

# NKF Client News

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## FAQ - Annual General Meetings in Start-Ups and SMEs under the New Swiss Corporate Law

### Introduction

The new Swiss corporate law that entered into force last year brought several welcomed changes by modernizing the holding of general meetings of shareholders ("**GMs**") of Swiss corporation (*Aktiengesellschaft/société anonyme; AG/SA/Ltd*) pursuant to articles 620 *et seq.* of the Swiss Code of Obligations (the "**CO**"). Under the new act, start-ups and small and medium enterprises ("**SMEs**"), and their shareholders, enjoy additional flexibility, in particular with respect to the use of electronic means.

Despite this flexibility, the holding of proper GMs requires compliance with several legal norms, including norms on the convening of GMs, their conduct, the voting process and the minuting thereof. In addition, the use of certain new tools allowed by the CO requires the prior amendment of the articles of association (the "**AoA**") of the company.

Due to time and financial constraints, start-ups and SMEs incorporated as Swiss corporation often overlook mandatory legal norms or their AoA when holding their annual general meeting of shareholders ("**AGM**", *ordentliche Generalversammlung/assemblée générale ordinaire*). This may lead, inter alia, to the resolutions of the GM being void or voidable, to defects in the organization of the company, and even to the personal liability of the members of the board of directors (the "**BoD**") and/or the management. These issues will generally have to be resolved at a later stage with much more efforts and frequently scare away potentials investors and acquirers conducting due diligence processes.

This FAQ aims at helping start-ups and SMEs avoid such issues and common stumbling blocks encountered when holding AGMs under the new Swiss corporate law in the light of first experiences made since its entry into force on 1 January 2023.

We focus on the rules applicable to start-ups and SMEs incorporated as Swiss corporations, which are subject to a limited audit (*eingeschränkte Revision/contrôle restreint*), or which opted-out from limited audit.

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### 1. When need the AGM to be held?

The AGM shall be held within 6 months after the end of each financial year.

### 2. Who must convene the AGM?

As a rule, the BoD convenes the AGM. The AoA of start-ups/SMEs often grant the chair of the BoD the power to convene GMs alone. Start-ups/SMEs should refer to their AoA.

### 3. When does the AGM need to be convened?

The AGM shall be convened in accordance with the notice period set forth in the AoA of the start-up/SME, which is usually 20 calendar days (i.e., the minimum mandatory notice period by law). The 20-calendar day period must be computed without counting the date at which the invitation is sent and the date of the AGM.

#### **4. How must the AGM be convened?**

The invitation to the AGM shall be communicated to the shareholders in accordance with the communication form set out in the AoA of the start-up/SME, which may vary, for instance, from mere emails to registered mails with acknowledgement of receipt.

A copy of the invitation shall be sent to the holders of non-voting shares (*Partizipationsscheine/bons de participation*), if any, for their information (and not as an invitation to attend the AGM, unless the AoA state otherwise) within the notice period and in accordance with the form of communication set out in the AoA.

As the shareholders and holders of non-voting shares shall be granted access to the management report and the audit report, as applicable, at least 20 days before the AGM, a personal electronic link to such documents should be communicated to the shareholders and holders of non-voting shares, together with the AGM invitation and the copy of the invitation, respectively.

Any shareholder or holder of non-voting shares may request the delivery of these documents in hard copies if they are not made available electronically.

#### **5. What content need to be included in the AGM invitation?**

The AGM invitation shall mention:

- the type of general meeting (i.e., that the convening is in respect of an AGM, as opposed to an extraordinary GM);
- the date and time of the AGM;
- the form of the AGM (in person, virtual or hybrid);
- the location(s) of the AGM in case of an AGM in person;
- the agenda items (including any new agenda items requested by shareholders holding alone or together 5% or more of the (voting) share capital or the voting rights, if any);
- the motions of the BoD related to the agenda items (and in case of agenda items requested by shareholders holding alone or together 5% or more of the (voting) share capital or the voting rights, the motions of said shareholders related to said agenda items and their statements of reasons to request these agenda items, if any);
- a detailed presentation of the agenda items (including all information which is necessary for the AGM to take resolutions) or a short presentation of the agenda items (provided that detailed information is communicated by others means); and
- the name and address of the independent representative, as applicable (see question 21 below).

It is advisable to mention, in addition, information related to representation of shareholders at the AGM and attach a proxy/power of attorney form to the invitation, as well as, unless the AoA state otherwise, the statement that the share ledger at the date of convening of the AGM (or any other earlier date) is decisive for determining who may exercise the shareholders' rights at the AGM.

#### **6. May shareholders request inclusion of agenda items and motions in the AGM convening?**

Shareholders holding alone or together 5% or more of the (voting) share capital or the voting rights may request the inclusion in the AGM convening of new agenda items, motions to the agenda items and short statements of reasons related thereto. The AoA of the start-up/SME may grant further rights to the shareholders and/or set forth a lower percentage for requesting the foregoing.

## **7. What items need to be included in the AGM agenda?**

An AGM agenda typically comprise the following items:

- approval of the annual accounts;
- appropriation of the results from the balance sheet;
- release of the members of the BoD and the executive management;
- election/re-election of the members of the BoD (and the chair of the BoD, if the AoA provide for his/her election by the GM);
- election/re-election of the auditors (unless the start-up/SME has opted-out from limited audit); and
- miscellaneous, allowing the BoD and the shareholders (and the shareholders' representatives, if any) to discuss any other relevant topic.

As a rule, an AGM that does not qualify as a universal GM (i.e., a GM where all shares are represented – see question 9 below) may not take any resolution that is not on the agenda items mentioned in the AGM convening.

## **8. Is it possible to derogate from the convening requirements?**

The convening requirements may be derogated from if the AGM is held as a universal GM (see question 9 below) or if the GM takes circular resolutions (see question 10 below).

## **9. Can an AGM be held as a universal GM?**

An AGM may be held as a universal GM, i.e., a meeting held in person, virtually or in a hybrid form attended by the holders of all the (voting) shares of the start-up/SME (or their representatives) without any of them objecting thereto. A universal GM may validly deliberate and pass resolutions on any item within its competence.

In case of doubt on the expected attendance and the agreement of all the shareholders to hold a universal GM, it is recommended to convene an AGM in accordance with the ordinary procedure.

If a start-up/SME has issued non-voting shares, the holding of a universal GM, without complying with the applicable convening requirements, may require the consent of the holders of non-voting shares, who may have to waive certain of their rights.

## **10. Can resolutions of the GM be taken as circular resolutions?**

Unless stated otherwise in the AoA of the start-up/SME, the GM may take resolutions in writing in paper or electronic form, i.e., without holding a meeting (in person, virtually or in a hybrid form), and derogate from the convening requirements, provided that no shareholder requests a discussion.

Whether circular resolutions may only be taken with all the shareholders participating (or being represented) and voting (even with abstention ballots) or if it is sufficient that all the shareholders agree, in each case, to a written decision process without further participating is controversial. Absent any guidance from case law at this point, and in view of the risk of nullity, it is advisable to interpret narrowly the new provision, and that the GM takes circular resolutions with the participation of all the shareholders (or their representatives). In other words, it is recommended to have all shareholders cast a yes or no vote or expressly abstain from voting. An explicit waiver of the shareholders' right to request a discussion may be included in the circular resolutions.

In the event a start-up/SME has issued non-voting shares, a GM may, in our view, take circular resolutions provided that the rights of the holders of non-voting shares, including granting access to the management and audit reports and a copy of the resolution being circulated, are complied with or waived by the holders of non-voting shares.

#### **11. In which forms can an AGM be held?**

An AGM may be held as an in-person, virtual or hybrid (i.e., both in-person and virtual) meetings. The option to hold purely virtual GM shall, however, be expressly provided for in the AoA of the start-up/SME to be valid (see question 16 below).

#### **12. Does an AGM require a notary?**

As a rule, an AGM with the typical agenda (as set out in question 7 above) does not need to be notarized and, accordingly, the attendance of a notary is not required.

Conversely, a notary may be required in case certain additional items are added to the agenda, such as amendments to the AoA.

#### **13. Can an in-person GM be held in different locations?**

Unless stated otherwise in the AoA of the start-up/SME, an in-person GM may be held simultaneously in different locations. In such case, discussions have to be broadcasted live (both audio and video) in all such locations.

The BoD decides of the location(s) of in-person GMs, unless stated otherwise in the AoA of the start-up/SME. The location must not, without ground, impede any shareholder from attending the AGM and from exercising his/her/its shareholders' rights.

#### **14. Can an in-person GM be held abroad?**

Unless stated otherwise in the AoA of the start-up/SME, an in-person GM may be held in Switzerland and abroad simultaneously. In-person GM may be held exclusively abroad if the AoA of the start-up/SME so provide and an independent representative is appointed by the BoD (see question 21 below). The obligation to appoint an independent representative may be unanimously waived by all the shareholders (or their representatives) (see question 21 below).

#### **15. Can an AGM be held both at a physical location and virtually (hybrid GM)?**

Unless stated otherwise in the AoA of the start-up/SME, an AGM may be held as a hybrid GM, i.e., a meeting in which shareholders who are not attending in person (or physically represented) at the location(s) of the meeting may exercise their rights by electronic means.

#### **16. Can an AGM be held exclusively virtually (virtual GM)?**

If provided for in the AoA of the start-up/SME, an AGM may be held as a virtual GM, i.e., a meeting held entirely through electronic means, without any physical meeting location.

## **17. What are the modalities for use of electronic means during a virtual or hybrid GM?**

To the extent not regulated by the AoA of the start-up/SME, the BoD determines the modalities for use of electronic means. The BoD shall opt for reasonably secure electronic means, which may be used by shareholders with standard computer skills and equipment.

The BoD may not hold a mere Microsoft Teams or Zoom (or other videoconference services) meeting, but shall verify the identity of the participants and ensure that the results of the votes cannot be falsified. It shall also set up a live (audio or audio and video) broadcasting allowing the shareholders to fully exercise their shareholders' rights such as voting, taking actively part in the discussions, requesting information and making motions on the agenda items.

During hybrid GMs, shareholders participating in person and shareholders participating electronically (or their respective representatives) shall have the possibility to influence the decision-making process on an equal footing.

When GMs are held as purely virtual meetings, an independent representative shall be designated by the BoD unless the AoA of the start-up/SME allows the BoD to waive the designation of an independent representative, and the BoD decides in this sense (see question 21 below).

## **18. What happens in case of technical issues during a virtual or hybrid GM?**

In case of technical issues leading to the GM not complying with the requirements for use of electronic means mentioned (see question 17 above), set out in the AoA of the start-up/SME and/or by the BoD, the AGM shall be reconvened. Resolutions taken before the occurrence of the technical issues remain valid. If the technical issues are only temporary, it is sufficient that the GM is briefly suspended and that the interrupted vote or election is repeated.

The BoD may reconvene the AGM with the same agenda items without observing the 20-day period (or any longer period provided for in the AoA of the start-up/SME) for the convening of GM. The newly chosen date and time of the AGM shall not lead to hinder de facto the shareholders from participating to the AGM.

As a rule, a GM does not have to be reconvened in the event the technical issues arise from the own hardware or software of the shareholders or from technical issues of their Internet providers that are not widespread.

## **19. What are the key steps of an AGM?**

### **19.1 Attendance list and verification**

Before the opening of the AGM, the BoD completes the attendance list and verifies the rights of the participants (i.e., the natural or legal persons entitled to vote pursuant to the share ledger of the company at the relevant date - see question 5 above -, their representatives, if any, and the attending members of the BoD and the management, as well as any third party authorized to participate in the AGM by the GM, the BoD or the chair of the AGM, as applicable, such as the members of the start-up's/SME's advisory board, the board observers or the holders of non-voting shares) to participate in and, as applicable, vote at the AGM, including by verifying the identity of such persons and the proxies/powers of attorney.

In case of an in-person GM, the shareholders (and the shareholders' representatives, if any) usually sign the attendance list. When the AGM is held as a virtual or hybrid GM, it is advisable to have the

shareholders in attendance and the shareholders' representatives sign the attendance list and to detail which participants are attending the AGM virtually, and how their identities have been confirmed (e.g., by live audiovisual check of online participants' identities). Further, the chair of the AGM and the secretary of the AGM shall as a rule sign the attendance list.

## 19.2 Opening of the AGM and appointment of the chair and secretary of the AGM

The person that will act as the chair of the AGM usually opens the AGM. The chair of the AGM and the secretary of the AGM are then appointed in accordance with the AoA of the start-up/SME or, absent any provision in that respect in the AoA and any resolution of the GM, by the BoD. AoA of start-ups/SMEs generally provide that the chair of the AGM is the chair of the BoD or the sole member of the BoD, and that the chair of the AGM appoints the secretary of the AGM, who will draft the minutes of the AGM (see question 22 below).

## 19.3 Statements of the Chair of the AGM

The chair of the AGM then makes different statements. He/she typically makes statements regarding the due convening of the shareholders (as well as, communication of a copy of the AGM convening to the holders of non-voting shares, if any) and access in due time to the management report and audit report, as applicable, the number of shares that are present or represented (and other related information; see question 22 below), the valid constitution of the GM and its competence to validly deliberate and pass resolutions, and then recalls the agenda items.

## 19.4 Conduct of the AGM

Thereupon, the chair of the AGM conducts the AGM and proceeds with the agenda items one by one. It is advisable for him/her to use a script detailing the steps that shall be undertaken, including if there is a question or request of a participant. He/she allows the shareholders in attendance (and shareholders' representative), as well as the attending members of the BoD and the management, to discuss the agenda items.

Any shareholder (or shareholder's representative) may make motions on the agenda items. The BoD may also make any such motions.

Any shareholder (or shareholder's representative) may ask information to the BoD regarding the business of the start-up/SME. The AoA of the start-up/SME may also grant the holders of non-voting shares the right to exercise such right. Following the discussions and before moving to the next agenda item, the chair of the AGM invites the GM to pass resolutions by voting (see question 20 below) on the (non-withdrawn) motions.

## 19.5 Closing of the AGM

When there is no further item to be discussed (and resolutions to be taken) the chair of the AGM closes the AGM. Following the AGM, the minutes of the AGM shall be finalized and signed by the chair of the AGM and the secretary of the AGM.

Afterwards, the BoD shall, as applicable, elect or re-elect the chair of the BoD and notify the competent commercial register of any change in the composition of the BoD and/or of auditors. This is achieved through an application to the commercial register.

## 20. What is the voting process at the AGM?

Unless provided otherwise by the law or in the AoA of the start-up/SME, the GM takes resolutions and proceeds to elections by an absolute majority of the votes allocated to the shares represented during the relevant vote, i.e., 50% of such votes plus one vote.

The law does not provide for another majority in connection with the approval of the annual accounts, the appropriation of the results from the balance sheet, the release of the members of the BoD and the management and the election/re-election of the members of the BoD and the auditors.

The total number of votes shall be determined in connection with each vote and does not include the votes allocated to (i) shares owned by the start-up/SME itself (so-called treasury shares), (ii) treasury shares transferred by the start-up/SME to a third party in the framework of a security lending transaction or a similar transaction and (iii) shares of the members of the BoD and of the management when the GM votes on their discharge.

Unless otherwise specified in the AoA of the start-up/SME, abstentions count as negative votes when the total number of votes shall be computed on the basis of the votes allocated to shares that are represented (i.e., not on the basis of the casted votes). If any, attending holders of non-voting shares cannot vote and non-voting shares shall not be considered when computing majorities.

## 21. What is an independent representative?

An independent representative is a natural or legal person that may (or, depending on the circumstances, shall - see questions 14 and 17 above) be appointed by the start-up/SME to give the shareholders the opportunity to be represented at the AGM by such representative. The shareholders can also chose to be represented by another person in accordance with the AoA of the start-up/SME.

The authority of the independent representative to represent the shareholders is granted through a proxy/power of attorney prepared by the BoD. The independent representative must exercise the voting rights in accordance with the instructions given by the shareholders, and, in the absence of instructions, must abstain from voting.

The independent representative must be independent in fact and appearance and therefore cannot, as a rule, be, inter alia, a member of the board of directors or of the management of the start-up/SME, an employee or a substantial shareholder or creditor of the start-up/SME.

## 22. Do AGM minutes need to be taken?

The secretary of the AGM shall take the minutes of the AGM. He/she usually does this on the basis of a draft during the AGM and finalizes the minutes within a few days following the AGM. The chair of the AGM and the secretary of the AGM shall sign the minutes.

The minutes of the AGM shall contain at least:

- the date, the time of the opening and closing of the GM, the form (in-person, virtual or hybrid GM);
- the location of the GM (in case of an in-person GM);
- the number of shares that are present or represented, their kind (registered shares; *Namenaktien/actions nominatives*), their category (ordinary/privileged; *Stammaktien/Vorzugsaktien / actions ordinaires/privilégiées*), their par value (*Nennwert/valeur nominale*) and, as applicable, which shares are represented by the independent representative, a member of a corporate body or a depositary;



- the resolutions of the GM and the results of the elections;
- any request for information made during the AGM and the answers thereto;
- any statement which records in the minutes has been requested by a shareholder (or a shareholder's representative); and
- any significant technical problem that occurred during the GM.

It is advisable to include details on the votes (the number of positive and negative votes casted, as well as the abstentions, and the total number of votes in connection with each vote), the motions and any relevant information, explanation or comment made during the AGM, as well as on the persons (not listed on the attendance list, which usually only mention the shareholders and their representatives, if any) that are attending the AGM.

Upon request, each shareholder (and each holder of non-voting shares, if any) may request that access to the minutes of the AGM be granted to him/her/it within 30 days from the AGM.

### **23. Do start-ups/SMEs have to adapt their AoA?**

The new corporate law entered into force on 1 January 2023 and applies as from that date.

Incorporated start-ups and SMEs have, as a rule, a 2-year period, i.e., until 31 December 2024, to adapt their AoA and regulations to the new mandatory provisions.

As of 1 January 2025, the new mandatory provisions will supersede any contradictory provision of start-ups'/SME's AoA or regulations. Conditional capital increases decided before 1 January 2023 will continue to be governed by the former law.

Start-ups and SMEs may wish to amend their AoA to benefit from certain new tools offered by the new corporate law (such as virtual GMs), to avoid the application of provisions of their AoA authorized under the former law that deviate from mandatory new provisions during the 2-year transitional time period, and/or to avoid the application of provisions of their AoA deviating from non-mandatory new provisions during or after such period.

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