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Be careful with the (non-)reelection of the Board of Directors

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File number KMU_today_007: The column by André Brunschweiler, partner at the law firm Lalive in Zurich, provides answers to legal questions that can or should concern Swiss SMEs.



André Brunschweiler, partner at the law firm Lalive in Zurich. (Photo: PD)

Many small and medium-sized enterprises (SMEs) are familiar with the problem: the ordinary general meeting (AGM), at which the members of the board of directors (BOD) are re-elected, does not always take place within six months of the end of the financial year, as required by law. This can have serious consequences - it can lead to the company being unable to act. The relevant court practice and possible solutions are presented below.

Imminent incapacity to act

In a groundbreaking ruling in 2001 (BGE 148 III 69), the Federal Supreme Court ruled that a board mandate generally ends six months after the end of the financial year if the statutes provide for a one-year term of office, which is often the case. In particular, there is no automatic re-election.

Without a valid re-election, the company does not have a (validly elected) board of directors, which represents a so-called organizational deficiency and leads to the company being unable to act. There is then no one left who can legally act on behalf of the company. In particular, no one can call a general meeting at which the board of directors is then re-elected. Rather, such a deficiency must be remedied by means of legal proceedings (so-called organizational deficiency proceedings).

In a more recent decision from 2024, the Federal Supreme Court put this strict view into perspective and clarified that the statutory provisions on the election and term of office of the Board of Directors are crucial. For example, the Federal Supreme Court considered it permissible for a Board of Directors re-elected (only) on November 21, 2021 "for one year until the next General Meeting" to not only be elected until the expiry of the six-month statutory period for holding the AGM for the 2021 financial year, i.e. until June 30, 2022, but that his term of office does not end until November 21, 2022. By way of interpretation, the Federal Supreme

Court assumed that the statutory provision permitted such re-election for one year or until the next AGM.

Possible solutions for SMEs

Based on this case law, the following recommendations are made:

- **Provide clear regulations in the statutes** : The term of office of the board of directors can be freely set in the statutes up to a maximum of six years. The statutes can also clearly regulate how long a board of directors' term of office should last. It is advisable to provide for a longer period, but then still hold re-elections every year without specifying until when the re-election is valid.
- **Hold regular re-elections** : Regardless of the statutes, the AGM should be held no later than six months after the end of the financial year, usually by the end of June. *Nota bene*, the financial year can also be set differently from the calendar year. In this case, the AGM should be planned immediately after the end of the financial year.
- **Universal meeting as a way out**: If the re-election was missed, an auditing company can also call a general meeting, of course only for companies that have an auditing company. Otherwise, the only way to remedy the problem out of court is by means of a universal meeting, i.e. with all shareholders present. If all shareholders are present, a general meeting can be held without being called by the board of directors, and the board members can be (re-)elected without any complications.

Concrete recommendation for action

Conclusion: It is crucial for SMEs to have clear statutes and to hold the AGM on time. Anyone who fails to do both risks invalid board mandates and thus the company being unable to act. Clear statutes and consistent compliance with the six-month deadline offer the safest protection against expensive legal disputes.

Lalive

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