

## transparency in non-financial matters

# Is the legal nature of the AGM vote a false debate ?

Par Rashid Bahar le 27 February 2024

This year, the general meetings of public-interest companies meeting the criteria of Art. 964a para. 1 of the Swiss Code of Obligations will be asked to approve their reports on non-financial matters in accordance with Art. 964c para. 1 of the Swiss Code of Obligations. In this context, a controversy has arisen over the legal nature of the vote : on the one hand, Novartis and Roche have already organised a consultative vote, while on the other, the Ethos Foundation is outraged and has demanded a binding vote.

According to Art. 964c para. 1 of the Swiss Code of Obligations, the report must be “approved and signed by the supreme management or administrative body and approved by the body responsible for approving the annual accounts”, i.e. the General Meeting. However, this provision does not specify the nature of the approval vote by the general meeting. The travaux préparatoires do not shed much light on the matter.

In this respect, Art. 964c para. 1 of the Swiss Code of Obligations differs from Art. 735 para. 3 no. 4 of the Swiss Code of Obligations, which expressly states that the vote on the remuneration report is advisory. However, this is in contrast to Art. 735 para. 3 no. 3 of the Swiss Code of Obligations, which requires a binding vote on the amount of remuneration. In reality, Art. 964c para. 1 CO is more akin to the votes to approve the annual report and financial statements under Art. 698 para. 2 nos. 3 and 4 CO, which are the counterparts on financial matters to the report on non-financial matters. Since these votes are binding in nature, it would be tempting to conclude that approval should have the same effect. However, the analogy only holds in part : these votes have different consequences than the report on non-financial issues. They are the preamble to the vote on the appropriation of profits provided for in art. 698 para. 2 no. 4 of the Swiss Code of Obligations. If the annual accounts are not approved by the General Meeting, the latter may not distribute an annual dividend. The same principle applies to the distribution of any interim dividend, which must be based on interim financial statements that are also submitted to the vote of the General Meeting (art. 698 para. 2 no. 5 OR). Approval of the report on non-financial matters has no legal consequences for the public limited company. It does not constitute discharge in respect of these matters, since discharge continues to be the subject of another item in the proceedings of the General Meeting (Art. 698 para. 2 no. 7 CO) and its effects are governed by Art. 758 CO.

In addition, there is the question of what meaning should be given to a vote refusing approval. Refusal may be motivated by the feeling that the report does not meet the legal requirements regarding the content of the report defined in art. 964b of the Swiss Code of Obligations or, at

the very least, does not satisfy shareholders' expectations in terms of transparency. It may also be a criticism of the company's business model, its due diligence procedures, the measures taken to implement these concepts or the way in which the company manages risk (see the list in art. 964b para. 2 nos. 1 to 5 CO), or of the decision not to adopt a concept in this area (see art. 964b para. 5 CO). However, a rejection may be motivated as much by a feeling that the company is not doing enough as by a feeling to the contrary, or even by an objective alliance between supporters on both sides of the issue who together oppose the Board's policy for diametrically opposed reasons. The polysemic nature of the vote is all the more problematic as shareholders are not required to give reasons for their vote.

In the first case, giving legal effect to the refusal may be understandable : it would be a refusal to accept the report on the grounds that it was not complete, or at least not sufficiently detailed, in the eyes of the shareholders voting at the AGM. The consequence of such a refusal would be that the Board of Directors would be obliged to reconsider its position and resubmit the report to a vote, but this would have no other consequences under company law.

On the other hand, if the refusal is intended to condemn the strategy adopted by the Board of Directors, there is nothing to be gained by submitting the report to a new vote at the Annual General Meeting, since, given the retrospective nature of the report, the Board of Directors, even if it accepts the criticism – which it should not since, within the framework set by the purpose of the Articles of Association, it has sole responsibility for senior management (art. 716a para. 1 no. 1 CO), including non-financial matters, can only modify its business model for the future, but cannot modify the report.

In short, the controversy is purely dogmatic. In reality, the choice open to the Board of Directors is to adopt the legal text, without taking sides, or, on the contrary, to specify that the vote of approval is only consultative in nature. As for the shareholders, it does them no good to complain on the sidelines of the general meeting about the nature of the vote, since even if the vote were to be recognised as binding, it would still be devoid of legal consequences and they would not be listened to any better. On the contrary, it would be preferable for the debate between companies and their shareholders to focus, if there are any differences, on the fundamental issues, whether these be the degree of transparency of the report, the choice of reference framework or the company's policy on these issues.

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