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Shareholders' Rights & Shareholder Activism 2023

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Switzerland: Law & Practice

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SWITZERLAND

Law and Practice

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Contents

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1. Types of Company, Share Classes and Shareholdings

1.1 Types of Company

The main (and most common) types of companies that can be formed in Switzerland are:

- the stock corporation (*Aktiengesellschaft*, *AG*); and
- the limited liability company (*Gesellschaft mit beschränkter Haftung*, *GmbH*).

However, the stock corporation is much more common than the limited liability company (LLC).

Both company types enjoy limited liability to the effect that only the company's assets are liable for company debts and not the private assets of the respective shareholder(s); therefore, shareholders do not lose their private assets in the event of bankruptcy.

Shares of stock corporations can be publicly listed, whereas quota shares of LLCs cannot be traded publicly.

1.2 Types of Company Used by Foreign Investors

Foreign investors typically use stock corporations or LLCs. While a stock corporation essentially consists of a board of directors that is responsible for the overall strategy of the corporation, and of a management to which the board of directors delegates the daily business, the governance of an LLC is usually simpler. Therefore, international group companies often use LLCs for their Swiss subsidiaries. The transferability of shares of a stock corporation is usually less restricted than for those of an LLC.

Shareholders of a stock corporation are not publicly known (except when they hold a participation of at least 3% in a publicly listed company). Quotaholders of LLCs are registered in the commercial register.

1.3 Types or Classes of Shares and General Shareholders' Rights

The rights attached to shares of a stock corporation or quota shares of an LLC are set out in the Swiss Code of Obligations and in the articles of association of the respective company.

Stock Corporation

In a non-listed Swiss stock corporation, it is most common to issue registered shares. These can be certificated. Non-listed companies may only issue bearer shares if they are issued as intermediated securities. Publicly listed stock corporations can issue bearer shares.

Both share types must have a nominal value that is greater than zero. In addition, different classes of shares, such as super-voting or preference shares, participation and dividend rights certificates, can be introduced. Usually, the voting rights and the financial rights attached to a share are in proportion to the total nominal value of the shares belonging to the respective shareholder. Every shareholder must have at least one vote.

If, however, super-voting shares are introduced, the right to vote is determined by the number of shares belonging to each shareholder – regardless of the total nominal value each shareholder holds. This means that each share confers one vote. The nominal value of the super-voting shares may not be lower than one tenth of the nominal value of the other (common) shares. Super-voting shares allow shareholders to remain in control regarding voting rights while holding a comparatively small amount of capital. Super-voting shares are quite common in Swit-

zerland but have been criticised in the context of listed companies.

Preference shares, on the other hand, enjoy preferential rights vis-à-vis the other (common) shares that are expressly conferred on them by the articles of association of the respective company, and may relate to:

- dividend payments;
- the share in the liquidation proceeds; or
- subscription rights in the event that new shares are issued.

Participation certificates only confer financial rights. They do not confer voting rights.

Dividend rights certificates must not have a nominal value, and entitle their holders only to a share in the disposable profit or the proceeds of liquidation or to subscribe to new shares.

LLC

In a Swiss LLC, only registered quota shares can be issued. These can be certificated, and their par value must also be greater than zero. The LLC can issue different types of quota shares as well (see above). However, participation certificates are not permitted. In comparison to a stock corporation, quota shares cannot be listed on a stock exchange in Switzerland or abroad.

1.4 Variation of Shareholders' Rights

The main shareholders' rights are:

- the right to vote at the shareholders' meeting;
- the entitlement to receive a share of the profit and liquidation proceeds of the company; and
- the subscription right in the event of the issuance of new shares.

These shareholder rights can be limited by way of amending the articles of association of the company (eg, by introducing super-voting or preference shares – see **1.3 Types or Classes of Shares and General Shareholders' Rights**) or by resolution of the shareholders' meeting.

1.5 Minimum Share Capital Requirements

Stock Corporation

The share capital of a stock corporation must amount to at least CHF100,000. At the time of incorporation, at least 20% of the nominal value of each share must be paid up, and in all cases capital contributions must in total amount to a minimum of CHF50,000.

There is no upper limit for the share capital. The share capital can be paid in by cash, contributions in kind (such as real property or machines) or offset with a claim. The nominal value of a share must be greater than zero. As of 2023, it is permitted to denominate the share capital in euros, US dollars, British pound sterling or Japanese yen – provided that the respective currency is the functional currency of the business and the reporting currency used in the financial statements.

LLC

The quota capital of an LLC must amount to at least CHF20,000. It can also be paid in by cash, contributions in kind or offset with a claim. However, the quota capital must be paid up to 100%. There is no upper limit for the quota capital. As a special characteristic of an LLC, the quotaholders must be entered in the commercial register by name, with their number of quotas and the nominal value of their participation.

1.6 Minimum Number of Shareholders

When incorporating a stock corporation or an LLC, at least one shareholder/quotaholder is required. This can either be a natural person or a legal entity. Shareholders/quotaholders are not obliged to reside in Switzerland. However, at least one representative of the company must have residence in Switzerland.

1.7 Shareholders' Agreements/Joint Venture Agreements

Shareholders' agreements (SHAs) and joint venture agreements (JVAs) are commonly used in privately held companies in Switzerland. SHAs, in particular, protect minority shareholders and grant them contractual rights that they would not otherwise have due to their minority shareholding.

In listed companies, relationship agreements may be entered into between anchor shareholders and the company.

1.8 Typical Provisions in Shareholders' Agreements/Joint Venture Agreements

SHAs

Typical provisions of SHAs concern, inter alia:

- transfer restrictions and provisions regarding change of control or exit events, in which case pre-emptive rights, tag-along or drag-along rights, and put or call options are foreseen;
- the composition of the board of directors and the management;
- specific decisions of the board of directors or the shareholders' meeting that require qualified majorities or the consent of a specific shareholder or board representative, or that are subject to a certain veto right;
- dividend policy; and
- future financing and anti-dilution protection.

SHAs can only be enforced against the parties to the agreement. They do not need to be disclosed to the public and usually contain confidentiality provisions.

JVAs

Typical provisions of JVAs are very similar to SHAs – in essence, JVAs govern the rights and duties of different shareholders with regard to a certain company. However, JVAs usually contain additional provisions on how the business of the joint venture company shall be conducted.

2. Shareholders' Meetings and Resolutions

2.1 Types of Meeting, Notice and Calling a Meeting

The following refers exclusively to stock corporations.

The shareholders' meeting is the supreme governing body of a Swiss stock corporation. Annual general meetings (AGMs) must be held within six months from the end of the company's financial year. The AGM is usually convened by the company's board of directors at least 20 days before the respective meeting, and the notice period cannot be shortened. However, if all shareholders are present (so-called universal meeting), the notice period of 20 days can be waived.

The main agenda items to be resolved on at an AGM are:

- approval of the annual financial statements;
- allocation of the balance sheet profits;
- granting discharge to the members of the board of directors; and
- (re-)electing the members of the board of directors and the statutory auditor.

An extraordinary general meeting (EGM) can be held if there is a need, or upon written request of a shareholder reaching a certain threshold (5% of the share capital or voting rights in a listed company; 10% of the share capital or voting rights in a non-listed company).

2.2 Notice of Shareholders' Meetings

Notice of a shareholders' meeting (ie, AGM or EGM) must be given to the shareholders at least 20 days before the respective meeting. This convocation period can only be omitted if the shareholders' meeting is held as a universal meeting of all shareholders or by way of circular resolution (see **2.1 Types of Meeting, Notice and Calling a Meeting**).

The invitation to the shareholders must include:

- the agenda items of the forthcoming shareholders' meeting; and
- the motions of the board of directors regarding each agenda item (including a short explanation of the motions if the company is publicly listed).

2.3 Procedure and Criteria for Calling a General Meeting

Shareholders' meetings are usually convened by the board of directors or, where necessary, by the external auditors of the respective company. Further, liquidators and representatives of bond creditors of the company may also call for a shareholders' meeting.

In addition, shareholders of non-listed companies representing 10% (in listed companies, the threshold is 5%) of the share capital or of the votes can request that a shareholders' meeting be convened. Such shareholders' request must be made in writing to the company's board of directors, stating the agenda items and the respective motions. A brief explanation can be added by the shareholders, which must then be included in the notice convening the shareholders' meeting. If the board of directors fails to grant such a request within a reasonable time, and at the most within 60 days, the requesting shareholders may ask the court to order that the meeting be convened.

2.4 Information and Documents Relating to the Meeting

Each shareholder has the right to receive notice of a shareholders' meeting. Every shareholder is given access to the annual report and the audit reports of the company at least 20 days before the AGM. Also, every shareholder is entitled to ask questions during a shareholders' meeting.

Shareholders of non-listed companies representing 5% of the capital or of the votes hold the right to inspect the company's books and records, to the extent this is necessary to exercise their rights properly and provided that no trade secrets or other company interests warranting protection are put at risk.

Shareholders of non-listed companies representing 10% of the capital or votes also have the right to receive requested information on company matters outside the shareholders' meeting in writing from the board of directors. The board of directors is obliged to provide the information in so far as it is required for the proper exercise of shareholders' rights, and provided no trade secrets or other company interests warranting protection are put at risk. Any refusal of the board of directors must be justified in writing. The requesting shareholders can challenge such decision of the board of directors in court within 30 days.

Shareholders of listed companies do not have the above-mentioned information rights – they are already entitled to receive more information due to the fact that the company is listed. In particular, listed companies must disclose all information that might affect the share price (so-called ad hoc publicity). Moreover, listed companies must provide, inter alia:

- a half-year report;
- a non-financial report;
- a compensation report; and
- a corporate governance report.

2.5 Format of Meeting

As of 2023, shareholders' meetings can be held in the form of:

- a physical meeting;
- a hybrid meeting (physical meeting with remote participants who exercise their voting rights electronically); or
- an entirely virtual meeting, if the articles of association of the company so allow.

However, if electronic means are used, the board of directors must ensure that:

- the identities of the participants are established;
- the oral contributions are directly transmitted;
- each participant can table motions and participate in the debate; and
- the result of the vote cannot be falsified.

Entirely virtual shareholders' meetings require a basis in the company's articles of association.

Also, if no shareholder requests an oral debate, resolutions can be passed in writing (on paper or by electronic means – eg, email).

Physical shareholders' meetings outside Switzerland are possible if the articles of association provide for such meetings.

2.6 Quorum, Voting Requirements and Proposal of Resolutions

Whether the required majority is reached is typically decided based on the shares that are represented at the shareholders' meeting. This means that no quorum is required to hold a shareholders' meeting if the articles of association do not provide otherwise.

2.7 Types of Resolutions and Thresholds

As of 2023, shareholders' resolutions can be passed either at a physical, virtual or hybrid (ie, physical with remote participants) shareholders' meeting. In addition, a circular resolution (on paper or by electronic means – eg, email) is possible provided no shareholder requests an oral debate.

The articles of association of the company must explicitly provide for the possibility of holding a virtual shareholders' meeting. In listed companies, certain proxy advisers recommend voting against the introduction of the possibility of holding virtual shareholders' meetings.

The board of directors must decide whether remote participants are entitled to exercise their rights electronically – ie, whether a hybrid shareholders' meeting is possible.

2.8 Shareholder Approval

The Swiss Code of Obligations contains a list of resolutions which must be decided by the shareholders' meeting. As of 2023, the list comprises the following inalienable powers:

- determining and amending the articles of association;

- electing the members of the board of directors and the external auditors;
- approving the management report and the consolidated accounts;
- approving the annual accounts and passing resolutions on the allocation of the disposable profit, and in particular setting the dividends and the shares of profits paid to board members;
- determining the interim dividends and approving the interim accounts required therefor;
- passing resolutions on repaying the statutory capital reserve;
- discharging the members of the board of directors;
- delisting the equity securities of the company; and
- passing resolutions concerning matters reserved to the shareholders' meeting by law or by the articles of association.

The shareholders' meeting of a stock corporation whose shares are publicly listed has the following additional inalienable powers:

- electing the chair of the board of directors;
- electing the members of the remuneration committee;
- electing the independent voting representatives; and
- voting on the remuneration of the board of directors, the executive board and the board of advisers.

The aforementioned resolutions require a majority of the voting rights that are represented at the shareholders' meeting.

As of 2023, the following resolutions require a supermajority – ie, the affirmative vote of two thirds of the represented voting rights and a majority of the represented share capital:

- changes in the company's purpose;
- merging of shares, unless the consent of all affected shareholders is required;
- capital increases from the company's own equity, with contribution in kind, by way of set-off or granting special privileges;
- restrictions or cancellations of subscription rights;
- creation of contingent share capital or capital bands;
- conversion of participation certificates into shares;
- restrictions on the transferability of registered shares;
- introduction of shares with preferential voting rights;
- changing the share capital currency;
- introduction of a casting vote of the shareholders' meeting chairperson;
- amending the articles of association to allow physical shareholders' meetings outside Switzerland;
- delisting;
- relocation of the company's seat;
- introduction of arbitration clauses in the articles of association;
- waiver to appoint an independent proxy for virtual shareholders' meetings; and
- dissolution of the company.

2.9 Voting Requirements

The delegation of voting rights of corporate bodies and the delegation of voting rights to custodian banks are not permitted for companies whose shares are listed on a stock exchange. The shareholders' meeting must appoint an independent proxy to represent shareholders.

Shareholders of privately held companies can delegate their voting rights to a proxy at will, unless the articles of association restrict or prohibit this, by stating, for example, that a shareholder may only be represented by another shareholder at the shareholders' meeting. If the articles of association contain such a provision, the board of directors must, at the request of a shareholder, designate an independent proxy to represent shareholders or a voting representative for a corporate body who can be instructed to exercise the participation rights.

The board of directors must ensure that the shareholders are able to instruct the proxy on any motion relating to tabled agenda items and provide them with general instructions on unannounced motions.

The voting at the shareholders' meeting can be conducted by show of hands or by electronic poll vote.

2.10 Shareholders' Rights Relating to the Business of a Meeting

As of 2023, shareholders holding 5% of the capital or of the votes of non-listed companies have the right to request that items be placed on the agenda and that motions relating to items on the agenda be included in the notice convening the shareholders' meeting. A brief explanation can be added by the shareholders, which must then be included in the notice convening the shareholders' meeting. In addition, every shareholder may request motions relating to any agenda item even during the shareholders' meeting.

For listed companies, the threshold is 0.5% of the capital or of the votes.

Universal meetings (ie, where all shareholders are represented) can pass binding resolutions on all kinds of matters.

2.11 Challenging a Resolution

Shareholders can challenge resolutions of a shareholders' meeting that are null and void, at any time.

Resolutions are null and void if they:

- remove or restrict the right to participate in the shareholders' meeting, the minimum right to vote, the right to take legal action, or other shareholder rights that are mandatory in law;
- restrict the shareholders' rights of control beyond the legally permissible degree; or
- disregard the basic structures of the stock corporation or the provisions on capital protection.

Voidable resolutions can be challenged by every shareholder who has not voted for the respective resolution within two months from the passing of the resolution. No minimum shareholding is required, but the contesting shareholder must still be a shareholder at the time of the beginning of the court proceedings. Where the challenging shareholder prevails, the resolution of the shareholders' meeting will be rescinded.

Resolutions are voidable if they:

- remove or restrict the rights of shareholders in breach of the law or the articles of association;
- remove or restrict the rights of shareholders in an improper manner;
- give rise to the unequal treatment or disadvantaging of the shareholders in a manner not justified by the company's objects; or

- transform the company into a non-profit organisation without the consent of all the shareholders.

2.12 Institutional Shareholder Groups

Shareholders may influence the company's actions by nominating for election members of the board of directors, as well as by tabling agenda items and bringing motions at the shareholders' meeting (see **2.10 Shareholders' Rights Relating to the Business of a Meeting**). Shareholders may also use their information rights to monitor the company's activity (see **2.4 Information and Documents Relating to the Meeting**).

Influential shareholders sometimes resort to public statements if they deem it necessary to influence the company (see **11. Shareholder Activism**).

2.13 Holding Through a Nominee

Shareholders may have their participation rights, in particular their right to vote, exercised by a representative of their choice, unless the articles of association of the company provide otherwise.

2.14 Written Resolutions

Written resolutions can be passed in writing on paper or by electronic means (eg, email), unless a shareholder requests an oral debate.

3. Share Issues, Share Transfers and Disclosure of Shareholders' Interests

3.1 Share Issues

Existing shareholders of a company have a right to first subscription in the case of the issuance of new shares. This right can only be limited or extinguished by a resolution of the shareholders' majority if the company has a valid reason for it. In particular, the takeover of companies, parts of companies or equity interests and employee share ownership are deemed to be valid reasons.

3.2 Share Transfers

The transfer of shares in a corporation depends on whether the shares have been issued as certificated or uncertificated shares. In both cases, an obligation to transfer ownership in the shares (typically a share purchase agreement) is required. If the shares are issued as uncertificated shares, they are transferred by a written assignment declaration. If the shares are issued as certificated shares, they are transferred by physical delivery to the acquirer of the share certificate that is duly endorsed by the transferor. Certificated shares can also be transferred by physical delivery and written assignment declaration (instead of endorsement).

The articles of association of a non-listed company can provide for transfer restrictions. In this case, the transfer of ownership requires the approval of the board of directors of the company with regard to the envisaged transfer. Usually, the articles of association contain specific reasons why a transfer is not allowed. If there is such a reason to refuse the transfer, the board of directors can decide not to approve the transfer. The transfer will then not take place. If there is no specific reason to refuse the transfer, the company can still prevent the transfer by purchasing the shares itself at the fair market value.

A listed company may refuse to accept the acquirer as a shareholder only in the case of either of the following.

- Where the articles of association envisage a percentage limit on the registered shares

for which an acquirer must be recognised as shareholder, and such limit is exceeded.
- Where, at the company's request, the acquirer fails to expressly declare that:
  (a) they have acquired the shares in their own name and for their own account;
  (b) there is no agreement to take back or return the shares concerned; and
  (c) they bear the economic risk associated with the shares.

3.3 Security Over Shares

Shareholders are entitled to grant security interests over their shares – eg, in the form of a pledge. The articles of association of a company may contain provisions that limit or hinder the granting of such security interests. SHAs often restrict the ability to grant security interests over shares.

In the LLC, the articles can prohibit the granting of security interests over the quota shares, or state that such granting requires the consent of the board of the LLC or of the quotaholders' meeting.

3.4 Disclosure of Interests

In principle, shareholders are not required to disclose their interests in privately held Swiss corporations. Nevertheless, there are exceptions in certain regulated industries (such as banking), where regulatory authorities must be notified if a certain qualified participation is reached.

The ultimate beneficial owner must be reported to the company if a shareholder owns 25% or more of the share capital or voting rights.

In listed companies, disclosure is required if a shareholder acquires or disposes of shares resulting in a participation that reaches, exceeds or falls below 3%, 5%, 10%, 15%, 20%, 25%, 33.33%, 50% or 66.66% of the voting rights of that company. If shareholders are acting in concert, their voting rights are aggregated for the purpose of complying with disclosure requirements relating to the aforementioned participations.

Quotaholders of LLCs are registered in the commercial register – ie, their participation is public.

4. Cancellation and Buybacks of Shares

4.1 Cancellation

Shares can be cancelled after issue through a capital reduction, which has to be resolved on by the shareholders' meeting. The share capital can, alternatively, be reduced by reducing the nominal value of the shares.

As of 2023, the articles of association can authorise the board of directors to vary the share capital within a bandwidth (capital band) for a period not exceeding five years.

4.2 Buybacks

Companies can buy back their shares if freely disposable equity capital is available and if the aggregate nominal value of these shares does not exceed 10% of the share capital specified in the commercial register. These shares do not carry any voting rights. The shareholders' meeting can decide that the company will buy back its shares to cancel them, thereby reducing the share capital.

If the acquisition of own shares is connected with a restriction on transferability or an action for dissolution, the upper limit is 20% of the share capital specified in the commercial register. The shares that exceed the threshold of 10%

must be sold or cancelled by means of a capital reduction within two years.

5. Dividends

5.1 Payments of Dividends

Swiss corporations may not use their profit as they please. Rather, 5% of the profit is allocated to the statutory retained earnings until these reach (together with the statutory capital reserve) 50% of the share capital that is specified in the commercial register. For holding companies, the threshold is 20%. The company is only entitled to distribute dividends from disposable profit and from reserves formed for this purpose. A resolution of the shareholders' meeting is required in order to distribute a dividend.

As of 2023, it is permissible for a company to disburse interim dividends – ie, dividends out of earnings for the current financial year, based on an interim balance sheet.

6. Shareholders' Rights as Regards Directors and Auditors

6.1 Rights to Appoint and Remove Directors

Shareholders can appoint or remove a director to or from the board with a resolution of the shareholders' meeting. The proposal to elect or dismiss a director can be put on the agenda of a shareholders' meeting by shareholders who hold the required percentage of voting rights/capital (see **2.10 Shareholders' Rights Relating to the Business of a Meeting**).

Publicly held or large privately held companies usually have a nomination committee which makes recommendations regarding the appointment and removal of directors. However, shareholders are not obliged to follow such recommendations. If the articles of association do not require a qualified majority, a resolution regarding the election or dismissal of a director requires the majority of the voting rights that are represented at the shareholders' meeting.

6.2 Challenging a Decision Taken by Directors

Shareholders can only challenge a decision of the board of directors if it is null and void. Decisions of the board of directors are null and void for the same reasons as resolutions of the shareholders' meeting (see **2.11 Challenging a Resolution**).

6.3 Rights to Appoint and Remove Auditors

Shareholders decide on the appointment or removal of the company's auditors in the course of the shareholders' meeting. If the articles of association do not provide for a qualified majority, a resolution regarding the election or dismissal of the auditors requires the majority of the voting rights that are represented at the shareholders' meeting.

7. Corporate Governance Arrangements

7.1 Duty to Report

The Swiss Code of Obligations contains no duty of the board of directors to produce a corporate governance report. However, companies listed at SIX Swiss Exchange must provide investors with, inter alia, certain key information regarding the company's management principles – ie, the relationship between shareholders, the board of directors and the executive management in appropriate form. Listed Swiss companies are

therefore obliged to publish a corporate governance report annually.

The Swiss Code of Best Practice for Corporate Governance (the "Swiss Code") primarily focuses on public corporations and contains non-binding recommendations and guidelines with a special focus on the rights and duties of shareholders and the board of directors. The Swiss Code requires companies that do not comply with its recommendations to provide an explanation for their non-compliance (the "comply or explain" principle). Most public companies follow the recommendations of the Swiss Code, although it constitutes soft law.

8. Controlling Company

8.1 Duties of a Controlling Company

There is no specific duty of a controlling company towards the shareholders of the controlled company. The only duty of all shareholders (including controlling shareholders) is to pay the issue price for their shares.

However, subject to the existence of different share classes, in general all shareholders of a company must be treated equally.

9. Insolvency

9.1 Rights of Shareholders If the Company Is Insolvent

Shareholders are entitled to a share of the liquidation proceeds in proportion to their pro rata share or depending on the rights a specific share class conveys. However, before any shareholder receives its pro rata share of the liquidation proceeds, the creditors of the company are paid. This means that shareholders usually do not receive any liquidation proceeds in the case of an insolvency.

10. Shareholders' Remedies

10.1 Remedies Against the Company

Shareholders can challenge resolutions of the shareholders' meeting if they are:

- null and void; or
- voidable (see **2.11 Challenging a Resolution**).

If the board of directors refuses a shareholders' request for information or inspection, shareholders can apply to the court for an order to provide the information or to permit inspection.

Where the board of directors fails to grant a shareholders' request to convene a shareholders' meeting within a reasonable time, but at the most within 60 days, the requesting shareholders may request that the court order the meeting be convened.

Shareholders representing at least 10% of the share capital or the votes can request the court to dissolve the company for good cause.

Resolutions of the board of directors can only be challenged by shareholders if they are null and void (see **6.2 Challenging a Decision Taken by Directors**). Moreover, shareholders have legal remedies against the members of the board of directors (see **10.2 Remedies Against the Directors**).

10.2 Remedies Against the Directors

Shareholders of Swiss companies may file liability actions against the directors, members of the executive management or the auditors.

The directors and the executive management of the company have fiduciary duties. If these fiduciary duties are breached and a damage results, the directors and/or members of the executive management are liable to the company and the shareholders.

If the breach of the fiduciary duty only results in a damage to the company, a shareholder is only entitled to bring a legal action against the respective director(s) and/or member(s) of the executive management to indemnify the company. If a shareholder suffers a direct damage as a result of the breach of the director's and/or executive manager's fiduciary duties, the shareholder can sue the director and/or executive manager who has breached their fiduciary duties and request indemnification of the damage. The shareholder must prove:

- the damage suffered by the company or the shareholder;
- the breach of the director's fiduciary duties;
- the causal link between the breach of fiduciary duties and the damage; and
- that the breach is the result of the wilful action or negligence of the director.

10.3 Derivative Actions

Shareholders can challenge shareholders' resolutions that violate the law or the articles of association with effect for the entire company.

Derivative actions might be brought by shareholders if the directors, the executive management or the auditors breached their fiduciary duties, and if, as a consequence thereof, the company suffers a damage (and the shareholder therefore suffers an indirect damage). See also **10.2 Remedies Against the Directors**.

11. Shareholder Activism

11.1 Legal and Regulatory Provisions

The primary sources of law and regulations relating to shareholder activism are the Swiss Code of Obligations (CO) and the Financial Market Infrastructure Act (FMIA) as well as the respective ordinances.

Legal and regulatory tools available to shareholder activists include the shareholder's right to:

- vote;
- request information (which is often used to increase pressure on the target company prior to a shareholders' meeting) and inspect documents;
- propose motions and counter-motions at shareholders' meetings; or
- request a special audit or a special expert committee to investigate certain facts and behaviours of the management or the board of directors.

Further, any shareholder has the right to demand that certain agenda items be tabled at a shareholders' meeting, or to request that an extraordinary shareholders' meeting be convened, in each case provided that such shareholder represents a certain amount of voting rights or capital in the target company (see **2.3 Procedure and Criteria for Calling a General Meeting** and elsewhere).

11.2 Aims of Shareholder Activism

Activist shareholders typically aim at giving all supporting shareholders a voice at the table of the board of directors. Shareholder activists typically focus on the following topics:

- corporate governance;

- change of the company's strategy;
- ESG; and
- financial performance.

11.3 Shareholder Activist Strategies

Shareholder activists usually start by building a relatively small stake of shares in the target company in order to avoid triggering the disclosure obligations of the FMIA. Usually, a shareholder activist will make private contact with the executive management or board of directors of the target company to discuss its ideas and demands before increasing its stake. If these private negotiations fail, the shareholder activist may launch a public campaign, stating its key requests towards the target company with the aim of obtaining other shareholders' support. The publication of the key requests is likely to attract new investors and thus likely lead to an increase in the share price. Shareholders of the target company may start to support the shareholder activist, who may subsequently be able to negotiate an attractive compromise with the board of directors, following public support and possibly support from professional proxy advisers.

If such negotiations fail, proxy fights at shareholders' meetings, litigation (eg, liability claims) or even criminal charges may be the route of escalation chosen by the activists. In advance of the shareholders' meeting, the shareholder activist may form a group with other shareholders, which may lead to disclosure obligations towards the target company and the stock exchange, as certain thresholds of voting rights pursuant to the FMIA are exceeded (eg, exceeding the threshold of 3% or 5% of the voting rights triggers a disclosure obligation). In such case, the shareholder activist may use the disclosure as a sign of determination towards the target company and the market, which usually also triggers additional media attention.

The shareholder activist often also uses the shareholders' meeting to speak publicly as well as to reiterate its requests for improved performance.

Typical agenda items of shareholder activists in Switzerland are:

- corporate governance (such as board representation, changes of the articles of association and executive compensation); and
- strategic, operational and financial matters (such as payment of dividends).

11.4 Recent Trends

In Switzerland, the most targeted industries seem to be:

- basic materials;
- technology;
- services;
- the financial industry;
- industrial goods; and
- the healthcare sector.

11.5 Most Active Shareholder Groups

International and Swiss hedge funds have been the most active groups of shareholders targeting Swiss public companies.

11.6 Proportion of Activist Demands Met

Since 2015, there have been 42 campaigns of shareholder activism against companies of all sizes in Switzerland. In three of these campaigns, the activists were able to gain board seats. In comparison to 2020 when nine campaigns took place, only four campaigns emerged in 2021. Nevertheless, since 2022 an increase of activity can be observed.

However, it should be noted that only roughly half of all activist campaigns ever become pub-

lic, since many stay in the realms of private negotiations. It is thus difficult to accurately estimate what proportion of activist demands are met. A known successful activist campaign in 2022 was Petrus Advisers, who requested the resignation of the CEO and chairman of the board of Temenos. Further back, Veraison and Cobas were successful at Aryzta's EGM in 2020, replacing a number of board members.

11.7 Company Prevention and Response to Activist Shareholders

As shareholder activism has gained traction in Switzerland, preparing and implementing preventative and defensive measures has become a part of corporations' routines.

Regarding preventative measures, the board of directors may try to identify and reduce existing exposure of the company to shareholder activists, such as through minimising undervaluation, board instability and large cash reserves combined with a comparably low dividend pay-out ratio or fewer M&A transactions involving the company.

Additionally, the executive management should continuously monitor and asses the company's shareholders to identify potential shareholder activists among them. If shareholder activists emerge, the company should be prepared to address and consider its legitimate concerns open-mindedly and politely in a private setting. Following a close examination of the raised concerns, the dialogue between the company and the shareholder activists should continue, especially to preserve the consistency and credibility of the board's engagement.

If no satisfactory solutions can be negotiated, the board of directors may opt for defensive measures, such as by:

- responding clearly and comprehensively to the shareholder activists;
- using committed and consistent board communication; and
- engaging with their major shareholders and significant proxy advisory firms, to secure their support.

If the company recognises which shareholder activists are more likely to go public with their demands, an effective approach is to slightly relent towards their position with a moderate alternative.

Other defensive measures are to include defensive provisions in the articles of association, such as:

- restrictions on the transfer of shares or on voting rights; or
- the introduction of super-voting shares or supermajorities for specific resolutions to be taken by the shareholders' meeting.

However, such provisions would need to be introduced before an activist becomes involved, as they are unlikely to be supported by key shareholders at a shareholders' meeting or are considered undue restrictions from a corporate governance perspective.

In addition, Swiss law and regulations already provide for some effective impediments which shareholder activists must overcome – in particular:

- the lack of access to the company's share register;
- the duty to disclose shareholdings pursuant to the FMIA; or
- the mandatory tender obligation.

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