

"Empty Voting" Restrictions: Transforming How Swiss Listed Companies Interact with Activists

Proper drafting of the articles of association of Swiss listed companies can improve the board's ability to resist activists with no meaningful economic exposure to the company.

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AUTHORS	Jacques Iffland Tino Gaberthüel	Partner, Head of Capital Markets Partner, Head of Corporate and M&A, Co-Head of Capital Markets
EXPERTISE	Capital Markets Corporate and M&A	

One notable aspect of the Swiss corporate law reform in 2023 was the introduction of measures allowing Swiss listed companies to limit so-called "empty voting", i.e. the exercise of voting rights by persons who do not bear the economic risk of the shares they hold. However, the new regime received little attention, probably because it seemed not too different from the existing framework, which permits listed companies to restrict nominee or "street name" registrations in their share register.

This muted reaction might also have resulted from a perception among Swiss listed companies that the determination of a shareholder's eligibility to voting rights can only be made when the shares are first registered in the company's share register. In this case, voting rights typically persist, even if the original conditions for their grant (like holding the shares for one's own account or bearing their economic risk) are no longer met. Restrictions on empty voting may seem of limited value if they can only be enforced during the initial registration process and not upon occurrence of subsequent changes (such as a transfer of economic risk through equity swaps or similar arrangements).

However, while many companies' articles of association assume that eligibility for the exercising of voting rights can only be assessed when the shares are registered in the company's share

register, this is not a legal requirement. The new empty voting restrictions reinforce this conclusion: the new regime is only fit for purpose if companies can verify on an ongoing basis that their shareholders bear the economic risk, especially before general meetings.

Acknowledging the importance of the topic, companies are now increasingly incorporating provisions in their articles of association that enable them to periodically ask shareholders to re-confirm the beneficial ownership of their shares. The Capital Markets and Technology Association explicitly recommends such a regime for the issuers of ledger-based equity securities. The recommendation is, however, also relevant for listed companies, which are now beginning to recognize its benefits.

For Swiss listed issuers, adequate use of the new ability to curb empty voting may level the playing field with activists, who often try to sway the board's strategy with little economic exposure to the company. Under Switzerland's "Minder regime" – which mandates annual shareholder approval of board compensations and prohibits director terms exceeding one year – Swiss boards are often ill-equipped to resist such pressures. Introducing adequate provisions in the articles of association may, however, help them regain leverage that can be used to safeguard the interests of the company.

Please do not hesitate to contact us in case of any questions.

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CONTACTS	Jacques Iffland	Partner, Head of Capital Markets, Geneva jacques.iffland@lenzstaehelin.com Tel: +41 58 450 70 00
	Tino Gaberthüel	Partner, Head of Corporate and M&A, Co-Head of Capital Markets, Zurich tino.gaberthuel@lenzstaehelin.com Tel: +41 58 450 80 00
	Andreas Rötheli	Partner, Head of Corporate and M&A, Geneva andreas.roetheli@lenzstaehelin.com Tel: +41 58 450 70 00
	Matthias Wolf	Partner, Zurich matthias.wolf@lenzstaehelin.com Tel: +41 58 450 80 00
	Stephan Erni	Partner, Zurich stephan.erni@lenzstaehelin.com Tel: +41 58 450 80 00
	Simone Ehram	Partner, Zurich simone.ehram@lenzstaehelin.com Tel: +41 58 450 80 00
	Roman Graf	Partner, Head of Insolvency and Restructuring, Geneva roman.graf@lenzstaehelin.com Tel: +41 58 450 70 00
	Ariel Ben Hattar	Partner, Geneva ariel.benhattar@lenzstaehelin.com Tel: +41 58 450 70 00
