

EVEN THE GENERAL MEETING CAN CHANGE ITS MIND



The general meeting of a company can now lawfully amend its previously adopted resolutions. This is especially good news for those shareholders who wish to withdraw extra dividend from their subsidiary mid-year.

Due to changes in financial prospects or to the need for additional liquidity, shareholders often face the necessity to withdraw such, accumulated profits of their subsidiary that have not been declared as dividend in due time. In terms of the potential solutions, the practice followed by legal advisors to date has been fairly narrow: a decision about the previous year's profit and the dividend can only be made once, at the general meeting held to approve the balance sheet. If, in the remainder of the year, the shareholders request more distribution, then only one possible course of action can be followed: determining a dividend advance. The payment of a dividend advance is, however, subject to the approval of an interim balance sheet, and the hassle involved in compiling and auditing such a document often makes it impossible, or at least very difficult in practice, to accommodate this kind of distribution requirement in a quick and straightforward manner.

The magic bullet: amendment of the general meeting resolution

Now there seems to be a remedy to the problems described above. All it took to bring about this change was a precedent-setting court decision passed a good few years ago, a two-year-old

amendment to the Accounting Act, and a change of practice. The court decision stated that a resolution by a joint stock company's annual general meeting regarding the time of dividend payment can subsequently be amended by another general meeting. In other words, the general meeting is entitled, at a later time, to amend its own resolution passed with respect to dividend payment. It doesn't need much of a departure from the wording of the decision to arrive at an interpretation that the shareholders are entitled to change not only the date of dividend payment, but also the amount of the dividend in a subsequent resolution.

This interpretation is also supported by an amendment to the Accounting Act that was made two years ago. From 2017 onwards, the amount of dividend approved by the general meeting is stated not in the annual report for the given year, but in the year in which the general meeting resolution was adopted. (In other words, the dividend paid from the 2017 profits features in the 2018, and not the 2017 financial statements.) This means that any change in the amount of dividend does not require modification of the items in the approved balance sheet, or the filing of new financial statements.

This interpretation, which is also increasingly making its way into everyday practice, makes it possible for company owners to withdraw extra dividend from their subsidiaries mid-year by amending their previous resolutions made with regard to the amount of dividend. Of course, in order to pass such an amendment, the general meeting has to be

reconvened; and it only has the power to distribute the surplus profits accumulated in previous years. The profit earned in the current year, on the other hand, can still only be paid out as a dividend advance, which is subject to the approval of an interim balance sheet.

So does this mean that everything is allowed from now on?

With a little generalisation, the court decision mentioned above could also be taken to mean that, in effect, any decision of the general meeting can be amended at a later juncture. However, things aren't quite that simple.

When it comes to corporate decisions that affect data recorded in the company registry, the rules on company procedure also need to be observed. Under those rules, the date of an amendment that affects

company registry data cannot be later than the date of the actual change. For example, a resolution dated 20 January cannot validly state that the managing director's mandate terminated on 1 January of the same year, or that – contrary to a previous decision – such mandate was not even granted.

For this reason, even if a decision on the appointment of the managing director (or a decision affecting any other company registry data) might be retrospectively amendable in theory, it would not be possible to register the amendment with effect from the original date in the company registry. So when it comes to changes of this nature, decision makers still need to think ahead as there is no scope for shareholders to change their minds later.