



# Newsletter

January 2023



# NEWS AND CHALLENGES FOR 2023

FIDINAM (GENEVE) SA proudly celebrated its **50<sup>th</sup> Anniversary** in 2022, and we are all very excited to step into this second half-century of presence in business and continue serving private and professional clients, in Switzerland and internationally, on various matters including business, accounting, and tax consulting, with the same inspiration and loyalty as through the past five decades.

We are continuously working to enhance the quality of our trust and fiduciary services and also to develop new synergies with our affiliates within the FIDINAM group, in strategic fields, such as payroll management and integrated HR and accounting services.

## UAE: new family business structuring law

The United Arab Emirates' (UAE's) Federal Decree-Law No.37/2022 on Family Businesses ("the new Family Companies Law"), issued on 10 October 2022, came into effect on 11<sup>th</sup> January 2023.

It is the first UAE law to regulate family businesses, giving them means to organize their wealth management and succession planning structures. It will apply to all free zones, including the Dubai International Financial Centre and Abu Dhabi Global Market, subject to the relevant company laws already in force.

The main provisions of the the new Family Companies Law are the following:

- Introducing separate classes of shares with voting rights and profit participation rights as agreed between family members;
- providing a mechanism preventing existing shareholders from selling their stake to outsiders;
- the Family Company may have, in addition to its memorandum and articles of association (AoA), a Charter which includes "special rules of the ownership, governance, objectives, and values of the family company, share assessment, distribution of profits, education of the family members and their work therein, the subsidiaries/affiliates thereof, and solution of family disputes and such other rules and provisions agreed upon by the shareholders and family members". Additionally, the Family Companies Law provides that in the event of a discrepancy or conflict between the AoA and the Charter, the provisions of the AoA shall prevail;
- the AoA provide for the Board of directors or the director (as the case may be) to act as a trustee over the shares of a deceased shareholder for the purpose of supervising the procedure for transferring the relevant shares to the heirs and taking the necessary measures to reflect the same in the AoA (after settling any rights or debts over such shares).

## Bahamas: jurisdiction rated as FATF compliant

The Bahamas Financial Services Board has recently announced that it has now attained technical compliance ratings of "**Compliant and Largely Compliant**" in 40 of the 40 [FATF](#) Recommendations – International Anti- Money Laundering, Countering of Terrorism and Proliferation Standards.

As such, the country becomes the second jurisdiction in the Caribbean, South and North American Regions to attain such standing.

## Hong-Kong: new provisions on taxation of foreign-source passive income

Effective January 1<sup>st</sup> 2023 Hong Kong amended its Foreign Source Income Exemption (FSIE) regime for passive income in accordance with the Guidance on FSIE regimes promulgated by the European Union.

These amendments apply to Hong Kong companies being qualified as members of a Multinational Enterprise ('MNE') group. A MNE group is defined as a group that includes at least one entity or permanent establishment that is not located or established in the jurisdiction of the ultimate parent entity of the group.

The passive income falling under the scope of the reform means: (a) interest, (b) dividend, (c) disposal gain from the sale of equity interests in an entity (capital gain) and (d) intellectual property (IP) income, **when received in Hong Kong**.

A specified foreign-sourced income is regarded as received in Hong Kong when: (a) the income is remitted to, or is transmitted or brought into, Hong Kong, (b) the income is used to satisfy any debt incurred in respect of a trade, profession or business carried on in Hong Kong, or (c) the income is used to buy movable property, and the property is brought into Hong Kong.

Also, the amendments allow for certain exemptions from taxation of foreign source income, (depending on its nature), including compliance with: (a) economic substance, (b) nexus and (c) participation requirements.

## Public access to company ownership registers: a step back ?

A recent judgement of the Court of Justice of the European Union (CJEU) has ruled that the measures of the 5<sup>th</sup> European Anti Money Laundering Directive (AMLD) go beyond what is strictly necessary and is disproportionate to the AML objective. The information disclosed on the register enables a potentially unlimited number of persons to find out about the material and financial situation of a beneficial owner, and that information can never be recalled from the register.

The CJEU concluded that making the register fully open to the public violates individuals' privacy, and that Member States must put appropriate safeguards in place to protect privacy in accordance with articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

Some EU countries, in their transposition of the 5<sup>th</sup> AMLD, have legislated to require members of the public to register before allowing them access to the register, or have provided exemptions to public access in exceptional circumstances. These measures are not, in themselves, sufficient privacy safeguards, said the CJEU in its judgment.

In the opinion of certain professionals, this judgement will also have implications for the commitments made by British Overseas territories and Crown Dependencies to establish publicly available registers of beneficial ownership. A number of those jurisdictions have or are undertaking consultations, and most have committed to put registers in place in 2023.

# BVI: changes to the Business Companies regime

A number of important amendments to the BVI Business Companies Act 2004 came into force on January 1, 2023. The most relevant areas covered by these amendments are the following:

## **Struck off and Dissolution**

Under the current legislation, companies have a seven (7) year struck-off period before being automatically dissolved for non-payment of their annual fees. The new legislation abolishes the seven (7) year struck-off period and introduces a new process for stricken-off companies to be automatically dissolved for non-payment of their license fees.

For any BVI company that has been designated with a struck off status when the legislation takes effect, there are transitional provisions to allow the BVI company to apply for restoration at the Registry, on the earlier of either of the following dates: (a) expiration of the seven-year strike off period; or (b) 1<sup>st</sup> July 2023.

Companies that are struck off/dissolved after the six (6) month period may be restored by making an application to a BVI Court.

## **Voluntary Liquidator**

To voluntarily dissolve a company, the liquidator must be a BVI resident who has been physically living in the BVI for not less than 180 days and has liquidation experience and professional competence to liquidate the specific company concerned.

It is important to note that any voluntary liquidations which commenced prior to the coming into force of these amendments, will be allowed to progress until the liquidation has been completed and will be unaffected by this requirement.

## **Register of Directors**

The BVI Registrar of Companies may make available upon request the name of the directors of a company, according to the register of directors filed at the Registry.

## **Financial Information and Annual Returns**

Companies will have to provide the Registered Agent with certain financial information in a prescribed form once a year. The form must be provided to the Registered Agent up to nine (9) months after the end of the company's fiscal or financial year. This form has not been released yet. As soon as it becomes available, we shall share it with you.

This information will be kept by the Registered Agent only, and it will not be filed with the regulator or any BVI authority. However, the Registered Agent shall inform the regulator if the company does not provide the information in due time.

# Suisse: nouveautés fiscales et juridiques au 1<sup>er</sup> janvier 2023

## Révision du droit des successions

Le Conseil Fédéral a révisé le droit des successions pour donner plus de liberté aux testateurs et favoriser d'avantage son partenaire.

Ainsi, la réserve héréditaire des enfants est réduite de 3/4 à 1/2, et celle des parents est simplement supprimée.

La diminution des réserves facilitera également la transmission successorale d'une entreprise familiale.

Le nouveau droit prévoit des changements en cas de divorce. Ainsi, dans le cadre de la procédure de divorce sur requête commune ou en cas de séparation depuis deux ans au moins, une personne qui souhaiterait priver son futur ex-conjoint de sa qualité d'héritier devra prendre des dispositions testamentaires dans ce sens. A défaut, le futur ex-conjoint reste héritier légal jusqu'au prononcé du divorce, dans la mesure où il ne perd pas son droit légal à la succession, mais uniquement sa réserve légale.

En revanche, la réserve du conjoint ou du partenaire enregistré demeure inchangée, et les concubins n'ont toujours aucun droit légal sur la succession.

## Frais de garde des enfants

Afin de compenser les effets de la progression à froid, le Département fédéral des finances adapte au 1<sup>er</sup> janvier 2023 les barèmes et déductions en matière d'IFD.

Notamment, la déduction pour frais de garde des enfants par des tiers s'élève à CHF 25'000 par an et par enfant contre CHF 10'100 auparavant.

Les conditions pour en bénéficier restent inchangées : la garde de l'enfant de moins de 14 ans doit être assurée par un tiers, l'enfant doit vivre dans le même ménage que les contribuables assurant son entretien, lesquels exercent une activité lucrative, une formation ou justifient d'une incapacité de gain.

## Impôt anticipé

La procédure de déclaration des rendements sur participation au sein des groupes est simplifiée au 1<sup>er</sup> janvier 2023.

Désormais, la procédure de déclaration est admise pour les participations égales ou supérieures à 10% (au lieu de 20%) et pour toutes les personnes morales détenant une participation qualifiée.

De plus, l'autorisation requise dans le cadre international pour appliquer la procédure de déclaration est valable 5 ans, et non plus 3 ans.

## Modifications du droit de la société anonyme

Le 1<sup>er</sup> janvier 2023 est entré en vigueur le reste du droit révisé des sociétés anonymes. Nous vous proposons un aperçu non exhaustif des principales dispositions:

### Capital social

- Le capital social peut désormais être libellé en une devise étrangère.
- Le capital autorisé est remplacé par la marge dite de fluctuation du capital. Le conseil d'administration peut, pendant cinq ans au maximum, augmenter ou réduire le capital social dans la marge précitée dans la mesure où il y est autorisé par les statuts.
- Le nouveau droit distingue entre réserves de capital et de bénéfice. Des réserves de bénéfice facultatives ne peuvent être formées que sous certaines conditions. De plus, le versement de réserves de capital aux actionnaires est réglé selon la jurisprudence du Tribunal fédéral.
- Des dividendes intercalaires sont expressément admissibles sous le nouveau droit. L'assemblée générale doit prendre la décision correspondante.

## **Droits des actionnaires**

- Les actionnaires de sociétés non cotées en bourse représentant ensemble au moins 10 % du capital social ou des voix peuvent demander en tout temps des renseignements au conseil d'administration si cela est nécessaire à l'exercice des droits des actionnaires et qu'aucun secret d'affaires n'est touché. Le conseil d'administration doit renseigner dans les quatre mois. Un refus doit être motivé par écrit.
- Sous les mêmes conditions, les actionnaires représentant au moins 5 % du capital social ou des voix peuvent demander de consulter les livres de comptes et les dossiers.

## **Le conseil d'administration**

- La surveillance des liquidités et la garantie de la capacité de paiement sont introduites explicitement en tant qu'obligations du conseil d'administration.
- La convocation immédiate d'une assemblée générale n'est pas nécessaire quand les comptes annuels montrent une perte en capital. Les comptes doivent cependant être examinés par l'organe de révision avant l'approbation par l'assemblée générale.
- En cas de surendettement, le conseil d'administration ne doit pas informer dans chaque cas le tribunal. Si l'on suppose que le surendettement pourra être éliminé dans les 90 jours dès la présentation des résultats intermédiaires, il peut être renoncé à informer le tribunal.

## **Assemblée générale**

- Une assemblée générale peut aussi avoir lieu à l'étranger ou parallèlement dans différents endroits si certaines conditions (notamment si prévu dans les statuts) sont respectées. Une condition pour une assemblée en parallèle est notamment que les votes des participants soient transmis de façon visuelle et sonore dans tous les lieux concernés.
- L'assemblée générale peut aussi prendre ses décisions par voie de circulaire dans la mesure où personne ne demande un débat oral et où tous les actionnaires sont « représentés ».
- Selon le nouveau droit, les actionnaires peuvent exercer leurs droits par voie électronique, ce qui inclut aussi la tenue virtuelle d'assemblées générales. Les statuts doivent prévoir ces possibilités. Sont en outre applicables les conditions suivantes : fixation de l'identité des participants, transmission immédiate des votes, garantie de la participation à la discussion, impossibilité de falsifier les résultats des scrutins.

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