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Towards conditional abolition of notarial certification when companies are being incorporated?

As part of the revision of the law on limited companies, the Federal Council is tackling the requirement for notarial certification for companies which are said to have a “simple structure”. Through amendment of several articles, it wishes to implement an administrative easing of various procedures involved in the life of limited companies. This formal simplification concerns four articles in the Code of Obligations (referred to below as “CO”) and will of course be applicable only under certain stringent conditions. We refer to the provisions dealing with the incorporation (Art. 629 CO), amendments of the articles of association (Art. 647 and 655g CO) and finally those concerning the increase in capital (Art. 650 CO). This note deals solely with the case of the incorporation of a limited company.

At present, the law requires notarial certification when a limited company is incorporated. The aim here is to ensure legal certainty. The Federal Office of Justice in fact defines the objectives of this requirement of a specific form as being to protect the parties in the performance of their most important legal acts, to guarantee means of proof and create clear legal relationships with a view to entry in a register.

Through the draft reform of the law on limited companies, the legitimacy of these aims in the context of that law on limited companies is called into question. Under the terms of the revision, notarial certification is no longer justified when a limited company is incorporated. Although the Federal Council was still opposed to this provision in 2012, it has now changed its position. It maintains that, given the present economic situation, this measure would lighten the administrative and financial burdens placed on companies and would therefore be more justified today.

The draft lays down specific conditions to dispense with the need for notarial certification. The waiver can be envisaged only for joint stock companies which have what is known as a simple structure. The latter notion is defined by the incorporation of a paragraph 4 into Article 629 CO which establishes the three following conditions: (i) the content of the articles of association is confined to the provisions of Art. 626 CO; (ii) the equity capital is denominated in Swiss francs; (iii) contributions to the capital have been fully paid up.

We believe that a revision of this kind half opens the door to a genuine risk of legal uncertainty caused by the lack of verification. It is no mere chance if, on the occasion of the latest parliamentary debates on this matter in 2013, a majority of the cantons and all the associations of notaries rejected this amendment. The parties concerned also put forward the argument that the administrative burden of which companies would be relieved would in fact be transferred to the register authorities which will then be guarantors of the entire process of incorporation. Waiving the need for notarial certification would also have another consequence: that of making the incorporation procedure silent or even opaque. That may facilitate tax evasion or even money laundering, offences which go against the positions adopted by our government in recent years.

Source :

<https://www.wg-avocats.ch/en/news/commercial-law/towards-conditional-abolition-of-notarial-certification-when-companies-are-being-incorporated/>