

Practical guide on the new company law

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The new Swiss corporate law came into effect on January 1, 2023. Here is a practical guide to the new possibilities for shareholders and boards of directors. Companies have been given two years (until January 1, 2025) to bring their articles of association into compliance with the new law. ¹

Lexicon (in order of appearance):

Abbreviation	Meaning
CO	Swiss Code of Obligations
GM	General Meeting of the shareholders
BoD	Board of Directors
CRO	Swiss Commercial Register Ordinance
LR	Legal Reserve

I. CHANGES FOR THE SHAREHOLDERS ²

What	Who	How
Convening of the GM by shareholders 699 CO	Listed companies: shareholders representing ≥ 5% of the capital/votes Unlisted companies: shareholders representing ≥ 10% of the capital/votes	Write to the BoD to request the convening of a GM. This communication should include the agenda and proposals.
Additional item on the GM agenda 699b CO	Listed companies: shareholders representing ≥ 0.5% of the capital/votes Unlisted companies: shareholders representing ≥ 5% of the capital/votes	Write to the BoD to add an item to the agenda. Interested shareholders may give reasons for their request, which will then be recorded in the agenda.

¹ This newsletter does not address the widely discussed amendments related to the gender representation quotas in the bodies of public limited companies, nor with the transposition of the Ordinance against Unfair Remuneration in Public Limited Companies (ORAb) into the new law.

² Changes effective January 1, 2023, are shown in bold.

What	Who	How
Right to be informed 697 CO	Any shareholder	Question to the BoD at the GM. <u>In the case of unlisted companies,</u> shareholders representing $\geq 10\%$ of the capital/votes may make their request in writing to the BoD at any time. The BoD may reject the request providing the information would jeopardize business secrecy or other interests worthy of protection. Any unjustified refusal may be appealed to a judge.
Inspection of the company's books and records 697a & 697b CO	shareholders representing $\geq 5\%$ of the capital/votes	Request to be addressed to the BoD, which has four months to grant access. The BoD may reject the request providing the information would jeopardize business secrecy or other interests worthy of protection. Any unjustified refusal may be appealed to a judge.
Special examination 697c & 697d CO	Shareholder who has exercised his right to be informed or his right of inspection	Proposal to the GM to have certain facts investigated by one or more independent experts. <ul style="list-style-type: none"> ○ If the GM agrees, the company or any shareholder can request the appointment of the expert by the judge. ○ If the GM refuses, only the shareholders representing $\geq 10\%$ (unlisted companies), resp. $\geq 5\%$ (listed companies) of the capital/votes can appeal to the judge. The latter shall order a special examination when it is made likely that the founders or governing bodies of the company have violated the law or the articles of association <u>and</u> that this violation is detrimental to the company or the shareholders.
Interim dividends on the current fiscal year 675a CO	General Meeting	Interim financial statements to be prepared and audited. Decision taken by the GM.

II. CHANGES FOR THE BOARD OF DIRECTORS

What	Concerning	How
Currency 621 & 653j CO 45a & b CRO & Schedule 3	Share capital in foreign currency	The list of authorized currencies is exhaustive: CHF, EUR, USD, GBP and JPY. In order to adopt a foreign currency, it must (1) be stated in the articles of association, (2) be used for all accounting purposes, and (3) the foreign currency value must correspond to an equivalent in Swiss francs of \geq CHF 100,000 at the time the capital is established in the foreign currency.
GM 701a I CO, 701b CO & 701d CO 22 CRO	Organization	The BoD decides on the place where the GM is held. This decision must not unduly affect the exercise of the shareholders' rights. <ul style="list-style-type: none"> ○ In case of multiple locations, the speeches are broadcasted live. ○ Voting by electronic means must avoid any risk of falsification and any participant must be able to take part in the debates. In the event of technical problems affecting the proceedings, the meeting must be reconvened.
	Virtual meetings (i.e. without physical location)	This must be (1) provided for in the articles of association , and (2) the BoD must appoint an independent representative of the shareholders in the notice of meeting , to whom the shareholders may give a mandate. <u>For unlisted companies</u> , the articles of association may provide for the waiver of the appointment of an independent representative in the notice of meeting.
	Outside of Switzerland	
Variation in capital 653g & 653s CO 59a to 59c CRO	Duration of the authorization to the BoD and capital fluctuation margin	This must be provided for in the articles of association; limitations: <ul style="list-style-type: none"> ○ A maximum fluctuation margin of +/- 50% of registered capital. ○ Authorization valid for a maximum of 5 years.
	Simultaneously in several locations (Switzerland and/or abroad)	
Revaluation of balance sheet items 725c CO	Real estate or holdings	In the event of capital loss or over-indebtedness, it is possible to revalue properties or holdings in the balance sheet up to their actual value, if: <ul style="list-style-type: none"> ○ Separate indication in the LR of the amount of the increase in value. ○ Certification by the auditor that the legal requirements have been met. Dissolution of the reserve exclusively by conversion into share capital or participation, by value adjustment or by disposal of the revalued assets.
Legal reserves	In general	<ul style="list-style-type: none"> ○ Distinction according to the financing of the legal reserves (see following

What	Concerning	How
671 & 672 CO		sections). <ul style="list-style-type: none"> ○ Allocation of the company's equity to its respective LR until they together reach 50% of the issued share capital (20% for holding companies). ○ If this is exceeded, surplus refundable to shareholders.
	LR from the capital	Funded by agio, additional contributions, payments withheld on the cancelled shares ³ , and payments from shareholders/participants.
	LR from the benefit	Funded by 5% of the profit for the financial year after elimination of any carried-forward loss.
Losses set-off 674 CO	Must be done following a specific 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. Possibility for residual losses to be partially or fully carried forward instead of being compensated.
Return of the benefits in case of unduly and in bad faith obtained dividend or any other profits 678 CO	<ul style="list-style-type: none"> ○ Members of the BoD and the persons close to them, ○ Persons in charge of the management (also <i>de facto bodies</i>), ○ Members of advisory committee. 	Expanded type of benefits : <ul style="list-style-type: none"> ○ Compensations ⁴, ○ Reimbursement of the LR from the capital, ○ Reimbursement of the LR from the benefit, and ○ Any other profits unduly received. Liability criterion ⁵ decreased to the amount unduly received. Thus: <ul style="list-style-type: none"> ○ Suppression of the bad faith criteria ○ Suppression of the notion of “economic situation of the company”.

³ When shareholders do not pay up their shares in due time, the Board of Directors may declare that they forfeit the rights resulting from their subscription and that their payments are acquired by the company. The old shares will be cancelled, and new shares will be issued instead.

⁴ Such as dividends, directors' fees, other profit shares, remuneration and interim interest.

⁵ Art. 678 CO covers the repossession of property and the conclusion of other legal transactions. Breaches of duty in connection with Art. 678 CO are subject to the liability of art. 754 CO.