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The ever-increasing role of the independent shareholder representative in Swiss company law

The independent shareholder representative entered Swiss company law a few years ago through the back door of the Minder initiative and then through the Ordinance against abusive remuneration of members of the management and board of directors (ORab). The pandemic and the COVID ordinances have given the institution a new lease of life. The new law on public limited companies, which will come into force next year, promises to give it a prominent place. In fact, since the beginning of the pandemic, the independent representative has already become indispensable.

Until the successive entry into force of the various Ordinances on measures to combat the coronavirus (COVID-19 Ordinances), the role of the independent representative was confined to listed companies within the limits of the ORab. The latter are obliged to appoint an independent proxy to enable distrustful shareholders to entrust their votes or instructions to a person who is independent of the company in order to ensure that the votes they represent or their instructions are properly recorded and processed at the general meeting of shareholders. According to the ORab, the independent proxy should exercise the voting rights in accordance with the instructions received from the shareholders. If no instructions are received, he/she should abstain. The independent proxy may also represent shareholders under the ORab if the shareholders have instructed him/her to do so in the case of new items not on the agenda, but only within the limited scope of Art. 700 para. 3 of the Swiss Code of Obligations (CO), i.e. the convening of an extraordinary general meeting, the establishment of a special audit or the appointment of an auditor.

In the context of the ORab, our experience as an independent representative has shown us the importance of anticipating these cases in the drafting of the voting form, or the form in which the shareholder will give the independent representative his voting instructions. This must be both clear and precise in order to avoid any formal defect on the part of the shareholder and sufficiently flexible to anticipate any modification of the initial agenda. In the case of listed companies, however, this latter risk is minimal, as it is rare for the agenda to be modified during the general meeting.

However, this relatively strict and well-defined framework was shattered with the entry into force of the COVID-19 Ordinances and the COVID Act. Indeed, Article 27 of Ordinance 3 COVID-19, in force until 31 December 2021 and confirmed by Article 8 of the COVID Act of 25 September 2020, allowed the “organiser” of a general meeting of any legal person under Swiss law and even any “company” to use the “services” of an independent representative.

The differences between the framework of the COVID legislation and that of the ORab are, however, significant: (i) in the COVID legislation, it is the “organiser” and not the general meeting that elects the independent representative; (ii) in the COVID-19 period, the use of the independent representative may be mandatory and no longer only optional; (iii) the criteria for independence are not specified by the COVID legislation, contrary to the ORab provisions; (iv) COVID legislation does not define the powers of the independent representative, in particular in case of lack of instructions or new agenda items; (v) COVID legislation is apparently not coordinated with the CO and ORab in the case of general meetings of listed companies but organised electronically during the COVID-19 period.

The difficulties posed by this emergency legislation are thus numerous and the board of directors must in particular decide the following open questions:

i. Who is the “organiser” of the general meeting?

ii. Are the independence criteria set out in Article 11 of the ORab applicable *mutatis mutandis* to the COVID legislation?

iii. What are the powers of the independent representative in case of no instruction or new items on the agenda?

iv. Can the general meeting of a listed company during the period of application of Ordinance 3 COVID-19 go beyond the strict framework of the ORab and extend the role of the independent representative?

Our experience as Independent Representative allows us to give the following advice in this respect:

i. The organisation of the general meeting should be carefully planned and anticipated by the board of directors with the active participation of the independent representative in order to establish a clear and unambiguous voting and instruction form for the shareholders. This ballot should allow shareholders to ask questions at the general meeting through the independent proxy, naturally within the limits of the current legal framework;

ii. The independence criteria defined by the ORab are in our view not applicable to the independent representative appointed under the COVID-19 legislation. This legislation, i.e. Article 8 of the COVID-19 Act, provides for the possibility of derogating from the provisions of the CC and the CO, and therefore a fortiori from the ORab, if “the exercise of the rights of the participants in company meetings so requires”. Considering that the rights of these participants are precisely defined by the CC and the CO, it is difficult to understand the hasty wording of this legal provision. This being said, we are of the opinion that the notion of independence cannot be compromised and that the independent representative, whatever his legal basis, should at least not be an organ of the company or a custodian and should furthermore be free from any legal and economic link with the company within the framework of which he is going to exercise his functions as independent representative;

iii. The powers of the independent representative appointed under the COVID-19 legislation are in our opinion more important than those of the ORab independent representative. Thus, the shareholders, but also the organiser of the meeting, may, in the drafting of the instruction form, validly provide that this representative may vote in favour of any proposal of the executive body of the company, this in the context of new items on the agenda;

iv. We also believe, for the above-mentioned reasons, that the general meeting of a listed company during the period of application of Ordinance 3 COVID 19 can go beyond the strict framework of the ORab and extend the role of the independent representative to everything that may enable the exercise of the shareholder’s rights, but within the limits of the provisions of the CO, the SESTA and the articles of association.

The entry into force of the revision of the law on public limited companies, probably on January 1st 2022, i.e., on the expiry of Ordinance 3 COVID-19, will put an end to this exceptional regime. The use of an independent representative will be institutionalised, in particular, as the new law on public limited companies will provide, in the case of virtual general meetings, or in the case of general meetings held simultaneously in different locations, in particular both in Switzerland and abroad, or if shareholders can exercise their rights electronically. As the new Article 701 of the Swiss Code of Obligations will provide, this can only be waived if the articles of association so provide or if all shareholders agree, and then only if the company is not listed on the stock exchange.

In conclusion, in view of the above and without wishing to close this important subject, which moreover overlaps with that of the governance of the public limited company, we recommend, in order to overcome these uncertainties, considering that the COVID legislation is applicable until the 31st of December 2021 and perhaps beyond, and considering that the new law on public limited companies will enter into force in 2022, possibly on the 1st of January 2022, at least for public limited companies under Swiss law, that these questions be anticipated by providing that the institution of the independent representative be clearly provided for in the articles of association. These new provisions of the articles of association could usefully incorporate both the provisions of the new law on public

limited companies and the regime established by the current provisions of the ORab. The way this ordinance operated has indeed proven itself over time. The institution of the independent representative will therefore continue to exist in the future and will be an inherent part of all general meetings of Swiss corporations.

Source :
https://www.wg-avocats.ch/en/news/company-law/independent-shareholder-representative-in-swiss-company-law/