

The New Company Law

Good things come to those who wait!

After almost twenty years in preparation, parliament finally adopted the revised company law on 19 June 2020¹. At its meeting on 11 September 2020, the Federal Council enacted the provisions of the Code of Obligations about gender quotas and the stricter transparency regulations for companies engaged in the extraction of raw materials to come into effect from 1 January 2021. Since implementing ordinances are required, the other changes to company law will only enter into force during the course of 2022².

Among other things, the new provisions introduce important measures to improve flexibility with regard to capital requirements, additional and more modern formats for general meetings (GM) and board of directors' meetings, as well as clarifications on implementing the Ordinance Against Excessive Compensation (OaEC).

This article provides an overview of some of the new rules that are important for boards of directors (BoD).

Share capital

Share capital in foreign currency

In future, the share capital can be expressed in another currency that is significant to a company's business activities instead of in Swiss francs (Art. 621 para. 2 nCO), whereby other capital-centric aspects such as dividends, reserves and overindebtedness are also expressed in the relevant foreign currency.

Par value >0

The minimum par value of a share is reduced from CHF 0.01 to an amount greater than zero (Art. 622 para. 4 nCO).

New capital spread

The general meeting (GM) can authorize the BoD to increase or reduce the share capital within a bandwidth of 50% of the share capital entered into the Commercial Register during a maximum period of five years (Art. 653s nCO).

¹ Code of Obligations (Company Law), Amendments of 19 June 2020, Federal Gazette 2020, 5573 et seq.

² See the Federal Council's press release in German at: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-80358.html>



Dividends, repayments, repayment obligations

Interim dividends are permitted

Interim dividends are now explicitly permitted. The GM can approve the payment of an interim dividend, provided that the conditions for a dividend payment are met and audited interim financial statements³ are on hand. The interim financial statements do not have to be audited for companies that have opted out. An audit is also not required if all shareholders approve the dividend payment and the distribution does not jeopardize the claims of creditors (Art. 675a nCO).

Clarification regarding repayment of statutory capital reserve

The statutory capital reserve may be repaid to the shareholders if the capital reserve and retained earnings, minus any loss carry-forwards, exceed 50% (or 20% for holding companies) of the registered share capital (Art. 671 paras. 2 and 3 nCO).

Tightening of the repayment obligation

In future, shareholders, governing and executive bodies and their related parties always have an obligation to repay unjustified receipts. Bad faith or an obvious disproportion to the company's financial situation are no longer a requirement (Art. 678 nCO).

Participation and control rights of shareholders

Adjustment of various thresholds for the assertion of participation and control rights

Participation/ control right	Current law	New law
Convocation of GM	10% of share capital (SC)	10% of SC or votes (non-listed) 5% of SC or votes (listed)
Adding items to agenda	10% of SC or CHF 1 million par value	5% of SC or votes (non-listed) 0.5% of SC or votes (listed)
Information outside of GM	n/a	10% of SC or votes (non-listed) n/a (listed)
Inspection of books	No threshold	5% of SC or votes
Special audit (new: special investigation)	10% of SC of CHF 2 million par value	5% of SC or votes (listed) 10% of SC or votes (non-listed)

General meeting of shareholders

Stricter regulations, but also relief before and after GM

- The invitation to the GM of listed companies must now include a short explanation of the BoD's proposals (Art. 700 para. 2 (3) nCO).
- In future, the agenda must comply with the single-subject rule (Art. 700 para. 3 nCO). Nevertheless, it should still be possible, for example for a total revision of the articles of association, to vote on thematic blocks, but no longer on the revision as a whole.
- In future, it will be sufficient to make the annual report and audit report available electronically before the annual GM. These documents no longer have to be made physically available and (on request) delivered to shareholders (Art. 699a para. 1 nCO). The deadline of 20 days before the GM remains the same.
- The resolutions and election results of the GM must be made available electronically to the shareholders of listed companies within 15 days. The shareholders of unlisted companies may request that the minutes are made available to them within 30 days after the GM (Art. 702 paras. 4 and 5 nCO).

More flexibility for execution of the GM

- In future, GM resolutions can also be adopted by circular letter (in writing or electronically) without adhering to the rules that apply to the calling of the GM, provided that none of the shareholders requests that the matter be discussed orally (Art. 701 para. 3 nCO).
- Art. 701a para. 3 nCO explicitly permits multi-location GMs, provided that the votes are immediately broadcast by audio and visual means at all locations.
- A foreign venue is also permitted if provided for by the articles of association and if an independent proxy is appointed. Unlisted companies may waive the appointment of an independent proxy with the consent of all shareholders (Art. 701b nCO).
- In future, the BoD may allow shareholders to exercise their rights electronically by direct voting at the GM (Art. 701c nCO). GMs may even be held virtually in their entirety, i.e. without a physical venue, if provided for by the articles of association and if an independent proxy is appointed (Art. 701d nCO).

³ The interim financial statements have to be prepared in accordance with the provisions of Art. 960f CO and may therefore include simplifications and abbreviations.

Board of directors

Circular resolutions passed electronically without signatures are now permitted

It is controversial under the current law whether the BoD may also adopt resolutions that are circulated by e-mail. Art. 713 para. 2 nCO now makes it clear that resolutions may be adopted electronically, and that no signatures are required in this case.

New explicit duties of due diligence and loyalty for conflicts of interest

Members of the board of directors and the Management are now obliged to inform the BoD immediately and in full about any conflicts of interest (Art. 717a para. 1 nCO).

Auditors

Auditors can now only be dismissed for good cause

The GM can in future only dismiss the auditors for good cause (Art. 730a para. 4 nCO). The offenses that constitute good cause must be disclosed in the notes to the annual financial statements (Art. 959c para. 2 (14) nCO).

Financial distress

New explicit obligations of the BoD with regard to impending insolvency (Art. 725 nCO)

The BoD is obliged to monitor the company's ability to pay its debts and, in the event of impending insolvency,

- must speedily implement measures to restore solvency;
- implement further rehabilitation measures if needed or request the GM to do so, and
- submit an application for a debt moratorium, if necessary.

Convocation of GM no longer obligatory if half of capital is lost

In future, if the company loses half of its capital, the BoD has to implement rectifying measures and, if necessary, further restructuring measures or request the GM to do so. The requirement under the current law to call a mandatory restructuring general meeting will no longer apply (Art. 725a para. 1 nCO). In future, a company without auditors has to submit its most recent financial statements to a limited audit by a licensed auditor (Art. 725 para. 2 nCO).

Clear guidelines and improved legal certainty for overindebtedness

- If there is reason to be concerned about overindebtedness, the current requirement to prepare and audit interim financial statements appraising the assets at going concern and liquidation values still applies. If the company is not expected to be able to continue its operations, the interim statements only have to be based on liquidation values. If it is assumed that the company can continue as a going concern and the interim financial statements do not confirm its overindebtedness, no interim balance sheet drawn up at liquidation values is required (Art. 725a paras. 1 and 2 nCO).
- The subordinations that authorize the BoD to refrain from informing the judge must now explicitly also include the interest accruing during the period of overindebtedness (Art. 725b para. 4 (1) nCO).
- In future, the BoD can also explicitly refrain from informing the judge if there is reason to believe that the overindebtedness can be remedied within 90 days at most after presentation of the audited interim financial statements and creditors' claims are not jeopardized (Art. 725b para. 4 nCO).

Implementation of OaEC

Clarifications and tightening of the OaEC

- The number of external mandates permitted under the articles of incorporation for the members of governing and executive bodies now also includes mandates "in similar functions", i.e. in particular also Management mandates, but only for companies with a business purpose (Art. 626 para. 2 (1) nCO).
- In future, these functions of members of governing and executive bodies for other companies with a business purpose must also be disclosed in the compensation report (Art. 734e nCO).
- Another widely discussed measure concerns the gender quotas: if both genders are not represented by at least 30% on the BoD and at least 20% on the Management, the compensation report must disclose the reasons and the measures implemented to promote the under-represented gender (Art. 734f nCO).





- These gender quotas, however, apply only
 - to listed companies that exceed the thresholds for an ordinary audit obligation pursuant to Art. 727 para. 1 (2) CO, and
 - from the financial year that starts five years (for the BoD) or ten years (for the ExB) after the new law enters into force (Art. 4 nChge current CO).
- The new Art. 689c para. 4 CO makes it clear that the independent proxy must maintain confidentiality about shareholders' instructions until the GM. The independent proxy may only provide the company with a general summary of the instructions that have been received from shareholders three days before the GM, and must report to the GM on this information provided to the company.
- With regard to prospective voting about variable compensation, the compensation report must in future always be submitted to the GM for a consultative vote (Art. 735 para. 3 (4) nCO).
- The catalog of prohibited payments now also applies to former members of governing and executive bodies. This catalog is also being expanded – in future, the following payments are also expressly forbidden:
 - Payments based on a restraint of competition agreement that exceed the average payments made over the last three financial years, or based on a restraint of competition agreement that is not justified in business terms (Art. 735c para. 2 nCO);
 - Non-market compensation related to a previous position on a governing or executive body (Art. 735c para. 3 nCO);
 - Sign-on bonuses that serve as compensation for an unprovable financial disadvantage (Art. 735c para. 4 nCO).

The general conclusion about the revised law is positive. The alignment of company law with the new accounting regulations, more flexible provisions on share capital and dividends, and the modernization of the general meeting format are likely to improve Switzerland's attractiveness as a business location. Initial concerns about a further tightening of provisions during the transfer of the OaEC into the framework of the Code of Obligations have vanished into thin air. The changes primarily concern clarifications that will definitely be welcomed by practitioners.



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