

# Can the powers of the Shareholders' General Assembly be delegated to the Board of Directors? ASIE

According to articles 76, 80 and 81 of the Civil Code of the People's Republic of China, a company's shareholders' assembly (including for limited liability companies and joint-stock companies), or general assembly (for joint-stock companies) is the company's sovereign governing body, with the exception of fully state-owned companies. The company's board of directors, or its managing director, is the company's executive body.

In this newsletter, we are going to look at the current provisions of Chinese legislation on the delegation of power by the shareholders' assembly or general assembly ("the Assembly") to the board of directors. We will start with a summary of the respective powers of these two bodies.

## ■ POWER ALLOCATION

### a. Assembly powers

According to the Companies Law, the Assembly is the company's highest authority and must therefore decide on all important company matters. According to article 37 of the Companies Law, the Assembly has the following powers and carries out the following duties:

- 1) *setting the company's commercial policy and investment plans;*
- 2) *appointing and removing directors and supervisors who are not employee representatives and deciding on the remuneration of directors and supervisors;*
- 3) *examining and approving the reports of the board of directors;*
- 4) *examining and approving the reports of the supervisors or of the board of supervisors;*
- 5) *examining and approving the company's annual financial budget and accounting and financial plans;*
- 6) *examining and approving the company's profit distribution and loss recovery plans;*
- 7) *deciding on the increase or reduction of the Company's share capital;*
- 8) *adopting resolutions on the company's bond issuances;*
- 9) *adopting decisions on the merger, demerger, dissolution, liquidation or change in the company's legal form;*
- 10) *amending the company's articles of association;*
- 11) *any other functions and powers indicated in the company's articles of association.*

### b. Powers of the board of directors

In its capacity as the company's executive body, the board of directors is accountable to the Assembly and is in charge of implementing the Assembly's decisions. According to article 46 of the Companies Law, the Board of Directors has the following powers:

- 1) *convening Assemblies and submitting reports to the Assembly*
- 2) *implementing the resolutions adopted by the board of directors*
- 3) *deciding on the company's business and investment plans;*
- 4) *drawing up the company's annual financial budget and financial accounting plans;*
- 5) *drawing up the company's profit allocation and loss recovery plans;*
- 6) *drawing up plans for the increase or reduction in the company's share capital and the issuance of corporate bonds;*
- 7) *drawing up plans for the merger, demerger, dissolution or change in the company's legal form;*
- 8) *deciding on the establishment of the company's internal management bodies;*
- 9) *deciding on the appointment or dismissal of managers (executive management staff) and on matters concerning their remuneration, and deciding on the appointment or dismissal of the company's deputy managers and financial controllers based on managers' recommendations;*
- 10) *setting up the company's basic management system;*
- 11) *carrying out any other functions and powers stipulated by the company's articles of association.*

## ■ PRINCIPLE OF DELEGATION BY THE ASSEMBLY

According to article 46.11) of the Companies Law, the board of directors may exercise other powers and functions as provided by the company's articles of association, but neither the Companies Law nor the applicable regulations clearly state whether these "other powers and functions" may include the powers and functions of the Assembly (as specifically listed in article 37 of the Companies Law) transferred to it by means of a delegation of powers.

### a. Validity of a delegation of powers issued by the Assembly to the board of directors

For the sake of efficiency and flexibility, some company Assemblies have wished to delegate some of their powers and functions as listed in article 37 of the Companies Law to the board of directors by means of Assembly resolutions or amendments to the articles of association.

According to case law, such a delegation by the Assembly to the board of directors of part of its power to set the company's commercial policy and investment plans has been ruled valid by the Supreme People's Court, on the grounds that articles 37 and 46 of the Companies Law are not mandatory provisions that affect the validity of these decisions. The Companies Law does not prevent the Assembly from independently granting a portion of its right to decide on the company's operating policy and investment plan to the board of directors.

However, case law tends to consider that the Assembly's power to amend the company's articles of association, decide on an increase or reduction of the share capital and on the merger, demerger or dissolution of the company should not be granted to the board of directors as this would undermine the rights of the shareholders, given that in accordance with article 43, paragraph 2 of the Companies Law *"resolutions on the amendment of the company's articles of association, the increase or reduction in the company's share capital or on the merger, demerger, dissolution or change in the company's legal form must be taken by a shareholders' assembly. Resolutions related to the merger, demerger, dissolution or change in the company's legal form must be adopted by shareholders representing at least two thirds of voting rights."*

### b. Ways to delegate

In practice, when the Assembly delegates a portion of its powers and functions under article 37 of the Companies Law to the board of directors, the delegation of powers takes the form of a direct provision included in the articles of association, or a resolution voted on by the shareholders' assembly.

## ■ PRINCIPLE OF DELEGATION BY THE ASSEMBLY

The Supreme People's Court of China has not yet published specific guidelines or legal interpretations on the issue of whether the Assembly may delegate its powers and functions as listed in article 37 of the Companies Law to the board of directors.

When the Assembly must actually delegate some of its powers and functions as defined by article 37 of the Companies Law to the board of directors, then these delegated powers and functions must at least be restricted by excluding the power to amend the company's articles of association, decide on an increase or reduction in share capital, or decide on its merger, demerger or dissolution. However, there is always the risk that a judge may consider that the relevant provisions of the articles of association and the content of the resolution of the Assembly are invalid because they do not comply with the mandatory provisions of the Law. You should therefore first carry out an assessment of the legal risks of implementing such a delegation of powers.



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