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General Meetings of Stock Corporations in light of the Revised Swiss Code of Obligations

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The following article is intended to outline the changes in relation to the general meeting of stock corporations under the revised Code of Obligations. The formal framework of the stock corporation remains unchanged, but the reform brings increased flexibility and administrative simplification in various areas, in particular by allowing the use of electronic means of communication. It will even be possible to hold a general meeting entirely by electronic means as a virtual general meeting.

That this virtual concept works in practice has been confirmed in times of COVID-19. Due to the pandemic, the Swiss Federal Council has temporarily permitted virtual meetings based on a special legal basis, the COVID-19 Ordinance 2. However, although this test was successfully passed, virtual general meetings will under the new law – for practical reasons – presumably be reserved to small companies with only a few shareholders. For publicly listed companies with a large number of shareholders, the concept of physical general meetings will remain de facto the only method of holding a meeting of shareholders.

One controversial issue arose in the final stage of the parliamentary debate of the reform relating to a practice of the independent proxy holders to inform the company or its Board of Directors in advance confidentially on the instructions received. The revised law presents a compromise in this respect.

By Peter Forstmoser / Thomas Hochstrasser

1) Overview of the Reform regarding the General Meeting

The bulk of stock corporation law remains intact, but with an increased differentiation between private and listed companies. On the one hand, the new law continues the trend of the last decades to implement uniformity on the issues with the same economic impact (this according to the principle "same business, same risks, same rules"), even if different forms of companies are concerned. On the other hand, the revised law differentiates within the law of stock corporations according to the size or economic importance of a company. In particular, the special provisions for publicly listed companies have been further extended, especially with regard to the powers of the general meeting to determine the salaries of executive management and boards of directors. It should be mentioned, however, that these rules are not new. Indeed, they were already introduced in the Ordinance against Excessive Remuneration, with which the Federal Council temporarily implemented the requirements according to the so-called "Popular Initiative against Rip-Off Salaries" and which now will be converted into a law in the formal sense.

2) Modernization and increased flexibility of the provisions for the general meeting

a) Providing for the use of electronic means of communication

The rules for the general meeting will be modernized, in particular by allowing the use of electronic means of communication (art. 701c CO). In the future, it will be possible to participate in and pass resolutions of the general meeting electronically in the context of an otherwise physical meeting, and it will even be possible to hold a general meeting entirely by electronic means as a virtual general meeting (art. 701d CO).

The revised law makes explicit reference to the following possibilities of using electronic means of communication:

- The agenda items may be presented in summary form only in the convening notice if further information is made available to the shareholders "by other means" or "in an appropriate manner" (revised art. 700 (4) CO), which will generally correspond to electronic access to the information.

- Shareholders may request the delivery of annual and audit reports on paper only if these documents are not made available to them electronically (revised art. 699a CO).

- The adoption of resolutions at a universal meeting of shareholders is now also possible not only in writing (which is also new), but also electronically (revised art. 701 (3) CO).

- Participation in the general meeting may be made possible by electronic means (revised art. 701c CO) and the general meeting as a whole may be held by electronic means (virtual general meeting) (revised art. 701d CO).

- The general meeting may be held at several meeting places at the same time ("In this case, the votes of the participants must be transmitted directly in sound and vision to all meeting places", revised art. 701a (2) (3) CO).

The use of electronic means of communication is strictly optional, with the exception of the provisions on the electronic issuing of a power of attorney and of instructions to the independent voting proxy in listed companies (revised art. 689c (5) CO). These mandatory requirements result from the already mentioned implementation of the content of the Ordinance against Excessive Remuneration at the level of a formal law.

Whether and how the proposed innovations will actually be used and whether they will bring about savings in time and money remains to be seen.

b) Flexibility in the form of holding the general meeting

Despite these new rules, the concept of the general meeting per se will not be impacted. In the case of publicly listed companies with many small shareholders, this means that the "Landsgemeinde"-concept remains in place, i.e., the fiction of shareholders gathering in a meeting, exchange their ideas and positions and then take an informed decision. In reality, the results are known in advance and cannot be changed in the meeting because – as mentioned before – the independent proxy usually exercises the majority of the votes, and this in accordance with the instructions given to him by the shareholders well in advance.

The question of whether it should be possible to hold the general meeting of a Swiss company abroad has led to Homeric discussions in Parliament. As a compromise, it is now stipulated that this is permissible, but only if the articles of association provide it and if an independent proxy is appointed (art. 701b CO). Furthermore the location of the meeting must not make it objectively difficult for any shareholder to exercise his rights (which also applies to general meetings held in Switzerland).

The choice of a foreign venue might be particularly useful for wholly owned Swiss subsidiaries of foreign groups, which will be able to hold their general meetings at the headquarters of the parent company as the sole shareholder.

c) Confidentiality duty of the independent proxy?

In the late phase of parliamentary deliberations, a common practice of independent proxies, which is legally not unproblematic, came to light and was the subject of intensive discussion. This practice involves independent proxies informing the companies or their board of directors prior to the general meeting on the instructions received. Since, as mentioned, the majority of votes is almost always exercised through the independent proxy, the Board knows in advance what the outcome of the votes will be. This practice was defend by Boards, arguing that this information is necessary in order to prepare the meeting adequately. Opposing shareholders, on the other hand, qualified this advance information as an unjustified advantage for the company and its board.

As a compromise the revised law now states that the independent proxy may "provide the company with general information on the instructions received", but not earlier than three working days before the general meeting. At the general meeting itself, the independent proxy must disclose what information was given to the company. This will put an end to the grey area that heretofore existed.

3) Further aspects

a) Extension of the competences of the General Meeting

Strengthening the position of shareholders as owners of the company was a central goal of the reform. For publicly listed companies, this was implemented by shifting powers from the board of directors to the general meeting, a shift which as mentioned, has already taken place on the level of the Ordinance against Excessive Remuneration issued by the government. The reform of the Swiss stock corporation law will raise the provisions of the Ordinance to the level of a formal law.

According to these provisions, the general meeting of a listed company (and not the board of directors, as was previously the case for all corporations and will remain valid for private companies) is responsible for determining the total remuneration of the board of directors and of the executive board (as well as that of an advisory board if such a body exists which has become rare). In addition, the general meeting is mandatorily entitled to elect the chairman of the board of directors, the members of the compensation committee (which must be composed of members of the board of directors) and of the independent proxy. Finally, a one-year period of mandate is mandatory for the members of the board of directors of listed companies, whereas in the previous practice, three- or even four-year terms of office existed. Being (re) elected every year may be inconvenient for board members, but presumably, nothing will change in practice, reelection being a matter of routine and deselection being possible in every meeting (after a prior announcement) anyway.

b) Ordinary quorum for decisions remains, topics requiring a qualified quorum are extended

The Federal Council had proposed that, contrary to the current non-mandatory rule of art. 703 CO, in a vote of the general meeting only the yes and the no votes should be taken into account and abstentions should no longer be counted (relative majority). This could have led to more random majority decisions, especially in the case of publicly traded companies.

Both the National Council and the Council of States, however, decided that decisions will in the future as until now be taken by an absolute majority of votes represented at the general meeting (revised art. 703 CO). Abstentions thus continue to have the same effect as "no" votes, thus allowing a polite way of saying "no". As under current law corporations may provide another quorum by statutory provision.

In the current law, eight points are defined as so called important decisions within the meaning of art. 704 CO, for which a qualified quorum is required. In the future law nine additional topics are enumerated: (i) the consolidation of shares, insofar as this does not require the consent of all shareholders concerned, (ii) the conversion of participation certificates into shares, (iii) the introduction of a capital band or the creation of reserve capital, (iv) the change of the currency of the share capital, (v)

the introduction of the chairman's casting vote at the general meeting, (vi) a provision in the articles of association for holding the general meeting abroad, (viii) a delisting, (viiii) the insertion of an arbitration clause in the articles of association and (ix) the waiver of the appointment of an independent proxy to hold a virtual general meeting for companies whose shares are not listed on a stock exchange.

c) Comparison with the COVID-19 General Meeting

The current pandemic and the measures following the outbreak also affected general meetings. The COVID-19 Ordinances, as amended several times throughout the pandemic, provided a legal basis for companies to conduct their general meeting virtually. Although somewhat similar, the COVID-19 rules on general meetings differ from the possibilities under the revised CO. As the matter was time-sensitive, the virtual general meeting under the COVID-19 Ordinances does not require a respective base in the articles of association and there is no requirement of appointing an independent proxy. However, it is not possible to fully conduct the general meeting virtually, as it will be according to the revised CO. A physical meeting at a defined place on a defined date is still required, i.e. – in case of certain decisions to be taken such as changes of the articles of association – with a notary public present. Nevertheless, the current pandemic might have initiated a digitization process regarding the general meeting helping the newly introduced virtual general meeting according to art. 701d CO to actually be applied as soon as the revised CO enters into force. The exemption for COVID-19 general meetings based on the COVID-19 Ordinances was extended by the Federal Council until the end of 2021 and it is expected that the bulk of listed companies will make use of the exemptions next year also.

4) Summary

The reform brings much-welcomed flexibility and administrative simplification for general meetings, but the formal framework of the shareholder meetings remains basically unchanged. Stock corporations will be able to benefit from the opportunities provided by digitalization without being obliged to do so, especially when dealing with the shareholders.

The revised law makes an increased distinction between private and listed companies. At the same time, the revised law continues the trend of providing for the same rules and requirements for equivalent economic situations irrespective of the formal legal structure of an entity (the principle "same business, same risks, same rules").

An important innovation under the revised law is the possibility of holding a virtual general meeting.

As a rule, no amendments to the articles of association are necessary, as the new possibilities under the revised law – which may require a basis in the articles of association – are optional. However, if a company wants to hold its general meeting

abroad, which might be useful in particular for groups with a parent company abroad and subsidiaries in Switzerland, the articles of association must provide for this possibility.

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Changes affecting Shareholders' and Minority's Rights

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One of the main objectives of the corporate law reform was to strengthen shareholders' rights. And indeed, the reform will, albeit to a limited extent, strengthen the rights of shareholders, and those of minority shareholders' in particular, in a number of ways. Most notably, certain threshold requirements for the exercise of minority rights are lowered, while in turn a two-thirds majority vote requirement will be introduced for certain important resolutions. Perhaps most notably, information and participation rights for minority shareholders in both listed and non-listed companies are made more accessible and to some extent likely more effective.

By Remo Decurtins / Jonas Hertner

This article outlines the upcoming changes to Swiss corporate law with respect to the protection of the rights of shareholders generally and minority shareholders more specifically.

1) Changes to Information and Participation Rights

a) New Threshold Requirements

Several threshold requirements for the exercise of minority rights will be lowered as a result of the reform. Unlike the threshold requirements in the current law, which is based on capital alone, the new threshold requirements are calculated based on capital or voting rights. A distinction is generally made between listed and non-listed companies:

- The *right to convene a General Meeting* will require 5% of capital or voting rights in listed companies and 10% in non-listed companies. Current law requires 10% of capital for all companies.

- The *right to demand that an item be placed on the agenda of a General Meeting* will require 0.5% of capital or voting rights or participation capital. Current law requires a stake with a nominal value of at least CHF 1 million or 10% of capital for all companies.