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Even for small companies, organisational regulations for the board of directors are not an unnecessary luxury

Pursuant to Article 716b of the Swiss Code of Obligations (CO), the board of directors may adopt organisational regulations that provide not only for its organisation but also for the delegation of the management of the company to one or more members or even to third parties. The pandemic period has shown that such regulations are not a luxury, even for small companies.

According to Article 716a CO, the board of directors alone is responsible for exercising executive management, issuing the necessary instructions and determining the organisation of the company's governance. These powers are inalienable and non-transferable to other organs of the company such as the general meeting or third parties even if appointed by the board of directors. The management and governance of the public limited company is therefore the responsibility of the board of directors.

The board of directors acts collectively as an organ of the company. As stated in Article 716b para. 3 CO, the management is exercised jointly by all members of the board of directors. Apart from this, however, the law does not define how the board of directors is to exercise this power. It merely assigns it to the board.

Although these are not necessary provisions in the sense of the law, the articles of association must therefore determine the manner in which the meetings of the board of directors are to be convened, the frequency of such meetings, the manner in which they may be held and the way in which they are to be recorded in the company's records. In this context, it should be remembered that directors may not be represented at meetings of the board of directors. They are bound by a duty of diligence and loyalty to attend.

However, the law allows the board of directors to delegate the management of the company to one or more directors or to third parties if this delegation is expressly provided for in the company's articles of association. This is a delegation that will to a large extent free the board of directors from the responsibility taken within the framework set by the organisational regulations.

The organisational regulations are issued by the Board of Directors itself and can be adopted by a simple majority of its members, unless the articles of association specifically provide otherwise. It does not need to be approved by the shareholders in a general meeting, since the power to issue them has been conferred on it by a provision in the company's articles of association.

The regulations must be drawn up in written form. Article 716b para. 2 CO stipulates in general terms what such regulations may contain: (i) it sets out the management procedures, (ii) determines the necessary positions, (iii) defines the duties of the board of directors and (iv) regulates in particular the reporting obligation.

In practice, following the example of the Swiss Code of Best Practice for Corporate Governance issued by *economiesuisse* (see <https://www.economiesuisse.ch/en/publications/swiss-code-best-practice-corporate-governance>), the regulations will contain the following sections

- Constitution of the board of directors (appointment of the chairman, vice-chairman, secretary);

- Procedures for convening the board of directors (who convenes, who may request the convening of the board, frequency and modalities of meetings);
- Method and conditions for exercising the right to information of the members of the board of directors;
- Procedures for decision-making by the board of directors (quorum, majorities);
- Powers of the chairman of the board and/or the managing director;
- Establishment of committees and definition of their tasks and operation;
- Risk management and internal control system;
- Behaviour in case of conflict of interest of a board member.

The new law on public limited companies, in particular the new wording of Article 716b of the Swiss Code of Obligations, does not alter the above principles. However, these principles must be constantly updated. The pandemic has shown the fragility of the classic systems of management and operation of the organs of the public limited company. Companies now need sophisticated tools to preserve their management and governance capacity in all circumstances. The simple use of the law is not enough. The mere ability to manage face-to-face and in written form alone is inadequate for the requirements of modern governance. The elaboration of modern organisational regulations, taking into account the lessons of the pandemic and the evolution of techniques, in particular the digitalisation of commercial exchanges, is indispensable and is part of the duties incumbent on the board of directors alone, regardless of the size of the limited company.

Source : <https://www.wg-avocats.ch/en/news/company-law/small-compagnies-organisational-regulations-board-directors/>