
Guidelines on Shareholders' Meetings under COVID-19

Ordinance 2: On 16 March 2020, the Swiss Federal Council prohibited public and private events. This newsletter deals with possible ways for Swiss companies to hold meetings, especially shareholders' meetings.

Guidelines on Shareholders' Meetings under COVID-19 Ordinance 2



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The Swiss Federal Council (SFC) declared at its extraordinary meeting held on 16 March 2020 an «extraordinary situation» in Switzerland in terms of the Federal Act on the control of communicable human diseases and implemented amendments to the Ordinance 2 on measures to combat coronavirus (COVID-19) (COVID-19 Ordinance 2). According to the COVID-19 Ordinance 2, public and private events are prohibited.

This newsletter deals with possible ways for Swiss companies to hold meetings of their members, especially (annual or extraordinary) shareholders' meetings (**General Meeting**), under the COVID-19 Ordinance 2. The principles set out in this newsletter are primarily geared towards General Meetings of corporations, but are applicable to the members' meetings of all company types, including limited liability companies, cooperatives and associations (directly or mutatis mutandis).



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Ban of Public and Private Events

According to art. 6 para. 1 COVID-19 Ordinance 2, public and private events are banned, including sports events and club activities. In its explanatory notes to the COVID-19 Ordinance 2 (**Notes**), the SFC defines public and private events very broadly and includes shareholders' meetings as an example of a banned event.

Considering the main purpose of the ban (i.e. protection of the population), the notion of public and private events has to be interpreted restrictively. Meetings in a business context (such as a meeting of the board of directors (**Board**)) are not *per se* illegal. The Notes state explicitly that workplace meetings are allowed. However, if physical meetings are held, certain aspects must be observed:

First of all, the recommendations of the Federal Office of Public Health regarding hygiene and social distance must be observed; and (cumulatively) the number of people must be limited to the lowest number possible and thus the «*need-to-join*» rule should be applied: Those who have to be physically present in order to reasonably carry out the business of the meeting may be present, others must not. In case of shareholders' meetings of a company, the required persons would

be the chairman, secretary / vote counter (to the extent necessary), the auditor (unless presence is waived in accordance with art. 731 para. 2 of the Swiss Code of Obligations (CO)) and, as the case may be, notary public and independent voting proxy. The Federal Office of Justice (FOJ) in its FAQ regarding coronavirus and general meetings (**FAQ**) shares this view and holds that everyone who has to participate in person at the General Meeting will still have to do so and therefore, a «residual meeting» must take place even under COVID-19 Ordinance 2. However, according to the FAQ, the auditor may participate electronically.

Organization of a General Meeting

Organizer of a General Meeting is the Board. The Board is responsible to comply with the legal requirements when convening the General Meeting. The COVID-19 Ordinance 2 does not release the Board from its obligation under art. 700 para. 1 CO to give notice of the meeting, agenda items and motions no later than 20 days before the date for which the General Meeting is scheduled. Though, it enables the Board to issue an order that shareholders' rights have to be exercised remotely (art. 6b para. 1 COVID-19 Ordinance 2).



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Such order must be notified in writing or published electronically for example on the homepage of the company (for listed companies: ad hoc disclosure rules may apply) at least four days before the event. According to the FOJ, an order which is notified in writing must be dispatched no later than four days before the General Meeting is scheduled to take place (irrespective of the time the shareholder actually receives the order). Absent an order, the General Meeting cannot be held, unless the company has just one single shareholder, all shareholders are represented by one single person or an exception by the cantonal authorities is granted under art. 7 COVID-19 Ordinance 2 (*cf.* FAQ).

If at a General Meeting no shareholders (who are not at the same time assuming essential functions under the «need-to-join» rule set out above) are present, the General Meeting can be held even if no formal order pursuant to art. 6b para. 1 COVID-19 Ordinance 2 has been issued by the Board. Should a shareholder without essential function under the «need-to-join» rule show up and claim participation at such a General Meeting, the meeting would however have to be cancelled and reconvened, since such shareholder could not be validly excluded from the General Meeting for lack of said order. In case of violations, organizers are subject to criminal sanctions (*cf.* art. 10f COVID-19 Ordinance 2).

Holding of a General Meeting

A General Meeting carried out under art. 6b COVID-19 Ordinance 2 is an actual meeting taking place on a certain date, at a certain time and at a certain place, but without shareholders (to the extent they qualify as participants) being physically present. Therefore, circular resolutions are still not admissible!

There are different possibilities for shareholders to exercise their rights remotely:

In writing

If the company orders its shareholders to exercise their rights in written form, it may provide them with a written form which lists every agenda item and motion; shareholders need to be able to tick *yes*, *no* or *abstention* for each motion and sign the form. In addition, the company should indicate how the votes will be taken into account if the shareholder does not tick anything on the form or with regard to a specific motion, but returns the form nevertheless signed. Shareholders should be urged to return the form to the companies within a specified period of time; otherwise their votes will not be taken into account. The instruction by the company should specify that the signed form needs to be returned.

The FOJ states that shareholders have to provide signed originals of the form or, if submitted electronically, attach an authenticated electronic signature to the form.

In electronic form

If the company wishes to allow shareholders' to exercise their rights in electronic form, the same procedure set out above may be followed, except that shareholders do not necessarily have to sign the form and must return it by electronic means. With a view to the reduced evidential value of electronic transmission, this option should not be allowed where a controversial vote is anticipated and only accept forms returned from an email address registered in the shareholder register of the company. In any case, the Board has to assure eligibility of participants and the number of votes.

The process suggested by the FOJ is, however, different: The FOJ implies that all participants meet electronically (which is not possible by way of email) and therefore, a telephone or video conference is permissible (*cf.* FAQ). According to the FAQ, no «residual meeting» takes place as not only shareholders, but every person required to participate (such as the chairman and the auditor) is allowed to participate by electronic means. This

interpretation becomes noticeable in the unofficial English translation of art. 6b COVID-19 Ordinance 2 which states that shareholders may exercise their rights «online», whereas the legally binding wording of COVID-19 Ordinance 2 in German, French and Italian states clearly that shareholders may exercise their rights «in electronic form». The latter wording is similar to the one of art. 9 of the Ordinance against excessive compensation in listed corporations (OaEC) according to which shareholders may provide proxies and instructions also electronically: Listed companies are free to implement suitable measures as long as they ensure the identification of the sender / shareholder as well as stable ways for transmission. According to the prevailing doctrine on art. 9 OaEC, proxies and instructions may not be given via telephone because the speaker cannot be identified – at least not to a satisfactory extent. Thus, while we agree that the interpretation of the FOJ on the electronic form under COVID-19 Ordinance 2 has certain advantages from a practical point of view, telephones as «electronic» means should not be used for meetings involving large numbers of shareholders.

By an independent proxy

If shareholders are required to cast their votes through the proxy, they will receive a respective form. Unless elected by the General Meeting in line with the rules on «Say and Pay» pursuant to the OaEC, the independent proxy is appointed by the Board. Such proxy has to meet the applicable independence criteria (*cf.* art. 728 CO). Proxies and instructions may be given electronically.

Neither the SFC nor the FOJ states explicitly whether a combination of the means in art. 6b para. 1 letter a and b COVID-19 Ordinance 2 is allowed (for example exercise of voting right through an independent proxy, exercise of right to ask questions in electronic form). Considering the overhead and complexity of such a combination, only exceptional circumstances may justify ordering several means of art. 6b para. 1 letter a and b COVID-19 Ordinance 2.

In consideration of the abovementioned possibilities, non-listed companies that do not have a large shareholder base, respectively their Board, may prefer to order that their shareholders exercise their rights in writing or in electronic form, whereas listed companies, respectively their Board, may order that their shareholders exercise their rights through an independent proxy only.

The mentioned possibilities for shareholders to exercise their rights remotely apply to all agenda items of the General Meeting, including items respectively resolutions requiring certification (*cf.* FAQ).

Irrespective of the approach chosen, resolutions and elections of the General Meeting will need to be established in proper minutes: Shareholders not returning the voting form / proxy within the set deadline are not present / represented. Shareholders returning the voting form but not ticking a voting option are to be counted as abstentions (in case of voting forms) or as per the default voting options stipulated in the proxy (in case of proxies) for resolutions affected. The chairman of the General Meeting receives (or even calculates on his own, as applicable) the votes cast and confirms the results in the minutes.

Time Frame for General Meetings carried out under art. 6b COVID-19 Ordinance 2

Art. 6b COVID-19 Ordinance 2 shall apply until 10 May 2020 and, within this time frame, the Board may order the exercise of shareholders' rights by the abovementioned means (*cf.* art. 12 para. 8 COVID-19 Ordinance 2). In its FAQ, the FOJ makes clear that the decisive factor is when the organizer issues the order (i.e. until 10 May 2020) and not when the General Meeting actually takes place (i.e. even after 10 May 2020). However, we believe there is a certain risk that the resolutions taken by the General Meeting could be challenged or even deemed null and void if the Board called a General Meeting scheduled long after 10 May 2020 inclu-

ding an order for shareholders to exercise rights remotely, in particular if its primary motivation is to avoid «nasty» questions by certain shareholders at the General Meeting.

Put into practice, the following should be considered:

General Meeting has already been called

If the Board has already convened the General Meeting, it may subsequently order the exercise of shareholders' rights in writing, in electronic form or by an independent proxy, subject to the announcement of the order four days before the date of the General Meeting.

If, at the time the order has been issued, a shareholder had already empowered someone (other than the independent proxy) to represent such shareholder at the General Meeting, then such proxy has to consult the shareholder to determine if the proxy may exercise the shareholder's rights in writing, in electronic form or through the independent proxy. However, this approach may be cumbersome if the proxy was appointed by several shareholders and has very limited time for said consultation. In such a situation we believe it may be reasonably assumed that the shareholder and the proxy would have agreed to allow the proxy to exercise the shareholder's rights in writing, in electronic form or by an independent proxy, respectively, had they been aware of the order in advance. Therefore, the proxy may under such circumstances abstain from consulting the shareholder(s) and exercise the rights in the manner ordered.

General Meeting has not yet been called

If the Board has not yet convened the General Meeting, it may include the order in the invitation. In any case, the Board may also convene the General Meeting and thereby reserve the right to issue the order at a later stage. After 10 May 2020, the General Meeting will be governed by the CO and not by the COVID-19 Ordinance 2, unless the term of validity of the

COVID-19 Ordinance 2 is extended once more. Consequently, shareholders will be entitled to attend the General Meeting in person, unless the Board has issued an order on the exercise of shareholders' rights in the timeframe set by the COVID-19 Ordinance 2.

Conclusion

The current situation is challenging in many respects, including the navigation within a legal framework which was changed by SFC on very short notice, may change again, and as a result of these extraordinary measures, includes several ambiguities. We believe any good faith interpretation and application of the COVID-19 Ordinance 2 will have a fair chance of sustaining legal scrutiny before a Swiss court; conversely, any abuse of the rules to limit (shareholder) rights in pursuit of undue benefits/advantages will have low chances of being judicially protected.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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