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Contributing Editors
Ueli Studer, Kelsang Tsün and Joanna Long

LEXOLOGY
Getting the Deal Through

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LEXOLOGY
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Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan Brennan
dan.brennan@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
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Shareholder Activism in Switzerland

Rashid Bahar, Annette Weber and Valérie Bayard[1]

Introduction

Shareholder activism covers a broad range of activities by shareholders who attempt to exercise significant influence over a listed company's management and operations and, consequently, activist shareholders do not form a homogeneous group: quite to the contrary, they range from large institutional investors who consider that active engagements is a part of their stewardship role, to financiers seeking an opportunity to increase their returns by exercising their voice, to funds specialised in shareholder activism who are on the lookout for companies waiting to be targeted by a campaign. Activists also pursue varying goals: some aim at creating shareholder value and increasing their returns by influencing the strategy (eg, by calling for higher pay-outs), pushing for divestments or, on the other side, opposing a merger or, more indirectly, by effecting a change at board or management level. Others aim at improving the target company's footprint on environmental, social or governance (ESG) issues.

Activists use different channels to achieve their goals: the playbook of a typical activist campaign starts by building a stake that can serve as a platform for their campaign. They will initiate their approach through informal channels by engaging with the board of directors or launching a media campaign to convince the court of public opinion that they deserve to be heard or, more negatively, that the incumbent board and management did not achieve its goals. If they do not succeed, they may escalate by submitting a proposal to a general meeting or, even, seek representation on the board of directors of a company. The specific mode of engagement depends not only on the goals of the shareholder, but also on its stake in the target company. The larger the stake, the more pressure the shareholder will be able to exert on the company. Shareholders with smaller stakes will be limited to informal methods of engagement, making a statement at the general meeting or, possibly, make a proposal, unless they can coalesce with other investors to gain more influence. A large shareholder can request the board to call an

1 Rashid Bahar and Annette Weber are partners and Valérie Bayard is an associate at Advestra AG.

extraordinary general meeting, obtain representation on the board of directors or blur the line between activism and private equity, by taking control of a company.

In this chapter we provide an overview of the legal framework for shareholder activism in Switzerland and look at some precedents of shareholder activism in Switzerland. We consider in particular how the corporate law reform in 2020,[2] which will enter into force on 1 January 2023, will further facilitate the engagement of shareholders in a Swiss listed company.

Selected Swiss cases of shareholder activism

Historically, Switzerland was largely spared institutionalised shareholder activism. The shareholdings in large companies were often too dispersed to allow activists to step in, while many small and medium-sized listed companies were controlled by a founding family or, at least, tight-knit networks of investors. This is not to say that shareholder actions were unheard of: occasionally, large blockholders sought to influence management. Notably, in the 1990s, financiers tried to shake up management of large banks and Nestlé Ltd before that weathered critical voices at its general meetings after promoting formula over breastfeeding. In the same vein, the Ethos Foundation, a foundation launched in 1997 by two public pension funds to promote socially responsible investment, has sought to position itself as home-grown voice for shareholder engagement. The practical impact of these efforts was, however, more limited than in other jurisdictions.

Since then, the situation has changed. Even if shareholder activism remains less prevalent in Switzerland than in other jurisdictions, activist campaigns have become more frequent and many companies have been forced to respond to them. In 2016, Cevian Capital built up a stake of 6.2 per cent in ABB Ltd and then engaged with its board to unlock shareholder value by divesting its power grid activities. This step eventually led Cevian to take a seat at the board of directors of ABB and actively contribute to the strategy. In 2017, it was the Nestlé's turn to be targeted by Third Point LLC, which was critical of the lack of strategic focus of Nestlé's management. Although Third Point LLC, with 40 million shares worth 3.28 billion Swiss francs, did not purchase a sufficiently large stake to engage formally with Nestlé, its open letters to the chair were sufficient to push Nestlé to react and take a number of steps to increase its buy-back programme and dividend pay-out ratio as well as, ultimately, sell off its skin care division.

In 2017, GAM Holding AG, the Swiss holding company of the GAM investment management group (GAM),attracted the attention of Rudolf Bohli and his investment fund RBR Capital Advisors (RBR).[3] After reaching a stake of approximately 3 per cent in GAM, RBR started to criticise the company's costs structure and, in particular, its compensation policy, demanding far-reaching cost-cutting measures. To obtain support for its ideas, RBR set up a dedicated website under the address www.freegam.ch and subsequently placed several items on the agenda of the upcoming annual general meeting. While these requests were rejected by the general meeting, Bohli and RBR's campaign against GAM's compensation policy was successful, forcing GAM to revise its

2 Obligationenrecht (Aktienrecht), AS 2020 4005 (revCO).

3 Thomas Rautenstrauch/Janis Hummel/Benjamin Bitschnau, *Aktionärsaktivismus bei Schweizer Publikumsgesellschaften*, Hochschule für Wirtschaft Zürich (HWZ) Working Papers Series 2022, p26.

variable compensation package. RBR sold its participation in GAM in the same year, making a great profit.[4]

The activist campaign concerning Clariant AG, a chemical company with registered office in Muttenz, Canton Basel Landschaft (Clariant), was triggered by Clariant's planned merger with its US competitor Huntsman. In 2017, David Winter, David Milestone and Keith Meister joined forces to convince Clariant to reconsider the envisaged merger. Through a partnership named White Tale, the activist group significantly increased its stake in Clariant reaching almost 25 per cent of the company's share capital.[5] Since the dialogue initiated with Clariant's management was not proving successful, White Tale published an open letter addressed to the company's senior management asserting once more their view that the merger would not lead to increased shareholder value and asking them to propose alternatives to the deal, or White Tale would reject the merger at the shareholder meeting. In October 2017, Clariant announced that it had abandoned the merger project. In January 2018, White Tale sold its participation.[6]

In 2019, Panalpina Welttransport (Holding) AG, the holding entity of the Swiss logistics group Panalpina based in Basel (Panalpina), became the target of the Danish company DSV. In a first stage, the takeover failed to get the support of one of its major shareholders, Ernst Göhner Foundation (EGF), owner of 46 per cent of the company's share capital. In response, activist shareholders Cevian Capital and Artisan Partner Fund challenged the limitation of voting rights in Panalpina's articles of association, threatening legal action. First, EGF was exempted from such limitation and kept exercising all its voting rights and, second, the limitation meant a de facto veto right on any takeover proposal, because every acquirer would make its offer subject to the elimination of such limitation, meaning that EGF's consent was indispensable for an offer to succeed.[7] Panalpina and EGF relented and proposed to eliminate the contested provision from the articles of association. However, before the extraordinary general meeting could take place, DSV presented an improved offer that was accepted by the company and supported by all parties, activists included.[8]

Similar to the Clariant case, in 2019, the plan by Sunrise Communications Group AG (Sunrise) to acquire its competitor UPC Switzerland was sabotaged by Sunrise's largest shareholder Freenet, a German mobile operator. In August 2019, Freenet announced that it would vote against the deal, because it considered the agreed price to be too high. Sunrise reacted by modifying the terms of the transaction with UPC; however, a few days before the general meeting, the board of directors considered that there was still no majority to support the deal and called off the general meeting.[9] The termination of the share purchase agreement cost Sunrise the payment of a 50 million Swiss francs break-up fee. Nevertheless, the abandonment of this transaction was only temporary. In 2020, the parties recommenced their discussions and agreed on a reversal of the deal structure

4 ibid, p27.

5 ibid, p33.

6 ibid, p34 et seq.

7 David Ledermann, *Shareholder activism in Switzerland*, Ethical boardroom, 3 August 2020 (https://ethicalboardroom.com/shareholder-activism-in-switzerland/).

8 David Oser/Karin Mattle, The Shareholder Rights and Activism Review: Switzerland, in: Francis J Aquila, The Shareholder Rights and Activism Review, 2021, https://thelawreviews.co.uk/title/the-shareholder-rights-and-activism-review/switzerland.

9 Ledermann, *Shareholder activism in Switzerland*.

with UPC as buyer and Sunrise as target. In August 2020, UPC owner Liberty Global and Sunrise agreed that Liberty Global would make an offer for all publicly held shares of Sunrise. The terms of this transaction satisfied Freenet, which agreed to sell all its shares in Sunrise.[10]

Finally, in 2020, in the case of ARYZTA AG, a food business company specialising in baked goods based in Schlieren (ARYZTA), Cobas and Veraizon, two activist shareholders holding approximately 17 per cent of the company's shares requested an extraordinary general meeting and proposed the replacement of five members of the board of directors (including the CEO) by three new board members. They further proposed the election of two of the three proposed candidates as members of the remuneration committee.[11] Although the board of directors initially resisted and proposed a new chair, this candidate withdrew his candidacy and four of the five members targeted by the shareholders announced that they would resign shortly before the extraordinary general meeting, leaving the field to the slate proposed by the shareholders. At the meeting, the EGM voted to dismiss the last of the five members targeted by the shareholders and elected the slate proposed by the shareholder group, which dissolved itself. A month later, Elliott Advisors (UK) Limited approached the board of directors with proposing to make a tender offer for the shares of ARYZTA. After its offer was turned down by the board, Elliott let its offer lapse without pursuing its efforts any further.

As these precedents show, activist campaigns have been successful in Switzerland. They have caused companies to revise their dividend policy and divest significant parts of their business. They have prevented mergers, pushing, in some instances, the parties to revise the terms of the merger. They also facilitated reforms at board level and even, indirectly, changes of control. Notably, in most cases, the level of engagement remained informal, although it was often highly publicised. In only a few cases did the activists need to exercise their rights as shareholders to achieve their goals, and courts did not need to act in these cases. Nevertheless, these campaigns played out in the shadow of the law, which made this level of engagement possible and thus shaped the structure of the debates. Against this perspective, the legal foundations constitute the starting point to understand shareholder activism in Switzerland.

Legal framework

The legal framework governing shareholder activism in Switzerland is mostly laid out in the Swiss Code of Obligations of 30 March 1911 (CO, SR220), the statute that, among others, governs Swiss corporations. As such it defines, among other things, the corporate governance structure of Swiss companies and the rights of shareholders at the shareholder meeting and the proxy voting system.

In addition, the Ordinance Against Excessive Compensation in Listed Companies of 20 November 2013 (OaEC, SR221.331) gives shareholders further rights at general meetings of listed companies. In particular, it includes say-on-pay rules and gives shareholders the right to vote on the compensation of the board of directors and the executive management of

10 Oser/Mattle, op cit.

11 See Veraizon Press Release of 21 May 2020, Aryzta: Shareholder group led by VERAISON requests extraordinary general meeting and proposes Urs Jordi as new chairman, 21.May 2020, available at https://veraison.ch/en/news/page/2/. Oser/Mattle, op cit.

the company.[12] Further, the OaEC grants shareholders the power to elect on an annual basis members of the board of directors and its chair individually[13] and to appoint the members of the remuneration committee (the only mandatory committee for Swiss listed companies).[14] Finally, it reinforces the power of shareholders by prohibiting companies and depositories from seeking proxies to represent shareholders at the general meeting and mandating the appointment of an independent proxy elected by the general meeting whose task is to collect proxies for the general meeting and vote them at the meeting based on the express instructions provided by shareholders.[15]

Swiss corporate law underwent a major reform process in the past decade that led to the corporate law reform of 2020, which will enter into force on 1 January 2023. As part of this process, the principles of the OaEC will be transposed into the CO.[16] Furthermore, the corporate law reform amends both the rules governing the proxy voting system[17] and the rights of shareholders at the general meeting[18] to facilitate shareholder engagement. Moreover, in line with international trends, in particular with developments under EU law, Switzerland is introducing several additional ESG-related obligations by amending the CO and adopting implementing ordinances. Among others, larger Swiss listed enterprises or companies supervised by the Swiss Financial Market Supervisory Authority (FINMA) will be subject to non-financial reporting obligations and enterprises whose registered office, central administration or principal place of business is in Switzerland must comply with certain due diligence and transparency obligations if they have business abroad involving conflict minerals or potentially child labour.[19] Although these obligations do not give rights to shareholders directly, they enhance the disclosure and responsibility of subject companies paving the way for shareholder activism.

In connection with mergers and acquisitions of companies, the Federal Act on Mergers, De-Mergers, Transformation and Transfer of Assets of 3 October 2003 (Merger Act, SR221.301) provides for information[20] and voting rights of shareholders[21] as well certain safeguards for minority shareholders. Finally, in addition to the statutory framework, the Swiss Code of Best Practice for Corporate Governance defines principles that Swiss listed companies should consider. The Swiss Code of Best Practice is, however, not mandatory and, even then, only aspires to a comply or explain approach.

In parallel to the framework created by corporate law, the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (FMIA, SR958.1) and its implementing ordinances, the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 25 November 2015 (FMIO, SR958.11),

12 Article 18 OaEC.
13 Articles 3 and 4 OaEC.
14 Article 7 OaEC.
15 Articles 8 to 10 OaEC.
16 See articles 626, 689b to 689f, 710 (1), 712 and 732-735d revCO.
17 Articles 689b to 689f revCO.
18 Article 699b CO.
19 Obligationenrecht (Indirekter Gegenvorschlag zur Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt'), Änderung vom 19 Juni 2020, AS 2021 846.
20 Articles 14 and 16 Merger Act as well as articles 39 and 41 Merger Act.
21 Article 18 Merger Act and article 43 Merger Act.

the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 3 December 2015 (FMIO-FINMA, SR958.111), and the Ordinance of the Swiss Takeover Board on Public Takeover Offers of 25 November 2015 (TOO, SR954.195.1), regulate exchanges and capital markets. In particular, they require investors who acquire a shares or equity derivatives in a listed company to disclosure obligations if they reach or cross various threshold starting at 3 per cent of the share capital registered in the commercial register.[22] The FMIA also governs takeover bids. Investors with a shareholding of 33⅓ per cent or more in a company subject to the mandatory takeover bid rule, are required to submit a public tender offer for all outstanding shares in the company. The rules on disclosure of major shareholdings and takeover bids are applicable not only to listed companies incorporated in Switzerland but also to foreign companies whose equity securities have at least in part a primary listing in Switzerland.[23] The FMIA also provides for rules against market abuse such as insider trading, market or price manipulation,[24] which should also be considered in connection with activist campaigns. Unlike other jurisdictions, however, neither the FMIA nor the listing rules of the Swiss exchanges regulate the governance of listed companies or, more specifically, the conduct of general meetings or the proxy process, which are consequently governed exclusively by the CO, the OaEC and soft law, such as the Swiss Code of Best Practice.

Stake-building

The first step in any activist campaign will be to build a stake in the target company and then seek to leverage it to engage with the board before ultimately reaping the fruits of the campaign.

In this respect, it is important to review the articles of incorporation of the target company. Swiss corporate law allows companies to issue shares with preferential voting rights, which, although they represent a smaller share of the share capital, carry the same weight as common shares.[25]

Moreover, listed companies may limit shareholders' voting rights by setting a percentage limit for which an acquirer may be recognised as a shareholder with voting rights.[26] If an acquirer exceeds the limit, it will be entered in the share register as a shareholder without voting rights with regards to the shares exceeding that limit. As a consequence, the acquirer is not entitled to vote in respect of the shares exceeding the threshold. Such provision in a company's articles of association may prevent activist shareholders from exerting significant influence on the company.[27] As part of an anti-avoidance provision, the company can require shareholders seeking to be recognised with voting rights to declare that they own their shares for their own

22 Article 120 et seq FMIA.
23 Article 135 FMIA.
24 Articles 143 and 144 as well as articles 154 and 155 FMIA.
25 Article 693(1) CO. The voting preference is, however, capped at a 10:1 ratio (article 693 (2) CO) and does not apply to the election of the auditors, experts required to analyse the management, a special audit or the decision to hold directors, officers or auditors liable (article 693 (3) CO).
26 Article 685d (1) CO.
27 Article 685f CO.

account and not for the benefit of a third party.[28] This requirement will be extended under the corporate law reform to exclude shareholders who do not economically own their shares (eg, because they borrowed them under a securities lending arrangement or already agreed to sell them).[29] These rules condition the access to voting rights on the registration of the shareholder in the share ledger. Consequently, shareholders who fail to complete this step cannot exercise their voting rights, even if, as a matter of principle, they are entitled to be registered. As a practical matter, sizable stakes in many listed companies are not registered and as a side effect are forced into a passive role, which accordingly increases the weight of shareholders who did get registered. In addition to the registration requirements, the articles of association may restrict the number of voting rights of a holder of several shares.[30] This mechanism creates an additional cap on shares that can be used to limit the influence of an activist.

Often, activists will seek to avoid drawing attention on this effort to prevent the board from taking preventive measures and other investors to piggyback on the opportunity. While the FMIA does not govern shareholder activism per se, the rules on the disclosure of substantial shareholdings, takeover bids and market abuse have a significant influence on activist campaigns: Indeed, the rules on the disclosure of shareholdings constitute a hurdle for stake-building among existing shareholders and also constitute the first alarm bell that rings when a person starts to build a stake in a company. The FMIA requires any person who directly or indirectly or acting in concert with third parties acquires or disposes of shares or acquisition or sale rights relating to shares in a company with its registered office in Switzerland whose equity securities are listed (at least in part) in Switzerland or a company with its registered office abroad whose equity securities have at least in part a primary listing in Switzerland, and thereby reaches, falls below or exceeds the thresholds of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔ per cent of the voting rights (whether exercisable or not), to notify its stake to the company and to the relevant stock exchange within four trading days.[31] These rules apply not only to direct positions in shares but also extend to synthetic positions through cash-settled equity derivatives[32] and provide for dedicated regimes for stakes acquired through securities lending.[33] These rules tend to be strictly enforced and cases of non-compliance, if they come to light, tend to be sanctioned, making it difficult for an activist to build a secret stake in a Swiss company.

Beyond disclosure, the mandatory bid rule kicks in at the threshold of 33⅓ per cent of the voting rights requiring the holder or the group of holders of shares to submit an offer to all holders of equity securities.[34] Swiss law allows companies, however, to raise the threshold for a mandatory bid all the way up to 49 per cent through an opting-up[35] or even disapply the rules on mandatory bids completely through an opting-out clause in its articles of association.[36]

28 Article 685d (2) CO.
29 Article 685d (2) revCO.
30 Article 692 (2) CO.
31 Article 120 (1) FMIA.
32 Article 15 FMIO-FINMA.
33 Article 17 FMIO-FINMA.
34 Article 135 (1) FMIA.
35 Article 135 (1) FMIA.
36 Article 125 (3) and (4) FMIA.

Therefore, in this area as well, a careful analysis of the articles of incorporation is necessary to understand the legal framework applicable to a given company.

Persons are deemed to act in concert if they coordinate their conduct regarding the acquisition or disposal of shareholdings or the exercising of voting rights with each other by contract, other organised arrangement or by law.[37] A typical example of such coordination would be a shareholder agreement, but also any another arrangement (implicitly or explicitly) to join forces to reach a common goal may be sufficient.[38] Nevertheless, discussions among shareholders about their planned voting behaviour in the context of an upcoming general meeting do not trigger an acting in concert for the purpose of these provisions.[39] This constitutes an important safeguard for shareholder activism, although the line between coordination in view of a general meeting that does not constitute a concerted action and a concerted action to exercise control that does may blur in practice, which is why caution is advisable before engaging with other shareholders.

In contrast to US corporate laws, Swiss law does not permit the use of poison pills in connection with takeover bids. Quite to the contrary, Swiss takeover law bars the board of directors from making substantial changes to the assets and liability of the company once a tender offer is announced or published and, when facing competing bids, requires the board to treat all offerors on an equal footing.[40]

The main forum for shareholder activism: the general meeting

Under Swiss law, shareholders do not have any legal right to engage with the board of directors or contact other shareholders except at the general meeting. While, as part of Swiss corporate practice, the board of directors, generally acting through its chair, will engage with large shareholders out of the meeting and are often open to listen to their grievances, this practice is not mandated by law and remains largely informal. Activists can also put pressure on a board of directors by using the media to its advantage. They can use these channels as well as social media to reach out to other shareholders. More importantly, they may also try to leverage the public opinion to force the board to respond to their vindications, in particular, when they relate to ESG-related matters.

However, if these efforts do not yield the expected results, activists ultimately need to turn to the general meeting to raise their voice, be heard by other shareholders and, possibly, cause the company to respond to their demands. As a matter of Swiss corporate law, the general meeting of shareholders votes on a number of issues, including approving the annual report and the allocation of profits as well as dividend payments,[41] the election of the chair,[42] the

37 Article 12 (1) FMIO-FINMA.

38 Bahar, in: Werro/Amstutz/Trigo Trindade (eds), Commentaire Romand CO II, 2nd edn, 2017, art 120-121 FMIA, N 36; Weber/Baisch, in: Watter/Bahar (eds), Basler Kommentar Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz (BSK FinfraG), 3rd edn, 2019, art 121 FMIA N 10.

39 CR CO II-Bahar, art 120-121 FMIA, N 35; BSK FinfraG-Weber/Baisch, art 121 FMIA N 16.

40 Articles 132(2) and 133(2) FMIA.

41 Article 698 (2)(3) and (4) CO.

42 Article 4 (1) OeAC.

members of the board of directors[43] and remuneration committee[44] as well as the auditors,[45] most changes to the articles of incorporation[46] and capital increases, by directly resolving to increase the share capital,[47] by creating conditional capital to issue shares in connection with convertible bonds or employee stock participation plans,[48] or by authorising the board of directors to issue new shares.[49] Under the OaEC, the general meeting is also required to vote annually on the compensation available for the members of the board of directors and executive management.[50] Furthermore, the Merger Act requires the approval of the general meeting for mergers, demergers and changes of legal structures.[51] Therefore, a number of issues need to be presented to the shareholders for approval and an activist can have a direct impact by exercising its voting rights and getting the vote out.

The general meeting is also generally called upon to grant the discharge to the members of the board of directors and management.[52] The formal effect of the discharge is to release the directors and executives from liability to the company and shareholders who voted in favour of the discharge, while requiring dissenting shareholders to commence legal action within six months of the general meeting if they intend to seek redress.[53] The scope of the discharge is limited, however, to facts that were disclosed to the general meeting or were generally known at the time of the vote. Withholding the discharge has an important symbolic value in corporate Switzerland, conveying the message that shareholders were not satisfied with the performance of the directors and executives and is often a channel for activists to target management and the board of directors, while remaining short of challenging the re-election of sitting members of the board.

At the same time, the board of directors retains exclusive authority over certain matters such as the management of the company's activities and the appointment of executives,[54] placing a limit on the reach of shareholder activism unless there is a willingness to take a seat at the board of directors. If an activist wants to force a change in the company's strategy or reshape its management, it needs to replace one or more members of the board of directors. The CO provides for a simple majority of the votes represented at a general meeting (unless the articles of association state a different rule).[55] While the election of new board members typically occurs at the ordinary general meeting, there is no rule that prevents the election of new members at extraordinary general meetings, although the articles of incorporation may provide for a higher quorum to remove members of the board. Practically speaking, the need to do so

43 Article 698 (2)(2) CO.
44 Article 7 (1) OaEC.
45 Article 698 (2)(2) CO.
46 Article 698 (2)(1) CO
47 Article 698 (2)(1) and (6) CO cum article 650 CO.
48 Article 698 (2)(1) and (6) CO cum article 653 CO.
49 Article 698 (2)(1) and (6) CO cum article 651 CO.
50 Article 18 OaEC.
51 Article 18, 26 and 64 Merger Act.
52 Article 758 CO.
53 Article 758 (1) and (2) CO.
54 Article 716(2) and 716a (1) CO
55 Article 703 CO.

has strongly decreased as, under the OaEC, the mandate of board members, chair and members of the compensation committee needs to be renewed on an annual basis, preventing the use of staggered boards for listed companies.[56]

Agenda setting power of the board of directors and shareholders' rights to call a meeting and make proposals

The agenda of the general meeting is set by the board of directors, who therefore can channel requests from shareholders. However, by law, shareholders who represent at least 10 per cent of the share capital have the right to request the board to convene an extraordinary general meeting, while shareholders together representing shares with a nominal value of 1 million Swiss francs may demand to slate an item on the agenda.[57] The request to convene a general meeting or to slate an issue on the agenda must be made in writing setting out the details of the agenda items and its motions. Should the board of directors fail to act upon such a request within a reasonable time, shareholders may seek an order by the competent court.[58] Overall, the hurdle is set very high for large listed companies. Even the requirement to hold shares representing 1 million Swiss francs in nominal value can be prohibitive if the market value of the shares is few orders of magnitude more than the nominal value as is often the case. Therefore, a number of Swiss listed companies opted voluntarily for lower thresholds. Nevertheless, many companies did not do so.

In response, the threshold to call a general meeting will be lowered to 5 per cent of the share capital or the voting rights[59] and, more importantly, the threshold to table an issue on the agenda will be lowered to 0.5 per cent of the share capital, which should facilitate shareholders to raise their voice.[60] The corporate law reform will also change the rules regarding shareholder proposals within an agenda point: whereas until now any shareholder had the right to make a proposal, the new rules will provide for a differentiated approach: shareholders holding 0.5 per cent of the share capital will be allowed to make a proposal in advance of the general meeting[61] and ask the board to include their proposal on the proxy sheet sent to shareholders together with a concise explanation of their proposal.[62] Shareholders falling short of this threshold will continue to have the right to make a proposal at the meeting,[63] which, unless it is backed by coalition of shareholders with a significant stake or is preceded by a costly campaign to collect proxies, is very unlikely to succeed.

In this respect, the corporate law reform is likely to facilitate campaigns by shareholders, who alone or in a coalition with other shareholders reach the threshold of 0.5 per cent of the share capital, which remains a substantial investment when dealing with companies with a large capitalisation.

56 Article 4 and 7 OAEC.
57 Article 699 (3) CO.
58 Article 699 (4) CO.
59 Article 699 (3)(1) revCO.
60 Article 699b (1)(2) revCO.
61 Article 699b (2) revCO.
62 Article 699b (3) revCO.
63 Article 699b (5) revCO.

Access to other shareholders, the proxy voting system and electronic voting

The main challenge for shareholder activism lies, however, at an earlier stage: as a matter of Swiss corporate law, the share ledger listing the identity of registered shareholders is not a public document and shareholders are not entitled to consult it except to ascertain their own entry in the ledger.[64] In this respect, activist shareholders fight an uneven battle with the incumbents: the board of directors can use this information to reach out to major blockholders and ascertain their support prior to the general meeting, while outsiders will have no other choice than initiate a media campaign to be heard and reach out to other shareholders.

Additionally, the board of directors has a large influence on the general meeting through its attributions related to the preparation of the meeting and the proxy voting system: under Swiss corporate law, votes at the general meeting need to be cast in person or through a proxy.[65] Historically, banks and other depositories as well as companies themselves acted as proxy and, through this channel, mustered considerable influence over the general meeting. This practice was stymied to a limited extent by the corporate law reform of 1991[66] before it was banned outright under the OaEC in 2013: instead, institutional representation for shareholders can only be carried out through to an independent proxy, who is elected on an annual basis at the annual general meeting.[67] Even then, the proxy forms continue to be prepared and distributed by the board of directors rather than the independent proxy directly.[68]

The corporate law reform of 2020 does not overhaul this regime. However, it seeks to level the playing field by limiting the communication of the independent proxy with the company ahead of a general meeting. From 1 January 2023, independent proxies will be allowed to provide the company with general information regarding the instructions received from shareholders at the earliest three days prior to the general meeting provided that the independent proxy discloses the information to the general meeting of the company.[69] This rule seeks to prevent the board of directors from using information received from the independent proxy to get out votes if the ballot looks tight.

The proxy voting system set forth by the OaEC and the corporate law reform do not prevent a shareholder from appointing another representative for a general meeting.[70] On this basis, some activists have launched campaigns seeking to collect proxies to vote at the general meeting. Such exercises are, however, costly and complicated as an outsider cannot, as would be the case, for example, under US proxy rules, use the corporate resources to distribute the materials to shareholders and must therefore find other channels to interact with them. They remain therefore rather anecdotal episodes.

Beyond the proxy voting system, the digitalisation of the general meeting is arguably the next frontier in this area. While the OaEC already provides a requirement for Swiss listed companies to give its shareholders the possibility to submit instructions to the independent

64 Böckli, Schweizer Aktienrecht, 2009, 4th edn, §6 N 334; CR CO II-Trigo Trindade, art 686 N 40-41.

65 Article 689 (2) CO.

66 Article 689c and article 689d CO.

67 Article 8-11 OaEC.

68 See also article 689b (3) revCO.

69 Article 689c (2) revCO.

70 Article 689b (1) revCO.

proxy electronically,[71] the corporate law reform not only perpetuates this requirement[72] but also provides the possibility to hold general meetings virtually to the extent the articles of association expressly allow virtual meetings.[73] The decision to hold a general meeting virtually will be with the board of directors and, in contrast to electronic instructions, virtual general meetings are not mandatory for Swiss listed companies. It remains to be seen whether companies will opt for this option at all, in particular as a virtual meeting is deemed to be rather unfavourable for the board in the case of proxy fights.

Conclusion and outlook for board of directors

Overall, Swiss law offers a variety of options to shareholders that they can use in case they wish to influence a company. This prediction is confirmed by the experience of the recent years, which showed an increase in shareholder activism in Switzerland. Nevertheless, although Swiss corporate law does favour the incumbent board of directors and management, the OaEC, the corporate law reform and ESG-related obligations give shareholders more rights and tools to raise their voice. It is therefore likely that these reforms will further support the trend of recent years and lead to more shareholder activism in Switzerland. In parallel, we expect that institutional investors and activists will place an increased focus on ESG and, therefore, these topics are likely to be increasing the basis for shareholder activism.

In this context, boards of directors of Swiss listed companies should be prepared to respond to shareholder activists by regularly reviewing potential issues, including strategic orientation, dividend distribution and buy-back policy and ESG questions, regularly engaging with key shareholders and investors and monitor the positions of proxy advisers to understand shareholder sentiment and, rather than waiting for a disclosure of a substantial shareholding pursuant to article 120 FMIA, monitoring trading activity and major movements in the share ledger (including the evolution of the number of shares without a shareholder of record). The preparation should further include a plan to respond to direct engagements by activists as well as a communication playbook to deal with media engagement by activist shareholders in order to react appropriately and maintain the confidence of all relevant stakeholders, including other shareholders, employees and business partners. As in many other matters of corporate governance, defining the right approach is, however, more an art than a science.

71 Article 9 (1)(3) OaEC.

72 Article 689c (6)(3) revCO.

73 Article 701c to 701f revCO.

Appendix 1

About the Authors

Rashid Bahar

Advestra AG

Rashid Bahar is a founding partner of Advestra. Before that he was partner at a leading Swiss law firm for eight years. Rashid Bahar is an expert on corporate law and financial market regulations. He advises clients on transactional and regulatory matters. Financial institutions frequently seek his advice on M&A matters and their regulatory implications. Rashid is a professor at the University of Geneva, where he teaches corporate law as well as law and economics. He has extensively published and is an editor of the leading commentary in Swiss financial market regulation as well as the *Swiss Business Law Review*.

Annette Weber

Advestra AG

Annette Weber is a founding partner of Advestra. Before that she was a senior associate at a leading Swiss law firm. The focus of Annette's practice is capital market transactions, including a broad spectrum of equity capital market transactions, such as IPOs, rights offerings, spin-offs, or private placements as well as debt capital market transactions – bonds, convertible bonds as well as hybrid and regulatory capital instruments. She represents both issuers and banks. Annette practice also covers sustainable capital markets issuances. Annette further regularly advises clients on corporate and securities laws as well as corporate governance matters, in particular for listed companies.

Valérie Bayard

Advestra AG

Valérie Bayard is an associate at Advestra. She advises clients on capital market transactions, as well as on regulatory matters. One of her main areas of practice is assisting banks and issuers in the context of IPOs, capital increases and various securities law matters. She also advises financial services providers on compliance with their regulatory duties. Furthermore, Valérie assists companies on M&A and financing transactions and advises clients in general corporate and contract law matters.

Advestra AG
Uraniastrasse 9
8001 Zurich
Switzerland
Tel: +41 58 510 92 00
valerie.bayard@advestra.ch
rashid.bahar@advestra.ch
annette.weber@advestra.ch
www.advestra.ch