Swiss Corporate Law Reform: Publicly traded companies

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This legal update is part of a series summarizing the most important upcoming amendments to Swiss corporate law in a condensed form as relevant for legal practitioners. Previously published legal updates can be found on our website at Swiss Corporate Law Reform 2020. New legal updates on the corporate law reform are regularly e-mailed to our newsletter subscribers and published on our website.

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Key takeaways

Alongside transferring the compensation provisions, which remain mandatory only for listed companies, from the Ordinance against Excessive Compensation in Listed Stock Corporations (VegüV/OaEC) to the revised Swiss corporate law, the Swiss Corporate Law Reform provides for special regulations for listed companies in certain additional areas. Among other things, the following changes will enter into force:

- **Listed participation certificates may newly amount to 10 times the share capital.**
- **Delisting is newly subject to a qualified majority resolution of the shareholders' meeting.**
- **The consolidation of listed shares no longer requires a unanimous resolution; a qualified majority resolution of the shareholders' meeting suffices.**
- **Secrecy obligation of the independent representative of voting rights until three days before the shareholders' meeting.**
- **Various thresholds for publicly traded companies are adjusted:**

- Order for special investigation: 5% of the share capital or votes
- Convening of the shareholders' meeting: 5% of the share capital or votes
- Inclusion of items on the agenda and inclusion of motions for items on the agenda in the convocation of the shareholders' meeting: 0.5% of the share capital or votes

For the changes in corporate law in connection with the transfer of the provisions on compensation from the OaEC to the statutory level, we refer to the Pestalozzi Legal Update on Swiss Corporate Law Reform: Transfer of the provisions on compensation to the Swiss Code of Obligations.

Introduction

On 19 June 2020, Swiss Parliament adopted the final text of the Swiss Corporate Law Reform. As a result, important amendments concerning publicly traded companies will come into force. According to current estimates by the Federal Office of Justice, the entire revision is not expected to come into force until 2023.

More leeway regarding the participation capital

The Corporate Law Reform will allow listed companies limited by shares to provide for a participation capital (non-voting stock) up to ten times (instead of twice) the amount of the share capital. For privately held companies the current rule continues to apply. If a company has both listed and unlisted participation capital, the participation capital of this company can amount to a maximum of twelve times the share capital (composed of twice the unlisted participation capital and ten times the listed participation capital). This differentiation between listed and non-listed companies is justified by the lack of voting rights inherent to holders of participation certificates, which is less of a restriction to such holders if the participation capital is listed and, therefore, holders can sell their participation certificates via the stock exchange at any time if they do not agree with the management of the company or the resolutions of the shareholders' meeting.

Qualified majority in the event of delisting and consolidation of shares

Since the delisting resolution does not constitute de lege lata a non-transferable competence of the shareholders' meeting, the board of directors is responsible. However, the board of directors may delegate the resolution regarding the delisting to the shareholders' meeting. If the resolution is not delegated to the shareholders' meeting, those shareholders wishing to maintain the listing have no possibility to challenge the resolution. In such cases, their only recourse option is to file a liability action against the board of directors. Delisting represents a serious interference with shareholders' rights. The shares can no longer be sold on the stock exchange and the transparency requirements are reduced. In addition, an ordinary audit of the annual financial statements is no longer mandatory. Due to these major legal and economic consequences for shareholders, the Corporate Law Reform provides in Art. 698 para. 2 no. 8 in conjunction with Art. 704 para. 1 no. 12 of the new Code of Obligations (nCO) therefore that delisting is an inalienable power of the shareholders' meeting and is subject to a qualified majority.

A resolution of the shareholders' meeting with at least two-thirds of the votes represented and an absolute majority of the par value of the shares represented will also be required for the consolidation of shares listed on the stock exchange. The consolidation of shares is relatively rare in practice. Mostly, it is carried out prior to a restructuring (in preparation for a capital reduction) or afterwards (in order to make shares with a reduced par value due to the restructuring attractive for trading). Applicable corporate law requires the consent of all affected shareholders for the consolidation of shares. The reason lies in the nature of the vested right to maintain membership. Owners of only one or very few shares are forced to acquire additional shares in order not to lose their membership in the event of a consolidation. In the case of publicly traded companies with a very broad shareholder base, however, the requirement of the consent of all shareholders leads to insurmountable problems. Therefore, the Corporate Law Reform will provide that, in the case of publicly traded companies, a qualified majority resolution is sufficient to decide on a consolidation of shares. In particular, it is argued that, unlike shareholders of unlisted companies, it is reasonable for shareholders of publicly traded companies to purchase additional shares prior to the consolidation, as listed shares are easier to trade.

Simplified registration in the share register

According to Art. 686 para. 2bis nCO, publicly traded companies will have to ensure that the owners or usufructuaries of shares can apply for entry in the share register electronically. The lowering of the procedural hurdles for registration in the share register is intended to create an incentive to be entered in the share register as a shareholder in order to be able to participate actively in the shareholders' meeting. So-called dispo shares, whose owners are not entered in the share register and are therefore only entitled to property rights but cannot exercise voting rights, will be reduced. In particular, purchasers domiciled abroad and foreign custodian banks will be able to submit an online application for entry in the share register without any great effort.

Reduction of thresholds

The Corporate Law Reform allows distinctions to be made in the thresholds between listed and unlisted companies in order to better take account of the different structure of the shareholder base.

De lege lata, shareholders can only request a special investigation (previously special audit) if they represent 10% of the share capital or shares with a nominal value of two million Swiss francs. In practice, these thresholds have proven to be too high, especially for listed companies, and the special audit remained largely meaningless. Therefore, under the Corporate Law Reform shareholders of a publicly traded company representing 5% of the share capital or votes will be able to request the court to order a special investigation. The threshold is intentionally not set lower in order to minimise the risk of abuse.

The threshold for convening the shareholders' meeting will also be lowered for publicly traded companies. Whereas under the current law shareholders can convene a shareholders' meeting if they represent at least 10% of the share capital, the threshold will be decreased to 5% of the share capital or votes. Again, the threshold is deliberately not set lower, as holding a shareholders' meeting for publicly traded companies is associated with high costs.

The threshold for placing items on the agenda has also been adjusted. De lege lata, shareholders may place items on the agenda when they represent shares with a par value of at least one million Swiss francs (or, according to prevailing doctrine and practice, 10% of the share capital). De lege ferenda, this threshold will be lowered to 0.5% of the share capital or votes. The threshold for exercising the right to add items to the agenda is lower than for the other shareholder rights mentioned above, as the inclusion of an additional item on the agenda of a planned shareholders' meeting involves significantly less effort for the company. Under the same conditions (i.e. with 0.5% of the share capital or votes), shareholders will be able to request that motions be included in the convocation of the shareholder's meeting not only in respect of their own agenda items, but also in respect of items provided for by law. Furthermore, every shareholder, regardless of how many shares he or she owns, is entitled to submit motions during the shareholders' meeting in connection with the items on the agenda.

Further amendments around the shareholders' meeting

Art. 700 CO already contains minimum requirements for convening the shareholders' meeting. The provision will now be adapted and restructured to make it easier to understand. The revised corporate law stipulates that the board of directors of publicly traded companies shall provide a brief explanation of its own motions in the convocation of the meeting. Shareholders, on the other hand, are free to decide whether or not they wish to give reasons for their motions in the convocation.

Up to now, corporate law has not contained any provisions on the venue of the shareholders' meeting. In order to close this gap, Art. 701b nCO stipulates that shareholders' meetings may also be held abroad, provided that the articles of association provide for this possibility and provided that the board of directors appoints an independent representative of voting rights. Companies whose shares are not listed on the stock exchange may waive the appointment of a proxy if all shareholders agree. In the case of publicly traded companies, such waiver is not permitted since the exercise of voting rights must also be guaranteed to public shareholders who cannot or do not wish to travel abroad specifically for the shareholders' meeting.

In addition, the Corporate Law Reform allows the shareholders' meeting to be held by electronic means without a physical venue if the articles of association provide for this possibility and if the board of directors appoints an independent representative of voting rights. In contrast to unlisted companies, listed companies cannot dispense with the appointment of a representative so that shareholders with below-average technical skills and equipment can also exercise their voting rights.

Finally, under the Corporate Law Reform, publicly traded companies will be required to make the resolutions and election results available electronically within 15 days of the shareholders' meeting, stating the exact voting behaviour of the shareholders. Both listed and unlisted companies will have to publish the minutes of the shareholders' meeting within 30 days of the shareholders' meeting at the request of a shareholder.

Implementation of the OaEC at the legislative level

The implementation of the OaEC at the legislative level is a central concern of the Swiss Corporate Law Reform. Art. 95 para. 3 of the Federal Constitution obliges the Federal Council to regulate by law the principles of corporate governance and remuneration of the board of directors and executive management as set out in the Federal Constitution. The preliminary draft text of the Swiss Corporate Law Reform tightened the regulations of the OaEC in numerous respects. The legislator has largely refrained from implementing those stricter regulations. Some of the implemented OaEC provisions are discussed in more detail below. The provisions regarding compensation that have been transferred from the OaEC to the CO are discussed in a separate legal update.

Content of the articles of association - external mandates

Art. 626 nCO stipulates the legally required content of the articles of association and is supplemented with a new paragraph 2, which is only mandatory for publicly traded companies. Pursuant to Art. 626 para. 2 no. 1 nCO, the articles of association must contain provisions on

the number of permissible activities of members of the board of directors, the executive board and the advisory board in comparable functions at other companies with an economic purpose. Under the Corporate Law Reform, the articles of association must contain the number of activities of members of the board of directors and the executive board "in comparable functions" (instead of "in the highest management or administrative bodies" as was the case under the OaEC). As a consequence, the new wording also covers mandates in the management of other companies but only functions in "companies with an economic purpose". Hence, it is no longer required that those other companies are registered in the commercial register or a corresponding foreign register. An economic purpose exists if a company aims to achieve an economic advantage, i.e. a monetary benefit for its shareholders. In the absence of a direct economic purpose, non-profit organisations, foundations, trusts, etc. are excluded. The dispatch to the Swiss Corporate Law Reform also clarifies that the exception in Art. 626 para. 3 nCO, according to which other companies do not include companies that are controlled by the publicly traded company or that control the publicly traded company, only applies within the publicly traded company's own group.

Secrecy obligation of the independent representative of voting rights

For some years now, Swiss proxy advisors have been advocating the confidentiality of instructions to the independent representative of voting rights. Under the Corporate Law Reform, the independent representative of voting rights of a publicly traded company must treat the instructions of the individual shareholders as confidential until the beginning of the shareholders' meeting (Art. 689c para. 5 nCO). However, the fact that the independent representative of voting rights has been authorised is not covered by the scope of the confidentiality obligation. The independent representative of voting rights may therefore continue to inform the company which shareholders have authorised her/him and which have not.

The main purpose of this provision is to prevent the board of directors from gaining an information advantage over the probable outcome of a vote and exploiting this advantage to influence the result. The secrecy obligation applies to third parties as well as to the company. In terms of the company, the obligation of secrecy extends to the board of directors and the persons entrusted with "canvassing" for votes. The keeping of a so-called internal share register remains permissible, provided that the company takes organisational and technical measures to ensure that the aforementioned persons do not have access to the individual instructions or to the respective interim status. Furthermore, the involvement of proxy solicitors who contact shareholders and attempt to promote the proposals of the board of directors and thus to find out the voting intentions of the shareholders remains permissible.

Upon request, the independent representative of voting rights must provide the company three days before the shareholders' meeting with general information on the instructions received, i.e. how many votes in favor, votes against and abstentions have been received per agenda item to date. The independent representative of voting rights must also explain at the shareholders' meeting what information he/she has provided to the company.

Need for action

Following the enactment of the new law, Swiss companies will have a transitional period of two years to amend their articles of association and regulations. After this period, provisions of the articles of association that do not comply with the new law will automatically cease to apply. The changes described above, therefore, do not cause need for a mandatory amendment of the articles of association. However, the board of directors, the management or the in-house legal team should carefully consider the new provisions, changes and simplifications of the new law in order to assess whether their organisation could benefit from them, and/or to recommend them to the shareholders of the company. The transitional period still leaves time, but, for example, with regard to the new secrecy obligations of the independent representative of voting rights, publicly traded companies will have to review their existing (internal) processes and guidelines, as well as the agreements made with the independent representative of voting rights and the (external) share register, for compliance and appropriateness in the future and, if necessary, make appropriate adjustments.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this legal update.

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