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1. Definition and Meaning

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1.1 Definition

1 The company limited by shares *(Aktiengesellschaft; société anonyme)* is defined in law as a company with its own name, whose predetermined capital (share capital) is divided into shares and whose debts are payable only from company assets (CO 620 I). From this legal definition, it is possible to derive the following elements of the concept of the company limited by shares:

2 (i) *Legal personality*: The company limited by shares acts as a company in its own name and only the company assets may be used to satisfy its liabilities. As an association of persons organised as a company it is a legal entity (CC 52) and thus legally responsible, entitled to take legal action, authorised to act and conduct business and to claim its debts. Its legal personality arises from registration in the commercial register (CC 52 I; CO 643 I)[1]. The company limited by shares is separate from the personal characteristics of its shareholders and its existence is independent of any change in the composition of them. The company limited by shares possesses separate and independent entitlement to its assets. Accordingly, it is only its corporate bodies (organs) and not the shareholders as such that have control over the company assets. Shareholders are granted no management powers nor do they have any obligations. In a company limited by shares, the third party executive principle applies, which means that membership and management functions are totally separate, with the latter being necessarily reserved to the relevant corporate bodies of the company[2].

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1 *Cf.* N 86 et seq. below.

2 *Cf.* N 390 et seq. below.

3 (ii) *Share capital and shares*: The company limited by shares has its own assets, its share capital, which is separate from the assets of the shareholders[3]. The share capital must be defined in advance, *i.e.* a certain figure must be established and included in the articles of association (CO 626 Sec. 3) and in the commercial register (CO 641 Sec. 4). The share capital is a purely numerical sum, a total which indicates the company assets that should be available, but which need not in fact be available. The share capital represents a guaranteed or debit-side sum that must be contributed by the shareholders (CO 680 I) and which is intended to remain available to the company throughout its existence. Accordingly, it is not permitted to make any repayment to shareholders of their own contributions (CO 680 II); nor may any dividend payments be made unless a profit has been realised (CO 675 II)[4]. Any change in share capital can be effected only through the procedure of increasing capital (CO 650 et seq.) or of reducing capital (CO 732 et seq.)[5]. The share capital is necessarily divided into partial sums (shares) that must amount to a certain nominal value (CO 622 IV). As the share capital is determined in advance, the number of shares and their nominal value must also be specified and indicated in the commercial register (CO 626 Sec. 4; 641 Sec. 5) as they are in the articles of association. Each shareholder must own at least one share. Conversely, a company limited by shares can have as many shareholders as there are shares in existence. Changes among the shareholders can accordingly arise only through the transfer of shares, and although this process may be restricted (CO 685a et seq.), it can never be prohibited[6]. The nominal amount of the total shares owned by a shareholder, when set against the nominal value of the total share capital, provides the shareholder's level of shareholding, which is decisive for his voting eligibility and property rights in the company (CO 661; 692)[7].

4 (iii) *Exclusive liability of the company assets*: The high degree of the company's independence from its shareholders as well as the major importance of its fixed basic capital is especially evident in the legal provisions on liability: the obligations for which a company limited by shares is liable can be met only from the company assets. This means that there can be no personal liability of the shareholders for liabilities of the company.

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Shareholders who are not involved in management may not be made personally responsible for company debts. The capital protection regulations on the other hand are meant to ensure that at least a minimum level of assets and liability is available for the company creditors. The sole obligation for the shareholders is to provide the fixed sum required for the receipt of a share on its issue (CO 680 I). No other obligations, including subsidiary or fiduciary obligations[8], are imposed on shareholders. The sole liability restricted to company assets, together with the shareholder obligation limited to providing the required amount for share subscription and receipt, constitute decisive factors, in both legal and economic terms, in the characterisation of the company limited by shares as opposed to other limited companies, and these factors account for the major significance of this form of company in practice.

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3 The company can provide for participation certificate capital as well. Participation certificate capital is basically subject to the same provisions as share capital (CO 656a II).

4 *Cf.* N 157 et seq. below.

5 *Cf.* N 222 et seq. below.

6 *Cf.* N 202 et seq. below.

7 *Cf.* N 290 et seq. and N 296 et seq. below.

8 *Cf.* N 286 et seq. below. Fiduciary obligations can, if necessary, exist among the shareholders on account of a shareholders' agreement, or can arise from the applicable provisions governing simple partnerships (CO 530 et seq.; *cf.* in particular CO 536) insofar as the committed shareholder group can be classified as such. *Cf.* N 325 et seq. below.

1.2 Economic Significance

5 Among the types of companies entered in the commercial register, the company limited by shares is by far the most common[9]. It can be encountered in all economic sectors. In contrast to most other countries, the company limited by shares in Switzerland is used for a wide variety of purposes. It serves as a legal structure not only for multinational corporate groups and large companies, but also for family businesses, small businesses and even single person companies. The company limited by shares is preferred to other corporate forms for three reasons in particular:

6 (i) *Limited liability*: The limitation of the shareholders' obligation to make contributions and the sole liability imposed on company assets, *i.e.* the risk incurred by the shareholders is restricted to the amount of their capital participation. This limitation of liability, especially in the case of smaller companies, constitutes a decisive reason for the choice of the company limited by shares as company form, for on account of the very low statutory minimum capital of CHF 100 000 (until 1 July 1992 it was

only CHF 50 000), it is attainable with a comparatively low capital investment.

7 (ii) *Capital relationship*: With the company limited by shares the central focus is on capital participation and not on the shareholders as such. This facilitates the continuation of a company beyond the death of the original members or a change of shareholders and makes possible the pooling of capital among an unlimited number of persons who are unable or unwilling to take part directly in the operational activity of the company. For large enterprises, the company limited by shares' primary importance is that it fulfils this economic function of the limited company.

8 (iii) *Transferability*: Membership of a company limited by shares can be attested to by means of a security certificate, and this facilitates its transferability. This means that even shareholders with holdings in a company not quoted on the stock exchange can dispose of their participation relatively easily and convert their investment back into cash. This also simplifies the division of an inheritance in the administration of an estate.

1.3 Types of Company Limited by Shares

9 On account of the latitude in drawing up the articles of association and thus in particular for the types and categories of shares, the restrictions on transferability of shares and the organisation of management and supervisory functions and control, the corporate form of the company limited by shares is extremely adaptable. On account of this, the Swiss company limited by shares is the corporate form for multinational companies with countless subsidiaries in Switzerland and abroad, high shareholders' equity and tens of thousands of employees, as well as for the smallest economic entities, *i.e.* for companies with only half the required minimum capital paid up, with a modest balance sheet total and small turnover and only a single employee, who is not infrequently the sole shareholder and single member of the company's board of

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9 At the end of 2006 there were 148 982 sole proprietorships, 14 662 general partnerships, 2617 limited partnerships, 92 448 limited liability companies (*GmbHs*), 11 609 cooperatives and 175 459 companies limited by shares entered in the commercial register. In 2006, 6196 companies limited by shares were deleted from the commercial register, while 7711 new companies limited by shares were registered. *Cf.* Swiss Official Commercial Gazette (SOCG) No. 12 dated 18 January 2007, p. 35.

10 Economic importance is determined by company law according to the criteria of "balance sheet total/turnover/number of employees" (*cf.* CO 663e II and 727b I). These criteria, even though with differently defined thresholds, also apply for the definition of small and medium-sized

directors[10]. The different requirements for large and small companies are taken into consideration in the Swiss Code of Obligations (CO) in that on the one hand it contains

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many provisions that in practice affect only the largest companies[11] and at the same time it grants numerous types of relief to smaller companies[12]. The statutory framework for the company limited by shares is so broad that it allows companies with totally different functions and levels of economic importance. Thus in corporate practice, for example, the following forms of companies limited by shares can be found:

10 (i) *Publicly traded companies and privately held companies*: In Switzerland, the company limited by shares is the most widely spread corporate form[13] both for privately held companies and publicly traded ones. In the case of the privately held company (*i.e*. unlisted companies limited by shares) and companies open to the public (*i.e*. listed companies), however, quite different questions can arise in relation, for example, to the operational capacity of the company, or the interests of the shareholders, the management or creditors. Whereas, for instance, there are almost always dominant shareholders' groups in privately held companies, the genuine public companies are exposed to the risk that management can become detached from the shareholder sphere, leading to the *"principal/agent"* problem. With the coming into force of the Federal Act on Stock Exchanges and Securities Trading (SESTA) this distinction was taken into account and a special law for companies limited by shares quoted on the stock exchange was created[14]. Swiss law has thus moved closer to American law, which traditionally makes a distinction between company law and securities law. This movement towards a splitting of company law into a law for public companies and a law for private ones has progressed further in recent years under the topic of "corporate governance"[15].

11 (ii) *Operating, proprietary and holding companies*: Normally the company limited by shares runs an operationally active business. Operating companies appear in just as many shapes and sizes as there are business

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opportunities and activities. The most important forms in practice are manufacturing companies, trading and service providing companies, banking companies[16], insurance companies, mixed economy and semi-public companies limited by shares (*cf*. CO 762) and companies limited by shares subject to special legal provisions. Pure proprietary companies in contrast restrict themselves almost exclusively to the long-term custody of certain assets and provide services - if at all - only in connection with the use of

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companies (SMEs) in accordance with the Merger Act (*cf*. Merger Act 2 lit. e).

11 *Cf. e.g*. the regulations on conditional capital (CO 653 et seq.), on institutional proxy voting (CO 689c et seq.), on restrictions on transfer of listed registered shares (CO 685d et seq.) and on division of the executive into a board of directors and a management board (CO 716b).

12 *Cf. e.g*. the relief available for small companies in respect of the qualifications of the auditors (CO 727b), the requirement of consolidated statements (CO 663e II), the presentation of the annual accounts (CO 663h II), financial planning (CO 716a I Sec. 3), the principle of clarity and materiality of information in the annual accounts (CO 662a II Sec. 2) and in the case of merger, demerger and transformation (Merger Act 14 II; 15 II and 16 II).

13 In Germany and to some extent in France the company limited by shares is the normal legal form for large companies listed on the stock exchange. There, the limited company with closed membership is mostly the *GmbH* or (in France) the SARL (also Sàrl or SàRL).

14 *Cf*. N 856 et seq. below.

15 *Cf*. N 679 et seq. below.

16 The company limited by shares has also proved its value as a legal form for banks. Only the rare genuinely private banks are established as partnerships, mostly as limited partnerships (*cf*. CO 594 et seq.).

these special assets. Typical of this group are the property companies, the *sociétés anonymes immobilières* that are especially widespread in French-speaking Switzerland. In addition, the company limited by shares has for a long time been used as the legal form for holding companies, the purpose of which is for the most part to be found in their participation in other companies (*cf.* CO 671 IV; 708 I). The basic model of the holding company has in practice given rise to the emergence of four types:

12 The pure "asset management holding company", which manages both shares and other moveable assets as an "incorporated portfolio";

13 the "parent holding company", which mostly has majority shareholdings in several companies and makes active use of its shareholder rights without, however, constituting itself as a group of companies (*cf.* CO 663e I);

14 the "principal holding company" which in the form of a parent holding company manages its majority shareholdings actively and also, in its capacity as leading company in a group (CO 663e I), exercises the consistent leadership of the group of companies making up the group[17]; and

15 the "domiciliary, management or auxiliary companies", which exist primarily not to manage assets, but rather to carry out operational functions for closely related companies in the form of providing assistance[18].

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16 (iii) *Group controlling company and group subsidiary companies*: If a holding company combines the companies whose blocks of shares it holds into a uniform management structure, then the fact of the existence of a group as provided for by company law for the duty of balance sheet consolidation is fulfilled (CO 663e I). The holding company thereby becomes the group controlling company, and the companies combined under a uniform management structure become group subsidiary companies. In such constellations various questions arise in respect of liability, of the management obligations of the controlling company, the position of the management and the board of directors of the subsidiaries, the permissible extent of instrumentalisation of a legally independent group unit, of transparency, and of the minority rights of outside shareholders. Since the group of companies is not regulated specifically in Swiss law, these group-relevant questions must be dealt with according to the provisions governing the company limited by shares[19].

17 (iv) *One-person company*: This type of company limited by shares is defined solely by virtue of the number of its shareholders. Although it is not formally recognised under company law, the one-person company has been allowed, or at least tolerated, for a long time in practice. And this has been the case even though the totally shared, or almost totally shared, identity of the legal person and the company's single shareholder call into question both the self-management and the separate nature of the assets of the company limited by shares. For in such arrangements, the carefully considered structures and procedures of the company limited by shares can easily be perceived as unnecessary formalities for the single shareholder and thus not in need of being followed. If however the advantages of limited liability and the structure of a company limited by shares are to be made use of, then all formal requirements must be complied with. This is especially relevant for the sole member of the board of directors (*cf.* CO 716a) and its resolutions or decisions as well as for the minutes, the presenting of

17 In practice, the functions of asset management and management are often separated, and a so-called "management company" is set up, normally as a subsidiary of the main holding company, to which management functions capable of being delegated are transferred.

18 Tax breaks in various cantons have caused such companies to flourish since the 1950s (*cf.* N 1133 et seq. below).

19 *Cf.* N 648 et seq. below.

accounts, auditing and annual general meeting[20]. In legal precedent and expert opinion it is accepted that in cases of abuse of the law (CC 2 II), the independence of the company limited by shares cannot be asserted by the single shareholder, and he can be held directly responsible for any obligations incurred on behalf of the company. The parties suffering loss are thus permitted the socalled

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"lifting of the corporate veil" (or "piercing the corporate veil") that leads straight through the company to the shareholder. In practice, however, successful examples of this occurrence are rare (BGE 121 III 319; BGE 113 II 31).

18 (v) *Companies limited by shares subject to special legal provisions*: These companies limited by shares can be classified as belonging to the transitional area between state and private sector. Each of these companies limited by shares derives its legal legitimacy from a special Federal act, with each act containing a reference to general company law regulating all details falling within its scope (CO 620 et seq.)[21].

1.4 Alternatives to the Company Limited by Shares

19 Closely related to the company limited by shares are the limited liability company (*Gesellschaft mit beschränkter Haftung; GmbH*) and the commercial partnership limited by shares (*Kommanditaktiengesellschaft; Kommandit-AG*). Both are limited companies like the company limited by shares, but in both corporate forms the position of the members exhibits features relating to the specific person that contrast with the company limited by shares.

20 (i) *Limited liability company (GmbH; CO 772-827)*: Just like the company limited by shares, the *GmbH* is a corporation that pursues commercial objectives and which normally operates a commercial enterprise and has a specific level of ordinary capital; in contrast to the company limited by shares, company members are jointly and severally liable for the debts of the company to the extent that the capital is not fully paid up. The legal form of the company limited by shares continues as before to enjoy great popularity, but the preferences in the person-related structuring shift to the *GmbH*. Probably not least due to the raising of the legally required minimum capital of the company limited by shares from CHF 50 000 to CHF 100 000 on 1 July 1992, the number of companies in the legal form of the *GmbH* grew from 2964 at the end of 1992 to 92 448 by the end of 2006[22]. In particular, for many small and mediumsized companies (SMEs) the *GmbH* offers considerable advantages. The lack of a board of directors, for example, does away with a whole level of the structural organisation. The members' general meeting thus becomes

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the highest forum which the executive management must face directly (*cf.* CO 808 et seq.; 811 et seq.). In addition, and in contrast to the company limited by shares, the levels of ownership and management can be brought more closely together through requirements to make additional payments or subsidiary contributions (CO 803), making additional matters subject to the approval of the company members (CO 777 Sec. 4; 808 III), restrictions on transfer of company shares (CO 791) and a right to

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20 The general meeting can normally take place informally to a large extent, due to the possibility of a universal meeting (CO 701); nevertheless minutes recording the resolutions must be made (*cf.* N 412 below).

21 Examples of companies limited by shares subject to special legal provisions are *e.g.* the *Swiss National Bank (SNB)*, the *Swiss Federal Railways (SBB)* and *Swisscom AG*.

22 Swiss Official Commercial Gazette (SOCG) No. 12 of January 18, 2007, p 35. In 2006, the number of registered companies limited by shares rose by 1515, while the number of the *GmbHs* increased by 8157.

resign or withdraw (CO 822)[23]. The current law governing the *GmbH*, however, contains some provisions that have revealed themselves to be disadvantageous in practice compared to those of the company limited by shares. This is notably the case in respect of the personal and subsidiary liability of the company members for company debts to the extent of the company capital (CO 802), the upper limit of the company capital fixed at CHF 2 million (CO 773), the restriction of each company member to a capital contribution with a minimum nominal value of CHF 1000 (CO 774), the unanimity requirement for increases in capital (CO 784 III and 786 I in connection with 779 I) as well as the mandatory requirement of the consent of two thirds of the members and a notarised certification for the transfer of shares (CO 791 II and IV). With the revision that comes into force in 2008, the law governing the *GmbH* has been developed with the aim of eliminating these weaknesses and making the *GmbH* into the legal form for individual firms and small businesses with strong person-related elements, but whose members are still eager to limit their liability. The *GmbH* could thus become a viable alternative to the company limited by shares for SMEs.

21 (ii) *Commercial partnership limited by shares (cf. CO 764-771)*: Alongside the company limited by shares and the *GmbH*, Swiss Law has still a third type of limited company in the form of the commercial partnership limited by shares. In most respects the commercial partnership limited by shares has the same corporate form as the company limited by shares. In contrast to the company limited by shares, however, the individual partners are personally, jointly and severally liable without limitation for the debts of the partnership (CO 764 I). These partners with unlimited liability also make up the supreme management and administrative body and are named in the articles of association and in the commercial register (CO 765 I and II). Although this legal form is in practice an interesting combination of elements of a company limited by shares and a limited partnership (*cf.* CO 594 et seq.), it nevertheless

reveals some weaknesses in its current statutory regulation: for example, the members with unlimited liability, who form the management of the commercial partnership limited by shares, must, as has been already mentioned, be named in the articles of association (CO 765 I). A change of the members with unlimited liability requires not only the consent of the current members, but also a modification of the articles of association (CO 765 III). Nor is it possible to elect outside third parties to the management without their having personal unlimited liability. The members of the management board are specifically stated by the law to be involved in direct management (CO 765 I). Another faulty conception is the requirement of the auditors being simultaneously a supervisory body as well (CO 768). For whereas the auditors of a company limited by shares are restricted to examining the accounts (CO 728 et seq.)[24], in a commercial partnership limited by shares they are also required to watch over management at the same time on an ongoing basis (CO 768 I). As a result of these deficiencies, the legal form of the commercial partnership limited by shares has in practice all but disappeared.

23 In the case of the company limited by shares this close relationship is not possible or is possible only through the relatively complex instrument of the shareholders' agreement. *Cf.* N 325 et seq. below.

24 *Cf.* N 494 et seq. below.