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Shareholders' Rights & Shareholder Activism

Switzerland
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1. Shareholders' Rights

1.1 Types of Company

In Switzerland, the most common form for companies is the stock corporation. An overwhelming share of all companies takes this form. According to the Swiss Federal Office of Statistics, there were approximately 118,623 stock corporations as of 31 December 2018.

Stock Corporations

Swiss laws and regulations do not, with few exceptions, distinguish between large or small stock corporations. Generally, all stock corporations are subject to the same legal regime. It does not matter whether they are closely-held corporations or listed on one of Switzerland's stock exchanges, in particular the SIX Swiss Exchange (SIX) and the BX Swiss (BX). The basics are contained in Article 620 and following of the Swiss Code of Obligations (the CO). The respective provisions deal among others with the following topics:

- incorporation;
- capital structure;
- changes to the capital structure;
- corporate governance;
- shareholders' rights;
- annual reporting; and
- liquidation.

Listed Companies (Mainly Through Enhanced Transparency for Shareholders)

Nevertheless, in the past decades Switzerland has adopted specific rules applicable to listed companies only. These rules are very often related to shareholders' rights or were the result of shareholder activism. We would like to highlight two sets of rules applicable to listed companies:

- rules relating to the disclosure of significant shareholdings (Article 120 and following of the Swiss Federal Financial Infrastructure Act, FMIA) and takeover offers (Article 125 and following FMIA); and
- rules on the excessive compensation in listed companies.

Both sets of rules apply to listed companies only. As a general rule, the rules set out in the FMIA (disclosure of significant shareholdings, takeover offers) apply to Swiss corporations and to foreign corporations with a primary listing in Switzerland. The rules contained in the Ordinance on the Excessive Compensation in Listed Companies apply to Swiss corporations listed on any (domestic or foreign) stock exchange. As part of a larger revision of the rules relating to stock corporations (the Proposed Reform), these rules shall become part of the CO and the Ordinance on the Excessive Compensation in Listed Companies shall be transposed into the CO. Listed companies are subject to the listing rules of the exchange on which the securities are listed, with SIX Swiss Exchange being the most important exchange in Switzerland. Its listing rules foresee a number of additional disclosure obligations which are relevant for the exercise of shareholder rights, including:

- listing (and offering) prospectus (in accordance with Article 35 and following of the Swiss Financial Services Act);
- annual and semi-annual reporting;
- ad hoc disclosure of potentially price-sensitive information;
- disclosure of management transactions;
- annual corporate governance report.

All of the above disclosure requirements aim at ensuring full transparency for shareholders. The information allows shareholders to form an informed judgement about the business and the prospects of any corporation. The information contained in the corporate governance report is often the basis for activist shareholders to form their strategy in relation to a particular target corporation. The basis for potential action or areas to increase shareholder value is determined from the financial reporting and the compensation report.

Given that Switzerland is not a member state of the European Union or the European Economic Area, respectively, the Directive (EU) 2017/828 amending Directive 2007/36/ EC as regards the encouragement of long-term shareholder engagement (Shareholder Rights Directive II) has not been transposed into Swiss law.

Foreign Investment

As a general rule, Swiss law does not restrict foreign persons from investing into Swiss companies. Again, there are a few exceptions to this rule. Most notably, corporations may foresee transfer restrictions in their articles of incorporation. While the transfer restrictions in case of publicly listed companies are very limited, closely held companies enjoy a broader freedom when it comes to defining reasons why not recording a shareholder in the share register as a shareholder with voting rights.

Typically, companies that invest in residential real estate foresee investment restrictions for foreigners, as the acquisition of residential real estate by foreigners is subject to detailed regulations in Switzerland. Generally, non-Swiss and EEA nationals are not allowed to acquire residential real estate at all (so-called Lex Koller). Accordingly, even listed real estate companies will endeavour to exclude foreigners from becoming a shareholder in the respective corporation.

1.2 Type or Class of Shares

Currently, there are various ways to define the capital structure of a corporation and the shareholder structure. Pursuant to Article 621 CO, the share capital amounts to at least CHF100,000. While there are still bearer shares in circulation, since 1 January 2020, all shares have to be issued as registered shares (subject to a transitory period of 18 months and certain exceptions). Registered shares may be freely transferable or subject to transfer restrictions (see **1.1 Types of Company**).

In addition, Swiss law allows for the possibility to create voting shares. Swiss shares represent part of the share capital. They must have a nominal value (expressed in Swiss Francs or a fraction thereof, with the minimum nominal value per share being CHF0.01). Following the entry into force of the Proposed Reform, the share capital can be denominated in any currency (as long as the CHF equivalent amounts to at least CHF100,000) and the nominal value of an individual share must be greater than CHF0.00 (zero). The legislator has enacted some restrictions applicable to voting shares with the aim of protecting the ordinary shareholders. These restrictions can be summarised as follows:

- The nominal value of the voting shares must not be less than one tenth of the ordinary shares (Article 693, paragraph 2 CO).
- The fundamental resolutions of the shareholders' meeting require not only the approval of a majority of two thirds of the votes represented at a shareholders' meeting but in addition the approval of more than 50% of the nominal values represented at such shareholders' meeting. For a list of resolutions, see **1.8 Shareholder Approval**.

Finally, Article 654 and following CO allow for the creation of preference shares, ie, shares with preferred dividend or liquidation rights or preferred subscription rights.

1.3 Primary Sources of Law and Regulation

Shareholders rights are governed in the following primary sources of law and regulation:

- the Swiss Code of Obligations (CO) (Article 620 and following);
- the Swiss Financial Infrastructure Act (Article 120 and following);
- the Ordinance on the Excessive Compensation in Listed Companies;
- the Swiss Financial Services Act; and
- the Listing Rules (promulgated by the SIX and the BX) and implementing regulations (eg, rules on ad hoc disclosure or the reporting of management transactions).

1.4 Main Shareholders' Rights

Shareholders have economic rights and participation rights. All shareholders have these rights, even though they can be modified by the articles of incorporation.

Economic rights (*Vermögensrechte*), which typically depend on the capital contribution of the respective shareholder (or more generally, the respective share class), include:

- right to receive a dividend;
- preferential subscription rights (capital increases, issuance of convertible or option bonds); and
- right to participate in the liquidation proceeds.

Participation rights (*Mitgliedschaftsrecht* e) include:

- right to participate in the shareholders' meeting;
- right to call an (extraordinary) shareholders' meeting;
- right to request a particular agenda item being put up for vote at a shareholders' meeting; and
- right to be informed about the business and the affairs of the corporation (Article 697, CO), including the right to instigate a special audit (Article 697a and following CO).

From a shareholder activism perspective, the participation rights are very important. Shareholders' rights may be varied by the corporation's articles of incorporation. The articles are adopted by the shareholders' meeting and recorded with the register of commerce. They are publicly available.

Not all of the above participation rights are equally available to all shareholders, but they may depend on reaching a certain threshold (see **1.6 Rights Dependent Upon Percentage of Shares**).

Agreements between Shareholders

Besides the above economic rights and participation rights, it is possible that shareholders enter into agreements among themselves (eg, members of a family holding a controlling stake in a listed corporation). Even though very common in Switzerland, these shareholders' agreements are typically not available to the general public. They may lead to an acting in concert, which may trigger disclosure obligations in accordance with Article 120 and following FMIA, or even trigger a (mandatory) takeover offer pursuant to Article 125 and following FMIA (see also **1.5 Shareholders' Agreements/Joint-Venture Agreements**).

Shareholders' Rights in Light of COVID-19

Generally, shareholders' rights have not changed as a result of the COVID-19 pandemic. There were other areas of corporate and commercial law which were changed (eg, in connection

with the measures to be taken in case of a capital loss or an over-indebtedness), which indirectly affect shareholders' rights.

1.5 Shareholders' Agreements/Joint-Venture Agreements

Shareholders' agreements and joint venture agreements are enforceable in Switzerland. It is common to enter into shareholders' agreements and, very often, joint ventures are set up through the creation of a common corporation. Even though the corporation itself can – to a limited degree – become a party to shareholders' agreements, such agreements are generally not binding upon the corporation's executive bodies, in particular the board of directors and the executive board.

Ultimately, they have to take their decisions in the best interest of the company and in accordance with applicable law and the company's articles and regulations, otherwise they run the risk to become personally liable. Having said this, shareholders agreements are binding among the shareholders who enter into such an agreement or who accede such an agreement. Any agreement as to how decisions are taken (material limitations, majorities and veto rights) are binding among the respective shareholders.

1.6 Rights Dependent Upon Percentage of Shares

Shareholders holding shares with a nominal value of CHF1 million, or 10% of the share capital, may request that the corporation's board of directors calls an (extraordinary) shareholders' meeting. They can request a particular agenda item, eg, the election of new members of the board of directors, and make specific motions to the shareholders' meeting.

Furthermore, shareholders holding shares with a nominal value of CHF1 million or (according to the Swiss Federal Supreme Court) 10% of the share capital may request that a particular agenda item be put on the agenda and make specific motions to the shareholders' meeting.

As part of the Proposed Reform, these thresholds shall be adjusted, and the CO will distinguish between listed companies and all other companies:

- Shareholders in listed companies representing 5% of the share capital or voting rights may request that the corporation's board of directors calls an (extraordinary) shareholders' meeting. In all other companies, the respective threshold will remain at 10% of the share capital or voting rights.
- Shareholders in listed companies representing 0.5% of the share capital or voting rights may request that a particular agenda item be put on the agenda and make specific motions to the shareholders' meeting. In all other companies, the respective threshold will be lowered from currently 10% to 5% of the share capital or voting rights.

1.7 Access to Documents and Information

Shareholder access to a company's documents and information is limited in Swiss law. This is the result of the fact that anybody (even a competitor) can become a shareholder in a corporation.

In listed companies, corporate disclosure is very comprehensive. It encompasses the following:

- annual report;
- semi-annual report;
- annual compensation report;
- annual corporate governance report; and
- ad hoc publications.

The corporate governance report describes in detail the rights and obligations of the shareholders as well as the functioning of the corporation's executive bodies, including the decision-making processes. Therefore, the corporate governance report is the primary source of information for any activist shareholder. This particularly holds true with regard to the obligation to submit a mandatory bid following the acquisition of more than 33.3% of the voting rights in a corporation. Likewise, the corporate governance report contains information as to any (preventive) defence measures adopted by the board of directors.

The Proposed Reform foresees an extension of the information right of shareholders: shareholders holding at least 10% of the share capital or the voting rights may, at any time and not only during a shareholders' meeting, ask questions to the board of directors. Likewise, shareholders holding at least 5% of the share capital or the voting rights may request to review the books and records without prior approval by the shareholders' meeting, provided the legitimate interests of the company are not negatively affected.

1.8 Shareholder Approval

All items requiring shareholders' approval (the shareholders' meeting is the supreme governing body of any corporation) are set out in Article 698 CO. The shareholders' meeting has the following inalienable powers:

- to determine and amend the articles of incorporation;
- to elect the members of the board of directors and the external auditors;
- to approve the management report and the consolidated accounts;
- to approve the annual accounts and resolutions on the allocation of the disposable profit, and in particular to set the dividend and the shares of profits paid to board members;

- to grant discharge to the members of the board of directors; and
- to generally pass resolutions concerning the matters reserved to the general meeting by law or the articles of association.

As a general rule, and unless otherwise provided by law or the articles of incorporation of a corporation, the shareholders' meeting passes resolutions and conducts elections by an absolute majority of the voting rights represented (Article 703 CO).

Resolutions Requiring a Supermajority
There are specific resolutions requiring a supermajority of 66.6% of the votes present and more than 50% of the nominal values represented at a shareholders' meeting (Article 704, paragraph 1 CO):

- any amendment of the company's objects;
- the introduction of shares with preferential voting rights (voting shares);
- any restriction on the transferability of registered shares;
- an authorised or contingent capital increase or the creation of reserve capital in accordance with the Swiss Federal Banking Act;
- a capital increase funded by equity capital, against contributions in kind or to fund acquisitions in kind and the granting of special privileges;
- any restriction or cancellation of the shareholders' subscription right;
- a relocation of the corporation's domicile; and
- the dissolution of the corporation.

As part of the Proposed Reform, both catalogues (Article 698 and Article 704 CO) shall be significantly expanded, giving shareholders more rights to actively influence the company's decision making.

Electronic Voting
The possibility to physically attend a shareholders' meeting is required in any case. If there is the possibility of an electronic participation, both forms have to take place simultaneously, without delay and with the possibility to interact. Furthermore, the chosen meeting venue must not (de facto) prohibit the exercise of shareholders' rights. The Proposed Reform provides the same conditions for a foreign venue and a virtual shareholders' meeting.

The articles of association must allow these forms and designate an independent voting representative. The designation on an independent voting representative ensures that shareholders who are unable to travel abroad or who are unable or unwilling to exercise their voting rights by electronic means can still exercise their voting rights in writing. In the case of non-listed companies, the independent voting representative can be waived with the consent of all shareholders.

1.9 Calling Shareholders' Meetings

As outlined above (see **1.6 Rights Dependent Upon Percentage of Shares**), shareholders holding shares with a nominal value of CHF1 million or 10% of the share capital may request that the corporation's board of directors calls an (extraordinary) shareholders' meeting. Likewise, shareholders holding shares with a nominal value of CHF1 million or 10% of the share capital may request that particular item be put on the agenda. In both cases, they can (and must) make specific motions to the shareholders' meeting.

As part of the Proposed Reform, these thresholds shall be adjusted, and the CO will distinguish between listed companies and all other companies. As a result, it will become easier for activist shareholders to request that the board of directors calls a shareholders' meeting or to present motions to the shareholders' meeting.

Virtual/Remote Meetings
Swiss law does not (yet) provide virtual shareholder meetings. Only hybrid forms are recognised, that is an ordinary shareholders' meeting which is extended by electronic means. Virtual shareholder meetings are not anchored in the law but have been affirmed by scholars. This can take the form of a multi-local shareholder meeting, at which shareholders must be physically present but can choose the location from among the proposed ones. Furthermore, the company has the possibility to choose a foreign location as long as it does not constitute a disproportionate difficulty for the shareholders to attend. Participation via the internet is also permitted, although there must always be a physical meeting taking place. Shareholders or their representatives, who are not physically present can therefore participate by electronic means.

The Proposed Reform introduces the possibility to have virtual shareholder meetings. The other hybrid forms mentioned above will be anchored in the law as well.

1.10 Voting Requirements and Proposal of Resolutions

See **1.8 Shareholder Approval** and **1.9 Calling Shareholders' Meetings**.

1.11 Shareholder Participation in Company Management

Generally, shareholders have the right to elect the corporation's supreme corporate body, the board of directors (Article 698, paragraph 2 section 2 CO). Various share classes (ordinary

shares, voting shares, preference shares; see **1.2 Type or Class of Shares**) have the right to be represented on the board of directors (Article 709 CO). Other than that, there are no rights for shareholders to participate in the management of the company. In case of listed companies, there are certain other shareholders' rights:

- shareholders elect the chairman of the board of directors;
- shareholders elect the members of the compensation committee; and
- shareholders elect the independent proxy.

Note that individual shareholders do not have a right to be represented on the board. Board members are proposed by the existing board of directors. As outlined above (see **1.6 Rights Dependent Upon Percentage of Shares** and **1.9 Calling Shareholders' Meetings**) shareholders may have the right to call for an extraordinary shareholders' meeting or to make proposals to the agenda. In this instance, they can propose a specific person for election to the board of directors, however, there is no guarantee that the proposed individual will be elected.

Shareholders have no right to elect members of the executive management. The executive management is appointed by the board of directors.

Additionally, shareholders decide upon the compensation of the members of the board of directors and the members of the executive board, as well as any advisory board, if any (as set out in the Ordinance on the Excessive Compensation in Listed Companies).

The above rules remain largely unchanged as a result of the Proposed Reform.

1.12 Shareholders' Rights to Appoint/Remove/ Challenge Directors

As detailed in **1.11 Shareholder Participation in Company Management**, shareholders have limited scope to request the election of a specific individual to the board of directors. Whether or not such person is elected is for the shareholders present at the shareholders' meeting to decide. The election requires the absolute majority of the votes present at the respective shareholders' meeting.

Shareholders have no right to elect or remove members of the executive management. The shareholders' meeting is entitled to dismiss members of the board of directors, external auditors and any registered attorneys or commercial agents appointed by them (Article 705, paragraph 1 CO). Again, subject the limitations set out above (see **1.6 Rights Dependent Upon Percentage of Shares** and **1.9 Calling Shareholders' Meetings**), individual shareholders can request that a specific member of the board of directors be dismissed by the shareholders.

Challenging Shareholder Decisions

Shareholder decisions can be challenged in accordance with Article 706 CO. The board of directors and every shareholder may challenge resolutions of the shareholders' meeting which violate the law or the articles of association by bringing action against the corporation before the court. The following types of shareholders' resolutions may be challenged:

- decisions that remove or restrict the rights of shareholders in breach of the law or the articles of association;
- decisions that remove or restrict the rights of shareholders in an improper manner;
- decisions that give rise to the unequal treatment or disadvantaging of the shareholders in a manner not justified by the company's objects; or
- decisions that transform the company into a non-profit organisation without the consent of all the shareholders.

Based on the above it will, in most instances, be very difficult to challenge an election made in a shareholders' meeting. It would not suffice to challenge an election based on the argument that a certain candidate is not able or qualified to exercise its office.

Following the entry into legal form of the Proposed Reform, the election or dismissal of a member of the board of directors requires the majority of the votes present at the respective shareholders' meeting (instead of the absolute majority of the votes present). Hence, the threshold to elect or dismiss a member of the board of directors is (slightly) lowered.

1.13 Shareholders' Rights to Appoint/Remove Auditors

Based on Article 698, paragraph 2, section 2 CO, the shareholders' meeting elects the external auditors. Likewise, the shareholders' meeting is entitled to dismiss the external auditors (Article 705, paragraph 1 CO). Such dismissal must occur in a shareholders' meeting. To be valid, it is required that the dismissal is requested in the agenda with a proper motion.

1.14 Disclosure of Shareholders' Interests in the Company

There are several provisions dealing with the disclosure of shareholders' interests in their company.

Article 120, paragraph 1, FMIA, requires notification to the company, and to the stock exchange on which the equity securities are listed, of anyone who directly, indirectly or acting in concert with third parties acquires or disposes of shares, or acquisition or sale rights relating to shares, of a company with

its registered office in Switzerland whose equity securities are listed in whole, or in part, in Switzerland, or of a company with its registered office abroad whose equity securities are mainly listed in whole, or in part, in Switzerland, and thereby reaches, falls below or exceeds the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33.3%, 50% or 66.6% of the voting rights, whether exercisable or not.

It is worth noting that the disclosure obligations are very comprehensive in Switzerland. In particular, the disclosure of acquisition or sale rights requires the disclosure of all types of derivative instruments (without set-off of any acquisition or sale rights), irrespective of whether they are settled physically or in cash.

Special Reporting Obligations
There are special reporting obligations for members of the corporate bodies when acquiring or disposing of shares (reporting of management transactions according to Article 56 of the SIX Swiss Exchange's listing rules). Any corporation whose equity securities have their primary listing on SIX Swiss Exchange must ensure that the members of its board of directors and its executive committee report transactions in the issuers equity securities, or in related financial instruments, to the corporation no later than the second trading day after the reportable transaction has been concluded. Transactions undertaken on a stock exchange must be reported to the issuer no later than the second trading day after they are executed. The respective information is periodically disclosed in aggregated form by the corporations.

The information on significant shareholdings and management transactions is available through the websites of the relevant stock exchange. Furthermore, any corporation must list its significant shareholders in the annual report (corporate governance report; Article 663c CO).

The above rules make it particularly difficult to build a stake in a listed company without disclosure to the public. The tight disclosure rules are to a large degree the legislator's response to some spectacular stake building in Swiss companies by foreign investors in the late nineties. The Proposed Reform does not change these rules.

1.15 Shareholders' Rights to Grant Security over/ Dispose of Shares

The sale of shares is possible, particularly if a corporation's shares are listed on a stock exchange such as SIX Swiss Exchange or BX Swiss. Certain banks maintain trading venues or facilities for shares not listed on a stock exchange. In case of listed securities, there are various options, including on-exchange and off-exchange sales. Large blocks of shares are sold through block trades or by way of an accelerated bookbuilding, which is, in addition to the strategic sale, an exit option often sought by activist shareholders. Shares in closely-held companies are sold by private sale (share purchase agreement), followed by a transfer of possession in the (endorsed) share certificate(s) or, in the case of un-certificated shares, by an assignment, in order to consummate the transaction.

In case of closely-held corporations, the transfer can be restricted by the articles of incorporation. In addition, shareholders' agreements can (and typically do) contain transfer restrictions. However, in such case, the respective transfer restrictions are only binding upon the parties to the specific shareholders' agreement.

As a general rule, shareholders are entitled to grant security interests over their shares. Depending on the type of security, this may in case of security over listed shares lead to disclosure obligations in accordance with Article 120 FMIA. Likewise, it could trigger reporting obligations under the management transaction rules. Accordingly, security over shares in Swiss corporations usually takes the form of a share pledge, where ownership remains with the pledger, but possession is transferred to the pledgee, thereby avoiding any disclosure in accordance with Article 120 FMIA.

1.16 Shareholders' Rights in the Event of Liquidation/Insolvency

In the case of an insolvency of a corporation, shareholders have very limited rights. In the distribution of the liquidation proceeds, they rank lowest in priority. Nevertheless, shareholders can bring forward claims against the members of the corporate bodies in case of breaches of legal obligations by the respective individuals in accordance with Article 754 CO (directors' and officers' liability), which is fairly common following the insolvency of a corporation (for further detail see **3.3 Legal Remedies Against the Company's Directors**).

2. Shareholder Activism

2.1 Legal and Regulatory Provisions

Shareholder activism, and the defence against it, is subject to a number of rules and regulations.

These rules, which were, in part, a reaction to tactics employed by activist shareholders, have significantly altered the activities and strategies of activist shareholders over the last four decades (see **2.2 Level of Shareholder Activism**).

The most relevant regulations are the following:

Disclosure of Significant Shareholdings in Listed Companies (Article 120 and Following FMIA)
Such disclosure prevents activist shareholders from building up hidden stakes in a potential target company. As outlined in **1.14 Disclosure of Shareholders' Interests in the Company**, there is no netting of acquisitions and sales positions. Furthermore, derivatives transactions providing for a cash settlement (as opposed to a physical settlement) must be reported.

Takeover Offer Rules (Article 125 and Following FMIA)
The takeover offer rules regulate the process for submitting a takeover offer for listed companies. In particular, there is a duty to publish an offer prospectus (Article 127, paragraph 1 FMIA).

The offeror must treat all holders of equity securities of the same class equally (Article 127, paragraph 2 FMIA). The offeror, prior to publication, has to submit the offer to the review body (ie, a licenced audit firm or a securities dealer, respectively) for review. The offer prospectus is reviewed by the Swiss Takeover Board.

The Swiss Takeover Board has issued an ordinance on takeover offers (*Verordnung der Übernahmekommission über öffentliche Kaufangebote*), which sets forth detailed rules on takeover offers, including rules on permissible conditions precedent. Among others, the offeror has to demonstrate that the financing of the offer is secured (which must be reviewed/confirmed by the review body).

Mandatory Takeover Offer Rules
Mandatory takeover requires a shareholder or a group of shareholders acting in concert, to submit a mandatory takeover offer if they cross a specific threshold in a publicly listed company. Article 135, paragraph 1 FMIA, requires anyone who directly, indirectly or acting in concert with third parties acquires equity securities which, added to the equity securities already owned, exceed the threshold of 33.3% of the voting rights of a target company, whether exercisable or not, must make an offer to acquire all listed equity securities of the respective company. Corporations may raise this threshold to 49% of voting rights in their articles of incorporation.

The price offered to the shareholders must be at least match the higher of the following two amounts, either the stock exchange price or the highest price the offeror has paid for equity securities of the target company in the preceding 12 months. There is a detailed regime governing mandatory takeover offers.

Duties of Publicly Listed Target Companies
Article 132 FMIA sets forth the duties of publicly listed target companies, in particular, the board of directors of the target company shall publish a report to the holders of equity securities setting out its position in relation to the offer. More importantly, from the moment the offer is published until the result is announced, the board of directors of the target company shall not enter into any legal transactions which would have the effect of significantly altering the assets or liabilities of the company (prohibition of poison pills).

Decisions taken by the general meeting of shareholders are not subject to this restriction and may be implemented irrespective of whether they were adopted before or after publication of the offer.

Rights to Call for a Shareholders' Meeting
The right to call a shareholders' meeting, as well as the right put forward a proposal on the agenda, are important in this context (see **1.6 Rights Dependent Upon Percentage of Shares** and **1.9 Calling Shareholders' Meetings**). As a result of the Proposed Reform, shareholders holding 5% or more of the share capital or the voting rights might request to review the company's books and records and its correspondence (provided such request does not jeopardise the company's interests worthy of protection).

2.2 Level of Shareholder Activism

Switzerland experienced a first wave of shareholder activism in the 1980s (Werner K. Rey's takeover of Bally). At that time, taking over corporate control was the primary goal. Takeovers were not regulated and poison pills were still common (as was the case in the defence of Holvis Ltd, a Swiss paper group, against an unfriendly takeover by International Paper in 1995).

A second wave of takeovers occurred in the 2000s (for example, the takeovers of Unaxis Holding Ltd and Sulzer Ltd), where again the fight for corporate control was the driver behind the transactions. Some of the corporate "raiders" were building up stakes in the targets by circumventing the rules relating to significant shareholdings. This round of takeovers shaped Swiss disclosure and takeover laws with respect to:

- comprehensive disclosure of significant positions in accordance with Article 120 and following FMIA as well as Article 134 FMIA, including all types of derivatives transactions, irrespective of whether they are settled physically or in cash; and
- reinforcing mandatory takeover rules, including the decision of the Takeover Board on the circumvention of mandatory bid rules through the use of derivative instruments in the takeover of Saurer Holding Ltd.

More recently, the focus shifted towards optimising shareholder value, even though the battle for corporate control remains on the agenda. Prominent recent examples demonstrating the diverse goals of activist investors include:

Nestlé
In 2018, Daniel Loeb's Third Point fund bought a substantial stake in Nestlé, the Swiss-based food and drink processing conglomerate. He then reached out to management, requesting the spin-off of non-core assets and a simplification of the management structure to create additional shareholder value.

Sika
A controlling stake in Sika, the Swiss construction chemicals manufacturer, was sold to the French Saint Gobain group in 2015. Given that the transaction was structured as an indirect change of control, there was no public takeover offer for the remaining shareholders.

A group of minority shareholders, with the management, opposed the sale and, eventually, they were able to procure that the sellers, the buyer and the target re-negotiate the terms of the transaction, making it more appealing to the minority shareholders.

Clariant
Swiss specialty chemicals producer Clariant and US group Huntsman abandoned their USD20 billion merger deal in the autumn of 2017 following the intervention of activist investors (White Tale, the investment vehicle of hedge fund manager Keith Meister and New York City-based fund 40 North) who fought against the deal for months. In essence, they argued that it would destroy shareholder value.

During the fight, the activist investors had increased their stake in Clariant to more than 20%. This stake, coupled with the support of other Clariant shareholders who were against the deal, made the company doubt whether it would obtain the necessary quorums to push the deal through. Finally, Clariant decided to abort the transaction and White Tale sold its stake to SABIC.

Aryzta
In the case of Aryzta, a minority shareholder aligned with a financing provider and argued that the financial restructuring proposed by the board of directors destroyed shareholder value and led to an unnecessary dilution of existing shareholders. In this case, the activist shareholder was not successful, however, this is another example of the shift towards a maximisation of shareholder value vs the battle for corporate control.

Panalpina
In April 2019, the shareholders of Panalpina accepted an offer from Danish competitor DSV, ending a takeover battle, after the Ernst Goehner Foundation, which held 46% of Panalpina, had surrendered to pressure from 12.3% shareholder Cevian Capital and 9.9% shareholder Artisan Partners to sell the company to DSV.

Sunrise
Freenet, one of Sunrise's major shareholders successfully blocked the proposed merger with Liberty Global in 2019, arguing that the transaction would destroy shareholder value. In August 2020, Liberty Global turned around and launched – with the support of Freenet – a public tender offer for Sunrise.

Recent examples of corporations with activist shareholders include UBS, Credit Suisse and ABB. Generally speaking, there may be less activist shareholder activity in Switzerland compared to the USA as a result of a significant number of listed corporations still under the control of a stable majority shareholder (even though the example of Panalpina demonstrates that this must not necessarily be the case).

2.3 Shareholder Activist Strategies

Typically, activist shareholders build a stake in the target, an extreme case being Clairant, where the activist shareholders controlled approximately 20% of the shares. They then reach out to the target's management with their suggestions for additional shareholder value creation. Examples for this strategy include the activities of activist shareholder Third Point, managed by Daniel Loeb, in Nestlé in 2018.

While initial contacts would typically be in a non-public manner, recently, activist shareholders have addressed the general public more often, particularly in cases where management ignored their requests (Clariant, Nestlé or Aryzta being examples of this strategy). In these cases, activist investors stepped-up pressure on target corporations by disseminating their requests to the general public. This was Third Point's tactic, publicly requesting "sharper", "bolder" and "faster" steps from Nestlé regarding spinning off businesses and adjusting its overly complex management structure.

Switzerland has also seen a number of transactions, where activist shareholders, in particular private equity funds, have taken over companies (both, publicly listed and closely held companies). An example is EQT's takeover of the Kuoni group of companies. With respect to achieving full control over the target, Swiss takeover laws provide for a squeeze-out merger (in case the offeror holds more than 98% of the shares following a public tender offer) or a squeeze out merger pursuant to Article 18, paragraph 5 of the Swiss Act on Merger, De-Merger, Conver-

sion and Transfer of Assets (in case a shareholder holds more than 90% of the share capital and the voting rights in the target).

Both can be combined, however, following a public takeover, the offeror should wait for at least six months following the closing of the offer to proceed with a squeeze out merger to avoid the risk that a shareholder successfully claims that the offer price was too low and that it therefore has to offer the higher price paid to such shareholder to all shareholders that have tendered their shares in the offer (best price rule).

There has been no noticeable change in these strategies and agendas as a result of the COVID-19 pandemic.

2.4 Targeted Industries/Sectors/Sizes of Companies

As can be seen from the above examples (see **2.3 Shareholder Activist Strategies**), there are no particular industries or sectors that have been targeted by activist shareholders.

Likewise, size does not prevent a corporation from becoming the target of activist shareholders.

2.5 Most Active Shareholder Groups

In recent years, hedge funds and large private investors (often acting through their fund-like investment vehicles) have been more active in the Swiss market. See **2.2 Level of Shareholder Activism** and **2.3 Shareholder Activist Strategies** for recent examples. With the Proposed Reform, the number of activist shareholders targeting the Swiss market is expected to increase.

2.6 Proportion of Activist Demands Met in Full/Part

There is no statistical information available. However, boards of directors have responded to investments by activist shareholders (see **2.7 Company Response to Activist Shareholders**). The example of Clariant, which abandoned the USD20 billion merger deal with Huntsman, shows that activist investors' can successfully torpedo corporations' plans.

2.7 Company Response to Activist Shareholders

Target corporations have reacted in several ways to demands of activist shareholders:

- changes in corporate and competitive strategy (including, for example, the sale of non-core assets and the concentration of core business units and core competencies);
- changes to corporate governance (including changes in the senior leadership team);
- changes in the earnings distribution and cash management (announcement of a more shareholder-friendly distribution policy);
- implementation of share buy-back programs (as part of a more shareholder-friendly earnings distribution policy); and
- implementation of changes to compensation of the members of the board of directors and the executive board.

Preventing Shareholder Activism

General remedies

Advanced preparation is of essence. The best repellent against activist shareholders is a high share price, therefore, the board of directors and the executive management should take the following series of measures in order to prevent shareholder activism.

They should identify issues that may attract activist shareholders' attention. For example, companies with large excess cash have come into the spotlight of activist investors recently (eg, Nestlé). The same applies to corporate conglomerates, particularly in cases with limited synergies between the various divisions and differences in performance of these divisions (eg, ABB). Therefore, boards of directors and executive boards are advised to regularly question corporate performance and corporate cash flows. They should continuously evaluate strategic and transaction alternatives.

Boards of directors and executive boards need to respond to the shareholders' need for transparency and information. Basis is a clear corporate and competitive strategy, which can be communicated to investors (with key performance indicators which can be measured). In addition, this strategy and the corporation's value proposition must be regularly communicated to the investor community. Last but not least, the board of directors and the executive board need to monitor the composition of the shareholder base.

Legal remedies

In addition, there are a number of legal remedies that can be taken:

- transfer restrictions relating to registered shares (such restrictions in publicly listed companies being limited to percentage thresholds);
- voting restrictions (percentage limitation applicable to individual shareholders or persons acting in concert as well as to nominees); and
- qualified majorities for certain shareholders' resolutions, such as the deletion of transfer or voting restrictions.

While voting restrictions are still common, the other legal remedies are considered to be contrary to good corporate governance. As a result, they are less frequently employed than they used to be. It is noteworthy that it is not possible anymore in listed companies to have a staggered board of directors, as the

members of the board of directors are elected for a term of one year up to the next shareholders' meeting.

The Limited Options of the Board of Directors
It is also worth noting that the board of directors has only limited defence measures available. It is, for example, prohibited to grant extraordinary compensation to the members of the board of directors and the executive board (no "golden parachutes"). There are even more restrictions once a public tender offer has been launched. Specifically, it is prohibited to:

- buy or sell material assets (sale of the so-called "crown jewels");
- sell assets specifically mentioned in the takeover offer (irrespective of the materiality of the assets);
- issue new shares in the corporation; or
- buy or sell treasury shares.

3. Remedies Available to Shareholders

3.1 Separate Legal Personality of a Company

Swiss law recognises the separate legal personality of a corporation as distinct from its shareholders. Likewise, the members of the board of directors and/or the executive board may become personally liable.

3.2 Legal Remedies Against the Company

The main legal remedy available to shareholders under Swiss law is the ability to challenge shareholders' resolutions. Pursuant to Article 706, paragraph 1 CO, the members of the board of directors and every shareholder may challenge resolutions of the shareholders' meeting which violate the law or the articles of association by bringing action against the company before the court. It is generally not possible for shareholders to challenge resolutions of the board of directors.

Challenging shareholders' resolutions is only possible for other shareholders and members of the board of directors. The plaintiff must be able to demonstrate and substantiate that the shareholders' resolutions violate the corporation's articles of association, provisions of Swiss corporate law or general principles of Swiss corporate law. The challenged shareholders' resolutions must negatively affect the plaintiff 's legal position. The plaintiff must not have approved the resolutions (otherwise, there is no legitimate reason to bring forward the claim). Any respective actions are directed against the corporation itself and have to be filed within two months of the adoption of the resolution. If not filed within this deadline, the respective claims will be forfeited.

Minority shareholders have the right to challenge resolutions of the shareholders' meeting.

Under Swiss law, it is not possible for shareholders to challenge board resolutions (see, however, **3.7 Strategic Factors in Shareholder Litigation** for the exceptions to this rule in connection with transactions subject to the Swiss Federal Act on Mergers, Demergers or Conversions of Legal Form (the MA)). Shareholders could only claim that a particular resolution of the board of directors be null and void, however, in such case, courts and authorities would have to disregard the resolutions irrespective of whether a shareholder had claimed that the resolution be null and void.

3.3 Legal Remedies Against the Company's Directors

The main legal remedy available to shareholders under Swiss law is the ability to file claims against the corporation's directors and officers. These are personal claims against the respective individuals in their capacity as members of the board of directors and/or the executive board. Article 754, paragraph 1 CO, provides that the members of the board of directors and all persons engaged in the business management or liquidation of the corporation are liable both to the corporation and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties.

Liability claims against directors and/or officers require the plaintiff to show that the defendant intentionally or negligently breached a legal duty under Swiss corporate law. In addition, such breach must have caused a damage (loss) to the corporation or to the plaintiff itself. Any claim will only be successful if the plaintiff can demonstrate that there is an adequate causal link between the breach of duty and the damage (loss). It is controversial whether the plaintiff is required to establish fault or whether fault is presumed (in the latter case, the defendant still has the ability to prove that there was no fault). If the corporation suffers a loss, the corporation itself or individual shareholders may file liability claims. There are two options available to shareholders:

- they can sue either on behalf of the corporation (derivative action, see **3.6 Derivative Actions**); or
- they can sue in their own right and if they decide to do so, they can only claim damages directly suffered by them.

Minority shareholders have the right to file claims against the corporation's directors and officers.

As a result of the Proposed Reform, the shareholders' meeting may resolve that the company files a claim against its directors. At the same time, the statute of limitation is reduced from five years to three years from the date the claimant has knowledge of the facts leading to the claim.

3.4 Legal Remedies Against Other Shareholders
There are no legal remedies against other shareholders available to shareholders. There is no contractual basis for such claims. Outside any contractual claims, shareholders could try to claim damages based on general principles of tort law. However, as the damage is usually of a financial nature (as opposed to a physical damage), such claims will only be admitted if there has been a breach of a protective norm specifically safeguarding the financial interests of the plaintiff. Also, a shareholder has typically no obligation towards the company other than the obligation to pay in the nominal value of the shares acquired by such shareholder.

3.5 Legal Remedies Against Auditors
Article 755 CO, states that all persons engaged in auditing the annual and consolidated accounts, the company's establishment, a capital increase or a capital reduction are liable both to the company and to the individual shareholders and creditors for the losses arising from any intentional or negligent breach of their duties.

Accordingly, shareholders may file claims against the company's auditors. The conditions for a successful claim are substantially equivalent to claims against directors and officers (see **3.3 Legal Remedies Against the Company's Directors**). The claim can be directed against an audit firm.

Minority shareholders have the right file claims against the corporation's auditors.

3.6 Derivative Actions
Shareholders can bring derivative actions on behalf of the corporation (see **3.3 Legal Remedies Against the Company's Directors**). In such case, the plaintiffs (shareholders) will claim the damage (loss) suffered by the corporation itself. Any derivative action is brought in the name of the individual shareholder(s) as plaintiff(s) and not in the name of the corporation.

However, the plaintiff(s) may only request payment of damages to the corporation (but not to the plaintiff(s)). As a result, the corporation is compensated for the damages (losses) suffered, and shareholders are indirectly compensated.

3.7 Strategic Factors in Shareholder Litigation
If a plaintiff is able to demonstrate with prima facie evidence suggesting that a right of the plaintiff has been violated or is about to be violated, Swiss courts may order injunctive or interim relief in summary proceedings. In this case, the court will assess whether such violation will cause the plaintiff irreparable harm and whether there is an urgent need to protect the plaintiff 's rights. The court will further consider whether the relief requested by the plaintiff is reasonable and proportionate.

In a case of utmost urgency (which must not be caused by the plaintiff 's delay in applying for injunctive or interim relief), the court may also grant ex parte relief without allowing the defendant to comment on the claim for injunctive or interim relief. In this case, the measures ordered by the court are confirmed (or rejected) in inter partes proceedings. Any injunctive or interim relief granted by a court must be pursued by the plaintiff in ordinary proceedings in order to have a court confirm the right of the plaintiff and the violation any rights.

Shareholders may further consider filing an objection with the commercial register and request that the commercial register be blocked. As a consequence, applications filed by the company are not entered into the register anymore for a term of ten days. The shareholder(s) filing the objection must file an application for injunctive relief with the competent court within this ten-day term. If no application for injunctive relief is filed or if the application is dismissed, the commercial register will process the corporation's registrations.

Other Available Actions
Apart from the actions against shareholders' resolutions and claims against directors, officers and auditors set out above (see **3.2 Legal Remedies Against the Company** and following), there may be other actions available in case of transactions pursuant to the Swiss Federal Act on Mergers, Demergers or Conversions of Legal Form (the MA). In this case, shareholders' resolutions and board resolutions may be challenged, and shareholders can file liability claims in the case of mergers, demergers, conversions of legal form or transfers of assets. In addition, in the case of mergers, demergers or conversions of legal form, shareholders can file claims for review and determination of adequate compensation by the competent court.

Transactions as a Response to Shareholder Activism
Transactions prompted as a response to activist shareholders may include capital markets transactions. In this case, prospectus liability may become an issue. The liability for an issue prospectus is governed in Article 752 CO. Even though Article 752 CO primarily refers to equity prospectuses, it also applies to bond prospectus by reference (Article 1156 CO). With the entry into legal force of the Swiss Financial Services Act (FinSA), Articles 752 and 1156 CO are replaced by Article 69 FinSA (as of the date of this publication, the transitory periods have not yet lapsed, which allows the issuance of shares or bonds in accordance with the regime of the CO).

Article 69 FinSA reads as follows: any person who fails to exercise due care and thereby furnishes information that is inaccurate, misleading or in violation of statutory requirements in prospectuses, key information documents or similar communications is liable to the acquirer of a financial instrument for

the resultant losses. With regard to information in summaries, liability is limited to cases where such information is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus. With regard to false or misleading information on main prospects, liability is limited to cases where such information was provided or distributed against better knowledge or without reference to the uncertainty regarding future developments.

Article 752 CO only applies if the following two requirements are met:

- first, there must be an actual offering of shares, bonds or other securities by a corporation (eg, through a capital increase or through the issuance of any debt instruments including convertible or option bonds) or by a securities firm (with the consent of the issuer). The FinSA prospectus regime does – contrary to the former regime – not distinguish between primary and secondary offerings anymore; and
- second, the corporation must have prepared an issue prospectus or must have failed to do so despite the duty to publish such prospectus. Likewise, it may authorise the use of documents prepared by third parties, eg a securities firm (Article 35 paragraph 2 FINSA e contrario).

Prospectus liability does not only cover actual prospectuses but also prospectus-like offering documents and, according to certain scholars, even verbal statements made in the context of a capital markets transaction.

Shareholder Litigation

Generally, shareholder litigation, at least as of today, has not played an important role in Switzerland. This is attributable to several factors, including:

- the standards of proof of a claim are generally high and the burden of proof is on the plaintiff; and
- the cost associated with civil proceedings are high and entail additional litigation risks for the plaintiff, as it will not only bear its own cost but will also have to compensate the defendant for its cost in case of loss of the legal proceedings.

The barriers to shareholder litigation remain intact despite the entry into legal force of the FinSA.

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