Shareholders' rights in private and public companies in Switzerland: overview

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A Q&A guide to shareholders' rights in private and public companies law in Switzerland.

The Q&A gives an overview of types of limited companies and shares, general shareholders' rights, general meeting of shareholders (calling a general meeting; voting; shareholders' rights relating to general meetings), shareholders' rights against directors, shareholders' rights against the company's auditors, disclosure of information to shareholders, shareholders' agreements, dividends, financing and share interests, share transfers and exit, material transactions, insolvency and corporate groups.

To compare answers across multiple jurisdictions, visit the shareholders' rights in private and public companies *Country Q&A tool*.

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Types of limited companies and shares

1. What are the main types of companies with limited liability and shareholders? Which is the most common? Which type do foreign investors most commonly use?

In Switzerland there are three types of companies which truly enjoy limited liability:

- Corporation limited by shares (*société anonyme* (SA) or *Aktiengesellschaft* (AG)) (Corporation).
- Limited liability company (*société à responsabilité limitée* (Sàrl) or *Gesellschaft mit beschränkter Haftung* (GmbH)) (LLC).
- Cooperative (*société coopérative/Genossenschaft*).

With a few notable exceptions, the Cooperative is now rarely used in Switzerland to conduct profit-driven commercial activities, as its capital and governance structure is generally ill-suited to this type of activity.

The Corporation and the LLC are the most common forms of limited liability companies in Switzerland. These forms are widely used across all industries to conduct all types of profit-driven commercial activities, from a pure holding activity to heavy industrial production.

The Corporation is by far more prevalent than the LLC. This form is also chosen by persons who prefer not to have their name publicly disclosed as shareholders in the commercial registry, as is the case for an LLC. Due to a recent modernisation of the provisions of the Swiss Code of Obligations governing the LLC, this form of company is becoming more popular. Because its governance structure is simpler than the governance structure of the Corporation, Swiss subsidiaries of large international groups are increasingly being structured as LLCs.

Both the Corporation and the LLC have a stated capital, divided in shares (for the Corporation) or in equity quotas (for the LLC), which will be referred throughout this article as the "shares".

2. What are the minimum share capital requirements for companies?

Swiss law requires the Corporation to have a minimum stated capital of CHF100,000. At the time of incorporation, 20% of the stated capital of a Corporation (or CHF50,000, whichever is higher) must be paid up by the founders.

Swiss law requires the LLC to have a minimum stated capital of CHF20,000. At the time of incorporation, 20% of the stated capital of a LLC or CHF20,000, whichever is higher, has to be paid up by the founders.

There is no upper limit to the stated capital of a Corporation or an LLC.

3.Briefly set out the main types of shares typically issued by a company and the main rights they provide. Set out the other main financial instruments (for example, bonds) and participation instruments that can be issued by a company.

Corporations

The Corporation can issue either bearer shares or registered shares. It is possible for a Corporation to have both types of shares outstanding at the same time. The shares issued by a Corporation have a par value. The minimum par value of a share is CHF0.01. In the contemplated reform of Swiss corporate law (not expected to enter into force before 2020), the minimum par value of CHF per share would be abrogated.

Unless the articles of association provide otherwise, the voting rights attached to a share are proportional to the par value of such share. It is not possible to issue shares without voting rights. Each share grants to its holder a right to a portion of dividend and liquidation proceeds proportional to its par value. It is not possible to issue shares with absolutely no right to the dividend or liquidation proceeds. A Corporation can issue different classes of shares. Each class of shares can have a different par value. However, the par value of the class of shares with the highest par value cannot exceed ten times the par value of the class of shares with the lowest par value.

Different rights and privileges can be attached to each class of shares if the articles of association of the company so allow. Two main categories can be distinguished: preferred shares as to their voting rights and preferred shares as to their economic rights. With regard to the first category, the articles of association of the Corporation can provide that each share, irrespective of its par value and its class, has only one vote (one share one vote). In such a case, the class of shares with the lowest par

value will be considered as benefiting from a voting privilege since for a lower investment it will grants its holder with the same voting right as the higher par value class of shares. With regard to the second category, the most commonly granted privileges are preferred rights of dividend or preferred right of liquidation, but it is also possible to provide other types of rights and privileges such as a privilege on the first subscription on a future issuance of shares.

The corporation can issue participation certificates and profit sharing certificates. Participation certificates have a par value and form part of the stated capital of the company. The holders of participation certificates are entitled to the financial rights and privileges set out in the articles of association. Participation certificates have however no voting rights and cannot be granted any of the social rights typically attached to shares. Because participation certificates can be granted the same financial rights as ordinary shares, they are often referred to as non-voting shares. It is possible to issue different classes of participation certificates.

Profit sharing certificates have no par value and do not form part of the stated capital of the company. The rights and privileges attached to profit sharing certificates are set out in the articles of association. Profit sharing certificates can only grant a right to a share of the dividend or liquidation proceeds or the right to subscribe new shares.

The Corporation can issue notes, bonds and other financial instruments such as options, warrants and so on.

Issuance of shares or bonds by a Corporation to the public in Switzerland requires the preparation of a prospectus in compliance with the relevant provisions of the Swiss Code of Obligations, the Swiss Collective Investment Schemes Act and the listing rules set out by the SIX Swiss Exchange. Shares or bonds issued by a Corporation can be listed on an exchange in Switzerland or abroad.

LLCs

An LLC can issue registered equity quotas. Equity quotas cannot be issued in the bearer form. The equity quotas issued by an LLC have a par value. The minimum par value per equity quota is CHF100.

An LLC can issue different classes of equity quotas, as well as participation certificates and profit sharing certificates. The articles of association of the LLC set out the rights and privileges attached to the equity quotas, participation certificates and profit sharing certificates.

Equity quotas issued by an LLC cannot be listed on an exchange in Switzerland or abroad.

4. What is the minimum number of shareholders in a company?

The minimum number of shareholders for a Corporation or an LLC is one shareholder.

General shareholders' rights

5. What are the general rights of all shareholders? How can shareholders' rights be varied (for example, additional rights attaching to a class of shares, or limitations on shareholders' rights?) Are such variations generally provided in the company's bye-laws and shareholders' agreements?

The basic rights of any shareholder are:

- The right to vote.
- The right to receive a share of the profit or liquidation proceeds.

These two rights can be limited in the articles of association but can never be entirely excluded.

Each shareholder has a right of first subscription with respect to any issuance of new shares by the company. This right can only be limited or excluded by a resolution of a qualified majority of the shareholders, and only if the company has a valid reason to do so. Financing new acquisitions or supporting employee stock option plans are examples of a valid reason where the right of first subscription of shareholders can be validly extinguished. Conversely, defending against a hostile tender offer is not considered as a justified ground for excluding the right of first subscription.

With respect to the right to be represented at the board, Swiss law provides that if there is more than one class of shares with regard to voting or property rights, the articles of association must provide that each class of shareholder can elect at least one representative to the board of directors.

Each shareholder has a right to receive each year a copy of the:

- Audited accounts of the company.
- Management report of the board of directors.
- Audit report of the auditors.

Each shareholder has, in addition, the right to ask questions during the shareholders' meeting to the board of directors and the auditor. Information requested by the shareholder must be provided to the extent that such information is necessary for the shareholder to exercise its rights. Information can be refused if it puts in jeopardy the business secrets of the company or other worthy interests of the company. A shareholder can only consult the books and accounts of the company if expressly authorised to do so by the shareholders' meeting or the board of directors, and only to the extent the business secrets of the company can be preserved at the same time. In the currently proposed reform of Swiss corporate law (not expected to enter into force before 2020), the shareholders of publicly listed company representing at least 5% of the stated capital would obtain the right to ask written questions to the company outside of shareholders' meeting.

If information or the consultation of the books and accounts are refused, the shareholder can request the competent court to decide whether its request has merit or not.

Each shareholder can propose at the shareholders' meeting the initiation of a special audit to investigate specific facts, provided that both:

- Such audit is necessary for the shareholder to exercise its rights.
- The shareholder has already exercised its rights to obtain information and consult the books and accounts of the company.

If the shareholders' meeting refuses to initiate a special audit, one or more shareholders representing at least 10% of the stated capital, or shares with an aggregate par value of at least CHF2 million, can request a judge to appoint a special auditor within three months from the resolution of the shareholders' meeting refusing the special audit. The judge will appoint a special auditor if the applicants show that the company's organs have breached the law or the articles of association, and have caused a prejudice to the company or its shareholders. In the contemplated reform of Swiss corporate law (not expected to enter into force before 2020), the 10% threshold to request a special audit would be reduced to 3%, but only for publicly listed companies, and the minimum aggregate value of CHF2 million would be eliminated..

6. Briefly set out the rights of minority shareholders and the shareholding required to exercise such rights.

Swiss corporate law provides very few specific rights for minority shareholders. Minority shareholders do not have the right to nominate a representative to the board of directors. Minority shareholders can request the board of directors to summon a shareholders' meeting and/or to add an item to the agenda of the meeting only if they represent at least 10% of the stated capital or shares with an aggregate par value of CHF1 million. In the contemplated reform of Swiss corporate law (not expected to enter into force before 2020), the 10% threshold to summon a shareholders' meeting would be reduced to 5% to for publicly listed companies (the threshold would remain unchanged for privately held companies. Further, the right to add an item on the agenda of the shareholders' meeting would belong to any shareholder or group of shareholders owning 5% of the stated capital of publicly listed company. The 10% threshold of the stated capital for a privately held company would remain unchanged.

Furthermore, a shareholder can, on certain conditions, challenge resolutions passed by the GM, initiate derivative actions against directors and apply to court for the winding-up of the company.

7. How influential are institutional investors and other shareholder groups in monitoring the company's actions (for example, corporate governance compliance)? List any such groups with significant influence in this area.

Investor activism is a well-known (albeit recent) phenomenon in Switzerland which has in particular resulted in the imposition in 2014 of a stricter framework on the control of management compensation of Swiss public companies. Investor activism is mostly driven by foreign hedge funds, but home-grown activists such as the Ethos foundation have also been influential.

General meeting of shareholders

Calling a general meeting

8. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved? Which decisions must be approved by the shareholders in a general meeting?

A Corporation or LLC must hold a general meeting (GM) every year within six months from the end of their financial year.

At a minimum, the annual GM will provide for the approval of the directors' management report, the annual accounts, and the allocation of the yearly profit to the company's reserves or for distribution to the shareholders as dividend. The GM also provides for the election of the directors and auditors who are up for election or re-election.

9. Can a general meeting be held by telecommunication means or written/electronic approval?

Under Swiss law the GM can only be held physically. Attendance by videoconference, teleconference, or circular letter is not permitted. In the contemplated reform of Swiss corporate law (not expected to enter into force before 2020), it will become possible to hold a shareholders' meeting by electronic means (cyber meeting).

10. What are the notice, information, and quorum requirements for holding general meetings and passing resolutions?

The general meeting (GM) is summoned by the board of directors by sending a summons to the shareholders, or publishing the same at least 20 days before the GM. The summons includes the agenda of the meeting and the proposals of the board of directors for each item on the agenda.

Unless provisions to the contrary are provided in the articles of association, there are no quorum requirements for the GM to pass resolutions.

Voting

11. What are the voting requirements for passing resolutions at general meetings?

Voting at the GM can be conducted by a show of hands and/or a poll vote. Voting rights are specified in the company's articles of association, which can provide either for a "one vote, one share" principle or for voting rights proportional to the par value of the shares.

All classes of shares vote together, except for items for resolution which affect the right of a specific class of shares, in which case these items require the approval of both:

- All classes of shares voting together.
- The affected class of share voting as a class.

Shareholders can delegate their voting right to a proxy unless the articles of association prohibit or restrict such practice (for example, by only allowing the delegation to be given to another shareholder).

Written resolutions are only possible for LLCs, they are not possible for Corporations. In the contemplated reform of Swiss corporate law (not expected to enter into force before 2020), it will become possible to hold a GM by way of written resolutions.

12. Are specific shareholder approvals/resolutions required by statute for certain corporate actions? What voting requirements and majorities apply?

Most resolutions require an absolute majority of the voting rights attributed to the shares present or represented at the general meeting (GM). Certain resolutions require a qualified majority consisting of both:

- Two thirds of the voting rights attributed to the shares present or represented at the GM.
- An absolute majority of the par value of the shares present or represented at the GM.

The resolutions requiring a qualified majority are as follows:

- Any amendment to the corporate purposes of the company.
- The creation of shares with voting privileges.
- Any restriction to the transferability of shares.
- The creation of a conditional or authorised capital.
- Any increase of the share capital:
  - through incorporation of reserves;
  - in consideration for assets contribution;
  - for the purpose of acquiring specific assets;
  - where special benefits are granted.

- Any limitation to, or removal of, the shareholders' right of first subscription.
- The transfer of the registered seat of the company.
- The dissolution and/or liquidation of the company.
- The merger of the company.

In the contemplated reform of Swiss corporate law (not expected to enter into force before 2020), the following resolutions will also require a qualified majority:

- Consolidation of shares.
- Conversion of participation certificates into shares.
- Change in currency of the share capital.
- Delisting of the company's equity securities.
- Introduction of an arbitration clause in the articles of association.

Shareholder rights relating to general meetings

13. Can a shareholder require a general meeting to be called? What level of shareholding is required to do this? Can a shareholder ask a court or government body to call or intervene in a general meeting?

Only minority shareholders representing at least 10% of the stated capital or shares with an aggregate par value of CHF1 million can request the board of directors to summon a GM (*see Question 6*).

If the board of directors does not summon a GM despite the request of minority shareholders satisfying the above requirement, the minority shareholders can initiate court action to obtain a judicial summons to hold the requested GM.

14. Can a shareholder require an issue to be included and voted on at a general meeting? What level of shareholding is required to do this? Can a shareholder require information from the board about the meeting's agenda?

Only minority shareholders representing at least 10% of the stated capital or shares with an aggregate par value of CHF1 million can request the board of directors to add an item to the agenda of a GM (*see Question 6*).

Each shareholder has the right to ask questions during the GM to the board of directors and the auditor. Information

requested by the shareholder must be provided to the extent such information is necessary for the shareholder to exercise its rights. Information can be refused if it puts in jeopardy the business secrets of the company or other worthy interests of the company. A shareholder only has the right to consult the books and accounts of the company if expressly authorised to do so by the shareholders' meeting or the board of directors, and only to the extent the business secrets of the company can be preserved at the same time.

15. Do shareholders have a right to resolve in a general meeting on matters which are not on the agenda?

No resolutions can be passed on items which have not been duly put on the agenda, with the exception of:

- Shareholder motions for the convening of an extraordinary GM.
- The initiation of a special audit or the appointment of auditors.

Motions proposed by shareholders during the GM which fall within the scope of agenda items can be validly resolved. In addition, any item upon which no formal resolution will be passed can be discussed at the GM even if it was not included on the agenda. Finally, universal shareholders' meeting may validly discuss and pass binding resolutions on all matters within the remit of the GM, provided that the owners or representatives of all the shares are present.

16. Can a shareholder challenge a resolution adopted by a general meeting? Is a certain shareholding level required to do this? What is the time limit and procedure to challenge a general meeting resolution?

Swiss corporate law makes a distinction between the resolutions of the general meeting (GM) which are void and the ones which are merely voidable.

Under Swiss corporate law, a GM resolution is voidable if it:

- Withdraws or limits the rights of a shareholder in violation of the law or the articles of association.
- Withdraws or limits the rights of a shareholder without proper reason.
- Favours a shareholder or discriminates against one in a manner which is not justified by the company's purpose.
- Transforms the company into not-for-profit organisation without the consent of all shareholders.

Under Swiss corporate law, a GM resolution is void if it:

- Withdraws or limits the shareholders' rights to participate in the GM, the minimum voting right, the right to sue, and other rights granted by mandatory provisions of law.

- Limits shareholders' rights of control on the company provided by law.
- Disregards the fundamental structures of the company or violates the provisions for the protection of the stated capital.

Resolutions which are void can be challenged at any time by any shareholder. Resolutions which are only voidable can only be challenged within two months from the passing of the considered resolutions by shareholders who have not adhered to those resolutions.

There is no requirement for a minimum shareholding to challenge GM resolutions which are void or voidable.

To be entitled to take action, the shareholder must not have voted in favour of the challenged resolution and must have a sufficient legal interest to act. In particular, the claimant must still be a shareholder at the time he initiates court proceedings to rescind the resolution of the GM.

In the event where the court decides in favour of the claimant, the resolution of the GM will be rescinded and that rescission will be binding on the claimant, the company and all the other shareholders of the company. In the event where the court decides in favour of the company, the court will decide at its discretion on the allocation of the costs of proceedings between the company and the claimant.

Shareholders' rights against directors

17. What is the procedure to appoint and remove a director?

The directors are appointed, replaced and revoked by resolution of the general meeting (GM). The board of directors will put the election, replacement or revocation of the directors on the agenda of the GM and will outline the proposals of the board of directors in this respect.

It is customary for publicly-listed companies and for large privately-held companies to have a nomination committee whose task will be to make recommendations regarding vacancies to be filled on the board of directors.

The shareholders do not have to follow the recommendation of the nomination committee and can vote in favour of candidates which have not been vetted by the nomination committee.

The duration of a director's term is set out in the articles of association but it must never exceed six years. Directors can be re-elected, unless the articles of association provides otherwise. In large privately-held companies, the usual term for a director is one year. However, it is possible to provide for longer terms and create a staggered board. In publicly-listed companies, the term for a director is one year.

The election, replacement and revocation of directors usually require only a majority resolution. However, the articles of association can provide for a qualified majority.

18. Can shareholders challenge a resolution of the board of directors? Is there a minimum shareholding required to do this?

A shareholder can only challenge resolutions of the board of directors which are null and void, such as:

- Any resolution withdrawing or limiting the rights of shareholders or directors which result from mandatory provisions of law.
- Any resolution limiting the rights of shareholders or directors to control the company.
- Any resolution disregarding the fundamental structures of the company or violating the provisions protecting the stated capital of the company.

There is no minimum percentage of capital required to challenge a board resolution which is null and void.

19.Briefly set out the main directors' duties to the company and its shareholders. What is the potential liability of directors to the shareholders? Can their liability be limited or excluded? On what grounds can shareholders bring legal action against the directors?

The board of directors is responsible for setting the strategy which the company will pursue. In practice, the strategy will be principally formulated and proposed by the management, but it is submitted to the board for discussion and approval. The board of directors is further responsible for the corporate organisation and supervision of the company. It appoints the members of management and grants any power of representation. The board of directors has a duty to adequately select, instruct and supervise the persons to whom it delegates its power.

The board of directors is responsible for the preparation of the financial statements of the company and the annual report to the shareholders. It must take all organisational measures to ensure that the financial statements are established in accordance with the accounting principles applicable to the company, and that these accounting principles are consistently applied and the accounts are accurate. The board of directors is responsible for the design of the internal control system and the establishment of a control environment which ensures the accuracy of the accounts.

The board of directors enforces compliance by management and all delegates with:

- The law.
- The articles of incorporation.
- The bye-laws.
- The board of directors' instructions.

The board of directors is responsible for ensuring that the risks associated with the business are properly evaluated and managed. The board of directors must undertake the necessary recapitalisation measures in case of capital loss, and it is responsible for notifying the bankruptcy court if the capital is entirely lost (that is, if third party liabilities exceed the assets of

the company). The board of directors is responsible for calling the general meeting of the shareholders and for submitting audited accounts for approval. The general meeting of the shareholders must be held within six months from the end of the business year.

The directors of the company are liable towards the company and the shareholders for any losses or damages resulting from a breach of their fiduciary duties. If such breach has caused a loss or damage only to the company, a shareholder can only bring a legal action for the indemnification of the company (derivative action). If the breach of fiduciary duties is causing a direct loss or damage to the shareholder (as opposed to an indirect damage resulting from the loss or damage suffered by the company), then such shareholder can bring a legal action against the breaching director and seek direct indemnification of its damage. The claimant will have to prove:

- The breach of the director's fiduciary duties.
- The damage suffered by the company or the shareholder itself.
- The causation between the breach of fiduciary duties and the damage.
- That the breach is the result of a wilful action or the negligence of the director.

Where the board of directors has lawfully delegated the day-to-day business to a third party (such as the management), the board is exempt from liability provided that it can show that the management was carefully selected, instructed and supervised.

20. Are directors subject to specific rules when they have a conflict of interest relating to the company? Are there restrictions on particular transactions between a company and its directors? Do shareholders have specific rights to bring an action against directors if they breach these rules?

The duty of a director is to always act in the interest of the company, including when he is in a conflict of interest situation. If the director fails to act in the interest of the company and favours his/her own or a third party's interests over those of the company, and as a result causes damage to the company, he will be liable towards the company for that damage. Any shareholder will have the right to bring a derivative action against such a director and seek indemnification on behalf of the company. Swiss corporate law does not provide for specific provisions to address conflict of interest situations. There is, in particular, no legal requirement to abstain from attending meetings of the board, or abstain from casting his vote at such meeting, when a conflict of interest situation has arisen. Swiss companies will often adopt internal regulations to set out the appropriate course of action for directors in conflict of interest situations (such as disclosure, abstention from the meeting and abstention from voting).

21. Does the board have to include a certain number of non-executive, supervisory or independent directors?

The board of privately held Corporations or LLCs in non-regulated industries do not have to include non-executive or

independent directors, unless their articles of association or the organisational rules requires the appointment of such directors. In regulated industries, such as banking, securities dealing or insurance, requirements for the board to include a majority of non-executive or independent directors are common.

22. Do directors' remuneration and service contracts have to be disclosed? Is shareholder approval of directors' remuneration required?

Since 1 January 2014, remuneration and service contracts of directors and senior management of publicly-listed companies must be disclosed to the shareholders and their compensation package must be approved by the shareholders' meeting.

There are no such provision with respect to directors of privately-held companies.

Shareholders' rights against the company's auditors

23. What is the procedure to appoint and remove the company's auditors? What restrictions and requirements apply to who can be the company's auditors?

The auditors are appointed, replaced and revoked by resolution of the general meeting (GM). The board of directors will put the election, replacement or revocation of the auditors on the agenda of the GM, and will outline the proposals of the board of directors in this respect.

The election, replacement and revocation of auditors usually require only a majority resolution. However, the articles of association can provide for a qualified majority.

24. What is the potential liability of auditors to the company and its shareholders if the audited accounts are inaccurate? Can their liability be limited or excluded?

The auditors of the company are liable towards the company and the shareholders for any losses or damages resulting from a breach of their fiduciary duties. If such breach has caused a loss or damage only to the company, a shareholder can only bring a legal action for the indemnification of the company (derivative action). If the breach of fiduciary duties is causing a direct loss or damage to the shareholder (as opposed to an indirect damage resulting from the loss or damage suffered by the company), then such shareholder can bring a legal action against the auditor and seek direct indemnification of its damage. The claimant will have to prove:

- The breach of the auditor's fiduciary duties.

- The damage suffered by the company or the shareholder itself.
- The causation between the breach of fiduciary duties and the damage.
- That the breach is the result of a wilful action or negligence of the auditor.

Disclosure of information to shareholders

25. What information about the company do the directors have to provide and disclose to its shareholders? What information and documents are shareholders entitled to receive?

Each shareholder has a right to receive each year a copy of:

- The audited accounts of the company.
- The management report of the board of directors.
- The audit report of the auditors.

Each shareholder has a right to obtain a copy of the minutes of the general meetings (GMs). Each shareholder has, in addition, the right to ask questions during the shareholders' meeting to the board of directors and the auditor. Such questions can relate to the general state of the company's business or to a specific transaction. From a practical standpoint, it is advisable to communicate to the board of directors in advance the list of questions that the shareholder intends to pose at the GM, so as to enable the board of directors to be ready to answer at the GM, or to provide the shareholders with its answers ahead of the GM if the board of directors chooses to do so. The right of information of the shareholder is the same irrespective of the number of shares held. In the currently contemplated reform of Swiss corporate law (not expected to enter into force before 2020), the shareholders of a publicly listed company representing at least 5% of the stated capital would obtain the right to ask written questions to the company outside of the shareholders' meeting.

Information requested by a shareholder must be provided to the extent such information is necessary for that shareholder to exercise his rights. Information can be refused if it puts in jeopardy the business secrets of the company or other worthy interests of the company. A shareholder only has a right to consult the books and accounts of the company if he is expressly authorised to do so by the shareholders' meeting or by the board of directors, and only to the extent the business secrets of the company can be preserved at the same time.

If a request for information or to consult the books and accounts are refused, the shareholder can request the competent court to decide whether his request has merit or not.

26. What information about the company do the directors have to disclose under securities laws (where applicable)?

Publicly-listed companies must inform the market of any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts which are capable of triggering a significant change in market prices. The issuer must provide notification as soon as it becomes aware of the price-sensitive fact. Disclosure must be made so as to ensure the equal treatment of all market participants. The issuer can postpone the disclosure of a price-sensitive fact if the price sensitive fact is resulting from a plan or decision of the company itself, and its dissemination might prejudice the legitimate interests of the company. In such a case, the company must ensure that the price-relevant fact remains confidential for the entire time that disclosure is postponed. In the event of a leak, the market must be informed about the fact immediately, in accordance with the rules on disclosing price-sensitive information.

27. Is there a corporate governance code in your jurisdiction? Do directors have to explain to shareholders in the company's annual report if they have not complied with it (comply or explain approach)?

The Swiss Code of Best Practice for Corporate Governance (published by Economie Suisse) provides companies with recommendations on designing their corporate governance, and information that goes beyond the minimum requirement of Swiss corporate law. In particular, it provides for a "comply or explain" approach when the company deviates from its recommendations.

28. What information can shareholders request from the board about the company? On what grounds can disclosure of company information be refused? Are shareholders entitled to inspect the company's books and similar company documents?

A shareholder can only have the right to consult the books and accounts of the company if he is expressly authorised to do so by the shareholders' meeting or the board of directors, if such consultation is necessary for that shareholder to exercise his rights, and only to the extent the business secrets of the company can be preserved at the same time (*see Question 25*).

Once a shareholder is granted the right to inspect corporate books and/or any other corporate or accounting documents, he can do so either directly or through its legal or financial advisors.

Shareholders' agreements

29. Briefly set out the main provisions of a typical shareholders' agreement.

Shareholders' agreements are common in Switzerland and are enforceable against the shareholders who are party to them. However, shareholders' agreements are not enforceable against third parties (such as other shareholders) who are not party to them.

Shareholders' agreements typically contain provisions regarding:

- The composition of the board of directors.
- Decisions of the board of directors or the GM requiring qualified majority, the consent of a specific shareholder or board representative or subject to a certain veto right.
- Right of pre-emption.
- Tag along, drag along and other change of control provisions.
- Dividend policy and future financing, including anti-dilution protection.

Shareholders' agreements can also contain certain undertakings of one category of shareholders (for example, founders) towards another (for example, financial investors).

Shareholders' agreements governed by Swiss law usually provide for a fixed term with a mechanism of automatic renewal for further fixed-term periods. It is not advisable to enter into a shareholders' agreement for an undetermined duration, as there is a risk that under Swiss law such an agreement could be considered as terminable at will by giving a six-month written notice.

30. Are there circumstances where shareholders' agreements can be enforceable against third parties?

In principle, shareholders' agreements governed by Swiss law are only enforceable against the parties to them (or their successors).

31. Do shareholders' agreements have to be publicly disclosed or registered?

There is no requirement in Switzerland to disclose or register a shareholders' agreement entered into in relation to a privately-held company.

With respect to publicly-listed Corporations, a shareholders' agreement could result in the parties being considered as acting in concert, and the shares held by such parties will be aggregated for the purpose of complying with disclosure requirements relating to substantial shareholdings. Such disclosure is required when a shareholder, or group of shareholders acting in concert, acquires or disposes of shares and thereby reaches, exceeds or falls below the limits of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights of a Swiss Corporation listed in Switzerland.

Dividends

32. How can dividends be paid to shareholders and what procedures and restrictions apply? Is it possible to exclude or limit the right of certain shareholders to dividends? Is the payment of interim dividends allowed?

Dividend can only be distributed by a Corporation or an LLC if that company has accrued earning or distributable reserves. The distribution of a dividend by a Corporation or an LLC requires a resolution of the shareholders. 5% of the yearly profits must be allocated to the legal reserves of the company until that reserve amounts to 20% of its stated capital, it being specified that the articles of association can increase the 5% and 20% thresholds. In addition, 10% of the portion of the dividend exceeding 5% of the stated capital must be allocated to the legal reserves of the company unless that company qualifies as a holding company. As long as they do not reach 50% of the stated capital of the company, the legal reserves cannot be distributed to the shareholders and can only be used to cover losses, unless the company qualifies as a holding company. The portion of the legal reserves exceeding 50% of the stated capital can be distributed to the shareholders by way of a dividend. Swiss corporate law provides that dividend can only be distributed based on the last audited annual accounts, so in theory the payment of interim dividend (that is, dividend of the profit of the current financial year) is not possible. In practice, interim dividend is admissible provided that it is based on interim audited accounts showing distributable profits.

Financing and share interests

33. Can shareholders grant security interests over their shares?

Shareholders of a Corporation are entitled to grant security interests over their shares. In practice, it is important for the beneficiary of these security interests to review the articles of association of the Corporation for any provisions which may limit or hinder the enforcement of such security interests. Limitations in the articles on the transferability of the shares, or the percentage of stated capital or voting rights which can be held by a single shareholder, can impact the value of any security interest granted on the shares. It is common for shareholders of a Corporation to restrict their ability to pledge their shares through a shareholders' agreement.

Quotaholders of an LLC are entitled to grant security interests over their shares, except when the articles prohibit the transfer of the shares. In such a case, the granting of security interests over the shares is also prohibited. The articles of association can also submit the grant of security interests over the shares to the approval of a majority of quotaholders.

34. Are there restrictions on financial assistance for the purchase of a company's shares?

The provisions of Swiss corporate law aimed at protecting the stated capital of a Corporation limit the ability of a Corporation to guarantee the obligations of an acquirer who would have borrowed heavily to purchase the entire share capital

of that Corporation.

A Swiss Corporation can only guarantee the obligations of its controlling shareholder up to an amount which is equal to the accrued earnings and reserves of that Corporation which could be freely distributed by way of a dividend at the time the guarantee is called.

The possibilities of a "debt push-down" (through a merger of the Corporation with the acquisition vehicle) are severely limited due to Swiss tax considerations. The tax authorities will typically refuse to consider as deductible any interest paid by the Corporation on the acquisition debt.

The answer is identical with respect to an LLC.

Share transfers and exit

35. Are there any restrictions on the transfer of shares by law? Can the transfer of shares be restricted? What are the rights of shareholders in the case of an issue of new shares (pre-emption rights)?

Bearer shares issued by a Corporation are always freely transferable. Such transfer is made through the delivery to the acquirer of the share certificates incorporating the shares.

Registered shares issued by a Corporation are also freely transferable unless its articles of association subject such transfer to the consent of the board of directors. However, the transfer of shares cannot however be *per se* prohibited.

If the transfer of registered shares issued by a privately-held Corporation is restricted, the articles of association can set out the circumstances in which the board of directors is allowed to refuse its consent and therefore prevent the transfer of the shares. Such circumstances typically relate to the composition of the Corporation's shareholding (that is, to limit a concentration of shares in one shareholder) or to the independence of the company (that is, to prevent the company from being acquired by a competitor). The board of directors can also refuse its consent if the would-be acquirer does not confirm that it is acquiring the shares for itself and for its own account.

The board of directors can also refuse its consent without giving any reason for such refusal, but in such a case the board of directors must offer to buy back the shares for a price which corresponds to the value of the Corporation on a going concern basis. If the registered shares are acquired through inheritance, liquidation of matrimonial regime or through debt enforcement proceedings, the board of directors can only refuse its consent if it offers to buy back the shares for a price which corresponds to the value of the Corporation on a going concern basis. If there is a dispute between the Corporation and the shareholder on that price, the price will be determined by the courts in the context of an appraisal proceeding or by an expert if the parties agree to such appointment.

If the transfer of registered shares issued by a publicly-held Corporation is restricted, the company can only refuse its consent if the articles of association provide for a maximum shareholding's threshold, and such threshold is exceeded, or if the would-be acquirer has not confirmed that it is acquiring the shares for itself and for its own account. The consent of the board of directors cannot be withheld if the shares have been acquired through inheritance, liquidation of matrimonial regime or through debt enforcement proceedings. If the shares with a restriction of transfer issued by a publicly-listed Corporation are acquired on an exchange, the transfer of title from the seller to the acquirer occurs immediately, but the acquirer cannot exercise its voting rights and other related rights until the transfer is approved by the board of directors. If the consent of the board of directors is validly denied, the acquirer will be registered as a non-voting shareholder in the shareholders' register.

With respect to equity quotas issued by an LLC, Swiss corporate law provides that the transfer of such quotas require the approval of the general meeting (GM). The articles of association can provide that the transfer can be made without the consent of the GM. The articles of association can also set out the circumstances in which the GM is allowed to refuse its consent. The rules governing such limitations are similar to those applicable to privately-held Corporations. Furthermore, the articles of the LLC can also provide that the transfer of quotas is *per se* prohibited, it being specified that a quotaholder can then exercise an exit right for good cause.

Each shareholder has a right of first subscription with respect to any issuance of new shares by a Corporation or an LLC. Such right can only be limited or extinguished by a resolution of a qualified majority of the shareholders, and only if the company has good cause to do so. Financing new acquisitions or supporting employee stock option plans are examples of good cause justifying the limitation or extinction of the right of first subscription.

36. Can minority shareholders alter or restrict changes to the company's share capital structure?

No, unless specific provisions in the articles of association or an applicable shareholders' agreement grant veto rights to minority shareholders on certain decisions.

37. When are shareholders required to notify changes to their shareholding to a regulatory authority?

With respect to privately-held Corporations, Swiss corporate law does not provide for any authorisation or information requirement. However, Corporations which are active in a regulated industry, such as banks, securities dealer, and so on, may be required to obtain an authorisation or provide information with respect to material changes in the composition of their shareholding.

The quotaholders of an LLC are registered in the commercial register, and so any transfer of quotas in an LLC must be announced to, and registered with, the commercial register.

38. Can companies buy back their shares? Which limitations apply?

A Corporation or an LLC can acquire its own shares or equity quotas only if it has freely disposable reserves to pay the purchase price, and if the aggregate nominal value of such shares does not exceed 10% of the nominal value of the share capital. The voting rights and associated rights attached to shares or quotas will lie dormant as long as they are owned by the company. If shares are acquired due to the restrictions of transfer applicable to the shares or equity quotas, such limit of 10% is increased to 20% of the stated capital for Corporations and to 35% for LLCs. Shares repurchased by a Swiss Corporation

or LLC do not carry any rights to vote at shareholders' meetings. Additionally, when a company buys back its own shares, a transfer of distributable profits or freely disposable assets must be made to an undistributable capital redemption reserve in the amount of the purchase price of the acquired shares or quotas on its balance sheet. Furthermore, in the event that the 10% threshold is crossed, the company must either dispose of the shares (or equity quotas) in excess or cancel them within two years from their acquisition.

The above-mentioned conditions do not apply if a general meeting (GM) resolves that a company will buy back shares in order to cancel them so as to reduce the share capital. Moreover, there are no specific restrictions under Swiss law in relation to financial assistance by a corporation to persons intending to purchase shares of that corporation (although the board of directors must ensure that such transactions are in compliance with the general principles of corporate law and certain tax directives).

Listed companies intending to implement a share buyback programme may be subject to additional requirements stemming from the Swiss takeover rules. Indeed, all public offers by a listed company on its own shares are deemed to be tender offers, albeit after review of the offer the Swiss Takeover Board may exempt, on certain conditions, the company from the obligations to comply with the takeover rules.

From a Swiss tax perspective, share buybacks followed by a subsequent capital reduction are deemed partial liquidations of the company, resulting in income and withholding tax duties for private sellers on the difference between the redemption price and the nominal value of the shares. Share repurchase programmes with subsequent capital reduction are therefore attractive only for Swiss holding companies and tax-exempt entities, although the negative consequences for the non-exempt sellers can be avoided by using various schemes. However, share repurchases with a subsequent capital reduction are not considered as a partial liquidation of the company if the corporate law requirements are satisfied and the redeemed shares are not held for a period of more than six years.

39. What are the main ways for a shareholder to exit from the company? Can shareholders require their shares to be repurchased by the company? Can shareholders be required to exit the company in certain circumstances? How are the shares valued in this case?

There is no legal right to withdraw from a Corporation limited by shares. A shareholder can never request the company in which it is invested to repurchase its shares. Correspondingly, a shareholder can, in principle, not be deprived of his shares by the company in which it is invested. However, there are four exceptions to this principle:

- A shareholder has not fully paid up the subscription price of its shares and fails to pay up the balance after being requested to do so by the company: in this situation, the shareholder will forfeit its shares.
- In a situation where the company is over indebted and needs financial restructuring, the stated capital of the company is reduced to zero and is then immediately increased back to its initial level and the shareholder fails to participate to such share capital increase: in such a situation, the shares held by the shareholder will be cancelled without compensation.
- In the context of a public tender offer, if the offeror holds more than 98% of the voting rights of the target company.
- Shareholders representing less than 10% of the stated capital of a company can be squeezed out upon merger of such company into another entity. In such instance, the minority shareholders will receive cash instead of shares as merger consideration. This cash consideration will be determined by the companies party to the merger agreement, and can be challenged by the minority shareholders in court should this consideration be inadequate.

Material transactions

40.What rights do shareholders have in the case of material transactions, such as a sale of all or substantially all of the company's assets, and a company reorganisation such as a merger or demerger?

As a general rule, the decision to sell the company assets lies with the board of directors, not the general meeting (GM). However, if the Corporation is selling all, or substantially all, its assets, it may be considered either as a fundamental change of the corporate purpose of the Corporation, or a liquidation of the Corporation, which in both cases will require a resolution of the GM approved by a qualified majority. Minority shareholders can therefore challenge a resolution of the board of directors approving the sale of all, or substantially all, the assets of the Corporation on the ground that the board of directors is not the competent organ to pass such a resolution. If the sale of all, or substantially all, the assets is approved by the required qualified majority of the GM, the minority shareholders can no longer challenge the transaction itself, but can obtain a judicial review of the terms of the transaction, determining in particular whether the assets were sold or transferred for adequate consideration.

Merger and demerger require a resolution of the GM approved by a qualified majority (two-thirds majority). In principle, the rights of minority shareholders must be maintained in the merger or demerger, and the minority shareholders must retain an adequate stake in the merged entity or the company (or companies) created as a result of the demerger. However, Swiss merger law provides that consideration other than shares in the surviving company can be granted to minority shareholders. The merging companies can even provide in the merger agreement that the minority shareholders must accept the settlement if at least 90% of the votes of the absorbed company consent (squeeze-out merger).

Shareholders who consider that their rights have not been adequately maintained or compensated in a merger or demerger can request a court to set an adequate monetary compensation for their shares. This request must be filed within two months from the merger or demerger resolution. Besides this request for monetary compensation, the minority shareholders do not have a cause of action to challenge the merger or demerger itself, unless such merger or demerger has been made in breach of the law.

41. What rights do shareholders have if the company is converted into another type of company (consider if applicable, a European Company (SE))?

In a situation where a Swiss corporation or limited liability company is converted into another type of company, the same remedies are available to the minority shareholders as in a situation of merger or demerger.

Insolvency

42. What rights do shareholders have if the company is insolvent?

Upon resolving on the dissolution of the company, the general meeting (GM) can decide to completely discharge the board of directors and to appoint third parties to act as liquidators of the company.

Each shareholder will be entitled to a share of the liquidation proceeds to the extent that the articles of association do not provide for another use of the net assets of the company in liquidation.

Unless otherwise provided for by the articles of association, the net assets of the company in liquidation will be distributed to the shareholders in proportion to the amount paid in and with due regard to the preferential rights associated to each class of shares.

Liquidation proceeds can be distributed at the earliest upon the expiry of one year from the date upon which the call for the filling of claims was issued for the third time. However, a distribution can already be made after a three-month period if a specifically qualified auditor confirms that the liabilities have been satisfied and that, under the circumstances, it can be assumed that no third party interests are jeopardised.

43. Can shareholders put the company into liquidation? What is the procedure to do this?

The company can be dissolved by a resolution of the GM made in the form of a notarised deed. This resolution can be passed at any time. At least two thirds of the votes represented, and the absolute majority of the par value of the shares represented at the GM, are required for such a resolution to be passed.

Corporate groups

44. Is the concept of a corporate group recognised under specific legislation?

The concept of "group" is not recognised as such under Swiss law and there are no specific rules applicable to groups in Switzerland. However, Swiss corporate law provides the obligation to maintain consolidated group accounts for the company that comprises by a majority of votes, or in another way, one or more companies under common management (that is, a group of companies).

The absence of specific group legislation is particularly problematic in situations of group meltdown. Since each of the various companies composing the group is considered as a separate legal entity, there is no consolidation of all the assets of the various group companies for the satisfaction of all group creditors. The Swiss Supreme Court has developed an exception to the principle that each group company is only liable for its own obligations. Under the "trust liability", the Swiss Supreme Court has ruled that a parent company could be held liable towards third parties for the obligations of its subsidiary if it had created the expectation with that third party that the parent company would provide its subsidiary with the sufficient financial means to satisfy its obligations.

Furthermore, under Swiss case law, a parent can be liable under certain circumstances for the acts of its subsidiary in application of the doctrine of piercing the corporate veil.

45. Does a controlling company have any duties and liability to the shareholders of the company it controls? What are the rights of company shareholders if the controlling company carries out actions that are prejudicial to the shareholders?

Swiss law does not provide for any specific duty of the controlling company towards its controlled company shareholders besides the preparation of group accounts. The controlling company must comply with the provisions of Swiss corporate law regarding the organisation and functioning of its controlled subsidiaries. If the controlling company does not comply with these provisions, it is running the risk of being considered a *de facto* organ of the controlled subsidiaries, and therefore being held liable towards third parties (including minority shareholders) in this capacity.

If the controlling company is passing shareholders' resolutions or board resolutions which are not in compliance with law or the articles of association of the company, the minority shareholders can challenge these resolutions in court. If the controlling company is usurping powers of the shareholders' meeting or the board of directors, it could be held liable towards the minority shareholders as a *de facto* organ of the company. If the representatives of the controlling company on the board of directors are in breach of their fiduciary duties towards the company, they could be held liable towards the shareholders and creditors for any damage arising from that breach.

46. What are the limitations on owning reciprocal share interests in companies?

There is no limitation to the possibility of owning reciprocal stock interests in companies, as long as none of these reciprocal interests is a majority holding. Once a company holds a majority holding in a company which holds a stock interest in that controlling company, this stock interest will be considered as treasury shares. Under Swiss corporate law, a company cannot hold, either directly or through subsidiaries, more than 10% of its own stock.

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