RUSSIAN DESK

Important amendments to corporate law

Every year the Russian legislator adopts a large number of amendments. The complex coronavirus year of 2020 is no exception to this rule. We talk here about the most important amendments to corporate law that could have an impact on your business.

IMPLEMENTATION OF THE "FOUR EYES" PRINCIPLE – OPPORTUNITY TO ENTER THIS INFORMATION IN THE UNIFIED STATE REGISTER OF LEGAL ENTITIES

The "four eyes" principle (*Vier-Augen-Prinzip*) or the "two keys" principle is a popular tool used to control the activities of management bodies that is well known in a number of foreign jurisdictions. Since 2014 Russian companies have also been able to use this tool. In practice, however, the exercise of this right was complicated, as companies had no option at their disposal to notify third parties of the specific competences of directors – whether they always conclude transactions jointly or are entitled to conclude transactions at their sole discretion. Such information had to be entered in the Unified State Register of Legal Entities (hereinafter the "**USRLE**"). In practice, however, it proved impossible to do this. In addition, the Supreme Court of the Russian Federation formalised the following rule: unless counterparties have information to the contrary, they are entitled to proceed on the premise that whoever has been entered in the USRLE as the director is the person assigned the competence of the chief executive officer on any issues, regardless of the presence of other persons.[1]

Effective 1 September 2020 amendments entered into force, which make it possible to enter in the USRLE information on the authority of several directors – whether they act jointly or independently of each other. Accordingly, if such information is available in the USRLE, it should be held that third parties have been notified of the existence or absence of restrictions on the authority of directors.

The Federal Tax Service of Russia has approved new forms of applications for entering information in the USRLE, which make it possible to enter this information in the USRLE.[2] The new forms enter into force from 25 November 2020. Consequently, from this moment on companies with two or more directors will be able to indicate in the USRLE the nature of their authority – whether they act jointly or independently of each other.

At the same time, if a company appoints several directors, the company may not enter information indicating that some of them are able to act at their sole direction, while others, for example, can act together with one of the other directors. Similarly, a company may not indicate in the USRLE that directors can act independently of each other on certain issues, and only jointly on other issues.

Consequently, use of the "four eyes" principle may still be complicated in practice. At the same time, however, the ability now to indicate this information in the USRLE represents significant progress.

ANY INFORMATION ON A COMPANY CAN BE ENTERED IN THE ONLINE REGISTER FEDRESURS

The online register Fedresurs provides even more opportunities to disclose to third parties restrictions on the authority of directors and accordingly expand opportunities to challenge transactions concluded in violation of such restrictions.[3] The information published in the register, on a par with information in the USRLE, is considered to be in the public domain and duly communicated to third parties. The information is published publicly online. If the information is contained in Fedresurs, a party cannot claim to be unaware of the information as protection against a claim challenging a specific transaction.

Since 1 April 2020 a company may enter any information in this register about the company that it deems essential.

Why is this important? For example, a charter may stipulate, in addition to the joint exercise of authority by two directors, other restrictions on the conclusion of certain transactions in the form of the need to obtain the consent of the other management bodies of the company (the Board of Directors / Supervisory Board or the General Meeting of Participants / Shareholders). In accordance with effective legislation, if there is a dispute, the company will have to prove that a third party knew or should have known about the existing restrictions.

This risk can be mitigated by including in the information contained on the company in the online register Fedresurs existing restrictions on the authority of the directors. In this case the information will be communicated publicly to third parties, and they will be unable to cite the fact that they were unaware of these circumstances, which should facilitate any challenge of corres-

[1] See Clause 22 of Judgment No. 25 of the Plenum dated 23 June 2015 "On the Application by the Courts of Certain Provisions of Section 1 of Part One of the Civil Code of the Russian Federation".

[2] Order No. ED-7-14/617@z of the Federal Tax Service of Russia dated 31 August 2020.

[3] The Unified Federal Register of Legally Significant Information on the Activities of Legal Entities, Individual Entrepreneurs and Other Economic Entities ("**Fedresurs**", www.fedresurs.ru) is maintained electronically and is compiled through the entry in the register of key information on companies stipulated by legislation received both from the companies themselves, and also from other state resources.

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ponding transactions that directors concluded by exceeding their authority.

INFORMATION MAY BE ENTERED IN THE USRLE ON THE DISPROPORTIONATE COMPETENCE OF CERTAIN PARTICIPANTS

Effective 1 September 2020 (*de facto* since 25 November 2020 – the time of the entry into force of the new forms for entering information in the USRLE), information may be reported in the USRLE on the existence of a corporate agreement between the participants of a company which stipulates the disproportionate allocation of corporate rights between them. The mechanism for the disproportionate allocation of authority is extremely relevant for joint ventures, whose participants often agree that one of them is entitled to appoint or dismiss early the general director, determine the number of members of the board of directors, liquidate the company, etc.

Prior to the entry into force of these amendments, the disproportionate rights of participants could be stipulated in the charter. This option continues to exist after the entry into force of the aforementioned amendments. It would appear that a charter provides more opportunities for participants to articulate and actualise their ideas and understandings. Accordingly, at present actual demand for this option in practice remains unclear. In our opinion, however, its practical significance today is that formalisation of this option in legislation demonstrates high-level recognition of opportunities for a fairly radical mechanism in corporate law – the disproportionate allocation of the rights of the participants of a company.

"REFORMATTING" THE RIGHT TO WITHDRAW FROM A RUSSIAN LIMITED LIABILITY COMPANY

Since 2009 the right to withdraw from a Russian limited liability company (OOO) is optional and only comes into effect if stipulated in the charter of the OOO. This right has frequently been exercised during the structuring of withdrawals from joint ventures. At the same time, however, there have been a number of issues as to how flexibly the right of withdrawal may be exercised.

Effective 11 August 2020 amendments to legislation entered into force, which formalise the opportunity for the more flexible exercise of the right to withdraw from the OOO and render it a more interesting and reliable mechanism.

For example, the amendments establish the opportunity to stipulate in the charter of an OOO the right to withdraw for a specific range of participants. Such an opportunity also existed in the past. For example, partners in joint ventures exercised it proactively. However, this was attributable to the freedom of regulation of corporate relations, whereas now it is authorised directly by law. Participants may establish this range of parties at their own discretion. For example, this could be participants mentioned in the charter or participants with a specific participation interest. In addition, the law makes it possible to link the right of withdrawal with the onset of certain factors or their failure to occur or to a specific timeframe. Various criteria for withdrawal can be combined. This may be relevant, for example, for start-ups when an OOO has attained specific KPIs, achieved regular levels of profit and no longer needs an investor-participant. Such amendments are relevant for the participants of joint ventures.

The right of a specific participant to withdraw from an OOO and criteria for the exercise of this right may also be stipulated in a separate decision of the general meeting of participants of the OOO adopted unanimously, and not by the actual charter if this option is established by the company's charter. In this case, this information will not be part of the charter of the OOO and from this perspective a greater degree of confidentiality can be ensured.

The procedure for withdrawal from an OOO is becoming independent of the company. Prior to the entry of the amendments, a participant that intended to withdraw from an OOO had to file a notarised application on withdrawal to the company. The company would independently submit the amendments to the USRLE.

Effective 11 August 2020, a participant wanting to withdraw from an OOO is required to contact a notary, not simply for the notarisation of the application on withdrawal, but also for its transfer to the tax authority. The notary has two days to do this. The notary is given one more day to send the application on the withdrawal of the participant from this OOO that the notary has notarised to the OOO. In turn, the tax authority enters corresponding amendments in the USRLE. After the entry of the amendments, the participant is deemed to have withdrawn from the OOO. From this moment, the participation interest is transferred to the OOO.

As a result, the participation of the actual OOO in the exercise by the participant of their right to withdraw is no longer required, which renders this mechanism more independent and interesting for use.

CONCLUSION: MORE FLEXIBILITY AND TRANSPARENCY

The most recent amendments to corporate law touch on very practical issues. They introduce more flexibility and consequently facilitate control over management, and also the exercise of corporate rights, which will prove particularly useful for joint ventures.

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