Switzerland
The system of corporate governance

PETER V. KUNZ

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I Background information

Swiss company laws provide for the distinction between corporate organizations and partnership organizations. The latter are outside the scope of this chapter; the former category consists of stock corporations

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1 See, inter alia, A. Meier-Hayou and P. Forstmozer, Schweizerisches Gesellschaftsrecht, 10th edn. (Bern: Stämpfli, 2007), section 2 n. 8 et seq. and 62 et seq.
II General information on corporate governance

A Definition of corporate governance and Swiss corporate law reforms

Switzerland does not have any official definition of corporate governance. In fact, corporate governance is not a legal term under Swiss law.\(^2\) Most erudite commentators pertaining to corporate law matters state that the term seems unclear and try to explain corporate governance by referring to several international reports (for example, to the Cadbury Report)\(^3\) and their definitions\(^4\) and to one particular Swiss code.\(^5\) In substance, the academic definition\(^6\) combines on one side internal corporate governance (i.e., management, board of directors, auditors, and

2 Stock corporations (Aktiengesellschaften ["AG"]) in accordance with Article 620 et seq. of the Swiss Code of Obligations ("CO") currently, the Swiss legislature is in the process of amending large parts of the corporation law - it is a "grüne Aktienreform" (see, inter alia, P. Kunz, "Aktienreformrevision 2002," Justelit (February 2, 2005), n. 1 et seq.; Switzerland has 186,332 corporations (September 15, 2009).

3 Gesellschaften mit beschränkter Haftung ("GmbH"). Article 772 et seq. of the CO: the Swiss LLC law was recently amended for the first time since the CO's first introduction in Switzerland in 1936. P. Kunz, "Gewerbe GmbH-Revision als Chance und Herausforderung für schwizerische Unternehmen," Justelit (April 30, 2007), n. 1 et seq.; Switzerland has 116,244 LLC's (September 15, 2009).

4 Only a small fraction of corporations (some 600 companies) are listed companies, i.e., corporations with shares being publicly quoted and traded either at the SIX (Swiss Exchange) in Zurich or at the BX (BX Berne Exchange) in Berne; "over-the-counter" ("OTC") companies do not qualify as listed companies under Swiss law (see www.six-swiss-exchange.com and www.berner-x.com).


8 For an overview, see P. Böckli, "Zum Vorwurf für eine Revision des Aktien- und Rechnungslegungsgesetzes," GeSoR 1 (2006), 4 et seq.


10 The Swiss government, in a specific report, referred to corporate governance in its recent report (see Böckli, "Corporate Governance and Swiss Code of Best Practice," in Festchrift für Forstmoos (Zürich: Schulthess, 2003), pp. 263 et seq.

11 Switzerland's 1990's legal reform was largely based on the Cadbury Report (1992), which was published on the Swiss population in 2013.
B Legal sources of corporate governance: regulation and self-regulation

Today, corporate governance principles may be found in laws and ordinances as well as in self-regulated codices. Historically, it was not regulation but rather self-regulation by business organizations that formally introduced and promoted good corporate governance as a concept in this country— as is apparently the case in most countries:

(i) Business association; economiesuisse, the most influential association of Swiss businesses,18 published for the first time in 2002 the Swiss Code of Best Practice ("SCBP")19 – primarily for listed corporations in Switzerland but also for "non-listed economically significant companies."20

(ii) Stock exchanges: the two current Swiss stock exchanges (i.e., SIX and BX), self-regulatory bodies submitting their regulations for approval to the Swiss Financial Market Supervisory Authority ("FINMA"), provide for numerous corporate governance issues21 – in particular improved transparency – in their Listing Rules, including various Directives.

The SCBP consists of legally non-binding recommendations. Thus non-compliance does not result in any sanctions by economiesuisse.22 SCBP recommendations cover, for example, the definition of corporate governance,23 general shareholders’ meetings,24 shareholders’ rights to information and inspection,25 composition of the board of directors and board committees,26 and auditors.27

Although corporate regulation seems to dominate corporate self-regulation in Switzerland (as well as abroad), the latter will continue to keep an ongoing legal function.28 In my view, the trend toward more corporate governance regulation is well founded but must not overreach.

The SIX self-regulation is pre-eminent,29 compared with the BX self-regulation, due to the greater relevance of this stock exchange. The corporate governance self-regulation by SIX30 is based on various sources, i.e., the Listing Rules (for example, concerning ad hoc publicity),31 the Directive on Information relating to Corporate Governance ("DCG"),32 the Directive on Ad hoc Publicity ("DAH"),33 and the Directive on Disclosure of Management Transactions ("DMT").34

C Capital market rules and corporate governance

Capital markets are external corporate entities and need basic regulations. The Federal Act on Stock Exchanges and Securities Trading ("SESTA")35 was enacted in the years 1997/1998, relatively late in comparison with other countries.

18 In general, see G. Giger, Corporate Governance als neues Element im schweizerischen Aktienrecht? (Zürich: Schulthess, 2003), pp. 55 et seq.; C. Bühler, Regulierung im Bereich der Corporate Governance (Zürich: Dike, 2009), pp. 41 et seq.
19 www.economiesuisse.ch, see Kunz, "Corporate Governance," pp. 485 et seq.
20 For its legal nature, see Böckli, "Corporate Governance and Swiss Code of Best Practice," pp. 284 et seq.
21 N. 3 Parens of the SCBP, see P. Fosteiner, "Corporate Governance: eine Aufgabe auch für KMU?" in Festschrift für Zoll (Zürich: Schulthess, 2004), pp. 675 et seq.; Nobel, "Corporate Governance und Aktienrecht," pp. 325 et seq.
22 See Bühler, Regulierung im Bereich der Corporate Governance, pp. 396 et seq.; Kunz, "Corporate Governance," pp. 483 et seq.
23 For a different emphasis, see P. Böckli, "Horte Steffen im Soft Law," ST 76 (2002), 1 et seq.
24 N. 2.2 SCBP; "Corporate governance encompasses the full range of principles directed towards shareholders’ interest seeking a good balance between direction and control and transparency at the top company level while maintaining decision-making capacity and efficiency.
25 N. 3 et seq. of the SCBP.
Corporate governance was never an explicit issue during the respective legislative discussions in the 1990s. Public takeovers of listed companies are governed today by Articles 22 et seq. of the SESTA and by the Takeover Ordinance (Übernahmeanordnung ["TOO"]), which cover various corporate governance aspects.

Recently, the Swiss takeover rules (including the disclosure of shareholdings according to Article 20 of the SESTA) were fundamentally amended. In 2007, the Parliament26 provided for several new and lower thresholds to notify shareholdings,37 and, as of 2009, the Takeover Board ("TB") revised the TOO.38 All reforms on laws and ordinances levels are aimed to make the takeover rules fairer and thereby to strengthen corporate governance.

D Specifics in Switzerland

Traditionally, case law plays a minor role in Switzerland, which is a civil law country. This is generally true for corporate governance issues. Some exceptions may be found in connection with public takeover situations, in particular, as well as with listed companies in general. The disputes usually remain in the domain of the administrative authorities and seldom reach Swiss courts.39

Interested corporate governance precedents include SIX (for example, regarding ad hoc publicity),40 TB recommendations on the rules for public takeover offers41 until the end of 2008,42 and FINMA orders (for example, disclosure obligations according to Article 20 of the SESTA).43

Listed companies represent just a minute part of all corporations in Switzerland. Moreover, in reality, many corporations with listed shares are controlled either by major shareholders or by entrepreneur families,44 hence they have only a small free float of buyable shares. In such a situation, sort of a Swiss specialty,45 takeover activities are more or less non-existent.

Banks play a major role in Switzerland, be it for financing or for organizational tasks, in connection with public takeover matters. In this regard, banks need to pay careful attention and look out that they are not abused in "hidden shareholdings" building tactics46 and that they are not active on both sides of a public takeover, i.e., doing mandatory disclosure – even under the previous version of the SESTA; see P. Kunz, "Offenlegungs- bzw. Meldungspflicht nach Art. 20 BEHG," AIP 19 (2010), 1475-1481.

40 Generally, orders by the SIX's Sanction Committee are published on a no-name basis only.

41 The Swiss Takeover Board (Übernahmekommission ["TB"] case law is, in fact, very important because it governs all public takeover bids (be they "friendly" or "unfriendly"), including shares buy-back programs; overviews to precedents: SSW 80 (2008), 335 et seq.; SSW 79 (2007), 345 et seq.; SSW 78 (2006), 319 et seq.; SSW 77 (2005), 199 et seq.

42 Originally, the TB only had the authority to publish non-binding recommendations in takeover matters; due to a recent reform, the TB has been issuing legally binding orders in this arena since 2009. TB recommendations or orders, respectively, may be appealed to the Swiss Financial Market Supervisory Authority (Bundesamt für Finanzmarktaufsicht ["FINMA"]).

43 These orders are, in general, not published under Swiss law; see Article 34 Financial Market Supervision Act (Finanzmarktaufsichtsgesetz ["FINMAG"]; SR 956.1.

44 P. Fontoura, "Corporate Governance in the Schweiz: besser als die USA?" in P. Fontoura, H. von der Cranee, R. Weber, and D. Zehl (eds.), Corporate Governance (Zürich: Schuhlenn, 2003), pp. 22 et seq. and 27 fn. 28 (eg., V. Finnen-La Roche, Schindler-Holding AG, von Schindler) Holding AG – the main author of the SBB was the general counsel of Schindler, therefore, the "special interests" of family-controlled listed companies may be discovered between the lines of this code; see ibid., p. 27 fn. 29.


46 Shareholders might try to hide their shareholdings behind banks and thus disregard the disclosure obligation (Article 20 of the SESTA); see, inter alia, R. Watterand and D. Dubs, "Optionssatzstrategien bei Übernahmekämpfen," in R. Tschätsch (ed.), Mergers & Acquisitions X (Zürich: Schuhlenn, 2008), pp. 173 et seq.; T. Jüttli and S. Schäfer, "Erfassung von Finanzinstrumenten im revidierten Offenlegungsgeset,

ST 83 (2009), 570 et seq.
business for the offering party and for the target company.\(^{49}\) Such banking behavior might lead to supervisory sanctions.\(^{49}\)

### E Foreign investments

In my view, foreign investors are apparently taking an increasing interest in Swiss listed companies (such is or at least was the case, for example, with Scor/France, Renova/Russia, Everest and Victory/Austria, Laxevey/UK); however, various public takeover attempts in 2006 and 2007 allegedly showed serious illegals\(^ {50}\) and led to legislative steps to curb such tactics. Switzerland's laws do not provide for any restrictions on foreign investments. Unlike in other countries state funds regulation is not planned by the Swiss government.\(^ {51}\)

Some years ago, though, many listed companies still had transfer restrictions on registered shares (Vinkällerung) in their articles of incorporation that specifically targeted foreign investors; these investment impediments were broadly rescinded in the 1990s.\(^ {52}\)

### F Corporate scandals and impact of foreign law

Enron and other corporate governance scandals did not take place in Switzerland.\(^ {53}\) Yet, the bankruptcy or "grounding," respectively, of Swissair in 2001 was partly explained by failures and a breakdown in the company's

48. The state-owned Zürcher Kantonalbank ("ZKB"), the fourth largest banking group in Switzerland, was under investigation regarding the Suter takeover discussions for allegedly being engaged on both sides; see FINMA order dated January 22, 2009: GeKR 2 (2009), 24 ff. 16.

49. Regulating the "Gewährleistung für Banken" (i.e., guarantee for proper conduct); R. Watter and D. Dür, "Wettbewerbs der Waffensysteme bei Unternehmensübernahmen — Optionenstrategien zur Herausforderung des schweizerischen Übernahmevertrages, MZZ 19 (2007), 31.

50. Some court procedures regarding disclosure obligations according to Article 20 of the SSTFA and other takeover matters are still pending as of today.


52. Forstmoser, "Corporate Governance in der Schweiz," p. 38; Swiss corporate law reduced the listed companies' discretion for consent or non-consent in this regard, i.e., only a few shares' transfer restrictions are legally possible; see Article 85C of the CO.

53. Perceived scandals are often the origin of calls for an improved corporate governance; in general, see P. Nobel, "Corporate Governance und Geschäftsbericht — Gleichlaufig oder Wettlauf zwischen Wirksamkeit und Recht," in Festschrift für Walter (Bem: Stempfl, 2005), p. 397.

Corporation governance; and several parliamentarians were thus motivated to formally ask for an improvement of corporate governance in the corporation law.\(^ {54}\)

Remuneration at ABB — and at other listed companies — were also considered by many observers as a corporate governance scandal.\(^ {55}\)

Finally, the financial market crisis of the years 2008–2009\(^ {56}\) has resulted in one particular corporate governance issue: the FINMA enacted the so-called Circular 2010/1, which sets minimum standards for remuneration schemes of financial institutions under its supervision.\(^ {57}\)

As pointed out above,\(^ {58}\) this country is — with a few interesting exceptions\(^ {59}\) — a traditional civil law country. However, foreign law has a much stronger impact in Switzerland than in other countries. This fact heightens, for instance, the relevance of comparative law studies.\(^ {60}\)

Furthermore, a set of comparative law concepts exist for implementing foreign laws in Swiss law by formal or informal means.\(^ {61}\)

Overall, the EU and its laws are crucial\(^ {62}\) — and Switzerland has already adjusted\(^ {63}\) to this situation, more in substance than in form, even though it is presently not a member of the EU.

\(^{44}\) For an overview of corporate governance requests in the Parliament, see BBl 2008, 1589; see, inter alia, Nobel, "Corporate Governance und Aktionäre," 333 et seq.

\(^{45}\) Originally, Percy Barnevik and Göran Lindahl were supposed to be paid a total of CHF 233 million by ABB after leaving the company in 2001; see Forstmoser, "Corporate Governance in der Schweiz," p. 24 ff. 16.

\(^{46}\) The failure in corporate governance worldwide seemed to deepen the crisis; see A. Buyers, "The Financial Crisis Impact," GeKR 2 (2009), 144 et seq.


\(^{48}\) See section I D above.


\(^ {50}\) F. Kuma, "Einführung zur Rechtserfüllung in der Schweiz," Recht 24 (2006), 37 et seq.

\(^ {51}\) For further details, see F. Kuma, "Instrumente der Rechtserfüllung in der Schweiz bei der Rechtssetzung und bei der Rechtswendung," ZVG/WiW 108 (2009), 31 et seq.

\(^ {52}\) This is the Federal Council’s official policy; see, inter alia, the Europareport 2006 dated June 28, 2006 (BBl 2006, 6928 et seq., available at www.admin.ch/ch/d/f/20060615.pdf), and the Auswärtigubläscher Bericht 2009 dated September 2, 2009 (BBl 2009, 6293) as well as 6320 et seq., available at www.admin.ch/ch/d/f/2009/6293.pdf)

\(^ {53}\) Recently, see P. Kuma, "Sonderfall Schwertler? — die Schweiz ist längst in Europa angekommen," DWS 3 (2009), 57 ("Die erste Seite") — editical.}
III Internal corporate governance

A The board

1 The one-tier and two-tier models

In form, the Swiss board concept follows the one-tier board model (Articles 707 et seq. of the CO). However, in substance, the corporation law proves to be so flexible that various models from abroad (for example, Germany’s two-tier board concepts with “Vorstand” on one side and “Aufsichtsrat” on the other side) exist.69


65 E.g., the US Securities Laws were taken into account in drafting Sesta in the 1990s.


67 Analyzing Oversight Act (Revisionausfädelung) ["RAO."] Zürich, Schaffhausen (2003), 688 et seq.


The delegation of management plays an important role in Swiss boards, and the “three caucuses” are always emphasized: "causa in algorum, causa in instaurando, causa in custodiendo."

The board members are elected for three years unless otherwise provided in the articles of incorporation; the term of office shall not exceed six years (Article 710 of the CO). The Federal Council proposed for the present corporate law reform, as a general rule, one-year election but the Parliament seems to go into a different direction: staggered boards are rare exceptions in Switzerland.


It is not uncommon in Switzerland, even for listed companies, to have maximum age limits (e.g., the organizational regulations of UBS AG set a mandatory retirement age of 65 for board members: Article 5).


If there are several classes of shares, i.e., with regard to voting rights or financial claims, the shareholders of each class are entitled to elect at least one representative to the board of the corporation (Article 709 para. 1 of the CO). Legal but rather uncommon in Switzerland (unlike in the US), however, is the cumulative voting for board members.79

3 Tasks and powers

The primary task of the boards of directors is to safeguard the interests of the corporation in accordance with Article 717 para. 1 of the CO. Not all interests involved (for example, shareholders, creditors) are necessarily in sync. Hence, the legal, economic, and political discussions between proponents of the shareholder value concept and the stakeholder value concept are ongoing in Switzerland80 – and still not resolved as of today.81

The board of directors may take decisions on all matters which, by law or by the articles of incorporation, are not allocated to the general meeting of shareholders (Article 716 of the CO).

In accordance with Article 716a of the CO, the board of directors has both non-transferable and inalienable duties.82 for example, the ultimate management of the company (i.e., strategy) and giving the necessary directives, the establishment of the organization, the structuring of the accounting system and of the financial controls, the appointment and the removal of the highest management and their supervision, the preparation of the business report and of the general meeting, and finally, the notification of the judge in case of over-incorrelatedness.

As of 2008, Swiss law provided for a new non-transferable and inalienable duty:83 the board of each and every corporation – listed or non-listed – must execute a formal risk assessment that needs to be published in the annual financial statement’s attachment (Article 663b para. 12 of the CO).84 In addition, the board assessment has to be audited.85 In my view, the risk assessment was always part of the boards’ duties under Article 716a para. 1 no. 1 of the CO.

4 Functioning of boards and board committees

The corporation law is flexible when it comes to the functioning of the boards of directors. For instance, corporate regulation in Switzerland does not require any committees,86 yet the SCBP and the Listing Rules contain rules and recommendations for several board committees (for example, the audit committee,87 the compensation committee, and the nomination committee).88

The board designates its chairman, or the shareholders may elect a chairman if the articles of incorporation so provide (Article 712 para. 2 of the CO). The chairman heads the board of directors and has the decisive vote in case of a tie unless otherwise provided for by the articles of incorporation (Article 713 para. 1 of the CO).89

Finally, the corporation law allows the personal union, a highly contested corporate governance issue in Switzerland, i.e., the joint function of direction and control.90

The persons entrusted with the management of the company are appointed and removed by the board (Article 716a para. 1 no. 4 of the CO), hence, the directors control the managers accordingly; moreover, the managers have an obligation to provide information at the board of directors’ meetings (Article 715a para. 2 of the CO).

79 See, inter alia, P. Böck, Schweizer Aktienrecht, 6th edn. (Zürich: Schulthess, 2009), section 13 n. 80 et seq.; Knia, Der Minderheits- schutz im schweizerischen Aktienrecht, section 8 n. 111 at seq. and n. 115; L. Glaesser, "Die Proporzwahlverfahren (cumulative voting) als Instrument der Corporate Governance," in Festschrift für Doris (Zürich: Schulthess, 2002), pp. 401 et seq.
80 Zehl, "Was ist Corporate Governance?" p. 12; Venture, "Corporate Governance in der Schweiz," p. 21; Giger, Corporate Governance als neues Element im schweizerischen Aktienrecht, pp. 9 at seq.
82 Thus, delegation is not possible; for further information, inter alia, see A. Kammerer, Die unverzichtbaren und unverzichtbaren Kompetenzen des Verwaltungsgesamts (Zürich: Schulthess, 1997), pp. 82 et seq.
85 See B. Möder, "Risikobeurteilung nach Art. 663b Ziff. 12 OCB," SEW 81 (2009), 264.
86 However, particular functions may be delegated to committees (Article 710a of the CO) see T. Jütt, Verwaltungsgesamthaftung im schweizerischen Aktienrecht (Bern: Stämpfli, 2008), pp. 4 et seq.; R. Wanner, "Verwaltungsgesamthaftung und Delegation von Aufgaben," in Festschrift für Förster (Zürich: Schulthess, 2003), pp. 183 et seq.
87 In general, see P. Böckl, Audit Committee: Die Prüfungsaufsicht des Verwaltungsrats auf Grundzusammen mit Obergesellschaft und Untergesellschaft (Zürich: Schulthess, 2005), pp. 5 et seq.; R. Beut, Audit Committee (Zürich: Eigenverlag Rudolf Boller, 2006), pp. 5 et seq.
88 N. 21 et seq. of the SCBP.
89 In addition, the providing of appropriate information within the board of directors is one of the core responsibilities of the chairman; see n. 15 of the SCBP.
90 It is the board’s responsibility to appoint one person or two persons to be the chairman and the CEO of the corporation; see n. 18 of the SCBP.
5 Lead directors and independent directors

The board positions of lead director on one side and of independent director on the other side are not provided for by the law but by self-regulation (for example, by the SCBP). The positions shall safeguard the proper functioning of the boards and, in particular, attack any potential conflicts of interest situations that may arise.

The lead director, an "experienced non-executive member" of the board, shall be appointed if a single individual assumes joint responsibility at the top of the company (i.e., chairman and CEO). Lead directors are not uncommon with listed companies.

The independent director shall be a member of the various important committees of the board; in this respect, as independent members of the board – according to self-regulation – only "non-executive members of the Board of Directors who never were or were more than three years ago a member of the executive management and who have none or comparatively minor business relations with the company" qualify.

6 Information and risk management

Article 715a of the CO is the legal basis for information flow in the board of directors and between its members, respectively:

Any board member may request information on all matters concerning the company (para 1). Yet, this is true only at the meetings of the board (para 2). Apart from the meetings, authorization of the chairman may be needed (para 3) – should the chairman decline the request, the board will decide (para 5). The board members have to apply to the chairman to be shown the books and the files of the corporation (para 4).

51 N. 18 of the SCBP.
52 E.g., Audit Committee (n. 23 of the SCBP, "preferably independent members"), and Compensation Committee (n. 25 of the SCBP, "independent members").
53 N. 22 of the SCBP (in Switzerland, unlike in the US under the SOX, it is legal for an audit committee member to be affiliated with the majority shareholder of the corporation (e.g., in group situations), thus, the formal independence standards seem to be somewhat lower; see H. von der Crone and A. Carlonis, "Corporate Governance und Führungs- organisation in der Aktiengesellschaft," ZIE 100 (2004), 407 et seq. In particular fn. 26; in general, see C. Meier-Scheuer, "Der unabhängige Verwaltungsrat: Ein Beitrag zur Corporate-Governance-Debatte," in Freizeit des Drey (Zurich: Schulthess, 2002), pp. 479 et seq.
54 For further information, see Bach, Schweizer Aktienrecht, section 13 n. 163 et seq.; P. Kunz, "Die Ansprüche und Einsichtsrechte des Verwaltungsratsgliedes," AJP 2 (1994), 572 et seq.
55 In general, see n. 19 et seq. of the SCBP.
56 See section III A 3 above.
57 For general information, see, inter alia, M. Roth (ed.), Corporate Governance and Compliance (Zurich: Dike, 2009), pp. 43 et seq.
59 See Bühler, "Corporate Governance and Compliance," pp. 211 et seq.
60 N. 35 et seq. of the SCBP.
63 For example, UBS AG’s Audit Committee accepted such a guideline on August 11, 2003; it is available at www.ubs.com/1/BrokerMedia/about_corporate_responsibility/commitment_strategy/policies/guidelines/content/pdf/-275350-name=AC_whistleblowing.pdf.
64 The equal treatment obligation (Article 717(2) of the CO) adds to the duty of care and the duty of loyalty according to Article 717(1) of the CO.
65 See n. 16 of the SCBP.
66 A minor exception is Article 718 of the CO, which excludes the potential conflict when a single person represents both him- or herself and the company entering into the agreement.
board members; this shortfall will be remedied with the new Swiss corporation law in the future. Explicitly regulated is the conflict of interest situation regarding boards of listed companies in connection with public takeovers. The board of directors of a target company shall submit a report to the corporation’s shareholders laying out its position in relation to the offer (Article 29 para. 1 of the SESTA) – therein, in all detail, the conflict of interest must be disclosed.

In all shareholder actions (for example, liability lawsuits, challenges of general meetings’ resolutions), the courts in Switzerland generally apply the business judgment rule on behalf of the boards and the corporations, respectively. The judges follow a rather pragmatic approach in that respect; therefore, no clear standard exists. In my view, however, the business judgment rule undermines shareholder protection and corporate governance and thus needs examination.

8 Remuneration: the political “hot potato”

One particular area of potential conflicts of interest is the remuneration of the corporation’s agents (for example, board members). Three different angles of the legal issue may be tackled: the transparency regarding these specific company’s expenses; the power to decide about pay, bonuses, and other benefits; and finally the capping of remuneration.

Swiss corporations have a long history of not disclosing the board’s and the management’s remuneration. For listed companies, though, self-regulation (i.e., the Listing Rules of the SIX) brought some light to the matter some years ago, and the legislature followed in 2007 with a new Article 663bii of the CO providing not full but plenty of transparency in the attachment of the annual financial statement (the total amount for the board and the individual compensation of each member must be disclosed; however, management remuneration is less transparent).

Today, in most corporations under Swiss law, the board of directors instead of the general meeting of the shareholders has the legal power to decide not only on the management remuneration but also on its own remuneration. As pointed out above, a citizen’s initiative to be voted in 2010 (Abroeker-Initiative) aims to empower the shareholders, and the Federal Council’s latest proposal attempts to find some middle ground. It remains to be seen what the outcome will be, but the shareholders may receive decision-making powers.

As mentioned above, the FINMA enacted a circular regarding remuneration schemes as of January 1, 2010. It primarily applies to banks, securities traders, financial groups and conglomerates, insurance companies, and insurance groups and conglomerates that are subject to Swiss financial market supervision (“firms”). The circular applies regardless of the legal form of the financial institution and whether or not said institution is publicly listed.

For firms with an equity capital in the amount of at least CHF 2 billion, the implementation of the circular is mandatory. If the threshold value is not met, the implementation of the circular is not mandatory. It is, however, recommended that the firms take the principles set out in the circular into account for their remuneration schemes as best practice guidelines.


110 See Article 717a of the draft CO (e.g., transparency by informing the chairman on a conflict of interest, duty to abstain) and Article 717b of the draft CO (i.e., remuneration issues for listed companies).

111 Article 32 of the TOG provides, for instance, that it must be disclosed in the report if a board member has entered into an agreement with or is elected on the proposal of or is an employee of the offence.


113 In the US, in particular, one may detect – contrary to Switzerland – a rather analytical approach by the courts; see Kunz, Der Minderheitschutz im schweizerischen Aktienrecht, section 6 n. 125 et seq.


116 See section II A above.


118 BBl 2008, 299 et seq. See section II F above.
In substance, the circular defines minimum standards for the design, implementation, and disclosure of remuneration schemes. In total, ten principles are set out. Important statements include the following: (i) the board of directors is responsible for the design and implementation of a remuneration policy and issues the rules relating thereto; (ii) the remuneration scheme is simple, transparent, enforceable, and oriented toward the long term; (iii) the structure and level of total remuneration is aligned with the firm’s risk policies and designed so as to enhance risk awareness; (iv) variable remuneration is funded through the long-term economic performance of the company and granted according to sustainable criteria; and (v) control functions are remunerated so as to avoid conflicts of interest.

Swiss laws provide no capping whatsoever for board and management remunerations. Recently, the small “Young Socialists Party” (Jungsozialisten) started to collect signatures for a citizen’s initiative with the title “11:2,” i.e., the new corporate rules shall be aimed at outlawing all remuneration that is more than twelve times higher than the lowest remuneration in a given company. Many political observers doubt, however, that the citizen’s initiative will even be filed with the Swiss authorities.

9 Civil liability of board members

The board members’ liability for damages in civil cases (Articles 754 et seq. of the CO) is not unlimited. In fact, each and every director is held liable with his or her entire assets. Moreover, the members of the board are both jointly and severally liable in a lawsuit. Mere negligence (leichte Fahrlässigkeit) in violating the board’s duties is sufficient to trigger liability consequences (Article 754 para. 1 of the CO).

Plaintiffs against the board members may be either the damaged corporation or any shareholder — in case of bankruptcy of the company — any creditor (Articles 754 para. 1 and 757 of the CO). Concrete cases are rare against board members but take place more often against auditors.

114 Available at www.juso.ch/files/091001_Argumenten-1_12_Initiative.pdf.

115 The citizen’s initiative would introduce this capping rule for both listed and non-listed companies.

120 Requirements for a citizen’s initiative are, inter alia, 100,000 valid signatures within eighteen months of the start.

121 For an overview, see H. von der Clausen, A. Caronara, and S. Hunsiker, Aktienrechtliche Verantwortlichkeit und Geschäftsführung (Basel, Genf and Münch: Hedding & Lichtenhahn, 2006), pp. 1 et seq.

B The shareholders

1 General information

Equity investors convene and execute their rights in the general meetings of the corporation; hence, the ordinary or extraordinary general meetings are a core element of corporate governance in Switzerland. Attempts at ranking of shareholders’ protection levels are always somewhat arbitrary. In comparison with other countries, Switzerland ranks somewhere in the middle in this regard. The Swiss standard regarding corporate governance, however, is perceived differently abroad.

For instance, a 1998 report by the Organisation for Economic Cooperation and Development (“OECD”) qualified Switzerland as very weak in corporate governance matters. Recently, the World Economic Forum (“WEF”) in its Global Competitiveness Report 2009–2010 saw Switzerland ranked only forty-first among 133 nations concerning the protection of minority shareholders’ interests.

2 Fiduciary duties of controlling shareholders

In accordance with Article 680 para. 1 of the CO, shareholders have one and only one obligation under Swiss corporation law, i.e., to contribute for a share the amount fixed at the time of issue (Leistungspflicht); at the end of the 1990s, SESTA introduced two additional obligations for equity investors.
in listed companies (Article 20 of the SESTA: disclosure obligation; Article 32 of the SESTA: mandatory takeover offer to the other shareholders). Only a few authors share the view that shareholders have any fiduciary duties at all, with the overwhelming majority of commentators soundly rejecting such a notion for (controlling and other) shareholders under Swiss law.

Nevertheless, majority and other controlling shareholders must respect legal boundaries. The board’s duty in accordance with Article 717 of the CO is to make sure that these investors comply with the laws – even though the board members might be removed afterward by controlling shareholders’ votes in the general meeting (Article 705 of the CO).

For example, funneling by controlling shareholders is illegal under Swiss law and has consequences both on corporation law and on tax law. In accordance with Article 678 of the CO, shareholders who have unjustifiably and in bad faith received shares of profits and interests as well as other performances of the company, for example, are obliged to return them to the corporation (para. 1 (para. 2); the damaged corporation and any of its shareholders may file an action (para. 3) for which the current statute of limitations is five years.

3 Shareholders’ rights, in particular information rights

Generally speaking, it is nearly impossible to describe shareholders’ rights under Swiss law in a fully satisfactory way in the limited space of this chapter. See section IV A 2 and IV B 2 below.


E.g., H. Wahlmann, Die Trennungstheorie des Aktienrechts (Zürich: Schulthess, 1998), pp. 110 et seq.

For further references and a detailed overview, see Kunz, Der Minderheitsrecht des schweizerischen Aktienrechts, section 8 n. 31 et seq. and n. 44.

See section III A 5 above.

The term means, in general, transferring assets and profits out of a company for the benefit of its controlling shareholders; this may often be the case in group situations.


The author’s Habilitation, which covers selected (all) aspects of minority shareholders’ protection in Switzerland, is over 1,000 pages long.

As an overview, the equity investor in corporations receives two sets of entitlements financial rights (for example, dividends and pre-emptive rights) and non-financial rights (for example, rights to call a general meeting and to participate at a general meeting; rights to speak and to vote at a general meeting; rights to file different actions against the corporation or the board members, respectively; and finally, a variety of information rights).

Concerning the right to participate at a general meeting, there has recently been a new discussion in Switzerland triggered by Arysta’s (a Swiss company listed at SIX Swiss Exchange) decision to hold its annual general meeting in Toronto, Canada. Swiss law does not (yet) explicitly regulate whether a general meeting has to take place in Switzerland. If the majority of the share capital is in the hands of foreign shareholders, or if the possibility of a meeting outside Switzerland is generally known (for example, through a clause in the articles of association), there is, in my view, no objection against such a meeting. Should, however, the meeting be organized abroad solely to “muzzle” critical shareholders, the above statement would have to be reversed.

The many information rights (Articles 696 et seq. of the CO) are crucial for the protection of (minority) shareholders in Switzerland. Four information rights are pre-eminent under Swiss law: Articles 696, 697, 697a et seq., and 697b of the CO:

(1) Article 696 of the CO: no later than twenty days prior to the ordinary general meeting of shareholders, the business report and, if there is one, the auditors’ report shall be made available at the corporation’s domicile for inspection (Article 696 para. 1 of the CO). A shareholder may request these documents in copy after approval by the general
meeting (Article 696 para. 3 of the CO). In business reality in Switzerland, most companies are much more forthcoming in favor of their investors.\footnote{Not surprisingly, many non-listed companies in Switzerland provide their shareholders with copies of these documents; the listed companies usually make the documents available through their web pages.}

(ii) Article 697 of the CO any shareholder is entitled to request information from the board at the general meeting concerning the "affairs of the corporation" (Article 697 para. 1 of the CO).\footnote{Under Article 697(1) of the CO, the information may be refused if business secrets or another company's interests are endangered; the board has some discretion in this regard, yet the shareholder might file an action if the information is unjustifiably refused (Article 697(4) of the CO).} Furthermore, any shareholder has the right to inspect the books and files of the company if the general meeting or the board of directors has granted the respective authorization (Article 697 para. 3 of the CO).

(iii) Article 697a et seq. of the CO: at the beginning of the 1990s, the Parliament implemented in Swiss corporation law the special audit (Articles 697a et seq. of the CO: Sonderprüfung),\footnote{The new corporation law will call it special investigation ("Sonderprüfung").} which was inspired by foreign models (for example, Germany).\footnote{For a comparative law perspective, see A. Cassis, Die Sonderprüfung im kirchlichen schweizerischen Aktienrecht (Zürich: Schulthess, 1991), section 2 n. 3 et seq.} The special audit aims to enhance the information level of shareholders so that they are in a better position to file a liability action against the board members, for instance.

Only facts – not legal issues – may be subject to a special audit on which the general meeting must vote in any case; the facts must be necessary for exercising the shareholders' rights (Article 697a para. 1 of the CO). If the general meeting does not approve the special audit,\footnote{If the general meeting accepts the request, the judge may be asked to appoint a special auditor within thirty days (Article 697a(2) of the CO).} only those shareholders meeting certain share capital requirements\footnote{Representation of at least 10 percent of the share capital of the corporation or of shares with at least a nominal value of CHF 2 million are required.} may go to court at all (Article 697b para. 1 of the CO). Afterward, a rather complicated two-step procedure between one shareholder and the corporation ensues (Articles 697c et seq. of the CO).

Finally, the special auditor's report will be presented to the judge (Article 697e of the CO) and, in the end, to all the shareholders in the next general meeting (Article 697f of the CO).

(iv) Article 697h of the CO: this rule provides that the annual financial statement of the corporation, after having been approved by the general meeting, shall either be published in the Swiss Official Gazette (Schweizerisches Handelsamtsblatt ["SHAB"]) or a copy shall be sent to every person requesting it within one year of approval. However, this unconditional rule applies only to listed companies and corporations having outstanding bond issues (Article 697h para. 1 nos. 1 and 2 of the CO).

Switzerland – unlike Germany – does not have a group corporate law. Nevertheless, some rules and precedents exist that are important for groups. For example, the shareholders of the parent company are, under certain preconditions, entitled to inspect the books and files of other group companies,\footnote{See M. Buxtorf, "Aktive Grossaktionäre: Neue Herausforderungen für das Aktienrecht" in Festschrift für Schlap (Zürich: Schulthess, 1995), pp. 233 et seq.; H. Rüthke, "Die Ausübung des Aktien-Stimmrechts durch institutionelle Vertreter und institutionelle Anleger und die Corporate Governance in der Schweiz und den USA," in Festschrift für Fertmann (Zürich: Schulthess, 2003), pp. 415 et seq.} and the specific disclosure obligation under Article 697h of the CO applies to the consolidated financial statements as well.

4 Institutional investors and shareholder activism

Only a few publications in Switzerland\footnote{For further information on Germany, see, inter alia, K. Schindelke, "Institutionelle Anleger und Corporate Governance. Traditionelle institutionelle Investoren vs. Hedgefonds," ZGB (2007), 701 et seq. for the legal definition of institutional investors; in general, see T. Spillmann, Institutionelle Investoren im Licht der (echten) Publikumsgesellschaften (Zürich, Basel, and Geneva: Schulthess, 2004), pp. 226 et seq.; Weber, "Insider v. Outsider in Corporate Governance," pp. 46 et seq.; BCGB, Schneider Aktienrecht, section 13 n. 700 et seq.; Kunz, Der Minderheitenabschuss im schweizerischen Aktienrecht, section 8 n. 78 et seq.} – unlike in Germany\footnote{There is no legal definition of institutional investors; in general, see T. Spillmann, Institutionelle Investoren im Licht der (echten) Publikumsgesellschaften (Zürich, Basel, and Geneva: Schulthess, 2004), pp. 226 et seq.; Weber, "Insider v. Outsider in Corporate Governance," pp. 97 et seq.} – cover the legal specifics of and issues surrounding institutional investors (for example, pension funds).\footnote{The issue is discussed, inter alia, by Weber, "Insider v. Outsider in Corporate Governance," pp. 46 et seq.; BCGB, Schneider Aktienrecht, section 13 n. 700 et seq.; Kunz, Der Minderheitenabschuss im schweizerischen Aktienrecht, section 8 n. 78 et seq.} In fact, institutional investors were a dormant issue for many decades – one disputed issue is whether institutional investors may claim privileged information.\footnote{The issue is discussed, inter alia, by Weber, "Insider v. Outsider in Corporate Governance," pp. 46 et seq.; BCGB, Schneider Aktienrecht, section 13 n. 700 et seq.; Kunz, Der Minderheitenabschuss im schweizerischen Aktienrecht, section 8 n. 78 et seq.} Recent calls from politicians and other sides are trying to convince institutional investors to get more involved as shareholders.
It might be expected under economic aspects that institutional investors are (or should be) active shareholders, but the reality in Switzerland looks different. In general, Switzerland does not qualify as a country with a strong shareholder activism.

In comparison, for instance, with the US or with Germany or even with Japan, there is nearly no investors’ protection association, and shareholders advisory committees (“SAV”), are basically unknown in Switzerland.

Slowly but steadily, in my view, the situation might change in favor of corporate governance. Over the last few years, one small organization — called Ethos — has been successfully active vis-à-vis several well-known listed companies in Switzerland in order to improve their corporate governance. Furthermore, the Swiss Pension Funds Association (“ASIP”) called upon its members to get more involved and to actively execute the shareholders’ rights in general meetings.

C. Labor

1 Employees’ participation in boards of directors

From a legal viewpoint, employees are creditors of the companies and not equity capital providers. Therefore, they are primarily protected by Swiss labor law (as part of the CO) and by Swiss bankruptcy law in case of financial distress. Corporation law also provides for creditors’ protection under certain aspects, but creditors are not entitled to the protective tools granted to shareholders (for example, participating in general meetings, challenging such resolutions, being elected to the board of directors).

Formerly, a board member had to be a shareholder of the corporation; this requirement was rescinded as of the year 2008. Today,

For further details, see M. Ruffinet, Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft - Ein Beitrag zur Theorie der Corporate Governance (Zürich: Schulthess, 2001), pp. 436 et seq. 

Overview, see Senn, Der Minderheitsrecht im schweizerischen Aktienrecht, section 6 n. 68 et seq.

[157] Ibid., section 6 n. 75 et seq.

See www.ethosfund.ch. See www.asip.ch.

See ASIP’s guidelines, available at www.asip.ch/news?id=35025b2d7a605f8d11c3 ed8f2c589f (dated November 11, 2005).

Transparency and information rights are not only very important for shareholders but also for creditors; see P. Kunz, “Transparenz für den Gläubiger der Aktiengesellschaft,” SIZ 99 (2003), 53 et seq.

Therefore, an employee of the company may be elected to the board but a mandatory rule – as in Germany – does not exist in Switzerland. Employees’ participation on boards is not part of Swiss tradition. It remains to be seen whether political initiatives in the other direction will be successful.

Creditors’ interests are also affected by corporate restructuring (for example, mergers and spin-offs). On July 1, 2004, the Swiss Mergers Act (“MA”) came into effect. Even though the creditors, as in the other areas of corporate law, do not have participation rights or, in particular, decision-making powers, their interests must be safeguarded by both the boards of directors and by the shareholders in the general meetings.

2 Trade unions

Compared to other Western European countries, trade unions in Switzerland play a minor role. Only approximately every fourth employee is a member of a trade union. As a consequence, Switzerland is one of Western Europe’s countries with the lowest rate of employees organized in a trade union. About 750,000 employees are members of one of the trade unions to this day. Since the 1970s, trade unions in Switzerland have lost around a third of their members.

There are two major trade union federations in Switzerland that contain approximately two-thirds of all trade unionists. Other trade unionists are organized in independent trade unions. Current topics of trade union involvements include full employment, fair salaries, enhancement of the conditions of employment, and equal opportunities for all employees.

In connection with the present reform of the corporation law, some discussions are still ongoing, e.g., Gesellschaftsrecht Kursbuch No. 5 (March 30, 2009) (“Aktienunternehmen / Arbeiterbeteiligung in der Verwaltung”); see www.treuezusammen.ch/de/system/files/57-aktienrecht-arbeiterbeteiligung-der-verwaltung.pdf.

Swiss Merger Act ("MA"): 521, 221, 301; for a detailed overview, see P. Kunz, “Das neue Fusionsgesetz (FusGa),” in P. Rittig and O. Arter (eds.), Entwicklungen im Gesellschaftsrecht, vol. 1 (Bern: Stämpfli, 2006), pp. 185 et seq.


Ibid., p. 11.
corporations, however – all corporations not meeting the particular thresholds and requirements for regular auditing – may resolve for review auditing with a lower standard (Article 727a of the CO). Finally, the smallest corporations can even "just say no" to any auditing at all (opting out of the auditing process in accordance with Article 727a para. 2 of the CO).

3 Tasks and independence levels

The regular auditors shall examine and later report on whether the annual accounts as well as the proposals of the board concerning the use of the balance sheet profits comply with the law and the articles of incorporation (Articles 728a et seq. of the CO); specifically, the regular auditors must check the internal control system (Article 728a para. 1 no. 3 of the CO).178 The review auditors, in comparison to the regular auditors, have fewer tasks in accordance with Articles 729a et seq. of the CO, for example, the internal control system is not an issue. The auditors’ independence always proves to be a critical and an often thorny issue for SG purposes.179 In Switzerland as of today, however, the independence requirements are different depending on whether a regular audit or a review audit is to be done.180

Generally speaking, of course, all auditing must be independent; this is emphasized by Articles 728a para. 1 and 729 para. 1 of the CO. As an additional general rule, however, the regular auditors (Article 728 of the CO) must meet a higher standard of independence than the review auditors (Article 729 of the CO); the main difference between the auditing providers is that the review auditors are allowed to offer bookkeeping and other services, for example, legal and tax counseling, to the corporations to be reviewed by them (Article 729 para. 2 of the CO).181

177 Corporations with ten or fewer employees on an average yearly basis may opt out with the consent of all shareholders (Article 727(2) of the CO), i.e., no auditing is done.
180 See section III D 2 above.
181 Under the former Swiss law, such combinations of auditing services, bookkeeping services, and other counseling services were generally frowned upon, thus, in my view, the independence standards were stricter.
4 Civil liability of auditors

Swiss corporation law expressly provides for the audit liability in Article 755 of the CO. All persons engaged in the audit of the annual accounts and the consolidated financial statements etc. – i.e., involved in auditing processes – are liable not only to the corporation but also to the shareholders and to the creditors for all the damages caused by intentional or negligent violations of their auditing duties. 182

If several persons are liable for damages, any one of them is liable jointly and severally with the others (Article 759 of the CO). This rule seems to endanger auditors if a claimant focuses on them rather than on the board members due to an alleged “deep pocket theory.” 183

Consequently, the present legislative reform proposes to introduce a new provision in Swiss corporation law with the purpose of capping the auditors’ liability toward the plaintiff.

The Federal Council, in its first proposal (bundesrechtlicher Vorentwurf), suggesting limitation caps in case of negligence of CHF 10 million for private corporations and of CHF 25 million for listed corporations, expressly referred to Germany and Austria. In my view, such a provision would not be in line with general liability laws in Switzerland and qualify as a privilege for auditors. 184 Nevertheless, most commentators are in favor of such a provision. 185

182 For information on auditors’ civil liability, see U. Berüschinger, “Verantwortlichkeit der Abschlussprüfer im Schweizer Recht – Aktuelle Fragen nach der Neuregelung des Revisionsrechts und vor der nächsten Aktienrechtreform,” in P. Harrer and M. Grauer (eds.), Aktuelle Probleme der Abschlussprüfung (Vienna: Mann, 2006), pp. 70 et seq.

183 It must be pointed out, though, that under Swiss law, joint and several liability exists only to the extent that the damage is attributable to the auditor based on the auditor’s own fault and personal circumstances (Article 759(1) of the CO); in general, see R. Bihler and R. Titgemeyer, “Revision des Verantwortlichkeitsrechts: differenzierte Stellungsnahme der Revisionstätte und übergeordneten Änderungen,” GesKB Sondernummer Aktienrecht (2008), 149 et seq.

184 For discussion, see W. Dotz, “Haftungsbeginn für die Revisionsstelle Notwendigkeit oder Privileg?” SZW 78 (2006), 168 et seq.


186 See section II C above. 187 See section IV A 4 below.

188 See section IV B 2 below. 189 See section IV B 2 below.

189 See, inter alia, C. Köppl, Die Angebotspflicht im Schweizerischen Kapitalmarktrecht (Zürich: Schulthess, 1999), pp. 1 et seq.

190 For further information, inter alia, see R. Tschöp, J. Ulland, and H.-J. Diem, Öffentliche Kapitalanleger (Zürich: Schulthess, 2007), n. 32 et seq. Kunz, Der Minderheiten Schutz im Schweizerischen Aktienrecht, section 10 n. 124 et seq.

191 Opting out, i.e., the listed company – prior to their equity securities being admitted to an official listing on a stock exchange – may state in its articles of incorporation that an offeree shall not be bound by the obligation to make a public takeover offer (Article 22 (2) of the SESTA).

192 Opting up, i.e., the listed company may raise the threshold in its articles of incorporation from 33 1/3 percent to a maximum 49 percent of the voting rights (Article 32(1) of the SESTA).
provisions in the articles of incorporation. Thus, a decision may be taken by the shareholders in the corporation’s general meeting.

If a mandatory offer is triggered, the price offered shall be at least as high as the stock exchange price at that time and – for further protection of the other shareholders – shall not be lower than 25 percent of the highest price paid by the offeror for equity securities of the target company in the preceding twelve months (Article 32 para. 5 of the SESTA). A mandatory offer may be settled in the form of an exchange of securities only if a cash payment is offered as an alternative. Further ordinance rules safeguard the shareholders’ interests in this regard.

Some years ago, TB precedents introduced the best price rule (post-bid) into Swiss law, not only for mandatory offers but for all public takeover in Switzerland. 194

3 Defensive measures
From the moment a public takeover offer is published, the board of directors of the offeree company is strictly limited in its defensive measures. 195 In particular, the target corporation shall not enter into any legal transactions that would have the effect of significantly altering the assets or liabilities of the company (Article 29 para. 2 of the SESTA).

For example, 196 the offeree company shall be deemed to be acting unlawfully if it sells or acquires assets of which the value or price exceeds 10 percent of the balance sheet total, or if it sells or pledges any parts of the business that form part of the main subject matter of the offer and that have been specified as such by the offeror ("crown jewels"), or enters

194 Until the end of 2008, this takeover rule protecting minority shareholders was provided for by precedents – the latest reform, however, implemented this rule in Article 4(2) of the PSMA Stock Exchange Ordinance ("SESTO-PSMA"); for background information, see J. Faneker and M. Glättli, "Öffentliche Tauschangebote und die Pflicht zum alternativen Bausparkonto," SZW 81 (2009), 191 et seq.
195 In general, Article 28 et seq. of the SESTO-PSMA: SR 954.193 and Art. 40 et seq. of the SESTO-PSMA (section titled "Determination of the Offer Price").
196 For further details and an overview, see S. Schürer, "Best Price Rule im schweizerischen Übernahmerecht," ST 82 (2008), 449 et seq.
197 Once the offer is published, in addition, the target company shall notify the TB in advance about any defensive measure that it is considering (Article 35 of the TOO).
198 See, in particular, Articles 36 of the TOO (unlawful defensive measures) and Article 37 of the TOO (inadmissible defensive measures); for details, see Bühler, Regulierung im Bereich der Corporate Governance, pp. 326 et seq.

into contracts with directors and officers of the company that provide unusually high remuneration in the event of their leaving the corporation ("golden parachutes"). Interestingly, decisions taken in the general meetings of the shareholders are not subject to the restrictions mentioned above and may be implemented irrespective of whether they were adopted before or after publication of the public takeover offer (Article 29 para. 2 of the SESTA).

Therefore, certain defensive measures – for example, the implementation of registered shares’ transfer restrictions by the articles of incorporation – are legal under Swiss law. 199

4 Squeeze-out rules
Finally, Article 33 of the SESTA provides for a squeeze-out or a freeze-out, respectively, of minority shareholders. An offeror, who upon expiry of the offer period, holds more than 98 percent of the voting rights of the target company may, within three months, petition the court to cancel the outstanding listed equity securities (Article 33 para. 1 of the SESTA). 200 According to Article 33 para 1 ad finem of the SESTA, the offeror shall file an action against the offeree company, and the remaining shareholders are entitled to participate in these proceedings. Following the final court decision, the target company shall reissue the cancelled equity securities and allot them to the offeror. The compensation – to be paid by the offeror – is the payment of the offer price or the fulfillment of the exchange offer in favor of the holders of the equity securities, which have been cancelled (Article 33 para. 2 of the SESTA).

B Disclosure and transparency

1 Accounting
Swiss corporation law (including its accounting rules according to Articles 662 et seq. of the CO) does not provide for any accounting system. This might change with the current accounting reform, but the legislative outcome, in my view, is still uncertain and very much in doubt.

199 For an overview, see ibid., pp. 341 et seq.
Today, self-regulation (i.e., by the Swiss Institute of Certified Accountants and Tax Consultants [Treuhänder-Kammer]) is more important for choosing the accounting system. The most important self-regulated system is the Swiss GAAP FER, a principles-based accounting standard closer to the IFRS than to the US GAAP. The particular SIX listing depends, for instance, on the accounting choice.

2 Disclosure obligations including the listing prospectus

As pointed out above, Swiss laws – both regulations (i.e., CO and SISTA) and also self-regulations – contain many rules on detailed disclosure and on higher transparency, for example, periodic transparency in accordance with Article 69f of the CO, disclosure obligations by shareholders according to Article 20 of the SISTA, and Ad hoc Publicity.

Finally, the listing prospectus, which must provide sufficient information for competent investors (Article 27 para. 1 of the SIX Listing Rules), is regulated by the Listing Rules. The listing prospectus must contain, according to Article 28 of the SIX Listing Rules, all information

Kunz, “Corporate Governance,” p. 479.
151 The listing in the SIX’s “Main Standard” requires either US GAAP or IFRS, for the “Domestic Standard,” however, Swiss Generally Accepted Accounting Principles of Foundation for Accounting and Reporting Recommendations (“Swiss GAAP FER”) is sufficient; see Article 51 of the SIX Listing Rules with further reference to the Directive Financial Reporting (“DFR”).
152 In general, see Weber, “Insider v. Outsider in Corporate Governance,” pp. 86 et seq.
153 See section III B 3 above.
154 See section II C above; the statutory thresholds of shareholdings to be disclosed under Article 20 of the SISTA see the following: 3 percent, 5 percent, 10 percent, 15 percent, 20 percent, 25 percent, 33 1/3 percent, 50 percent, and 66 2/3 percent; for further details, see Article 7 et seq. of the SIXTO-FINMA; in general, see P. Klüter, Die Erfüllung der (arbitr.- und beraubungsrechten) Meldungspflicht und Angebotspflicht durch Aktionärsgruppen (Zurich: Schultheiss, 2003), pp. 1 et seq.
155 See section II B above.
156 See further information, see F. Hueber, P. Hofold, and C. Staub Girrew, Praktikum zum Richtergesetz der SWX Swiss Exchange (Zurich: Schultheiss, 2000), pp. 211 et seq.
157 See Article 27 et seq. of the SIX Listing Rules.

V Enforcement

A Available sanctions and their relevance

1 Overview

Sanctions in connection with corporate governance matters may be either civil (for example, actions by shareholders against board members or against general meeting resolutions) or administrative (for example, by the supervisory authorities) or criminal (for example, notice by target companies to prosecutors or investigations by criminal authorities).

In recent years, a shift toward criminal prosecutions and administrative investigations – in particular regarding alleged disclosure obligation violations – may have been detected. Private enforcement, however, does not play a major role in this country.

The effectiveness of Switzerland’s sanctions system was never examined. Therefore, not more than an educated guess exists. In my view, though, the Swiss sanctions system for corporate governance issues seems rather weak. If the analysis shows a shortcoming of a sanction, however, the calls for a remedy are rather quick in Switzerland; the sanction system based on the voting rights suspension action (Article 20 para. 4bis of the SISTA) is illustrative.

2 Examples of legal sanctions

In ad hoc publicity matters the SIX has a long reputation of being lenient on the issuers. In my view, this seems not to be a general rule.

V C 2 below.
158 The Swiss Penal Code (“SPC”) (SR 311.0) contains various corporate governance crimes, e.g., insider trading (Article 141 of the SPC), or manipulation of the stock market (Article 161bis of the SPC).
159 See section V A 2 below.
In corporate governance matters, there have been only a few sanctions spoken to date. The Sanction Committee of the SIX may either reprimand or fine the companies for violating its rules. Until mid-2009, the maximum fine that could be levied by the SIX was only CHF 200,000, but this potential sanction was considerably strengthened to CHF 10 million (Article 61 para. 1 no. 2 of the SIX Listing Rules).

Late in 2007, a new sanction for violating the disclosure obligations by investors in listed shares came into force, i.e., the voting rights suspension action. At the request of FINMA, the company, or one of the shareholders, the judge may suspend for a period of up to five years the exercise of voting rights by any person who has breached the obligation to notify when buying or selling the holding (Article 20 para. 4bis of the SESTA).

The voting rights suspension action of Article 20 para. 4bis of the SESTA seems to be rather ineffective today with the FINMA as a quaint in court. Therefore, a reform is planned. In the future, the FINMA shall not file an action in court against the alleged violator of disclosure obligations but get the power to issue an order to suspend the voting rights of such an equity investor; thus, the sanction process will become much quicker than today.


219 Recent decisions by the SIX Sanctions Committee on ad hoc publicity violations: reprimand (January 31, 2008), and fines of CHF 10,000 (November 19, 2007), of CHF 20,000 (April 16, 2009), of CHF 30,000 (March 25, 2009), and of CHF 100,000 (November 19, 2007). Most recent decisions on corporate governance violations: reprimands (June 21, 2010 and July 30, 2010).

220 Article 81(1) of the SIX Listing Rules provides, in case of negligence, a fine of up to CHF 1 million, and in case of wrongful intent, a fine of up to CHF 10 million.

221 See, inter alia, P. Kunz, "Die Stimmrechtsauflösungs­klage im Recht der Direkt­­repräsentanten," Zeitschrift für das geschäftliche Recht (ZfGR), 13 (1990), pp. 187 et seq., R. Wetter, C. Hampus, and T. Cendrian, "Praktische Aspekte der Stimmrechtsauflösungs­klage nach Art. 20 Abs. 4bis BEHG," in Fest­schrift für vor­si­men­de Direkt­­re­präsentanten (Basel: Heidelberg: Lichten­­hahn, 2009), pp. 793 et seq.; if the violation of Article 20 of the SESTA took place in connection with a public takeover offer, not the FINMA but the TB may file an action in court (Article 20(4)bis ad foenum of the SESTA).

222 Examinationsminister Bündnerkante and Marktkommission, Bericht vom 29. Januar 2009 (Report of January 29, 2009), 86 (January 29, 2009), available at www.e6.admin.ch/dokumentation/rab.uno/0078/001375.html?lang=de­&ie=desc&download=55w9QlQuCa­/RulesKdXo3WemQqNfTNTJaXznxQV7YgPblhBsnmYmc=726Z2gSMINJx5ZAIKXZ­­251b71sN4n5sEp5Y7P0ksi0552apXCl3Y552hoYo9w51=42.
recommendations and its orders, respectively, in connection with public takeover offers, to the FINMA with its orders regarding violations of Article 20 of the SBSSTA (disclosure obligations), and to the SIX with reprimands and fines concerning violations of the Listing Rules (ad hoc publicity, accounting principles, etc.).

Starting on September 1, 2007, a new supervisory authority for auditing firms was introduced, i.e., the Auditors' Supervisory Agency (Revision- saufschutzbehörde ["RAB"]).227 The RAB does not supervise the listed companies but rather their auditors (sic), which need to attain a certain standard of expertise and excellence in auditing.228 Therefore, the RAB improves corporate governance at least indirectly for listed companies.

Switzerland has a long tradition of pragmatic authorities (maybe with the exception of some tax authorities). This assessment does not mean that the authorities are less serious or conscious about their work ethic, their powers, and legal compliance issues. But Swiss authorities sometimes see themselves as service providers instead of mere guardians of the law, thus, they are accessible to talks - within this context, it is meant as a compliment (for example, to the TB) and an advantage of the Swiss systems. The pragmatic approach, in my view, did not undermine corporate governance at all.

C Shareholders

1 Personal responsibilities

As a general rule, Switzerland is not in favor of state intervention or of state support in any areas, and this holds true in corporate law. Thus, the core principle guiding the Swiss corporation law is the shareholders' personal responsibility (Eigentumsverantwortlichkeit).

The equity investors are called upon to look out for themselves - if they are not interested or not willing to protect themselves and to fight for their own and for their rights, why should anyone else (for example, the authorities) serve as their guardians?229 In this regard, the Swiss

227 See www.revisionsauditsbehoerde.ch/docs/content_blue_right.asp?id=30483&mp=DE
domid=1063.

228 According to Article 729b(1) of the CO, for instance, the accounting of listed companies must be audited only by a supervised auditing firm (staatlich kaufmännisches Revision
unternehmen) which owns a specific certificate from the RAB; only some thirty auditing
firms in Switzerland have this particular qualification.

229 For information on this fundamental issue, see Kunz, Der Minderheitserschutz im schweizerischen Aktienrecht, section 6 n. 5 et seq.
the corporation to challenge resolutions of the general meeting (not of the board) that violate either the law or the articles of incorporation (Article 706 para. 1 of the CO). The right to sue lapses, however, if the lawsuit is not filed within two months after the general meeting (Article 706a para. 1 of the CO).

(iii) Request for the corporation’s dissolution (Article 736 no. 4 of the CO): Shareholders representing at least 10 percent of the share capital may request the dissolution of the company for valid reasons; instead of dissolution, the judge may decide on another solution appropriate in the circumstances and acceptable to the interested parties – in fact, this action may enhance the “exit solution” for minority shareholders.256

The major concern for the plaintiffs in shareholder lawsuits, in Switzerland and also abroad, is usually the costs aspect (including the lawyers’ fees). Swiss corporation law contains some rules to ease these concerns, in particular, Article 706a para. 3 of the CO (shareholder challenging general meetings’ resolutions)257 and Article 756 para. 2 of the CO (liability action).258 However, these rules do not effectively promote shareholders’ actions, primarily because they do not apply to payments of advances to the court (Gerichtskostenvorschüsse).

D Others

Since Switzerland’s business is often rooted in business associations, non-legal sanctions – such as peer pressure – must not be underestimated. In addition, the media being in competition with each other259 scrutinizes business behavior and alleged corporate governance shortfalls in great detail. In fact, business news has been big news in Switzerland over the last few years.

257 If the lawsuit is dismissed, the judge shall allocate the costs in his own discretion between the defendant corporation and the plaintiff shareholder.
258 If the shareholder, based upon the factual and legal situation, had sufficient cause to file an action, the judge shall divide the costs in his discretion between the plaintiff shareholder and the corporation, which is not the defendant, to the extent they are imposed on the defendant (e.g., a board member).
259 This intense competition seems to enhance, in particular, investigative journalism.

VI Other matters

A Financial institutions

Corporate governance is currently the main legal issue in terms of Swiss corporation law matters.241 Furthermore, corporate governance had and still has a traditional role in the area of banks and other financial intermediaries (for example, insurance companies).

Financial institutions in Switzerland are, with a few notable exceptions, regularly organized as corporations, but the corporate governance standards are higher for the financial sector than for other Swiss corporations in general.242 In accordance with specific laws, for instance, banks’ and insurance companies’ direction and control must be separated. Therefore, personal unions of chairman and CEO are specifically banned.

B Private codes by self-regulators

Switzerland follows a general trend – usually based on self-regulation – toward improved corporate governance over the last few years. This is true not only for corporations and for listed companies, respectively, but also for other Swiss enterprises.

Non-official proposals and private codes for business organizations and other interest groups are made, for example, for foundations

240 See section III B 4 above.
241 See section II A above.
242 Banking business e.g., Raiffeisen banks are cooperative companies (“Genossenschaften”), and all “Privatbanken” (special category of private banks) (e.g., in Geneva) must be either partnerships or sole entrepreneurs under the law; insurance business e.g., Mobiliar.
243 This might heighten the expectations vis-à-vis board members of banks; see, in general, E. Hopf, “Ermächtigungen an den Verwaltungsrat in Aktiengesellschaften und Banken. Bemerkungen aus deutscher und europäischer Sicht,” SZW 80 (2000), 230 et seq.
244 Booske e.g., Article 4(2) of the Banking Ordinance (Bankenverordnung ["BankV"]): SB 952.02; insurance companies: Article 13 et seq. of the Insurance Supervision Ordinance (Aufsichtsverordnung ["AVO"]: SB 961.01; see, inter alia, Forstmoser “Corporate Governance in der Schweiz,” p. 29 fn. 33.
245 Corporate governance should also be an issue for the "Kantonallähen" (i.e., banks entirely or partially owned by the Swiss Cantons); see M. Pedregosa, I. Müller, and D. Piet, "Corporate Governance: einige Gedanken zu den Kantonallähen," in Forschrift für von Bären (Basel: Helbing Lichtenhahn, 2009), pp. 691 et seq.
in Switzerland is weak or average at best. This view is (or was) understandable, and recent developments particularly in the areas of auditing\textsuperscript{229} on one side and of defensive measures against unfriendly takeover attempts by foreign investors\textsuperscript{230} on the other side might confirm this prejudice.

In my view, though, the winds have changed in Switzerland over the last few years. In particular, this decade’s developments in self-regulation (SCBP as well as SIX regulations)\textsuperscript{231} leveled the playing fields between Switzerland and foreign countries. Thus the country reached the international standards for corporate governance some years ago.

Moreover, the present legislative reform of Swiss corporate law\textsuperscript{232} will further increase Switzerland’s standing in this regard. The Swiss corporate governance standards in the future will be much higher above average – and hopefully, the international community will take better notice in the future. Some areas of the Swiss corporation law of the future, indeed, may even play a role model for other countries.

B The future of corporate governance in Switzerland

Notwithstanding the encouraging signs above, some legal improvements on corporate governance aspects are not yet final and currently endangered by political opposition in the Swiss Parliament (for example, the election duration for board members might not be shortened to one year). And certain areas of corporate governance remain to be improved.

Hence, corporate governance in Switzerland faces a long road to success.

In my view, the Swiss corporate law ought to be amended, inter alia, as follows:

(i) Transfer restrictions: the legality of transfer restrictions for listed registered shares (Vinkulierung)\textsuperscript{233} ought to be rescinded; the present rules (Art. 685a al sq. of the CO) impede the market for corporate control.\textsuperscript{234}

\textsuperscript{229} See section III D 1 above.

\textsuperscript{230} See section II E above.

\textsuperscript{231} See section II B above.

\textsuperscript{232} See section II A above.

\textsuperscript{233} Starting the recent debate, see F. Kast, “Die Vinkulierung als Gehirnwaffe gegen unfreundliche Übernahmeversuche: Plädoyer für die Ergänzung der laufenden Aktienrechtsrevision um eine Vinkulierungs-Debatte,” NZZ 268 (2007), 33; for a different view, see R. Walter and D. Dubs, “Was bedeutet Fairplay beim Kampf um die Kontrolle von Firmen?” NZZ 273 (2007), 29. None of these earlier studies, see Kast, Der Minderheitsenschutz im deutschen Aktienrecht, section 18 sqq.

\textsuperscript{234} For further details, see U. Schenker, Schweizerischer Übernahmerekhtsvertrag (Bern: Stämpfli, 2009), pp. 1 sqq.
(ii) Exit rights: the Swiss LLC laws, for instance, provide members with rights to exit the company (for example, Article 822 of the CO); the Swiss corporation law should be amended accordingly for shareholders of corporations as well.

(iii) Restricted personal liability: the legislature should not introduce any limitation on auditors’ personal liabilities in order to not privilege this profession.

(iv) Removal of directors by the court: Finally, the Swiss corporation law should provide for an action to remove board members from this position; today, only the shareholders in a general meeting may remove the directors with a majority vote (Article 705 para. 1 of the CO).

Good corporate governance is a legal concept that warrants being further promoted, in my view — and this holds true for both Switzerland and abroad. The present political developments seem to be most favorable, and this country is a good example for a successful approach, i.e., by evolution and not by revolution. The trend from self-regulation toward regulation might be inevitable, yet any overreaching has to be rejected.

VIII Annex

A Cases

BGE 122 III 195 (of May 28, 1996): cura in eligendo, etc.
BGE 129 III 499 (of April 4, 2003): rights of information within the board.
BGE 130 II 530 (of August 25, 2004): mandatory offer according to Article 32 of the SESTA.
BGE 136 II 304 (of March 11, 2010): disclosure obligation for CD (Impellen/Lazy).

Federal Banking Commission Order of May 29, 2008 (Sulzer/Everest) — not reviewed by a court.

282 Kiss, Der Minderheitsanspruch im Schweizerischen Aktienrecht, section 18 n. 63.
283 Ibid., section 18 n. 68.

TB recommendation of July 6, 2004: applicability of best price rule — not reviewed by a court.
TB order re Ludama of March 17, 2009: applicability of SESTA — not reviewed by a court.

B Literature

1 Leading corporate law literature

2 Main corporate governance literature
Böbler, C., Regulierung im Bereich der Corporate Governance (Zurich: Dike, 2009).
Giger, G., Corporate Governance als neues Element im schweizerischen Aktienrecht (Zurich: Schulthess, 2003).
C Other sources

- Classified Compilation of Swiss Federal Legislation: www.admin.ch /ch/ris/rs.html.
- Swiss legislation and ordinances: www.finma.ch/e/reguierung/gesetze /Pages/default.aspx.