Swiss Corporate Law Reform: New provisions concerning shareholders' meetings

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Overview

The Corporate Law Reform strengthens shareholders' rights in the area of shareholders' meetings and leads to a modernised and more flexible supreme body of the most widespread company form in Switzerland.

- **Shareholders' rights are strengthened by delegation of further non-transferable powers to the shareholders' meeting and the lowering of the thresholds for convening shareholders' meetings, placing items on the agenda and submitting motions.**
- **The extension of the catalogue of resolutions of the shareholders' meeting subject to a qualified quorum of two-thirds of the votes represented and the majority of the par value of the shares represented, such as the introduction of a casting vote of the chairperson of the shareholders' meeting, further strengthens the shareholders' rights.**
- **The possibility to send the invitation to the shareholders' meetings electronically and the possibility to hold shareholders' meetings at several venues at the same time, within Switzerland as well as abroad, adds flexibility in terms of preparing and holding shareholders' meetings.**
- **The supreme body will further undergo a significant modernisation with the introduction of the possibilities of electronic shareholder participation in conventional (i.e. physical) and virtual (i.e. without a physical venue) shareholders' meetings.**
- **Shareholders' meetings will also become more flexible if held in the form of a universal meeting. In future, universal meetings may also pass resolutions in writing or in an electronic form.**
- **The new provisions call for action on various levels: on the one hand, existing structures must be checked for compliance with the new provisions and, where necessary, adapted accordingly; on the other hand, companies should carefully examine whether and to what extent they shall make use of the newly introduced organisational possibilities.**

Introduction

As part of the comprehensive Corporate Law Reform, which according to current estimates by the Federal Office of Justice is not expected to come into force before 2023, various provisions concerning the shareholders' meeting will be newly introduced, amended or repealed.

The reform strengthens shareholders' rights by delegating additional non-transferable powers to the shareholders' meeting and by lowering the thresholds for convening shareholders' meetings, placing items on the agenda and submitting motions. Shareholders' rights are further strengthened by the fact that in future, more resolutions of shareholders' meetings, in particular those concerning the delisting of shares of listed companies, will be subject to the quorum of at least two-thirds of the votes and the majority of the par value of the shares represented.

By means of the newly introduced possibility of holding shareholders' meetings at several venues simultaneously and abroad, as well as by the new possibilities of electronic participation and the holding of virtual shareholders' meetings, the supreme body of Swiss stock corporations is undergoing a long overdue modernisation and shift to greater flexibility. Due to the newly introduced possibility to hold universal meetings electronically or by way of circulation resolutions, this also applies to shareholders' meetings held in the form of a universal meeting.

Strengthening shareholder rights

Non-transferable powers of the shareholders' meeting

With regard to the non-transferable powers of the shareholders' meeting, the revised law makes different provisions for listed and non-listed companies. While the non-transferable powers in the catalogue of Art. 698 para. 2 nCO apply to both listed and non-listed companies, the catalogue of Art. 698 para. 3 nCO only applies to listed companies.

The following resolutions will be included in the catalogue of non-transferable powers of shareholders' meetings of listed and non-listed companies:

- Determination of the interim dividend (cf. Art. 675a nCO) and approval of the interim financial statements required for this purpose (Art. 698 para. 2 no. 5 nCO); and
- Resolutions on the repayment of statutory capital reserves (cf. Art. 671 nCO; Art. 698 para. 2 no. 6 nCO).

The resolutions that will make up the non-transferable powers of the shareholders' meeting of listed companies is identical to the catalogue of resolutions currently contained in the Ordinance against Excessive Compensation in Listed Stock Corporations, namely:

- Election of the chairperson of the board of directors (Art. 698 para. 3 no. 1 nCO);
- Election of the members of the compensation committee (Art. 698 para. 3 no. 2 nCO);
- Election of the independent voting proxy (Art. 698 para. 3 no. 3 nCO); and
- Voting on the remuneration of the board of directors, the executive committee and the advisory board (Art. 698 para. 3 no. 4 nCO).

Additionally, under the new law, the shareholders' meeting will be explicitly responsible for delisting the equity securities of listed companies (Art. 698 para. 2 no. 8 nCO). Under the current regime, in the absence of a provision to the contrary, this decision is within the authority of the board of directors. The shareholders' resolution regarding delisting will require a qualified majority and thus the approval of at least two-thirds of the votes represented and the majority of the par value of the shares represented (Art. 704 para. 1 no. 12 nCO).

Reduction of the thresholds for convocation, placing items on the agenda and submitting motions

Under the current legislation, shareholders who, alone or together with others, represent at least 10 per cent of the share capital may demand the convocation of a shareholders' meeting, as well as the placing of items on the agenda. The placing of items on the agenda may also be

requested by shareholders representing shares with a nominal value of at least CHF 1 million. These regulations currently apply to both listed and non-listed companies.

With regard to the right to convene meetings and to request the placement of items on the agenda, the reformed law will distinguish, however, between listed and non-listed companies.

With regard to listed companies, shareholders representing at least 5% of the share capital or votes may in the future request the convocation of a shareholders' meeting. For non-listed companies, the threshold will remain, however, at 10% of the represented share capital or votes (cf. Art. 699 para. 3 no. 1 and 2 nCO).

With regard to the right to place items on the agenda and to submit motions, the reformed law provides the following rules: For listed companies, the threshold for placing items on the agenda and submitting motions will be 0.5% and for non-listed companies 5% of the represented share capital or votes (Art. 699b para. 1 nCO).

As expressly stated in Art. 656b para. 5 no. 2 nCO, participation certificates must not to be taken into account when calculating the aforementioned thresholds. The calculation will therefore exclusively base on the share capital (Art. 656b para. 6 nCO).

New resolutions subject to qualified majority voting

Under the revised law, further resolutions of shareholders' meetings will be subject to the qualified quorum of two-thirds of the votes and the majority of the nominal share value represented (Art. 704 para. 1 nCO). These resolutions are the following:

- Consolidation of shares of listed companies (Art. 704 para. 1 no. 2 nCO);
- Capital increase by debt to equity swap (Art. 704 para. 1 no. 3 nCO);
- Introduction of a capital band (Art. 704 para. 1 no. 5 CO);
- Conversion of participation certificates into shares (Art. 704 para. 1 no. 6 nCO);
- Change of the currency of the share capital (Art. 704 para. 1 no. 9 nCO);
- Introduction of the casting vote of the chairperson of the shareholders' meeting (Art. 704 para. 1 no. 10 nCO);
- Introduction of a provision into the articles of association regarding the holding of the shareholders' meeting abroad (Art. 704 para. 1 no. 11 nOR);
- Delisting of the equity securities of a listed company (Art. 704 para. 1 no. 12 nCO);
- Introduction of an arbitration clause into the articles of association (Art. 704 para. 1 no. 14 nCO); and
- Waiver of the requirement for non-listed companies to appoint an independent voting proxy for the holding of a virtual shareholders' meeting (Art. 704 para. 1 no. 15 nCO).

Modernisation and improved flexibility of shareholders' meetings

Convocation and information before and after shareholders' meetings

According to the explanatory statement of the Swiss Federal Council and with reference to the provision in Art. 626 para. 1 no. 7 nCO, which requires the articles of association to contain provisions on the form of the company's notifications to its shareholders, it should be possible

in the future for the board of directors to convene shareholders' meetings exclusively in electronic form (e.g. by e-mail), as long as this is provided for in the articles of association.

Furthermore, Art. 700 para. 2 nCO contains more detailed requirements regarding the content of the convocation. In the future, it will be required, for example, that the date, the start time, the type and the venue of the shareholders' meeting, as well as the agenda items, the proposals of the board of directors and, in the case of listed companies, a brief explanation of these proposals must be announced in the convocation. Of particular importance is the explicit requirement to specify the type and location of the shareholders' meeting. This will provide clarity as to whether the shareholders' meeting will be held physically, take place at one or more venues, whether shareholders will be able to exercise their rights electronically, and whether the shareholders' meeting will be virtual.

In the future, Art. 700 para. 3 nCO explicitly requires the board of directors to maintain cohesion of subject matter in the convocation and to make available all information to the shareholders that is required for decision making. Finally, Art. 700 para. 4 nCO will provide the possibility to the board of directors to describe the agenda items in a summarised form only, provided, however, that further information is available by other means, e.g. on the company's website.

Pursuant to Art. 699a para. 1 nCO, the annual financial statements and the auditor's report may, in the future, be made available to the shareholders electronically and the shareholders may only request delivery of these documents in physical form if they are not made available electronically. Consequently, the obligation to provide written notification regarding the availability (as well as the obligation for the availability as such) of the annual financial statements and the auditor's report at the company's registered office will no longer apply and Art. 696 CO will be repealed.

Furthermore, under the reformed law, any shareholder may request delivery of the minutes of the shareholders' meeting within 30 days following the shareholders' meeting. According to the explanatory statement of the Swiss Federal Council, this may also be done by e-mail (Art. 702 para. 4 nCO). Listed companies will further be required to make the resolutions and the results of voting available in electronic form within 15 days of the shareholders' meeting, indicating also the exact voting ratios (Art. 702 para. 5 nCO).

Finally, what remains unchanged is that the resolutions of shareholders' meetings of (SIX-) listed companies must be reported to SIX Exchange Regulation via the electronic reporting platform 'Connexor Reporting' in accordance with the agenda by no later than one trading day after the shareholders' meeting (Art. 55 SIX Listing Rules in conjunction with no. 3.04 Directive Regular Reporting Obligations).

Venue of shareholders' meetings

Art. 701a and 701b nCO introduce new provisions regarding the venue of shareholders' meetings.

Art. 701a para. 1 nCO states that the board of directors shall determine the venue of the shareholders' meeting, which, however, is to be understood as subject to any respective provisions in the articles of association. In this respect, Art. 701a para. 2 nCO stipulates that

the determination of the venue of the shareholders' meeting must not result in an unreasonable impediment for the shareholders in exercising their rights. Finally, Art. 701a para. 3 nCO states that a shareholders' meeting may take place at different venues at the same time. In this case, the votes of the participants must be transmitted directly with images and sound to all meeting venues.

According to Art. 701b para. 1 nOC, the shareholders' meeting may also be held abroad. In order to do so, however, the articles of association must provide for such an option and require the board of directors to designate an independent voting proxy in the convocation of the meeting. The requirement to appoint an independent voting proxy may only be waived by non-listed companies, which, in turn, requires the consent of all shareholders (Art. 701b para. 2 nCO). The board of directors is responsible for determining the modalities for obtaining such consent, unless otherwise provided in the articles of association.

Electronic shareholder participation and virtual shareholders' meetings

Art. 701c nOC will allow the board of directors to provide for shareholders who are not present at the physical location of the shareholders' meeting to exercise their rights electronically.

Pursuant to Art. 701d para. 1 nCO, it will also be possible to hold shareholders' meetings exclusively by electronic means and without a physical venue. This requires, however, that the articles of association explicitly provide for such an option and that the board of directors designates an independent voting proxy in the convocation of the shareholders' meeting. Non-listed companies may waive the latter based on a corresponding provision in the articles of association, the introduction of which requires a qualified majority (Art. 701d para. 2 in conjunction with Art. 704 para. 1 no. 15 nCO).

In principle, the board of directors has the authority to determine the use of electronic means (Art. 701e para. 1 nCO). In doing so, however, the board of directors must ensure pursuant to Art. 701e para. 2 nCO that:

- The identity of the participants is established;
- The votes are transmitted directly;
- Each participant is able to make motions and take part in the discussion; and
- The voting result cannot be distorted.

With regard to technical problems that may arise during a virtual shareholders' meeting, Art. 701f para. 1 nCO states that the shareholders' meeting must be repeated if, as a result of technical problems, it cannot be held duly. In contrast, resolutions passed by the shareholders' meeting before the technical problems occurred, remain valid (Art. 701f para. 2 nCO). Art. 701f nCO does, however, not cover technical problems for which an individual shareholder is responsible, such as connection issues or problems arising from the hardware used.

Universal shareholders' meeting

As under current law, all shareholders or their authorized representatives may hold a shareholders' meeting in the form of a universal meeting, being a shareholders' meeting conducted without complying with the (formal) requirements prescribed for the convocation, provided no objection is raised (Art. 701 para. 1 nCO).

In the future, it will further be possible to hold a universal meeting by passing resolutions in writing (circulation resolution) or in electronic form if no shareholder or representative of a shareholder requests oral deliberation (Art. 701 para. 3 nCO).

References to electronics used by the legislator

Extended possibilities using electronic means in connection with the shareholders' meetings account for a significant part of the modernisation of corporate law. There are, however, various different wordings in the law, resulting in a lack of clarity as to which technical means are eligible or permissible in the individual case. The list below sets out some examples in this regard:

- By 'use of electronic means' (Art. 701e nCO);
- Make 'electronically accessible' (Art. 699a nCO);
- Make 'accessible by electronic means' (Art. 702 para. 6 nCO);
- Provide 'in electronic form' (Art. 701 para. 3 nCO); and
- Make 'accessible by other means' (Art. 700 para. 4 nCO).

It is important to note that, in order to create conceptual clarity with regard to the legislator's references to the use of electronic means, there is a need to interpret the law and, in particular, to closely observe the developments in practice after the entry into force of the new law. When determining which electronic means (e.g. telephone, video conference, e-mail, website, etc.) are permissible for the transmission or provision of information, it is important to read the wording used in the law with a view to the type and purpose of the information to be transmitted. This may lead to different results even in the case of identical wordings.

Rights and duties of the board of directors

Under the reformed law, not only the members of the board of directors but also those of the executive committee are explicitly entitled to participate in shareholders' meetings (cf. Art. 702a CO and Art. 691 para. 2bis nCO). The new law further explicitly states that the members of the board of directors and of the executive committee, if they participate in shareholders' meetings, have the right to comment on every agenda item (Art. 702a para. 1 nCO). As under current law, only the members of the board of directors will have the right to submit motions on any agenda item (Art. 702a para. 2 nCO).

Art. 702 para. 2 nCO, which governs the minimum content of the minutes of shareholders' meetings, will be partially revised and extended. Accordingly, under reformed law, the minutes must reflect at least the following:

- The date, start time and the end as well as the type and venue of the shareholders' meeting;
- The number, type, par value and class of shares represented, including indication of the number of shares represented by the independent voting proxy, the corporate proxy and/or proxies for deposited shares;
- The resolutions and the results of voting;
- The requests for information made at the shareholders' meeting and the answers provided;
- The statements made by shareholders; and
- Relevant technical problems encountered when holding a shareholders' meeting (in case of permitted electronic participation and virtual shareholders' meetings).

Pursuant to Art. 702 para. 3 nCO, the secretary and the chairperson of the shareholders' meeting must sign the minutes.

Need for action

The reformed corporate law provisions regarding shareholders' meetings trigger a need for various actions on the part of Swiss stock corporations. Both listed and non-listed companies should examine and, if required, adapt their articles of association to reflect the new provisions regarding the non-transferable powers of the shareholders' meeting, the lowering of the thresholds for convocation, setting the agenda and submitting motions and for a qualified majority for resolutions.

Although the relevant provisions apply by law, and thus regardless of whether they are implemented in the articles of association, most companies cover them in their articles of association nevertheless. In order to avoid situations where the provisions in the articles of association deviate from the legal provisions, it is therefore important for Swiss stock corporations to bring their articles of association in line with the reformed law and to implement corresponding amendments. Where the articles of association do not already comply with the new regulations, the transitional provisions of the new law require the articles of association and regulations to be amended within two years after its entry into force, otherwise they will become void.

Furthermore, companies should ensure that they adapt their existing processes for the convening and recording of shareholders' meetings, as well as for the provision of information and documents to the reformed law. It is also important to clarify to what extent the newly introduced simplifications or means of communication may provide for more efficiency and/or flexibility.

Finally, companies should examine whether and to what extent they may want to make use of the new organisation options, such as electronic shareholder participation in conventional (i.e. physical) shareholders' meetings or virtual shareholders' meetings (i.e. without a physical meeting venue). The implementation of these and other newly available organisation options entails various challenges from a technical, as well as from a legal perspective. Therefore, it is important that the corresponding transformation process is accompanied at a professional level.

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