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Shareholders' Rights & Shareholder Activism 2021

Switzerland
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SWITZERLAND

Law and Practice

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CONTENTS

1. Shareholders' Rights p.3
1.1 Types of Company p.3
1.2 Types or Classes of Shares p.3
1.3 Primary Sources of Law and Regulation p.5
1.4 Main Shareholders' Rights p.5
1.5 Shareholders' Agreements/Joint-Venture Agreements p.5
1.6 Rights Dependent upon Percentage of Shares p.5
1.7 Access to Documents and Information p.6
1.8 Shareholder Approval p.6
1.9 Calling Shareholders' Meetings p.8
1.10 Voting Requirements and Proposal of Resolutions p.8
1.11 Shareholder Participation in Company Management p.8
1.12 Shareholders' Rights to Appoint/Remove/Challenge Directors p.9
1.13 Shareholders' Right to Appoint/Remove Auditors p.9
1.14 Disclosure of Shareholders' Interests in the Company p.9
1.15 Shareholders' Rights to Grant Security over/Dispose of Shares p.9
1.16 Shareholders' Rights in the Event of Liquidation/Insolvency p.10

2. Shareholder Activism p.11
2.1 Legal and Regulatory Provisions p.11
2.2 Level of Shareholder Activism p.11
2.3 Shareholder Activist Strategies p.11
2.4 Targeted Industries/Sectors/Sizes of Companies p.12
2.5 Most Active Shareholder Groups p.12
2.6 Proportion of Activist Demands Met in Full/Part p.13
2.7 Company Response to Activist Shareholders p.13

3. Remedies Available to Shareholders p.13
3.1 Separate Legal Personality of a Company p.13
3.2 Legal Remedies against the Company p.13
3.3 Legal Remedies against the Company's Directors p.14
3.4 Legal Remedies against Other Shareholders p.14
3.5 Legal Remedies against Auditors p.15
3.6 Derivative Actions p.15
3.7 Strategic Factors in Shareholder Litigation p.15

1. SHAREHOLDERS' RIGHTS

1.1 Types of Company

The corporation limited by shares (*société anonyme* (SA)/*aktiengesellschaft* (AG)) and the limited liability company (*Société à responsabilité limitée* (Sàrl)/*Gesellschaft mit beschränkter Haftung* (GmbH)) are the most common corporate forms in Switzerland. Corporation can be either privately held or publicly listed. Equity quotas issued by a limited liability company (LLC) cannot be publicly traded on an exchange in Switzerland or abroad, so LLCs remain privately held (it is, however, possible to subsequently transform a Swiss LLC into a Swiss corporation).

There are no legal restrictions (such as nationality/residence/status) on who may invest in a Swiss corporation or LLC (bearing in mind that in certain regulated industries, such as banking, the acquisition of qualifying participation will be subject to regulatory approval).

As its French name implies, the identity of the shareholders of a Swiss corporation is not a matter of public record (with the exception of shareholders holding qualifying participation in a publicly listed corporation). On the other hand, a shareholding in a Swiss LLC is a matter of public record, as is any subsequent transfer (the conditions of such transfer are not publicly recorded, however).

The corporate organisation of Swiss LLCs can be simpler than the one of a corporation and, as a result, Swiss LLCs are often the preferred corporate forms for wholly owned Swiss subsidiaries of foreign conglomerates.

1.2 Types or Classes of Shares

Corporations

A Swiss corporation may issue registered shares or bearer shares, provided, however, that for bearer shares to be validly issued, the issuing corporation must be publicly listed or the shares must be issued as intermediated securities (ie, book-entry securities). Bearer shares in physical form (bearer share certificates) are no longer permitted under Swiss law. Registered shares in certificated form remain common in Switzerland for privately held corporations.

Shares issued by a corporation must have a stated par value expressed in Swiss francs and the minimum par value is CHF0.01. Once the modernised Swiss corporate law enters into force in 2023, corporations will be allowed to denominate their shares in a foreign currency and the minimum par value of CHF0.01 will be abrogated, with the only requirement being that the par value of the share be superior to zero.

A Swiss corporation may issue common shares, preferred shares, participation certificates and/or profit-sharing certificates.

Common Shares

Ordinary shares have voting rights and financial rights (dividend and liquidation right) that are proportional to their par value. Unless the articles of association of the issuing corporation provide otherwise, shares issued are common shares.

Preferred Shares

Preferred shares are common shares with voting rights and/or financial rights that have been altered through specific provisions set forth in the articles of association of the corporation.

Shares with Preferred Voting Rights

A Swiss corporation may issue shares with preferred voting rights by issuing classes of shares with different par values and providing in its articles of association that voting rights are no longer proportional to the par value of the shares but exercised on a "one share, one

vote" basis. The class of shares with the lowest par value will then be considered a share with a preferred voting right compared to the other classes of shares with a higher par value since, for the same investment, purchasing shares with the lower par value will yield more shares (and therefore more voting rights) than purchasing shares with a higher par value. The par value of the shares with the highest par value may not exceed ten times the par value of the class of shares with the lowest par value.

Shares with a preferred voting right are used in privately and publicly held companies by founders and/or historical shareholders to maintain a controlling stake in terms of voting rights despite retaining only a minority stake in terms of financial rights.

Shares with Preferred Financial Rights

A Swiss corporation may issue shares with preferred financial rights, such as a preferred right on dividend or on liquidation proceeds. Other types of preference rights (such as a preferred right of subscription of future shares issuance) are possible but less common.

The dividend or liquidation preference right attached to a specific class of shares will be set out in the articles of association of the corporation. Such preference right may be limited in time or limited to a maximum amount, after which the preference right lapses. It is also possible to provide that once the preferred right of dividend/liquidation proceeds has been satisfied, the preferred shares are entitled to no further dividend or, on the contrary, to a pro rata share of any additional dividend.

Depending on how the dividend/liquidation preferred right is drafted, the preferred shares may have a lower economic value than common shares, although it is not possible to issue a class of shares with no dividend or liquidation right.

Participation Certificates

Participation certificates are sometimes referred to as "non-voting shares" because, like shares, they have a par value and are an integral part of the stated capital of the corporation, but unlike shares, the holders of participation certificates have no voting rights and, unless the articles of association provide otherwise, do not have any of the social rights attached to shares (such as the right to attend the shareholders' meeting, and the right to ask questions and obtain information).

The corporation can issue different classes of participation certificates with preferred rights of dividend and/or liquidation on the condition that the least favoured class of participation certificates has financial rights that are as favourable as the financial rights attached to the least favoured class of shares.

Profit-Sharing 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 and are limited to the right to a share of the dividend or liquidation proceeds, or a right of preferred subscription in a future share issuance.

LLCs

An LLC can only issue registered equity quotas. The equity quotas issued by an LLC have a par value (minimum CHF100).

An LLC can issue different classes of equity quotas, participation certificates and profit-sharing certificates. The rights and privileges attached to such quotas or certificates will be set out in the articles of association of the LLC.

1.3 Primary Sources of Law and Regulation

For privately held corporations or LLCs, the primary source of law and regulation relevant to shareholders' rights is the Swiss Code of Obligations (CO).

For publicly held corporations, the primary sources are:

- the CO (Articles 620 and following);
- the Swiss Financial Market Infrastructure Act (FMIA) and its two implementing ordinances, the Swiss Financial Market Infrastructure Ordinance (FMIO) (issued by the Federal Council) and the Swiss Financial Market Infrastructure (issued by the Swiss Financial Market Supervisory Authority (FMIO-FINMA));
- the Ordinance Against Excessive Compensation in Listed Companies (OAEC) issued by the Swiss Federal Council, which will eventually be incorporated in the CO once the modernised Swiss corporate law enters into force in 2023;
- the Merger Act, as it provides certain derivative actions to shareholders in merger situations; and
- the Listing Rules issued by the Swiss Stock Exchange (SIX) (including associated regulations such as the rules on ad hoc publicity or the reporting of management transactions).

1.4 Main Shareholders' Rights

The main rights common to all shareholders are:

- the right to participate in the shareholders' meeting and vote their shares;
- the right to receive a share of dividend or liquidation proceeds; and
- the right to subscribe to any future issuance of shares.

These rights may be varied through the company's articles of association, by resolution of the shareholders' meeting or by agreement among the shareholders, but such rights may never be entirely eliminated.

An agreement among shareholders of a privately held company does not have to be publicly disclosed and is typically subject to confidentiality provisions.

An agreement among shareholders of a publicly held company could result in such shareholders being considered as acting in concert, and the shares held by such shareholders will then be aggregated for the purpose of complying with disclosure requirements relating to qualifying participations. With respect to a Swiss corporation listed in Switzerland, a group of shareholders acting in concert would be required to disclose its participation when it acquires or disposes of shares resulting in such participation to reach, exceed or fall below 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights.

1.5 Shareholders' Agreements/Joint-Venture Agreements

Shareholders' agreements are enforceable under Swiss law among the parties thereto but are not enforceable against third parties. Shareholders' agreements are very common in privately held companies and can even be considered a necessity for any minority shareholder who wants to exercise a measure of control on the company or desires to be represented on the board of directors of the company.

1.6 Rights Dependent upon Percentage of Shares

Shareholders holding shares representing 10% or more of the stated capital of the company or having an aggregate par value of at least CHF1 million can request the board of directors to summon a shareholders' meeting and/or to add an item to the agenda of the meeting. Once

the modernised Swiss corporate law enters into force in 2023, these rights will be changed as follows.

- The 10% threshold to summon a shareholders' meeting will be reduced to 5% for publicly listed companies; the threshold for privately held companies remaining unchanged at 10%. It must be noted that certain Swiss publicly listed companies have already adopted articles that provide for a lower threshold than the 10% mandated by law to summon a meeting or to add an item to the agenda.
- The 10% threshold to add an item on the agenda of the shareholders' meeting will be reduced to 0.5% for publicly listed companies and to 5% for privately held companies.

1.7 Access to Documents and Information

Until the modernised Swiss corporate law enters into force in 2023, a shareholder in a privately held company has no access to the company's documents and records unless a resolution of the shareholders' meeting has expressly authorised such shareholder to do so and may only request information from, or ask questions to, the board of directors at the shareholders' meeting. Currently, the only documents that a shareholder is entitled to receive on a yearly basis are:

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

Once the modernised Swiss corporate law enters into force in 2023, shareholders representing 5% of the share capital or of the voting rights shall have the right to consult the company's documents and records upon request to the board of directors. The board of directors of the company is required to grant such access within four months from being requested to do so to the extent it is necessary for the shareholders to exercise their rights and to the extent the information requested does not put in jeopardy the business secrets of the company or any other worthy interests of the company. The board of directors is required to inform the shareholders in writing of the reason why the access requested is denied or restricted. The shareholders may then challenge in court the decision of the board of directors within 30 days from being notified of such decision.

In addition, shareholders in privately held companies representing at least 10% of the stated capital or of the voting rights will have the right to ask written questions to, or request information from, the board of directors outside of the shareholders' meeting. The board of directors will have four months to answer the question or provide the requested information, or explain in writing why it refuses to provide the requested information or answer. The shareholders will then have 30 days to challenge in court such response if they are not satisfied with it.

In publicly listed companies, the information that has to be disclosed is much more extensive and includes the following:

- the annual report;
- the semi-annual report;
- the annual compensation report;
- the annual corporate governance report; and
- ad hoc publicity (ie, information that may have an impact on the share price).

1.8 Shareholder Approval

The CO provides that the following resolutions belong to the shareholders and may not be delegated to, or exercised by, another corporate organ:

- adopt and amend the articles of association;

- any alteration of the share capital (increase, decrease, conditional capital, authorised capital, splitting or reunion of shares, creation of preferred shares);
- elect the members of the board of directors and the auditors;
- approve the annual report and the yearly financial statements;
- approve any distribution of dividends;
- approve the liability discharge of the members of the board of directors;
- dissolution and liquidation of the company;
- merger of the company with, or into, another corporation; and
- transformation of the company into another legal entity.

Once the modernised Swiss corporate law enters into force in 2023, the following additional resolutions will belong to the shareholders' meeting:

- approve an interim dividend and related interim financial accounts;
- approve the reimbursement to the shareholders of the capital contribution reserve;

and, for publicly listed companies only:

- approve the delisting of the shares of the company;
- elect the chairman of the board of directors;
- elect the members of the remuneration committee;
- elect an independent representative for the shareholders; and
- decide on the compensation of the board of directors, the management and the advisory board.

Generally, a shareholders' resolution requires an absolute majority of the shares present or represented at the shareholders' meeting. An abstention is counted as a negative vote, unless the articles provide that the required majority is computed based on the votes cast (yes or no). As an exception, the following resolutions require a qualified majority of two thirds of the voting rights attributed to the shares present or represented and the absolute majority of the par value of the shares present or represented:

- 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:
  - (a) through incorporation of reserves;
  - (b) in consideration for assets contribution;
  - (c) for the purpose of acquiring specific assets;
  - (d) where special benefits are granted;
- any limitation to, or removal of, the shareholders' right of preferred subscription;
- the transfer of the registered seat of the company;
- the dissolution and/or liquidation of the company; and
- the merger of the company.

Once the modernised Swiss corporate law enters into force in 2023, the following additional resolutions will belong to the shareholders' meeting and will also require the same qualified majority:

- the consolidation of shares (except when unanimous consent is required by law);
- the creation of a conditional capital, the institution of a capital fluctuation margin or the constitution of a reserve capital;
- the conversion of participation certificates into shares;
- the change in currency of the share capital;
- the grant of a casting vote to the chairman of the board of directors;

- the introduction of a provision in the articles of association allowing for the holding of the shareholders' meeting outside Switzerland;
- the waiver of the appointment of an independent representative in connection with the holding of an electronic shareholders' meeting in privately held companies;
- the approval of the delisting of the shares of the company; and
- the introduction of an arbitration clause in the articles of association.

1.9 Calling Shareholders' Meetings

Regarding the right of shareholders to request the board of directors to summon a shareholders' meeting, please refer to **1.6 Rights Dependent upon Percentage of Shares**.

Shareholders' meetings are summoned by the board of directors of the company, giving the shareholders no less than 20 calendar days' written notice. Such notice has to include the date, time and location of the meeting, the items for resolution on which the shareholders will be requested to vote and the recommendation of the board of directors on such items. The acceptable form of summons will be specified in the articles of association of the company (registered letter, publication in newspaper, electronic means).

Once the modernised Swiss corporate law enters into force in 2023, electronic shareholders' meetings will be possible and physical meetings in Switzerland will no longer be mandatory, provided that the board of directors can ensure that:

- the identity of the participating shareholders can be verified;
- the participating shareholders can participate live and interact with other participants; and
- the results of the votes cannot be falsified.

1.10 Voting Requirements and Proposal of Resolutions

Regarding the majority or qualified majority required to pass certain resolutions, please refer to **1.8 Shareholder Approval**.

Unless the articles of association provides for a quorum, there is no quorum requirement under Swiss law; the majority or qualified majority are always counted on the basis of the shares validly represented at the shareholders' meeting.

Regarding the right of shareholders to require that a specific issue be considered or resolution put forward, please refer to **1.6 Rights Dependent upon Percentage of Shares**.

1.11 Shareholder Participation in Company Management

The members of the board of directors are appointed and revoked by a shareholders' resolution requiring the absolute majority of the shares present or represented at the shareholders' meeting. Individual shareholders do not have any right to participate in the management of the company or to be appointed to its board of directors.

An individual shareholder does not have any right to request or obtain the dismissal of any director. The proposal to dismiss a director can be added to the agenda of any shareholders' meeting by shareholders holding the required minimum shareholding, as explained in **1.6 Rights Dependent upon Percentage of Shares**.

When the company has issued several classes of shares, the holders of each class of shares have the right to have a representative on the board of directors of the company. The holders of shares of a specific class will nominate a representative, who shall then be formally appointed by the shareholders' meeting.

1.12 Shareholders' Rights to Appoint/Remove/Challenge Directors

Regarding the right of shareholders to appoint or remove directors from their directorship, please refer to **1.11 Shareholder Participation in Company Management**.

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

- any resolution that eliminates or limits the rights of shareholders or directors derived from mandatory provisions of the law, such as the right to attend the shareholders' meeting or the right to vote the shares;
- any resolution that places more restrictions on the rights of the shareholders or of the directors to control the company than permitted by law; and
- any resolution that disregards the fundamental structure of the company or violates the provisions protecting the stated capital of the company.

Resolutions of the board that are null and void can be challenged in court by any shareholder, regardless of the number of shares they hold.

1.13 Shareholders' Right to Appoint/Remove Auditors

The company's auditors are appointed and revoked by a shareholders' resolution requiring the absolute majority of the shares present or represented at the shareholders' meeting. An individual shareholder does not have any right to request or obtain the dismissal of the company's auditor. The proposal to dismiss and replace the company's auditors can be added to the agenda of any shareholders' meeting by shareholders holding the required minimum shareholding, as explained in **1.6 Rights Dependent upon Percentage of Shares**.

1.14 Disclosure of Shareholders' Interests in the Company

With respect to a Swiss LLC, shareholding is a matter of public record as shareholders are registered with the Commercial Register.

With respect to a privately held Swiss corporation, there is no requirement on the shareholders to publicly disclose their shareholding in such corporation, but supervisory authorities in certain regulated industries (such as banking or securities trading) have to be notified when shareholders acquire or dispose of a certain qualifying shareholding.

With respect to a Swiss corporation listed in Switzerland, a shareholder would be required to disclose its participation when it acquires or disposes of shares resulting in such participation to reach, exceed or fall below 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔% of the voting rights.

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

Security Interests

Shareholders of a corporation have the right to grant a security interest over their shares. In a corporation, the grant of such security interest would not be subject to the consent of the company unless the articles provide for transfer restrictions, in which case the consent of the board of directors would be required to ensure that the secured creditor is in a position to fully enforce its pledge. It is usual in secured lending transactions for secured lenders to request that transfer restrictions on shares be removed from the articles as a condition to extend a loan to a shareholder. Shareholders' agreements also frequently restrict the ability of the parties to pledge their shares in the company.

Creating and perfecting a security interest over the shares of a corporation depends on how

such shares have been issued. If the shares have been issued as book-entry securities, a written pledge agreement between the pledgor and the pledgee will be required as well as a control agreement between the pledgor, the pledgee and the bank with which the securities account where the pledged shares are deposited is maintained. If the shares are certificated, a written pledge agreement and the physical delivery to the pledgee of the share certificates (usually endorsed in blank by the pledger) will be required. If the shares are uncertificated, only a written pledge agreement is required, but in practice a secured lender will require that uncertificated shares be certificated and delivered to the lender as a condition to extending credit to the shareholder.

In an LLC, the articles can prohibit the grant of a security interest over the shares or submit such grant to the consent of the board of managers of the LLC or of the shareholders' meeting.

Disposals and Transfers of Shares

The disposal of shares in a corporation depends on whether the shares have been issued as book-entry securities or as certificated or uncertificated shares. If the shares have been issued as book-entry securities, the shares are transferred from a seller to the acquirer through the banking system by transfer from one securities account to another. If the shares have been issued as uncertificated shares, the transfer of shares is operated by way of a written assignment executed by the transferor and the transferee. If the shares have been issued as certificated shares, the transfer of the shares is operated by physical delivery to the acquirer of the share certificates duly endorsed by the transferor.

If the articles of the corporation provide for transfer restrictions, then the actual transfer of ownership of the shares to the transferee requires that the board of directors approve such transfer. The articles of association would typically provide for specific grounds for the company to refuse the proposed transfer (eg, prohibition of transfer to a competitor). If there is a ground to refuse the transfer, the board of directors can refuse its consent and the contemplated transfer will not proceed. If none of the specific grounds to refuse the transfer exists, then the company can only prevent the transfer by purchasing the shares itself at fair market value.

In a privately held company, the shareholders' agreement would typically cover in detail the transfer of shares by providing a right of pre-emption, tag-along and drag-along provisions or other mechanisms to control the shareholding, such as put/call options and exit mechanisms. The articles of association of privately held corporations sometimes provide for a right of pre-emption in favour of the shareholders in the event of transfer. The validity and enforceability of such provisions are, however, disputed and such provision in the articles is therefore not an adequate substitute for a well-drafted pre-emption clause in a shareholders' agreement.

1.16 Shareholders' Rights in the Event of Liquidation/Insolvency

Unless a shareholder is also a creditor of the company, they have very limited rights in the event the company becomes insolvent. A shareholder is entitled to their pro rata share of liquidation proceeds but being junior to all the company's creditors, such share usually amounts to nothing in an insolvency scenario. Derivative actions initiated by shareholders against directors of the company for breach of fiduciary duties owed to the corporation before an insolvency will be placed under the control of the bankruptcy estate.

2. SHAREHOLDER ACTIVISM

2.1 Legal and Regulatory Provisions

There is no legislative act specifically dedicated to, or regulating, shareholder activism in Switzerland. The main regulatory and legislative provisions that are relevant to shareholders' activism are the same as the ones listed in **1.3 Primary Sources of Law and Regulation**.

2.2 Level of Shareholder Activism

As Swiss corporate law provides for a yearly mandatory in-person shareholders' meeting with a mandated set of agenda items and heavily restricts the ability of the shareholders to obtain information outside of the shareholders' meeting, shareholder activism has always been part of the Swiss corporate landscape. The development of a more strategic approach to shareholders' activism by certain investors and the high-profile cases such approach generates is more recent and is tied to the development of a more aggressive and adversarial approach to mergers and acquisitions of publicly listed companies.

The increased level of shareholder activism over the past 30 years is the result of globalisation, the general attractiveness of Switzerland to foreign investors and the result of a steady (but slow) stream of legislative and regulatory developments regulating public takeover bids, mandatory disclosure of participation, mandatory disclosure of relevant price-sensitive information or expanding the oversight power of the shareholders on the composition, organisation and compensation of the board of directors and management of the company.

The latest developments in this evolution are the contemplated incorporation in the modernised Swiss corporate law that will enter into force in 2023 of most of the provisions of the OAEC and the introduction of an obligation on all Swiss companies that have more than 500 employees and do not qualify as a small or middle-size company to produce every year a social responsibility report (covering environmental sustainability, social issues, human rights issues and anti-corruption practice), which will have to be submitted to the shareholders' meeting (thereby creating an additional space for shareholders' activism). This last development has been accepted by a popular vote in November 2020 and will enter into force at the end of 2021 and with the obligation to submit the first such report to the shareholders' approval in 2023 (in respect of the 2022 financial year).

2.3 Shareholder Activist Strategies

Initial Steps for Activist Shareholders

Activist shareholders typically pursue a strategy of incremental steps steadily building pressure until the desired results are achieved. Because the more aggressive steps available to an activist shareholder require very significant resources to yield results, it is rare that activist shareholders resort to such steps ab initio, unless the circumstances leave them no other choice (eg, in a takeover situation or merger/divestment announcement).

The first step for activist shareholders normally is to acquire shares in the targeted company as it gives them the right to be invited to, and participate in, its shareholders' meeting. Unless they acquire more than 3% of the share capital of the targeted company, they would not have to publicly disclose their share ownership.

Activist shareholders would then typically engage in a private dialogue with the targeted company to advocate their views and encourage the targeted company to act accordingly. This dialogue is permitted by Swiss law (conversely, there is no obligation to engage in such dialogue) but in so doing, the target company has to be careful not to breach the principle of equal treat-

ment of shareholders and its duties regarding the non-disclosure of insider information.

Further Methods in a Campaign

If this private dialogue with the targeted company is not productive, activist shareholders may ramp up their efforts by acquiring more shares to reach the 3% threshold at which their shareholding will become public or to reach a threshold where they can make a proposal to the agenda of the shareholders' meeting. As this legal threshold will be reduced from 10% to 0.5% once the revised Swiss corporate law enters into force, an increase in shareholders' activism is expected, even though certain Swiss listed companies have already reduced this threshold in their articles of association.

Bringing the activist shareholders' campaign to the other shareholders of the targeted company is not always an easy feat as the share register of the targeted company is not a public document and mandatory public disclosure is only required from shareholders who reach or exceed 3%, 5%, 10%, 15%, 20%, 25%, 33.3%, 50% and 66.6%. Consequently, the use of traditional media, social media and dedicated websites is a necessity to reach out to the other shareholders and obviously requires a significant investment in order to be effective.

Reaching out to shareholders ahead of the meeting is key for a successful campaign. As most shareholders will be represented by proxy and proxy holders are bound by the instructions received, the result of the shareholders' vote is usually preordained and the intervention of an activist shareholder during the meeting will only have a very limited impact when most shareholders vote by proxy.

At the shareholders' meeting, activist shareholders can ask questions to the board of directors and to the auditors, as explained under **1.7 Access to Documents and Information**.

The most aggressive steps that activist shareholders can take are to challenge the shareholders' meeting resolutions in court or to sue the directors for breach of their fiduciary duties (see **3.2 Legal Remedies against the Company** and **3.3 Legal Remedies against the Company's Directors** on these two options). Obviously these are measures of last resort given the time, effort and financial investments litigation requires.

2.4 Targeted Industries/Sectors/Sizes of Companies

There are no particular industries/sectors in Switzerland that have been particularly targeted by activist shareholders.

Activist shareholders appear to respond to perceived red flags – irrespective of sectors, industries or company size – such as:

- poor financial performance or stock trading at a discount to peer companies;
- operational struggles affecting the competitive position of the company relative to its peers (eg, weak pipeline products, underperforming divisions or subsidiaries);
- lack of innovation or difficulties in integrating recent acquisitions;
- a large reserve of cash, low dividend policy, no share buy-back strategy; or
- a long-tenured board or a board with too many members, lacking diversity or with too few independent members.

2.5 Most Active Shareholder Groups

The more prominent activist shareholders in Switzerland are typically hedge funds such as Third Point or Cevian Capital. The Ethos Foundation, a Swiss foundation federating more than 200 private and public pension funds, plays a

significant role in Switzerland to promote socially responsible investment and best practices in corporate governance.

2.6 Proportion of Activist Demands Met in Full/Part

There are no statistics available regarding the success rate of shareholder activist campaigns in Switzerland but there is no denying that such campaigns have an impact on the governance and strategies of the targeted companies.

2.7 Company Response to Activist Shareholders

As no listed company likes to be put under pressure by activist shareholders, the best strategy is to anticipate; by assessing whether the company presents obvious red flags that may attract activist shareholders, by adopting measures to counteract/minimise such red flags, and by having a strategy in place when the activist shareholders come knocking on the door.

Certain structural measures such as a quorum requirement, qualified majority and voting rights limitations can be contemplated to make activist campaigns more difficult, but such measures come with a price: if investors view these as an effort to entrench the management or the board and insulate them from accountability, this may have a negative effect on the share price compared to peers and consequently encourage rather than discourage shareholders' activism.

When facing an active campaign, the responses of the targeted companies range from announcing:

- changes in their corporate governance, including board and management compensation and incentives;
- changes in their corporate or commercial strategy (divestiture of non-core business, refocus on core activities); and
- a share buy-back programme or improved dividend policy.

3. REMEDIES AVAILABLE TO SHAREHOLDERS

3.1 Separate Legal Personality of a Company

Both the Swiss corporation and the Swiss LLC are limited liability corporate entities and, except in pathological situations where shareholders have disregarded corporate formalities and acted as de facto organs of such corporate entity (piercing the corporate veil situations), shareholders cannot be held liable for the obligations of such corporate entity.

The shareholder of a Swiss corporation may not be compelled to make further investment in such corporation (unless it has consented to such an undertaking in a shareholders' agreement). The articles of association of a Swiss LLC may provide that in certain circumstances, the shareholders are required to make additional specific contributions to the company. This is, however, relatively infrequent and would be more customarily addressed in a shareholders' agreement.

3.2 Legal Remedies against the Company

Under Swiss corporate law, shareholders have no cause of action directly against the company itself but only causes of action against the company's organs (members of the board of directors, senior officers and auditors).

Shareholders can challenge at any time any resolutions passed by the shareholders' meeting that are null and void.

Resolutions passed by the shareholders' meeting that are only voidable may be challenged by any shareholder who has not voted in favour of such

resolution within two months from the passing of the resolution. In order to have standing, the shareholder contesting the resolution must still be a shareholder at the time they initiate court proceedings. If the contesting shareholder prevails, the resolution of the shareholders' meeting will be rescinded and such rescission will be binding on the company and all its shareholders.

Under Swiss corporate law, a shareholders' resolution is null and void if:

- it eliminates or restricts the rights of shareholders or directors derived from mandatory provisions of the law, such as the right to attend the shareholders' meeting or the right to vote the shares;
- it places more restrictions on the rights of the shareholders or of the directors to control the company than permitted by law; or
- it disregards the fundamental structure of the company or violates the provisions protecting the stated capital of the company.

A shareholders' resolution is merely voidable if:

- it eliminates or restricts the rights of a shareholder in violation of the law or the articles of association;
- it eliminates or restricts the rights of a shareholder without proper reason;
- it favours, or discriminates against, a shareholder in a manner that is not justified by the company's purpose (equal treatment of shareholders); or
- it turns the company into a not-for-profit organisation without the unanimous consent of the shareholders.

Regarding the right of the shareholders to challenge the resolutions of the board of directors, please refer to **1.12 Shareholders' Right to Appoint/Remove/Challenge Directors**.

3.3 Legal Remedies against the Company's Directors

The directors of the company are liable to the company and the shareholders for any losses or damages resulting from the breach of their fiduciary duties (Article 754, CO). In the event that such breach only results in a damage or loss to the company, then a shareholder can only bring a legal action for the indemnification of the company (derivative action). If a shareholder incurred a direct loss or damage as opposed to indirect damage (resulting from the loss or damage suffered by the company) as a result of the breach of the director's fiduciary duties, then such shareholder can bring a legal action against the breaching director and seek direct indemnification of their damage. The claimant will have to prove:

- the breach of the director's fiduciary duties;
- the damage suffered by the company or the shareholder;
- the natural and equitable causation between the breach of fiduciary duties and the damage; and
- that the breach is the result of a wilful action or negligence of the director.

If the breach of fiduciary duties has been established, this last condition will almost always be satisfied, barring extraordinary circumstances.

3.4 Legal Remedies against Other Shareholders

There are no legal remedies available to shareholders against other shareholders. Swiss corporate law does not provide that a shareholder (including a majority or controlling shareholder) owes any fiduciary duty to any other shareholders. Regarding the ability of a minority shareholder to challenge the validity of a shareholders' resolution voted by a majority of shareholders, please refer to **3.2 Legal Remedies against the Company**.

3.5 Legal Remedies against Auditors

Article 755 of the CO provides that any auditor that breaches its fiduciary duties in connection with the yearly audit of the company's financial statement or group consolidated financial statement, the incorporation of the company or any subsequent share capital increase or reduction (where the auditor may have a role to play, depending on the circumstances) may be held liable for the damage caused to the company, wilfully or by negligence.

Both the company and any shareholder (regardless of the percentage of shareholding) have standing to sue the auditor to indemnify the company for the damages incurred. If the claimant prevails, damages will be awarded to the company even if the claim was brought by the shareholder.

3.6 Derivative Actions

See **3.3 Legal Remedies against the Company's Directors** and **3.5 Legal Remedies against Auditors**.

3.7 Strategic Factors in Shareholder Litigation

Shareholder litigation is not prevalent in Switzerland. This is due mainly to three factors. Firstly, the discovery process is very limited in Switzerland and obtaining information from the company through the exercise of shareholders' rights to document problematic behaviour or evidence of breach of fiduciary duties can be a multi-year process with no guaranteed results; a claimant would therefore initiate litigation only if in possession at the outset of strong documentary evidence. The second and third factors are the upfront costs, which are relatively high, and the long time it takes to reach a final resolution for any litigation before a Swiss court.

Provisional measures and interlocutory relief are more often used as they can be useful tools to build pressure to force a negotiated solution in a much speedier fashion.

Lenz & Staehelin is one of the largest law firms in Switzerland, with over 250 lawyers and offices in Zurich, Geneva and Lausanne. The firm handles all aspects of international and Swiss law. In addition to advising on corporate law, the strong corporate and M&A practice group is involved in domestic and cross-border private and public M&A transactions and has been party to many of Switzerland's most important corporate deals. The firm serves as principal outside counsel for a number of SMI and other SIX-listed corporate clients on stock exchange and securities law, and corporate governance matters.

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