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News - March 2021

The New Swiss Corporate Law

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Switzerland is known for its efficiency but also for its slow political and legislative pace. After 13 years of parliamentary debates and step-by-step progress, the New Swiss Corporate Law is completed finally. This newsletter presents the main changes introduced by this new law.

In 2013, the Swiss people accepted the Initiative against abusive pay, which requires from Swiss listed companies to have all remunerations of the members of the Board of Directors (BoD), Executive Board and Advisory Committee approved by the Shareholders meeting each year. It also prohibits severance pay, early remuneration (e.g. entry bonuses) and other bonuses.

Consequently, in 2016, the Federal Council published its bill of the last part of the reform of Swiss corporation law [1]. The Parliament approved it on June 19, 2020. This new law is important and innovative in many ways.

The Federal Council announced that the new corporate law would enter into force by **2022**, except for the gender representation guidelines, which became effective on **January 1, 2021**. No referendum was requested against the new package.

Three topics are highlighted in this newsletter:

(I) Shareholders' rights and capital/accounting rules;

(II) the transposition into the Swiss Code of Obligations of the Initiative against abusive pay; and

(III) the introduction of a gender representation principle on the BoD and management of big listed companies (as well on tightening equal pay implementation).

Some comments close these analyses.

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[1] The new law is intended for corporations mainly, but some of the changes also have effects on Swiss limited liability companies and cooperatives. However, we will not detail these changes in this newsletter.

I. Shareholders' rights and capital/accounting rules [2]

See the synoptical table hereunder at § 6.

1) *General Meetings of Shareholders*

➔ Until now, Swiss corporate law did not set many rules on how to hold the Shareholders meetings (so-called General Meetings or "GM").

To follow the evolution of society, the new law allows for all companies to organize **Virtual General Meetings** – without physical venue – if (a) the articles of association provide for it and (b) an independent proxy is appointed for the virtual meeting. For unlisted companies, the articles of association may waive the second requirement of appointing an independent proxy.

➔ Another innovation introduced by the new law is the admissibility of **General Meetings outside of Switzerland**. The same requirements are to be followed as for the Virtual General Meetings, as well as to the exception for unlisted companies.

The General Meetings may also be **held in more than one place**, provided that all necessary audiovisual resources broadcast live to all venues. The law however specifically states that all these innovative ways to hold the General Meetings **must not complicate** the exercise of any shareholder's rights.

➔ The law also partly lowers the threshold for the **notice of the General Meetings from shareholders**. Previously, it was required for all companies that the shareholders should represent min. 10% of the company capital. With the new law, the threshold remains of 10% for unlisted companies. However, for listed companies, it decreases to 5%.

In the same vein, **shareholders may add an item** to the General Meeting agenda if, for unlisted companies, they represent 5% of the capital or of all votes, respectively for listed companies, 0.5%. Previously, the shareholders had to represent min. CHF 1'000'000.- of shares (par value).

2) *Nota Bene: The effect of the COVID-19 pandemic on General Meetings*

The pandemic has had an astonishing effect of accelerating the implementation of some measures that had been discussed in Parliament regarding the new law.

In derogation with the current law and within a 4-days notification, the holder of the General Meeting may require the shareholders to express their votes exclusively in writing or in electronic form, or through an independent representative designated by the GM host. These new prescriptions are close to the Virtual General Meeting that the new law is introducing.

[2] These provisions will come into force in 2022.

3) *New Information Rights for Shareholders*

So far, the shareholders could request the Board of Directors to be informed on the company's business and on the auditor report during the GM. However, the BoD was entitled to set aside the request if said information was to compromise business secrecy or other interests worth of protection of the company. The shareholders' only option would then to file a claim to the Tribunal.

The new law strengthens the shareholders' information rights. In the case of **unlisted companies**, shareholders representing 10% of the share capital or of the votes may request the BoD to be informed on the company's business. The BoD will have to give the access within 4 months after receipt of said request. Any refusal from the BoD must be given in writing and is subject to appeal to the Court within 30 days. These information rights are not given to **listed companies**.

Nevertheless, shareholders representing 5% of the capital or of all votes may **consult the books and files** of the company (be it listed or not). The proceedings follow the same path than for information rights.

4) *Special Examination*

After having exercised his information rights, any shareholder may request to the General Meeting a special examination from independent experts. If the General Meeting refuses, the shareholders may appeal to the Court, provided that they represent 10% (unlisted companies), respectively 5% of the capital or of the votes (listed companies).

Previously, this right was restricted to shareholders representing 10% of the capital or with shares of min. CHF 2'000'000.- (par value).

5) *Capital Structure, Reserves and Dividends*

➔ While until now all Swiss companies had to have their share capital in Swiss francs, the new law allows to issue it in **foreign currency**. It must be the most important currency used in the company's activities and represent at least the countervalue of CHF 100,000 at the time of the foundation. The same currency is used for commercial accounting and bookkeeping purposes.

➔ **Capital increase authorization** is known by the current Swiss law. It allows companies to provide for a flexible statutory capital by authorizing the BoD for 2 years maximum to increase the capital without the shareholders' approval. The margin may not exceed 50% of the capital registered in the commercial registry. This option must be specifically provided for in the articles of association.

The new law extends the authorized period to 5 years maximum and, in addition to increase the capital, it allows to decrease said capital, without the shareholders' approval. The maximum fluctuation range is +/- 50% of the registered capital and it must also be provided for in the articles of association.

➔ The new law gives the possibility to **reevaluate buildings or holdings**, up to their real value, in case of capital loss or over-indebtness. The amount of the increase of value must be shown separately in the legal reserve. The auditors must certify that the legal requirements are met. The dissolution of said reserve may be done only by conversion into share capital, asset value adjustment or disposal of the revalued assets.

➔ Another innovation resides in the guidelines for **legal reserves**, which have been made clearer. Until now, the legal reserve was funded by 5% of the annual profits up until it reaches 20% of the share capital. In addition, the reserve would be funded by agios, any amount remaining on forfeited shares (minus any shortfall on the shares issued in return) and 10% of the profit after payment of a 5% dividend.

The new law changes the funding methods of the legal reserves. The legal reserve from capital is funded by agio, additional contributions and payments from shareholders/participants. The legal reserve from profit is funded by 5% of the profit for the financial year after elimination of any carried-forward loss. The company is compelled to assign these funds to their respective legal reserves until said reserves reach together 50% of the share capital issued (20% for holding companies). If both reserves exceed these thresholds (50%/20%) of the share capital, the surplus may be reimbursed to the shareholders.

➔ **Losses must be compensated** with, in the following order: (1) the profit carried forward; (2) optional reserves arising from the profit; (3) the legal reserve from the profit; (4) the legal reserve from the capital. The goal is to avoid presenting an annual loss and a profit carry-over at the same time in order to respect the principle of clarity and intelligibility. However, the new law allows residual losses to be partially or fully carried forward instead of being compensated with the legal reserve from profit or capital.

➔ **Interim dividends** may be distributed if the interim accounts have been prepared and audited beforehand. The decision is left to the shareholders at the General Meeting. Until now, Swiss law only authorized extraordinary dividends, which distributed to the shareholders on extraordinary GM. The extraordinary dividends are net profits from previous years that could have been distributed at that time.

➔ The so-called **return of the benefits** is a principle Swiss law has known for a long time. Under this principle, when members of the BoD, shareholders or persons close to them receive dividends or any other profits unduly and in bad faith, they must return the benefits they received. If the payment is justified but the amount itself is out of proportion in regard with the company's financial situation and the appropriate consideration for the payment, the latter also will have to return the benefits.

The new law reinforces this concept by expanding its application to the persons in charge of management (also *de facto* bodies) and members of the advisory committee. The type of payments is extended to compensation, reimbursement of the legal reserve from the capital, reimbursement of the legal reserve from the profit and other "reimbursements". Liability criteria are defined as the amounts unduly received (i.e. bad faith is no longer required). The new law also suppresses the notion of "economic situation of the company" and requires only a disproportion between the services and the financial consideration. Finally, the active legitimacy to file a claim is broadened to include the creditor in the event of an intra-group situation.

6) *Summary of the shareholders' rights and capital/accounting rules*

	Current law	**New law**
Virtual GM	N/A.	New. For unlisted companies: possibility to waive the independent proxy.
GM outside of Switzerland	N/A.	New.
GM in more than one place	N/A.	New.
Notice of the GM from shareholders	If they represent 10% of capital.	Listed companies: 5% of the capital. Unlisted companies: 10% of the capital.
Additional item to GM by shareholders	If they represent CHF 1 mio of the shares (par value).	If they represent: • listed companies: 0.5% of the capital/votes • unlisted companies: 5% of the capital/votes
New information and consultation rights for shareholders	Any shareholder may request information. BoD may set the request aside if the information was to compromise business secrecy or other interests worth of protection.	Shareholders representing 10% of capital/votes may request to be informed on the (unlisted) company's business. Any refusal from the BoD is subject to appeal to the Court. Shareholders representing 5% of the capital/votes may consult the company's book and files (listed and unlisted companies).
Special examination request to the Tribunal	If the shareholders represent 10% of the capital or CHF 2 mio of shares (par value).	If the shareholders represent 10% of the capital or votes (unlisted companies) / 5% of the capital or votes (listed companies).

Currency of the capital	Only CHF.	Foreign currency accepted.
Capital fluctuation margin	For 2 years, up to 50% of the capital. Limited to increase.	For 5 years, up to 50% of the capital. Extended to increase & decrease.
Reevaluation of buildings or holdings	Not authorized.	New. Only in case of capital loss or over-indebtness.
Legal reserves	Funded by 5% of annual profits until it reaches 20% of the capital. Funded by agios, any amount remaining on forfeited shares and 10% of the profit after payment of a 5% dividend.	Reserve from capital: funded by agio, additional contributions and payments from shareholders or participants. Reserve from profit: funded by 5% of the annual profit. Must reach together 50% of the issued capital (20% for holding companies).
Compensation of losses	Not compulsory.	Losses must be compensated with: 1. the profit carried forward 2. optional reserves arising from the profit 3. the legal reserve from the profit 4. the legal reserve from the capital
Interim dividends	N/A. However, extraordinary dividends could distribute net profits from previous years to shareholders.	New. Interim accounts must be established and audited beforehand.
Return of the benefits	Restricted to members of the BoD, shareholders or person close to them. Limited to dividends or any other profits. Necessity to prove disproportion with the company's financial situation and consideration for the payment.	• Extended to the persons in charge of the management (also *de facto* bodies) and members of advisory committee. • Expanded to compensation, reimbursement of one or the other legal reserve and other "reimbursements". • Liability criterion decreased to the amount unduly received. • Suppression of the notion of disproportion. • Active legitimacy includes the creditor in the event of intra-group.

7) *Nota Bene: Responsible Business Initiative*

The initiative for responsible business was rejected by popular vote on November 29, 2020. It required from companies based in Switzerland to ensure the respect of Human rights and to internationally recognized environmental standards. These companies should have carried out these controls for their activities in Switzerland, but also for those abroad. The multinationals were to be liable for damages caused by their subsidiaries, but not for the actions of their suppliers.

Because the initiative was rejected, the alternative act enacted by the Parliament will enter into force. It does not explicitly regulate the liability of the parent company for foreign controlled companies, nor does it introduce new standards. Nevertheless, it provides for new obligations: in the future, the large **companies (e.g. more than 500 employees, balance sheet total of CHF 20 million) will have to annually report on their Human rights and environmental policies**. They will also be required to exercise due diligence with regard to child labor and war minerals. In the event of a breach of their obligation to report, a fine of up to CHF 100,000 will be requested.

II. Transposition of the Initiative against abusive pay

The Initiative voted in 2013 aimed to increase the control of the Shareholders meeting on the salary and bonuses of the members of the BoD, as well as of the Executive Board and Advisory committee. The initiative was first implemented through the Ordinance of the Federal Council of November 20, 2013, which states that the Shareholders meeting is the sole body authorized to (1) elect the members of the BoD, of the Compensation committee and the independent proxy, as well as (2) vote the compensation of the BoD and of the persons to whom all or part of the management of the company has been delegated by the BoD and of the Advisory committee.

The new corporate law gives a formal legal basis to these rules, including the creation of *ad hoc* Compensation committees within companies, in charge to ensure the application of said principles. This body is already in place in many big companies.

The new law also prohibits:

- hiring allowances that do not compensate for a financial established disadvantage;
- in case of prohibition of competition, compensation not justified by commercial practice or exceeding the average pay for the last three years; and
- allowances related to a previous tenure not in line with commercial practice.

The articles of association must limit the number of tenures that members of the BoD, advisory committee and management may have in other companies. However, parent and subsidiaries companies are not included in this requirement.

All these rules only apply to listed companies. Unlisted companies may voluntarily provide in their articles of association for the application of these rules, opt for less stringent ones or keep their current model.

III. Gender Representation and equal pay

1) *Introduction of gender quotas in corporate law*

Listed companies must reach the quota of at least 30% of each sex (male and female) on the BoD and 20% in the management. If these benchmarks are not met, there are no sanctions, but the remuneration report must explain the reasons for deviating from the new guidelines and detail the measures for improvement which the company will be taking. These requirements do not apply to unlisted companies.

The Federal Council anticipated the entry into force of these requirements, which are now applicable **since January 1, 2021**.

Listed companies have until **January 1, 2026** to comply for the BoD and until **January 1, 2031** for the Management.

2) *Equal pay review*

To improve the implementation of **equal pay between men and women**, the legislator has amended the Gender Equality Act and enacted a new ordinance (Ordinance on the **verification of equal pay analysis**).

According to the Ordinance [3], companies with at least 100 workers have to:
1. proceed with an equal pay review;
2. in the year following said analysis, verify if the review has been correctly performed; and,
3. in the year following this verification, inform the employees of the result of the review. Shareholders of listed companies must also be informed.

This procedure must be carried out until **June 30, 2021**. In the end, if the company still does not respect equal pay rights, it must repeat the procedure 4 years later. However, this requirement ends on June 30, 2032.

[3] The new equal pay Ordinance came into force on July 1, 2020. The principle of equal pay has been first enacted in the Federal Constitution in 1981.

IV. Comments

Throughout the discussions between the two Chambers of the Swiss Parliament, many creative and practical ideas were raised. Some of them did not pass the final vote and thus were abandoned.

For instance, a proposition was made to cancel the requirement of the notarized form at the foundation of the company provided that the articles of association would follow an official template the Federal Council would have provided. The same was also discussed in case of amendment of said articles.

Another example lies with the fact that the obligation to "return the benefits" unduly received remained and was reinforced.

The Parliament debated on a possible mitigation of the auditors' liability when only minor fault was committed by the latter. This modification was not adopted in the end. All in all, the level of the auditors' liability remained the same.

The so-called Responsible Business Initiative, if accepted, would have raised significantly the liability standards of Swiss companies compared to other developed countries.

The disclosure obligation finally enacted is in line with current standards.

The new law has enacted corporate governance rules which are well established for listed companies. It should be noted that state-owned corporations still enjoy certain derogations for historical and federal considerations.

Whereas quotas for gender representation still are much debated, Switzerland embarks on a clear and moderate path, however limited to listed companies. This move comes as the country celebrates the 50th anniversary of women's citizenship at Federal level.

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Globally, it should be noted that all the legal changes presented above **widen the gap between unlisted and listed companies in Switzerland**. Without say, the legislator is creating thereby two different models: the ordinary corporations that fits small and medium businesses, and the listed or public company that is more akin to the original capitalistic model of the "*société anonyme".*

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