:

1. set a deadline by which the company must return to its legal status, failing which it will be dissolved;
2. convene a General Meeting, if necessary, to elect a new Board of Directors;
3. directly appoint the missing body or a director;
4. dissolve the company and order its liquidation in accordance with bankruptcy provisions, but only as an *ultima ratio*.

The list of measures enumerated in art. 731b para. 1bis CO to remedy organizational defects should not be understood as exhaustive ("in particular"). Moreover, according to the jurisprudence of the Swiss Federal Supreme Court, the legislator grants the judge considerable leeway to take measures appropriate to the concrete circumstances, in contrast to the action for dissolution under art. 736 ch. 4 CO, where the leeway is restricted.

According to the message and the jurisprudence of the Federal Court, the legal rule of art. 731b CO is justified by public interests, such as the smooth functioning of legal relations between private law entities, the interests of the public and third parties, as well as the interests of various *stakeholders*, such as employees, creditors or shareholders.

In view of the above, it is incumbent on the Board of Directors to be rigorous when holding general meetings, especially in the case of companies which, in derogation of the 3-year term of office for directors provided for in Art. 710 para. 2 CO, have provided for a one-year term of office in their articles of association.

Source :

<https://www.wg-avocats.ch/en/actualites/defects-in-the-organization-of-a-public-limited-company-art-731b-co-how-to-avoid-this-pitfall-and-or-remedy-a-deadlock-situation/>