



## General meetings in times of COVID-19

**The COVID-19 pandemic and the associated "lockdown" poses completely new challenges for Swiss companies. This concerns, among other things, the numerous upcoming annual general meetings, which are usually held between April and June. According to the Federal Council Ordinance (COVID-19 Ordinance 2), all face-to-face meetings are generally prohibited until further notice and until at least 10 May 2020.**

**Although the Federal Council has announced a gradual relaxation of the precautionary measures, it is unlikely that the regulations for general meetings will be relaxed. This Legal Compass shows what this means for shareholders and the board of directors.**

### 1. The novelties at a glance

According to the COVID-19 Ordinance 2, public or private events are prohibited until at least 10 Mai 2020, including all ordinary annual general meetings (GM) of companies limited by shares (Ltd.), limited liability companies (LLC), associations, cooperatives, general and limited partnerships. However, in case of a sole shareholder or if a single representative represents all shareholders and a universal meeting is held, the regulation does not apply.

The ordinance ensures that the participation rights of shareholders continue to apply in principle. The board of directors may order that participation rights be exercised either in writing or electronically or by means of an independent proxy.

Please note: According to the current ordinance, GMs only fall under the scope of the COVID-19 Ordinance 2 if they have been announced before 10 May 2020. The special provisions are applicable even if a general meeting is held after 10 May 2020. It is expected, however, that the ban will be extended beyond May 2020.

Theoretically, an application for an exemption from this requirement could be filed, so that the GM could still be held as a face-to-face event. In principle, the Cantons have the authority to permit events due to public interests, but this will not normally be the case with private companies.

In practice, numerous companies hold their AGMs without physical presence of the shareholders.

### 2. Convocation and organisation of the general meeting

#### 1. Convocation

If the GM is not convened yet<sup>1</sup>, the board of directors must decide either to postpone it to a later date or to organize it in accordance with the provisions of

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<sup>1</sup> If the GM has already been convened, shareholders must be informed of the new participation options as soon as possible, which must be done by 10 May, but no later than four days before the AGM.

#### Authors



**Marc Nufer**, Partner  
Head Corporate / M&A



**Lorenz Raess**  
Associate Corporate / M&A

COVID-19 Ordinance 2. According to the Swiss Code of Obligations, a general meeting must be held within six months after the close of the financial year. Since this period is merely indicative, failure to observe it has no direct legal consequences. In the interest of the shareholders and because a selective extension of the measures against COVID-19 is foreseeable, we recommend not to wait with convening and holding GMs. The GM must be summoned by law at least 20 days before the meeting.

Either way, the shareholders must be informed not only on the voting procedure, but also in what form the information rights can be exercised. In addition to the voting card, shareholders should be given the opportunity to raise questions that can be answered at the GM. Care should be taken to give shareholders a sufficient time frame (at least 30 days) to submit their votes and comments on the agenda items.

## **2. Execution**

Although the GM is held without the physical presence of the shareholders, certain persons are still required to be present. Besides the chairperson, a minute-taker and, if necessary, an independent proxy, the auditor and, in the case of transactions requiring public deeds, a notary public must be present. No special permission is required for this "residual meeting". However, the relevant hygiene and distance regulations of the Federal Office of Public Health must be observed at all times.

Shareholders' votes at the GM are made either on a form, which must be submitted in advance; voting by e-mail is excluded. It is permissible to sign such form using a qualified electronic signature. In the case of companies with a small group of shareholders, it may also be feasible to appoint a joint representative by means of a written proxy and to hold the GM as a universal meeting, provided that all votes are represented.

The GM can in principle also be held electronically through an online portal, where the shareholder can exercise voting rights and give instructions. While this option is already mandatory for listed companies, unlisted ones would have to set up a corresponding online portal. Alternatively, the GM can be held via telephone or video conference (e.g. Zoom or Skype). However, it must be ensured that the participants are properly identified, that they can comment on each agenda item and that they are able to cast their votes. Although this would most likely only be carried out by larger companies due to the technical requirements, such companies only offer a livestream without the possibility of "live" voting. Whether this will change in the future with the planned introduction of the "virtual GM" remains to be seen.

Finally, the board of directors may also order that shareholder rights must generally be exercised through an independent proxy appointed by the Board of Directors. Small and medium-sized enterprises in particular are unlikely to do so, but could instead allow their shareholders to vote in writing in advance on the agenda items. If a company decides to appoint an independent proxy, the precise wording of the proxy and the voting instructions must be drafted carefully.

In times of the COVID-19, it is controversial whether a shareholder can be prohibited from participating in a GM. According to Federal ordinance, physical presence is temporarily restricted and the shareholder can be obliged to exercise the rights by means of the aforementioned instruments. However, this only applies if the board of directors has informed the shareholders accordingly. In the absence of such information, the shareholder basically has the right to participate in the GM.

## **3. Legal risks**

While the exercise of shareholders' rights at the GM is of general importance, this in particular applies in the current situation. To minimize the risk of a later challenge or even the invalidity of GM resolutions, we recommend that shareholders be informed in advance and in detail about their voting rights and, above all, about how to exercise their information and disclosure rights. Since most of this year's GMs are not physically held, the agenda should be limited to the ordinary items. More delicate or extraordinary resolutions should possibly be postponed to a later . This would be the case, for example, if a shareholder asked to vote on items not on the agenda. If such a shareholder has a right to add items on the agenda, a subsequent extraordinary general meeting would need to be

convened, to allow the other shareholders to be informed of the new agenda item in time.

Finally, it should be pointed out that deliberate non-compliance with the aforementioned restrictions can also have consequences under criminal law.

#### 4. Conclusion

The organization of a GM in times of COVID-19 does not only put shareholder rights to the test. The board of directors is also required to inform shareholders promptly and transparently about any new organization of the upcoming GM. While the annual GMs are often social happenings, they remain a rather sobering affair at the moment and are limited to the most essential matters. This will hopefully change soon.

If you have any questions regarding the organization of your GM, we will be happy to assist you.

## Your contact for Corporate law and M&A



**Marc Nufer**  
*Partner, Head Corporate M&A*

T: +41 31 328 75 75  
[marc.nufer@eversheds-sutherland.ch](mailto:marc.nufer@eversheds-sutherland.ch)

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**Daniel Bachmann**  
*Partner*

T: +41 31 328 75 75  
[daniel.bachmann@eversheds-sutherland.ch](mailto:daniel.bachmann@eversheds-sutherland.ch)

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**Oliver Beldi**  
*Partner*

T: +41 31 328 75 75  
[oliver.beldi@eversheds-sutherland.ch](mailto:oliver.beldi@eversheds-sutherland.ch)

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**Olivier Dunant**  
*Partner*

T: +41 22 818 45 00  
[olivier.dunant@eversheds-sutherland.ch](mailto:olivier.dunant@eversheds-sutherland.ch)

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**Patrick Eberhardt**  
*Partner*

T: +41 22 818 45 00  
[patrick.eberhardt@eversheds-sutherland.ch](mailto:patrick.eberhardt@eversheds-sutherland.ch)

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