20

Switzerland

The system of corporate governance

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I Background information 869
II General information on corporate governance 870
A Definition of corporate governance and Swiss corporate law reforms 870
B Legal sources of corporate governance: regulation and self-regulation 872
C Capital market rules and corporate governance 873
D Specifics in Switzerland 874
E Foreign investments 876
F Corporate scandals and impact of foreign law 876
III Internal corporate governance 878
A The board 878
1 The one-tier and two-tier models 878
2 Structural elements in general 879
3 Tasks and powers 880
4 Functioning of boards and board committees 881
5 Lead directors and independent directors 882
6 Information and risk management 882
7 Fiduciary duties of board members 883
8 Remuneration: the political "hot potato" 884
9 Civil liability of board members 886
B The shareholders 887
1 General information 887
2 Fiduciary duties of controlling shareholders 887
3 Shareholders' rights, in particular information rights 888
4 Institutional investors and shareholder activism 891
C Labor 892
1 Employees' participation in boards of directors 892
2 Trade unions 893
D Audit 894
1 Recent legislative reform 894
2 Mandatory auditing 894

3 Tasks and independence levels 895
4 Civil liability of auditors 896
IV External corporate governance 897
A Takeover regulation 897
1 Overview 897
2 Mandatory offers and price rules 897
3 Defensive measures 898
4 Squeeze-out rules 899
B Disclosure and transparency 899
1 Accounting 899
2 Disclosure obligations including the listing prospectus 900
V Enforcement 901
A Available sanctions and their relevance 901
1 Overview 901
2 Examples of legal sanctions 901
B Supervision 903
1 Non-listed companies 903
2 Listed companies 903
C Shareholders 904
1 Personal responsibilities 904
2 Shareholders' lawsuits 905
D Others 906
VI Other matters 907
A Financial institutions 907
B Private codes by self-regulators 907
VII Final conclusions and observations 908
A View from abroad 908
B The future of corporate governance in Switzerland 909
VIII Annex 910
A Cases 910
B Literature 911
C Other sources 912

I Background information

Swiss company laws provide for the distinction between corporate organizations and partnership organizations.[1] 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-Hayoz and P. Forstmoser, *Schweizerisches Gesellschaftsrecht*, 10th edn. (Bern: Stämpfli, 2007), section 2 n. 8 *et seq.* and 62 *et seq.*

("corporations")[2] and of limited liability companies ("LLCs").[3] Unlike in Germany, the LLCs do not bear the same weight in Switzerland as corporations. Moreover, all listed companies are corporations.[4]

This chapter will cover the legal aspects of corporate governance for corporations.

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.[5] Most erudite commentaries 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)[6] and their definitions[7] and to one particular Swiss code.[8]

In substance, the academic definition[9] 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 "*grosse Aktienrechtsrevision*" (see, *inter alia*, P. Kunz, "Aktienrechtsrevision 20xx," *Jusletter* [February 2, 2009], n. 1 *et seq.*); Switzerland has 186,232 corporations (September 15, 2009).

[3] Gesellschaften mit beschränkter Haftung ("GmbH"): Article 772 *et seq.* of the CO; the Swiss LLCs law was recently amended for the first time since the LLCs' first introduction in Switzerland in 1936: P. Kunz, "Grosse GmbH-Revision als Chance und Herausforderung für schweizerische Unternehmungen," *Jusletter* (April 30, 2007), n. 1 *et seq.*; Switzerland has 116,242 LLCs (September 15, 2009).

[4] Only a small fraction of corporations (some 400 companies) are listed companies, i.e., corporations with shares being publicly quoted and traded either at the SIX (SIX Swiss Exchange) in Zurich or at the BX (BX Berne eXchange) in Bern; "over-the-counter" ("OTC") companies do not qualify as listed companies under Swiss law (see www.six-swiss-exchange.com and www.berne-x.com).

[5] P. Kunz, "Corporate Governance: Tendenz von der Selbstregulierung zur Regulierung," in *Festschrift für Böckli* (Zurich: Schulthess, 2006), p. 472.

[6] See P. Böckli, "Corporate Governance: The Cadbury Report and the Swiss Board Concept of 1991," *SZW* 68 (1996), 149 *et seq.*

[7] See, *inter alia*, D. Zobl, "Was ist Corporate Governance?" in P. Forstmoser, H. von der Crone, R. Weber, and D. Zobl (eds.), *Corporate Governance* (Zurich: Schulthess, 2002), p. 9 fn. 13; in general, see T. Bühler, "Corporate Governance und Compliance," in *Festschrift für Forstmoser* (Zurich: Schulthess, 2003), pp. 213 *et seq.*

[8] See section II B below.

[9] P. Böckli, "Corporate Governance auf Schnellstrassen und Holzwegen," *ST* 74 (2000), 133 *et seq.*; R. Weber, "Insider v. Outsider in Corporate Governance," in P. Forstmoser, H. von der Crone, R. Weber, and D. Zobl (eds.), *Corporate Governance* (Zurich: Schulthess, 2002), pp. 84 *et seq.*

their relations) and on the other side external corporate governance (i.e., relations with capital markets, customers, and employees).

Swiss corporation law underwent a fundamental reform at the beginning of the 1990s. The main legislative aim was to improve shareholders' protection[10] and thus to strengthen corporate governance.[11] In the meantime, the corporation law has been amended several times.[12]

Currently, Swiss corporation law, including the accounting rules in Articles 662a *et seq.* of the Swiss Code of Obligations ("CO") is being amended in a fundamental way (referred to as *grosse Aktienrechtsrevision*).[13] This latest reform project[14] puts improvements of corporate governance center stage (for example, with proposed changes primarily to the general meetings and the boards of directors).[15] Thus, corporate governance is *en vogue* and represents today's main political focus regarding corporation law in Switzerland.[16]

The corporate bill was introduced by the Swiss government (i.e., the Federal Council) in 2007 and is due to pass by the Parliament at the earliest in 2010 or 2011.

[10] See P. Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht: Eine gesellschaftsrechtliche Studie zum aktuellen Rechtszustand verbunden mit Rückblick und mit Vorausschau sowie mit rechtsvergleichenden Hinweisen* (Bern: Stämpfli, 2001), section 3 n. 140 *et seq.*; F. Ehrat, "Switzerland," in M. Stecher (ed.), *Protection of Minority Shareholders* (London *et al.*: Kluwer Law International *et al.*, 1997), p. 224.

[11] P. Nobel, "Corporate Governance und Aktienrecht," in *Festschrift für Forstmoser* (Zurich: Schulthess, 2003), pp. 328 *et seq.*

[12] Since the 1990s, the various Swiss company laws, in general, are under pressure, and many reforms took place over the last few years; see P. Kunz, "Permanenter Umbruch im Gesellschaftsrecht: Eine Übersicht zu den legislativen Sturmböen seit 1991," SJZ 102 (2006), 145 *et seq.*

[13] For an overview, see P. Böckli, "Zum Vorentwurf für eine Revision des Aktien- und Rechnungslegungsrechts," GesKR 1 (2006), 4 *et seq.*

[14] For early observations, see J. Druey, "Corporate Governance: Einige allgemeine Überlegungen," GesRZ, special issue (2002), 32 *et seq.*; P. Böckli, "Revisionsfelder im Aktienrecht und Corporate Government," ZBJV 138 (2002), 709 *et seq.*

[15] The Swiss government, *expressis verbis*, referred to corporate governance in its legislation draft report to the Parliament: BBl 2008, 1591/1606 *et seq.*; the author proposed a Corporate Governance Ordinance, see Kunz, "Corporate Governance," pp. 493 *et seq.*; in general, see P. Böckli, "Corporate Governance und 'Swiss Code of Best Practice,'" in *Festschrift für Forstmoser* (Zurich: Schulthess, 2003), pp. 263 *et seq.*

[16] One specific aspect of corporate governance, i.e., the remuneration issue of management and board (pay, bonuses, and other benefits), caused a particular political spin-off (BBl 2009, 299 *et seq.*) due to a citizen's initiative (commonly called "Abzocker-Initiative"), which will be voted on by 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[17] – 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 "[n]on-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 issues[21] – 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'

[17] In general, see G. Giger, *Corporate Governance als neues Element im schweizerischen Aktienrecht* (Zurich: Schulthess, 2003), pp. 55 *et seq.*; C. Bühler, *Regulierung im Bereich der Corporate Governance* (Zurich: Dike, 2009), pp. 41 *et seq.*
[18] www.economiesuisse.ch; see Kunz, "Corporate Governance," pp. 485 *et seq.*
[19] For its legal nature, see Böckli, "Corporate Governance und 'Swiss Code of Best Practice,'" pp. 284 *et seq.*
[20] N. 3 Preamble of the SCBP; see P. Forstmoser, "Corporate Governance: eine Aufgabe auch für KMU?" in *Festschrift für Zobl* (Zurich: Schulthess, 2004), pp. 475 *et seq.*; Nobel, "Corporate Governance und Aktienrecht," pp. 325 *et seq.*
[21] See Bühler, *Regulierung im Bereich der Corporate Governance*, pp. 396 *et seq.*; Kunz, "Corporate Governance," pp. 483 *et seq.*
[22] For a different emphasis, see P. Böckli, "Harte Stellen im Soft Law," ST 76 (2002), 1 *et seq.*
[23] 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."
[24] N. 3 *et seq.* of the SCBP.

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 SIX[30] 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 governance elements 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.

[25] N. 6 of the SCBP.
[26] N. 12 *et seq.* and n. 21 *et seq.* of the SCBP.
[27] N. 29 of the SCBP.
[28] For further details, see Kunz, "Corporate Governance," pp. 495 *et seq.*; in general, see Giger, *Corporate Governance als neues Element im schweizerischen Aktienrecht*, pp. 73 *et seq.*
[29] The revised SIX self-regulation came into effect on July 1, 2009; for an overview, see J. Morard, "Die revidierten Kotierungsregularien," GesKR 2 (2009), 220 *et seq.*
[30] See, e.g., Article 18 of the Listing Rules by the Berne Exchange BX (Kotierungsreglement ["BX Listing Rules"]), which contains an ad hoc publicity regime that is, in essence, the same as the SIX's; in addition, BX also published a recommendation regarding corporate governance ("Empfehlungen zur Corporate Governance").
[31] See Article 53 of the Listing Rules by the Swiss Exchange Group SIX (Kotierungsreglement ["SIX Listing Rules"]), i.e., "Obligation to disclose potentially price-sensitive facts").
[32] Available at www.six-exchange-regulation.com/admission_manual/06_15-DCG/en/index.html.
[33] Available at www.six-exchange-regulation.com/admission_manual/06_16-DAH/en/index.html.
[34] Available at www.six-exchange-regulation.com/admission_manual/06_17-DMT/en/index.html; see, *inter alia*, T. Jutzi, "Die Offenlegung von Management-Transaktionen," *Jusletter* (March 17, 2008), n. 1 *et seq.*
[35] Federal Act on Stock Exchanges and Securities Trading (Börsen- und Effektenhandelsgesetz ["BEHG"]): Systematische Rechtssammlung, authoritative collection of the Swiss Federal Law ("SR"), 954.1; an unofficial translation of the Federal Act on Stock Exchanges and Securities Trading ("SESTA") in English is available at www.six-exchange-regulation.

Corporate governance was never an explicit issue during the respective legislative discussions in the 1990s. Public takeovers of listed companies are governed today[36] by Articles 22 *et seq.* of the SESTA and by the Takeover Ordinance (Übernahmeverordnung ["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 Parliament[37] provided for several new and lower thresholds to notify shareholdings,[38] and, as of 2009, the Takeover Board ("TB") revised the TOO.[39] 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.[40]

com/download/admission/regulation/federal_acts/sesta_en.pdf. In addition, some ordinances, executing SESTA, must be observed, too, in particular the Ordinance of the Takeover Board on Public Takeover Offers, the Takeover Ordinance (Übernahmeverordnung ["TOO"]): SR 954.195.1.

[36] Prior to the SESTA legislation, the Swiss banks applied a self-regulated Swiss Takeover Code; see Kunz, *Der Minderheitenschutz* s. 10 n. 60 *et seq.*; Kunz, "Corporate governance," pp. 478 *et seq.*

[37] Unfriendly takeover attempts, particularly by foreign investors (e.g., Scor/Converium, Laxey/Implenia, and Renova/Sulzer), led to swift amendments of the SESTA and of SESTA ordinances. For background information, see P. Kunz, "Börsenrechtliche Meldepflicht in Theorie und Praxis," in *Liber Amicorum für Watter* (Zurich: Dike, 2008), pp. 229, 236 *et seq.*

[38] The statutory thresholds of shareholdings to be disclosed under the new Article 20 of the SESTA are the following: 3 percent (new), 5 percent, 10 percent, 15 percent (new), 20 percent, 25 percent (new), 33 1/3 percent, 50 percent, and 66 2/3 percent – each threshold is based on the issuer's voting rights, whether or not such rights may be exercised.

[39] See R. Tschäni, H.-J. Diem, and M. Wolf, "Das revidierte Recht der öffentlichen Kaufangebote," GesKR 1 (2009), 87 *et seq.*

[40] The Bundesgericht in Lausanne has rendered some crucial judgments, however, regarding disclosure obligations and mandatory takeover offers; see, e.g., BGE 130 II 530 (*Quadrant*) and most recently: BGE 136 II 304 (*Laxey Partners et al.* v. *Implenia*). In the latter case, the Bundesgericht clarified that so-called Contracts for Difference ("CfD") are subject to mandatory disclosure – even under the previous version of the SESTA; see P. Kunz, "Offenlegungs- bzw. Meldepflicht nach Art. 20 BEHG," AJP 19 (2010), 1475–1481.

Interesting corporate governance precedents include SIX (for example, regarding ad hoc publicity),[41] TB recommendations on the rules for public takeover offers[42] until the end of 2008,[43] and FINMA orders (for example, disclosure obligations according to Article 20 of the SESTA).[44]

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,[45] hence, they have only a small free float of buyable shares. In such a situation, sort of a Swiss specialty,[46] 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 tactics"[47] and that they are not active on both sides of a public takeover, i.e., doing

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

[42] 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: SZW 80 (2008), 335 *et seq.*; SZW 79 (2007), 244 *et seq.*; SZW 78 (2006), 219 *et seq.*; SZW 77 (2005), 199 *et seq.*

[43] 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 (Eidgenössische Finanzmarktaufsicht ["FINMA"]).

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

[45] P. Forstmoser, "Corporate Governance in der Schweiz: besser als ihr Ruf," in P. Forstmoser, H. von der Crone, R. Weber, and D. Zobl (eds.), *Corporate Governance* (Zurich: Schulthess, 2002), pp. 22 *et seq.* and 27 fn. 28 (e.g., Hoffmann-La Roche, Schindler Holding AG, Vontobel Holding AG) – the main author of the SCBP was the general counsel of Schindler, therefore, the "special interests" of family-controlled listed companies may be discovered between the lines of this codex; see *ibid.*, p. 27 fn. 29.

[46] *Ibid.*, pp. 22 and 27; for further details, see P. Kunz, "Publikumsgesellschaften in der Schweiz – theoretische und praktische Ansätze zum Investorenschutz," *Recht* 15 (1997), 136 *et seq.*

[47] 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, "Optionsstrategien bei Übernahmekämpfen," in R. Tschäni (ed.), *Mergers & Akquisitions X* (Zurich: Schulthess, 2008), pp. 173 *et seq.*; T. Jutzi and S. Schären, "Erfassung von Finanzinstrumenten im revidierten Offenlegungsrecht," ST 83 (2009), 570 *et seq.*

business for the offering party and for the target company.[48] 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, Laxey/UK); however, various public takeover attempts in 2006 and 2007 allegedly showed serious illegalities[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 (*Vinkulierung*) 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 Sulzer takeover discussions for allegedly being engaged on both sides; see FINMA order dated January 22, 2009: GesKR 2 (2009), 262.

[49] Regarding the "Gewährsfrage for banks" (i.e., guarantee for proper conduct): R. Watter and D. Dubs, "Wettlauf der 'Waffensysteme' bei Unternehmensübernahme – Optionsstrategien als Herausforderungen für das schweizerische Übernahmerecht," NZZ 19 (2007), 31.

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

[51] See statement (January 30, 2008), available at www.news.admin.ch/message/index.html ?lang=de&msg-id=17035.

[52] Forstmoser, "Corporate Governance in der Schweiz," p. 38; Swiss corporation 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 685d 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 Gesellschaftsrecht – Gleichklang oder Wettlauf zwischen Wirklichkeit und Recht?" in *Festschrift für Walter* (Bern: Stämpfli, 2005), p. 397.

corporate governance; and several parliamentarians were thus motivated to formally ask for an improvement of corporate governance in the corporation law.[54]

Remunerations 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 exists for implementing foreign laws in Swiss law by formal or by 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.

[54] For an overview of corporate governance requests in the Parliament, see BBl 2008, 1589; see, *inter alia*, Nobel, "Corporate Governance und Aktienrecht," 333 *et seq.*

[55] 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 fn. 16.

[56] The failure in corporate governance worldwide seemed to deepen the crisis; see A. Bohrer, "The Financial Crisis Impact," GesKR 2 (2009), 144 *et seq.*

[57] Available at www.finma.ch/e/regulierung/Documents/finma-rs-2010-01-e.pdf; in force as of January 1, 2010.

[58] See section I D above.

[59] For instance, Article 736(4) of the CO shows a common law approach with a broad discretion for courts in case of a dissolution of a corporation; in general, see, *inter alia*, P. Böckli, "Osmosis of Anglo-Saxon Concepts in Swiss Business Law," in *Liber amicorum for Bär and Karrer* (Basel *et al.*: Helbing & Lichtenhahn *et al.*, 1997), pp. 9 *et seq.*; W. Wiegand, "Americanization of Law: Reception or Convergence?" in L. Friedman (ed.), *Legal Culture and the Legal Profession* (Boulder: Westview Press, 1996), pp. 137 *et seq.*

[60] P. Kunz, "Einführung zur Rechtsvergleichung in der Schweiz," *Recht* 24 (2006), 37 *et seq.*

[61] For further details, see P. Kunz, "Instrumente der Rechtsvergleichung in der Schweiz bei der Rechtssetzung und bei der Rechtsanwendung," ZVglRWiss 108 (2009), 31 *et seq.*

[62] This is the Federal Council's official policy; see, *inter alia*, the *Europabericht 2006* dated June 28, 2006 (BBl 2006, 6828 *et seq.*, available at www.admin.ch/ch/d/ff/2006/6815.pdf), and the *Aussenpolitischer Bericht 2009* dated September 2, 2009 (BBl 2009, 6293 as well as 6320 *et seq.*, available at www.admin.ch/ch/d/ff/2009/6291.pdf).

[63] Recently, see P. Kunz, "'Sonderfall Schweiz'? – die Schweiz ist längst in 'Europa' angekommen," EWS 3 (2009), 57 ("Die erste Seite" – editorial).

In my view, neither the Swiss company laws in general nor SESTA in particular represent an autonomous execution (*autonomer Nachvollzug*) of EU laws.[64] The Federal Council and the Parliament often look abroad for legislative ideas in an eclectic way. In this regard, neighboring countries – in particular, Germany and France – are inspirational, and the business laws of the US are dominant in this area of the law.[65]

The Enron scandal in the US and the ensuing legislation (i.e., the Sarbanes-Oxley Act ["SOX"]) had a direct impact on Switzerland.[66] On one side, the auditing rules in the CO were amended accordingly, and on the other side, new legislation came into force[67] providing for supervision for the first time of auditors by a regulator.

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).[68] 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)[69] exist.[70]

[64] For general information on this Swiss specific comparative law issue, see, *inter alia*, P. Forstmoser, "Der autonome Nach-, Mit- und Vorvollzug europäischen Rechts: das Beispiel der Anlagefondsgesetzgebung," in *Festschrift für Zäch* (Zurich: Schulthess, 1999), pp. 523 *et seq.*; B. Spinner and D. Maritz, "EG-Kompatibilität des schweizerischen Wirtschaftsrechts. Vom autonomen zum systematischen Nachvollzug," in *Festschrift für Zäch* (Zurich: Schulthess, 1999), pp. 127 *et seq.*

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

[66] H. von der Crone and K. Roth, "Der Sarbanes-Oxley Act und seine extraterritoriale Bedeutung," AJP 12 (2003), 139.

[67] Auditors' Oversight Act (Revisionsaufsichtsgesetz ["RAG"]): SR 221.302.

[68] See P. Forstmoser, "Monistische oder dualistische Unternehmensverfassung? Das Schweizer Konzept," ZGR 32 (2003), 688 *et seq.*

[69] K. Hopt, "The German Two-Tier Board: Experiences, Theories, Reforms," in K. Hopt, H. Kanda, M. Roe, E. Wymeersch, and S. Prigge (eds.), *Comparative Corporate Governance: The State of Art and Emerging Research* (Oxford: Clarendon, 1998), pp. 277 *et seq.*

[70] For an overview, see, *inter alia*, Forstmoser, "Corporate Governance in der Schweiz,", pp. 28 *et seq.*; P. Nobel, "Monismus oder Dualismus: ein corporatologisches Scheinproblem?" in C. Baer (ed.), *Verwaltungsrat und Geschäftsleitung* (Bern, Stuttgart, and Vienna: Haupt, 2006), pp. 9 *et seq.*; P. Böckli, "Konvergenz: Annäherung des monistischen und des dualistischen Führungs- und Aufsichtssystems," in P. Hommelhoff and K. Hopt (eds.), *Handbuch Corporate Governance*, 2nd edn. (Stuttgart/Cologne: Schäffer-Poeschel/Schmidt, 2009), pp. 255–276.

In case of a delegation of management authorities to individual members of the board according to Article 716a para. 2 of the CO, in fact, a two-tier board (in substance) results. Such rightful delegation, either to a member of the board of the corporation or to a third party, excludes the directors' liability for damages provided that the board applied the necessary care in selection, in instruction, and in supervision (Article 754 para. 2 of the CO).[71]

2 Structural elements in general

Regarding composition and maximum number of seats and duration of office,[72] the Swiss corporation law is very flexible. The shareholders enjoy broad discretion.[73] Indeed, no formal requirements – with the exception of being a person instead of a legal entity (Article 707 para. 3 of the CO) – must be fulfilled today for a board election;[74] previously, until 2008, Swiss law provided mandatory legal requirements for nationality and domicile.

Swiss corporation law contains, for example, no rule on the maximum number of seats, no age restrictions on board members,[75] and no gender provision – yet[76] – for listed companies;[77] in my view, this flexibility and the lack of too many mandatory rules in this regard have proven useful. For the near future, no fundamental changes are expected.[78]

[71] The delegation of management plays an important role in Swiss board, and the "three *curae*" are always emphasized: "*cura in eligendo, cura in instruendo, cura in custodiendo.*"

[72] 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 corporation 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.

[73] In general, see R. Watter and K. Roth Pellanda, "Die 'richtige' Zusammensetzung des Verwaltungsrates," in R. Weber (ed.), *Verantwortlichkeit im Unternehmensrecht*, vol. III (Zurich, Schulthess, 2006), pp. 47 *et seq.*

[74] The articles of incorporation may set different rules for the corporations.

[75] 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).

[76] See motion dated March 9, 2009, by Katharina Prelicz-Huber in the Parliament ("Frauen in alle Verwaltungsräte"); the Federal Council rejected the request.

[77] Different rules apply in Norway; see I. Meissl Arebo, "Mehr Damenhandtaschen – weniger Krawatten – In Norwegens Verwaltungsräten gilt die Frauenquote," NZZ 37 (2006), 25.

[78] R. Watter and K. Roth Pellanda, "Geplante Neuerungen betreffend die Organisation des Verwaltungsrates," *GesKR Sondernummer Aktienrecht* (2008), 129 *et seq.*

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 Switzerland[80] – 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-indebtedness.

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.

[79] See, *inter alia*, P. Böckli, *Schweizer Aktienrecht*, 4th edn. (Zurich: Schulthess, 2009), section 13 n. 80 *et seq.*; Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 6 n. 111 *et seq.* and n. 113; L. Glanzmann, "Das Proporzwahlverfahren (cumulative voting) als Instrument der Corporate Governance," in *Festschrift für Druey* (Zurich: Schulthess, 2002), pp. 401 *et seq.*

[80] Zobl, "Was ist Corporate Governance?" p. 12; Forstmoser, "Corporate Governance in der Schweiz," p. 21; Giger, *Corporate Governance als neues Element im schweizerischen Aktienrecht*, pp. 9 *et seq.*

[81] In general, see P. Forstmoser, "Profit – das Mass aller Dinge?" in R. Zäch (ed.), *Individuum und Verband: Festgabe zum Schweizerischen Juristentag 2006* (Zurich, Basel, and Geneva: Schulthess, 2006), pp. 55 *et seq.*

[82] Thus, delegation is not possible; for further information, *inter alia*, see A. Kammerer, *Die unübertragbaren und unentziehbaren Kompetenzen des Verwaltungsrates* (Zurich: Schulthess, 1997), pp. 82 *et seq.*

[83] P. Nobel, "Risikomanagement als Aufgabe," in *Festschrift für Bucher* (Bern/Zurich: Stämpfli/Schulthess, 2009), p. 552.

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).

[84] See, *inter alia*, H. Moser and T. Stenz, "Angaben über die Durchführung einer Risikobeurteilung – Art. 663b Ziff. 12 revOR," ST 81 (2007), 591 *et seq.*

[85] See R. Mäder, "Risikobeurteilung nach Art. 663b Ziff. 12 OR," SZW 81 (2009), 264.

[86] However, particular functions may be delegated to committees (Article 716a(2) of the CO); see T. Jutzi, *Verwaltungsratsausschüsse im schweizerischen Aktienrecht* (Bern: Stämpfli, 2008), pp. 4 *et seq.*; R. Watter, "Verwaltungsratsausschüsse und Delegierbarkeit von Aufgaben," in *Festschrift für Forstmoser* (Zurich: Schulthess, 2003), pp. 183 *et seq.*

[87] In general, see P. Böckli, *Audit Committee: Der Prüfungssausschuss des Verwaltungsrats auf Gratwanderung zwischen Übereifer und Unsorgfalt* (Zurich: Schulthess, 2005), pp. 5 *et seq.*; R. Bak, *Audit Committee* (Zurich: Eigenverlag Rudolf Bak, 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,[91] 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;[92] 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.[93]

6 Information and risk management

Article 715a of the CO[94] 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).

[91] N. 18 of the SCBP.

[92] E.g., Audit Committee (n. 23 of the SCBP: "preferably independent members"), and Compensation Committee (n. 25 of the SCBP: "independent members").

[93] 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. Carbonara, "Corporate Governance und Führungsorganisation in der Aktiengesellschaft," SJZ 100 (2004), 407 *et seq.* in particular fn. 26; in general, see C. Meier-Schatz, "Der unabhängige Verwaltungsrat: Ein Beitrag zur Corporate-Governance-Debatte," in *Festschrift für Druey* (Zurich: Schulthess, 2002), pp. 479 *et seq.*

[94] For further information, see Böckli, *Schweizer Aktienrecht*, section 13 n. 163 *et seq.*; P. Kunz, "Die Auskunfts- und Einsichtsrechte des Verwaltungsratsmitglieds," AJP 3 (1994), 572 *et seq.*

Risk management by the board of directors is an integral part of the corporate governance concept.[95] As pointed out above,[96] the new Article 663b no. 12 of the CO – as an example – stresses this aspect.

The management of risks is promoted by legal compliance programs within the corporations that are standard[97] primarily in the financial sector[98] but also in other Swiss businesses.[99] Mandatory law does not provide any board committee for risk management purposes, yet the SCBP suggests setting up Audit Committees for this;[100] recently, Risk Committees were also proposed by commentaries.[101]

The early detection of difficulties (for example, of crimes) and thus the improvement of compliance and corporate governance, respectively, may be enhanced by "whistleblowing legislation" in favor of the respective employees. The Federal Council proposed on December 5, 2008[102] to implement such rules in the Swiss labor laws – this revision project is still pending as of today. Some corporations adopted internal guidelines in this regard.[103]

7 Fiduciary duties of board members

The fiduciary duties of the board of directors are critical to effective corporate governance, and Article 717 para. 1 of the CO broadly states: "The members of the board ... shall carry out their duties with due care and must duly safeguard the interests of the Company."[104]

The Swiss corporation law of today – unlike some self-regulation[105] – does *not* yet contain detailed rules[106] regarding conflicts of interest of

[95] In general, see n. 19 *et seq.* of the SCBP.

[96] See section III A 3 above.

[97] For general information, see, *inter alia*, M. Roth (ed.), *Corporate Governance und Compliance* (Zurich: Dike, 2009), pp. 43 *et seq.*

[98] See, *inter alia*, www.finma.ch/d/regulierung/Documents/finma-rs-2008-24.pdf (banks); and for the insurance business, see www.finma.ch/d/regulierung/Documents/finma-rs-2008-32.pdf.

[99] See Bühler, "Corporate Governance und Compliance," pp. 211 *et seq.*

[100] N. 23 *et seq.* of the SCBP.

[101] A. Lehmann and K. Roth Pellanda, "Agenda für ein (besseres) Risikomanagement durch den Verwaltungsrat," GesKR 3 (2009), 328.

[102] See www.bj.admin.ch/bj/de/home/themen/wirtschaft/gesetzgebung/whistleblowing.html.

[103] For example, UBS AG's Audit Committee accepted such a guideline on August 11, 2003; it is available at www.ubs.com/1/ShowMedia/about/corp_responsibility/commitment_strategy/policies_guidelines?contentId=27536&name=AC_whistleb.pdf.

[104] 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.

[105] See n. 16 of the SCBP.

[106] A minor exception is Article 718b of the CO, which resolves the potential conflict when a single person represents both him- or herself and the company entering into the agreement.

board members;[107] this shortfall will be remedied with the new Swiss corporation law in the future.[108]

Explicitly regulated is the conflict of interest situation regarding boards of listed companies in connection with public takeover offers. 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.[109]

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.[110] The judges follow a rather pragmatic approach in that respect; therefore, no clear standard exists.[111] In my view, however, the business judgment rule undermines shareholder protection and corporate governance and thus needs examination.[112]

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

[107] In general, see P. Forstmoser, "Interessenkonflikte von Verwaltungsratsmitgliedern," in *Liber Amicorum für Schulin* (Basel *et al.*: Helbing & Lichtenhahn, 2002), pp. 9 *et seq.*; in general, see H. von der Crone, "Interessenkonflikte im Aktienrecht," SZW 66 (1994), 1 *et seq.*

[108] 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).

[109] Article 32 of the TOO 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 offeror.

[110] For further information, see Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 6 n. 115 *et seq.*; A. Grass, *Business Judgment Rule* (Zurich: Schulthess, 1998), pp. 5 *et seq.*; A. Nikitine, *Die aktienrechtliche Organverantwortlichkeit nach Art. 754 Abs. 1 OR als Folge unternehmerischer Fehlentscheide – Konzeption und Ausgestaltung der "Business Judgment Rule" im Gefüge der Corporate Governance* (Zurich and St. Gallen: Dike, 2007), pp. 125 *et seq.*; P. Peyer, "Das 'vernünftige' Verwaltungsratsmitglied," in *Festgabe für Forstmoser* (Zurich, Basel, and Geneva/Zurich and St. Gallen: Schulthess/Dike, 2008), pp. 95 *et seq.*

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

[112] See P. Kunz, "Richterliche Handhabung von Aktionärsstreitigkeiten – zu einer Methode für Interessenabwägungen sowie zur 'Business Judgment Rule,'" in *Festschrift für Druey* (Zurich: Schulthess, 2002), pp. 459 *et seq.*; for a different view, see A. Grass, "Management-Entscheidungen vor dem Richter," SZW 72 (2000), 1 *et seq.*

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 663b*bis* 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).[113]

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,[114] a citizen's initiative to be voted in 2010 (Abzocker-Initiative) aims to empower the shareholders,[115] and the Federal Council's latest proposal attempts to find some middle ground.[116] It remains to be seen what the outcome will be, but the shareholders may receive decision-making powers.

As mentioned above,[117] 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.

[113] For an overview, see R. Watter and K. Maizar, "Transparenz der Vergütungen und Beteiligungen von Mitgliedern des Verwaltungsrates und der Geschäftsleitung (Art. 663b *bis* und 663c Abs. 3 OR) – Entstehungsgeschichte, Normzweck sowie erste praktische Anwendungsfragen," GesKR 4 (2006), 349 *et seq.*

[114] See section II A above.

[115] See P. Böckli, "Doktor Eisenbart als Gesetzgeber? Volksinitiative Minder und bundesrätlicher Gegenvorschlag zu den Vergütungen an Verwaltungsrat und Geschäftsleitung," in *Liber Amicorum Petitpierre-Sauvain* (Geneva: Schulthess, 2009), pp. 29 *et seq.*

[116] BBl 2009, 299 *et seq.*

[117] 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 "1:12,"[118] 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.[119] Many political observers doubt, however, that the citizen's initiative will even be filed with the Swiss authorities.[120]

9 Civil liability of board members

The board members' liability for damages in civil cases (Articles 754 *et seq.* of the CO)[121] is not limited. 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).

Plaintiff(s) against the board members may be either the damaged corporation or any shareholder or – 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

[118] Available at www.juso.ch/files/091006_Argumentarium-1_12-Initiative.pdf.

[119] 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 Crone, A. Carbonara, and S. Hunziker, *Aktienrechtliche Verantwortlichkeit und Geschäftsführung* (Basel, Geneva and Munich: Helbing & Lichtenhahn, 2006), pp. 1 *et seq.*

(i.e., "deep pockets").[122] In today's Swiss reality, most confrontations end with out-of-court settlements often financed by D&O insurances.

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.[123] Attempts at ranking of shareholders' protection levels are always somewhat arbitrary. In comparison with other countries,[124] 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")[125] qualified Switzerland as very weak in corporate governance matters. Recently, the World Economic Forum ("WEF") in its Global Competitiveness Report 2009–2010[126] saw Switzerland ranked only forty-first among 133 nations concerning the protection of minority shareholders' interests.[127]

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,[128] i.e., to contribute for a share the amount fixed at the time of issue (*Liberierungspflicht*); at the end of the 1990s, SESTA introduced two additional obligations for equity investors

[122] See section III D 4 below.

[123] See, *inter alia*, U. Bertschinger, "Zuständigkeit der Generalversammlung der Aktiengesellschaft: ein unterschätzter Aspekt der Corporate Governance," in *Festschrift für Druey* (Zurich: Schulthess, 2002), pp. 309 *et seq.*; R. Watter and K. Maizar, "Aktionärsdemokratie: Über erweiterte Zuständigkeiten der Generalversammlung und Erleichterungen bei der Stimmrechtsausübung in schweizerischen Aktiengesellschaften," in *Festschrift für Riemer* (Bern: Stämpfli, 2007), pp. 403 *et seq.*

[124] For further details on twenty-three countries, see Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 17 n. 7 *et seq.*

[125] OECD Business Sector Advisory Group on Corporate Governance; see Forstmoser, "Corporate Governance in der Schweiz," p. 41 (Switzerland being "one of the last of the pack").

[126] Available at www.weforum.org/pdf/GCR09/GCR20092010fullreport.pdf.

[127] Thus ranked below countries such as Japan, India, Ghana, Barbados, Senegal, and Sri Lanka (WEF ranking 35th–40th).

[128] The shareholders may not be obliged even by the articles of incorporation (Article 680 (1) of the CO).

in listed companies (Article 20 of the SESTA: disclosure obligation; Article 32 of the SESTA: mandatory takeover offer to the other shareholders).[129]

Fiduciary duties of shareholders in general and of controlling shareholders in particular are a rare topic of legal discussion in Switzerland.[130] Only a few authors share the view that shareholders have any fiduciary duties at all,[131] with the overwhelming majority of commentaries soundly rejecting such a notion for (controlling and other) shareholders under Swiss law.[132]

Nevertheless, majority and other controlling shareholders must respect legal boundaries. The board's duty in accordance with Article 717 of the CO[133] 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, tunneling by controlling shareholders[134] is illegal under Swiss law and has consequences based both on corporation law and on tax law.[135] 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.[136]

[129] See section IV A 2 and IV B 2 below.

[130] See, *inter alia*, C. Chappuis, "La responsabilité de l'actionnaire majoritaire fondée sur la confidence," in C. Chappuis, H. Peter, and A. von Planta (eds.) *Responsabilité de l'actionnaire majoritaire* (Zurich: Schulthess, 2000), pp. 67 *et seq.*

[131] E.g., H. Wohlmann, *Die Treuepflicht des Aktionärs* (Zurich: Schulthess, 1968), pp. 110 *et seq.*

[132] For further references and a detailed overview, see Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 8 n. 31 *et seq.* and n. 44.

[133] See section III A 3 above.

[134] 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.

[135] See T. Müller, *Der Schutz der Aktiengesellschaft vor unzulässigen Kapitalentnahmen* (Bern: Stämpfli, 1997), pp. 45 *et seq.*; R. Heuberger, *Die verdeckte Gewinnausschüttung aus Sicht des Aktienrechts und des Gewinnsteuerrechts* (Bern: Stämpfli, 2001), pp. 15 *et seq.* (corporation law) and pp. 160 *et seq.* (tax law).

[136] The author's Habilitation, which covers selected (sic!) aspects of minority shareholders' protection in Switzerland, is over 1,000 pages long.

As an overview,[137] the equity investor in corporations receives two sets of entitlements:[138] 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 Aryzta'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 part 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.[139]

The many information rights (Articles 696 *et seq.* of the CO)[140] 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 697h of the CO:

(i) *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,[141] the auditors' report shall be made available at the corporation's domicile for inspection (Article 696 para. 1 of the CO);[142] a shareholder may request these documents in copy after approval by the general

[137] See, *inter alia*, Meier-Hayoz and Forstmoser, *Schweizerisches Gesellschaftsrecht*, section 16 n. 167 *et seq.*; Kunz *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 1 n. 197 *et seq.*

[138] Most shareholders' rights may be executed by each shareholder alone with one share only; some entitlements, however, require the representation of either a minimal share capital participation (e.g., action for the dissolution of the corporation: Article 736(4) of the CO) or a minimal nominal share value (e.g., action for a special audit: Article 697b (1) of the CO) of the shareholders.

[139] See P. Kunz, "Aryzta," *Mittellandzeitung* (November 13, 2010).

[140] For details, see P. Kunz, in J. Kren Kostkiewicz, P. Nobel, I. Schwander, and S. Wolf (eds.), *OR Kommentar: Schweizerisches Obligationenrecht*, 2nd edn. (Zurich: Orell Füssli, 2009); Articles 696–697h of the CO n. 1 *et seq.*

[141] See section III D 1 and 2 below.

[142] The corporation does not provide, for instance, that copies be sent out to the shareholders.

meeting (Article 696 para. 3 of the CO). In business reality in Switzerland, most companies are much more forthcoming in favor of their investors.[143]

(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).[144] 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),[145] which was inspired by foreign models (for example, Germany).[146] 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,[147] only those shareholders meeting certain share capital requirements[148] may go to court at all (Article 697b para. 1 of the CO). Afterward, a rather complicated back-and-forth 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).

[143] 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.

[144] Under Article 697(2) 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).

[145] The new corporation law will call it special investigation ("*Sonderprüfung*").

[146] For a comparative law perspective, see A. Casutt, *Die Sonderprüfung im künftigen schweizerischen Aktienrecht* (Zurich: Schulthess, 1991), section 2 n. 3 *et seq.*

[147] 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).

[148] Representations 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.

(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,[149] 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[150] – unlike in Germany[151] – cover the legal specifics of and issues surrounding institutional investors (for example, pension funds).[152] In fact, institutional investors were a dormant issue for many decades – one disputed issue is whether institutional investors may claim privileged information.[153] Recent calls from politicians and other sides are trying to convince institutional investors to get more involved as shareholders.

[149] BGE 132 III 171 *et seq.*; this precedent of the Swiss Supreme Court shall be implemented with the new corporation law: BBl 2008, 1608 fn. 24 and 1672.

[150] See M. Ruffner, "Aktive Grossaktionäre: Neue Herausforderungen für das Aktienrecht?" in *Festschrift für Schluep* (Zurich: Schulthess, 1995), pp. 233 *et seq.*; H. Künzle, "Die Ausübung des Aktien-Stimmrechts durch institutionelle Vertreter und institutionelle Anleger und die Corporate Governance in der Schweiz und den USA," in *Festschrift für Forstmoser* (Zurich: Schulthess, 2003), pp. 415 *et seq.*

[151] For further information on Germany, see, *inter alia*, K. Schmolke, "Institutionelle Anleger und Corporate Governance. Traditionelle institutionelle Investoren vs. Hedgefonds," ZGR (2007), 701 *et seq.*

[152] There is no legal definition of institutional investors; in general, see T. Spillmann, *Institutionelle Investoren im Recht der (echten) Publikumsgesellschaften* (Zurich, Basel, and Geneva: Schulthess, 2004), pp. 226 *et seq.*; Weber, "Insider v. Outsider in Corporate Governance," pp. 97 *et seq.*

[153] The issue is discussed, *inter alia*, by Weber, "Insider v. Outsider in Corporate Governance," pp. 86 *et seq.*; Böckli, *Schweizer Aktienrecht*, section 13 n. 700 *et seq.*; Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 8 n. 78 *et seq.*

It might be expected under economic aspects[154] 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,[155] and shareholders advisory committees ("SAV")[156] 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.[157] Furthermore, the Swiss Pension Funds Association ("ASIP")[158] called upon its members to get more involved and to actively execute the shareholders' rights in general meetings.[159]

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,[160] 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,

[154] For further details, see M. Ruffner, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft – Ein Beitrag zur Theorie der Corporate Governance* (Zurich: Schulthess, 2000), pp. 436 *et seq.*

[155] Overview, see Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 6 n. 68 *et seq.*

[156] *Ibid.*, section 6 n. 75 *et seq.* [157] See www.ethosfund.ch/. [158] See www.asip.ch/.

[159] See ASIP's guidelines, available at www.asip.ch/files/news/?id=350eff26373a052f0d152ced672c5f69 (dated November 11, 2005).

[160] Transparency and information rights are not only very important for shareholders but also for creditors; see P. Kunz, "Transparenz für den Gläubiger der Aktiengesellschaft," SJZ 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[161] 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")[162] 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.[163]

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.[164] Since the 1970s, trade unions in Switzerland have lost around a sixth of their members.

There are two major trade union federations in Switzerland that contain approximately two-thirds of all trade unionists.[165] Other trade unionists are organized in independent trade unions. Current topics of trade unions include full employment, fair salaries, enhancement of the conditions of employment, and equal opportunities for all employees.[166]

[161] In connection with the present reform of the corporation law, some discussions are still ongoing, e.g., *Travail.Suisse* No. 5 (March 30, 2009) ("Aktienrechtsrevision: Arbeitnehmer in den Verwaltungsrat"); see www.travailsuisse.ch/de/system/files/PD+Aktienrecht+-+Arbeitnehmer+in+Verwaltungsrat.doc.

[162] Swiss Merger Act (Fusionsgesetz ["FusG"]): SR 221.301; for a detailed overview, see P. Kunz, "Das neue Fusionsgesetz (FusG)," in F. Jörg and O. Arter (eds.), *Entwicklungen im Gesellschaftsrecht*, vol. I (Bern: Stämpfli, 2006), pp. 185 *et seq.*

[163] For further information, see P. Kunz, "Arbeitsrecht – Neuerungen aufgrund des Fusionsgesetzes," in A. Kaenel (ed.), *Aktuelle Probleme des Arbeitsrechts* (Zurich: Schulthess, 2005), pp. 71 *et seq.* and 84 *et seq.*

[164] Bundesamt für Statistik, *Gewerkschaften und andere Arbeitnehmerorganisationen: Zahl der Mitglieder 1960–2008*, available at www.bfs.admin.ch/bfs/portal/de/index/themen/03/05/blank/key/gewerkschaften.html.

[165] Swiss Federation of trade unions, *Der SGB und seine Gewerkschaften* (2008), pp. 9 *et seq.*, available at www.sgb.ch/uploads/media/Broschuere_SGB_deutsch.pdf.

[166] *Ibid.*, p. 11.

D Audit

1 Recent legislative reform

As pointed out above,[167] the Enron scandal in the US and the ensuing legislation abroad (in particular, SOX) had a direct impact on Switzerland. The amended rules in the CO (Articles 727 *et seq.* of the CO)[168] and the new legislation supervising the auditors by a regulator, indeed, changed the corporate governance landscape considerably.[169]

An analysis regarding corporate governance and auditing shows, in my view, both improvements (for example, the introduction of a supervisory authority for all auditing firms in Switzerland)[170] and some shortfalls (i.e., first, the rule that smallest corporations may opt out of the auditing process,[171] which was mandatory beforehand for all corporations; second, the introduction of mere review auditing for small corporations with a lower independence standard for the auditors;[172] and perhaps third, the presently discussed capping of auditors' liability[173]).

2 Mandatory auditing

Until recently, all corporations in Switzerland – unlike the LLC – faced mandatory external auditing. As of the year 2008, the applicable Swiss laws were amended.[174] Thus, as a general rule, all companies (excluding partnerships) have to be audited notwithstanding their specific legal forms (corporation or LLC); however, three "types of auditing" exist: regular auditing, review auditing, and opting out of auditing.

Only larger corporations, which meet specific thresholds[175] or other requirements (for example, all listed companies), must have regular auditing under the new rules (Article 727 of the CO).[176] Smaller

[167] See section II F above.

[168] See section III D 2 and 3 below; for further details, see P. Böckli, *Revisionsstelle und Abschlussprüfung nach neuem Recht* (Zurich, Basel, and Geneva: Schulthess, 2007), pp. 5 *et seq.*

[169] Many legal issues are still open and unresolved, see P. Böckli, "Zwanzig Knacknüsse im neuen Revisionsrecht," SZW 80 (2008), 117 *et seq.*

[170] See section V B 2 below.

[171] See section III D 2 below.

[172] See section III D 2 below.

[173] See section III D 4 below.

[174] Kunz, "Corporate Governance," pp. 489 *et seq.*

[175] Exceeding two of the following three thresholds in the course of two consecutive business years triggers the regular auditing obligation according to Article 727(1) of the CO: balance sheet assets of minimum CHF 50 million, turnover of minimum CHF 20 million, 50 employees per year (on average).

[176] For instance, shareholders representing 10 percent (or more) of the nominal share capital of the corporation may request a regular audit (Article 727(2) of the CO).

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[177] 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 CG 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 728 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 727a(2) of the CO), i.e., no auditing is done.

[178] The requirement of an internal control system is new to Swiss law and highly disputed; for further information, see P. Böckli, "Existenz eines internen Kontrollsystems. Eine neue Prüfpflicht der Revisionsstelle," *Die Unternehmung* 6 (2007), 463 *et seq.*; L. Müller, "Das interne Kontrollsystem bei KMU," in *Festgabe für Forstmoser* (Zurich, Basel, and Geneva/Zurich and St. Gallen: Schulthess/Dike, 2008), pp. 317 *et seq.*; Bühler, "Corporate Governance und Compliance," pp. 245 *et seq.*

[179] See, *inter alia*, J. Druey, "Die Unabhängigkeit des Revisors," SZW 79 (2007), 439 *et seq.*; R. Watter, "Nicht exekutives Mitglied des Verwaltungsrates und Unabhängigkeit der Revisionsstelle," in *Festschrift für Druey* (Zurich: Schulthess, 2002), pp. 659 *et seq.*

[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 (*bundesrätlicher 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 commentaries are in favor of such a provision.[185]

[182] For information on auditors' civil liability, see U. Bertschinger, "Verantwortlichkeit der Abschlussprüfer im Schweizer Recht – Aktuelle Fragen nach der Neuordnung des Revisionsrechts und vor der nächsten Aktienrechtsrevision," in F. Harrer and M. Gruber (eds.), *Aktuelle Probleme der Abschlussprüfung* (Vienna: Manz, 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. Bahar and R. Trigo Trindade, "Revision des Verantwortlichkeitsrechts: Differenzierte Solidarhaftung der Revisionsstelle und übrige Änderungen," *GesKR Sondernummer Aktienrecht* (2008), 149 *et seq.*

[184] For discussion, see W. Doralt, "Haftungsbegrenzung für die Revisionsstelle: Notwendigkeit oder Privileg?" SZW 78 (2006), 168 *et seq.*

[185] See, *inter alia*, R. Camponovo and P. Bertschinger, "Haftungsreform für die Abschlussprüfung," ST 81 (2007), 256 *et seq.*; D. Widmer and R. Camponovo, "Haftung der Revisionsstelle im Entwurf zum Aktien- und Rechnungslegungsrecht," ST 82 (2008), 110 *et seq.*; R. Watter and A. Garbaski, "La responsabilité solidaire du réviseur selon le projet de revision du droit de la société anonyme: changement de paradigme?" SZW 81 (2009), 235 *et seq.*; U. Bertschinger, "Verantwortlichkeit der Revisionsstelle – Aktuelle Fragen und Perspektiven," ZSR 124 (2005), 598 *et seq.* and 602 *et seq.*

IV External corporate governance

A Takeover regulation

1 Overview

As pointed out above,[186] the self-regulation on public takeover matters was replaced at the end of the 1990s with the SESTA and with various ordinances of the Federal Council, of the FINMA, and of the TB. In addition to these statutory rules, the precedents by the TB – until the end of 2008 and the advent of recommendations and since then legally binding orders – and some court decisions played and continue to play a crucial role for public takeovers in Switzerland.

Several aspects of stock exchange laws may paint the picture on external corporate governance for listed companies. In the following, therefore, Swiss law shall be explained regarding, for example, mandatory bids,[187] squeeze-out rules,[188] and disclosure obligations.[189]

2 Mandatory offers and price rules

Article 32 of the SESTA provides for a mandatory offer by equity investors under certain conditions.[190] Whoever – directly, indirectly, or acting in concert with third parties – acquires equity securities (of a listed company) which, added to equity securities already owned, exceed the threshold of 33 1/3 percent of the voting rights of an offeree company, whether or not such rights may be exercisable, shall be under an obligation to make an offer to acquire all listed equity securities of the company (Article 32 para 1. of the SESTA).[191]

The corporation may either withdraw[192] or at least ease[193] the shareholders' (or rather equity investors') obligation by inserting respective

[186] See section II C above.
[187] See section IV A 2 below.
[188] See section IV A 4 below.
[189] See section IV B 2 below.
[190] See, *inter alia*, C. Köpfli, *Die Angebotspflicht im schweizerischen Kapitalmarktrecht* (Zurich: Schulthess, 1999), pp. 1 *et seq.*
[191] Fur further information, *inter alia*, see R. Tschäni, J. Iffland, and H.-J. Diem, *Öffentliche Kaufangebote* (Zurich: Schulthess, 2007), n. 32 *et seq.*; Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 10 n. 124 *et seq.*
[192] 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 offeror shall not be bound by the obligation to make a public takeover offer (Article 22 (2) of the SESTA).
[193] 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) *ad finem* 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.[194] Further ordinance rules safeguard the shareholders' interests in this regard.[195]

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.[196]

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.[197] 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,[198] 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 43(2) of the FINMA Stock Exchange Ordinance ("SESTO-FINMA"); for background information, see J. Essebier and M. Glatthaar, "Öffentliche Tauschangebote und die Pflicht zum alternativen Barangebot," SZW 81 (2009), 191 *et seq.*

[195] In general, Article 28 *et seq.* of the SESTO-FINMA; SR 954.193 and Art. 40 *et seq.* of the SESTO-FINMA (section titled "Determination of the Offer Price").

[196] For further details and an overview, see S. Schären, "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, Article 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.*

[200] *Inter alia*, see P. Kunz, "Einige Aspekte zur Kraftloserklärungsklage," SZW 71 (1999), 181 *et seq.*; Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 10 n. 182 *et seq.*; P. Nobel, "Börsengesetz: Zur Kraftloserklärung von Resttiteln aus früheren öffentlichen Kaufangeboten," SZW 70 (1998), 37 *et seq.*

Today, self-regulation (i.e., by the Swiss Institute of Certified Accountants and Tax Consultants [Treuhand-Kammer][201] and its foundation as well as by the SIX[202]) is more important for choosing the accounting system. The most important self-regulated system[203] is the Swiss GAAP FER, a principles-based accounting standard closer to the IFRS[204] than to the US GAAP.[205] The particular SIX listing depends, for instance, on the accounting choice.[206]

2 Disclosure obligations including the listing prospectus

As pointed out above, Swiss laws – both regulations (i.e., CO and SESTA) and also self-regulations – contain many rules on detailed disclosure and on higher transparency,[207] for example, periodic transparency in accordance with Article 696 of the CO,[208] disclosure obligations by shareholders according to Article 20 of the SESTA,[209] and Ad hoc Publicity.[210]

Finally, the listing prospectus, which must provide sufficient information for competent investors (Article 27 para. 1 of the SIX Listing Rules),[211] is regulated by the Listing Rules.[212] The listing prospectus must contain, according to Article 28 of the SIX Listing Rules, all information

[201] Kunz, "Corporate Governance," p. 479.

[202] One issue is the true and fair view approach which is contrary to the CO accounting principles; see Forstmoser, "Corporate Governance in der Schweiz," p. 34.

[203] Swiss self-regulation takes into account international trends; see M. Spadin, "Internationalisierung der Rechnungslegung in der Schweiz," in *Festgabe für Forstmoser* (Zurich, Basel and Geneva/Zurich and St. Gallen: Schulthess/Dike, 2008), pp. 337 *et seq.*

[204] International Financial Reporting Standards ("IFRS").

[205] US Generally Accepted Accounting Principles ("US GAAP").

[206] 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") (in particular, its Article 6).

[207] In general, see Weber, "Insider v. Outsider in Corporate Governance," pp. 86 *et seq.*

[208] See section III B 3 above.

[209] See section II C above; the statutory thresholds of shareholdings to be disclosed under Article 20 of the SESTA are 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 SESTO-FINMA; in general, see P. Kistler, *Die Erfüllung der (aktien- und börsenrechtlichen) Meldepflicht und Angebotspflicht durch Aktionärsgruppen* (Zurich: Schulthess, 2001), pp. 1 *et seq.*

[210] See section II B above.

[211] For further information, see F. Huber, P. Hodel, and C. Staub Gierow, *Praxiskommentar zum Kotierungsrecht der SWX Swiss Exchange* (Zurich: Schulthess, 2004), pp. 211 *et seq.*

[212] See Article 27 *et seq.* of the SIX Listing Rules.

prescribed in Scheme A of the SIX Listing Rules (for example, name and business address of all board members, disclosure of any criminal judgments or investigations regarding business affairs).[213]

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)[214] or administrative (for example, by the supervisory authorities) or criminal (for example, notice by target companies to prosecutors or investigations by criminal authorities).[215]

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. 4*bis* of the SESTA) is illustrative.[216]

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.[217]

[213] See www.six-exchange-regulation.com/admission_manual/04_03-SCHA_de.pdf.

[214] See section V C 2 below.

[215] The Swiss Penal Code ("SPC") (SR 311.0) contains various corporate governance crimes, e.g., insider trading (Article 161 of the SPC), or manipulation of the stock market (Article 161bis of the SPC).

[216] See section V A 2 below.

[217] See www.six-exchange-regulation.com/enforcement/sanction_decisions/adhoc_publicity_de.html.

In corporate governance matters, there have been only a few sanctions spoken to date.[218]

The Sanction Committee of the SIX may either reprimand or fine the companies for violating its rules.[219] 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).[220]

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. 4*bis* of the SESTA).[221]

The voting rights suspension action of Article 20 para. 4*bis* of the SESTA seems to be rather ineffective today with the FINMA as a claimant 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;[222] thus, the sanction process will become much quicker than today.

[218] See www.six-exchange-regulation.com/enforcement/sanction_decisions/corporate_governance_de.html.

[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 30,000 (April 16, 2009), of CHF 50,000 (March 25, 2009), and of CHF 100,000 (November 19, 2007). Most recent decisions on corporate governance violations: reprimands (June 11, 2010 and July 30, 2010).

[220] Article 61(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 Stimmrechtssuspendierungsklage im revidierten Börsenrecht. Eine neue Sanktion bei Meldepflichtverletzungen mit grossem Drohpotential," SZW 80 (2008), 280 *et seq.*; R. Watter, C. Rampini, and T. Candrian, "Praktische Aspekte der Stimmrechtssuspendierungs-Klage nach Art. 20 Abs. 4bis BEHG," in *Festschrift für von Büren* (Basel: Helbing 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 finem* of the SESTA).

[222] Expertenkommission Börsendelikte und Marktmissbrauch, *Bericht vom 29. Januar 2009* (Report of January 29, 2009), 86 (January 29, 2009), available at www.efd.admin.ch/dokumentation/zahlen/00578/01375/index.html?lang=de&download=M3wBUQCu/8ulmKDu36WenojQ1NTTjaXZnqWfVpzLhmfhnapmmc7Zi6rZnqCkkIN5e3Z+bKbXrZ2lhtTN34al3p6YrY7P1oah162apo3X1cjYh2+hoJVn6w==.

B Supervision

1 Non-listed companies

Some commentaries from abroad ask how shareholder protection and corporate governance may be improved, pointing out: "In view of the difficulties and expense faced by minority shareholders in seeking judicial relief and the traditional reluctance of the courts to interfere in corporate affairs, [solutions] may lie in the use of an administrative agency."[223]

Today, in Switzerland, no general supervisory authority for non-listed corporations exists. And in my view, the introduction of some sort of a protective "agency for shareholders," which was discussed earlier on, would need to be rejected as contrary to Swiss traditions and corporate concepts of personal responsibility.[224]

There is one authority for all (non-listed and listed) corporations that guarantees general transparency and thus a minimum corporate governance, i.e., the Commercial Register ("CR") of each Canton of Switzerland. It might be argued – and it sometimes is by erudite commentaries[225] – that the registrar of the CR ought to check in detail the corporations' filings (for example, the establishing of a company or the amendments of the articles of incorporation), thereby enhancing shareholder protection and the corporate governance aspects. Yet, this is contrary to today's Swiss law.[226]

Switzerland is a centuries-old republic democracy with independent and strong courts – and, in my view rightfully so, very proud of it. In corporation matters (whether of non-listed companies or of listed companies), therefore, each party has a right to appeal to the court(s). In reality, only few confrontations on corporate governance issues are presented before judges.

2 Listed companies

As pointed out above, several authorities have supervisory powers vis-à-vis listed companies. Reference is made, for example, to the TB with its

[223] See Note, "Freezing Out Minority Shareholders," *Harvard Law Review* 74 (1961), 1643 (emphasis added).

[224] Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 6 n. 298 *et seq.* and n. 301.

[225] See A. de Beer, "Minderheitenschutz durch erweiterte Kognitionsbefugnis des Handelsregisterführers," ZSR 114 (1995), 81 *et seq.*

[226] For further details and additional references, see Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 6 n. 239 *et seq.*

recommendations and its orders, respectively, in connection with public takeover offers, to the FINMA with its orders regarding violations of Article 20 of the SESTA (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 (Revisionsaufsichtsbehörde ["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 (*Eigenverantwortlichkeit*).

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.revisionsaufsichtsbehoerde.ch/docs/content_blau_right.asp?id=30483&sp=D&domid=1063.

[228] According to Article 727b(1) of the CO, for instance, the accounting of listed companies must be audited only by a supervised auditing firm (*staatlich beaufsichtigtes Revisionsunternehmen*) 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 Minderheitenschutz im schweizerischen Aktienrecht*, section 6 n. 5 *et seq.*

corporation law provides, for example, many opportunities to file shareholders' lawsuits in courts,[230] which emphasizes the level of corporate governance in Switzerland.[231]

One particularity under Swiss law, which may be different from the legal situation abroad, concerns the ad hoc publicity – self-regulation (i.e., the Listing Rules) instead of regulation provides for this transparency-promoting rule. It is under dispute whether the shareholder may claim damages for the violation of the ad hoc publicity principle.[232]

2 Shareholders' lawsuits

As pointed out above,[233] information rights and particularly the right of shareholders for a special audit (Articles 697a *et seq.* of the CO)[234] are fundamental for corporate governance. In addition, the three most important lawsuits for shareholders are, in my view, the following:

(i) *Liability action (Articles 752/754* et seq. *of the CO):*[235] Both board members and highest managers of the corporation may be liable for damages if they caused the damage by an intentional or negligent violation of their duties; plaintiff may either be the corporation or any shareholder (Article 754 para. 1 of the CO) or – in bankruptcy cases – a creditor (Article 754 of the CO). The statute of limitations is five years (Article 760 of the CO).

(ii) *Challenging of general meetings' resolutions (Articles 706* et seq. *of the CO):* Any shareholder or the board may take legal action against

[230] Overview, see P. Kunz, *Die Klagen im Schweizer Aktienrecht* (Zurich: Schulthess, 1997), pp. 19 *et seq.*

[231] Bühler, *Regulierung im Bereich der Corporate Governance*, pp. 280 *et seq.*

[232] In general, see J. Köndgen, "Die Ad hoc-Publizität als Prüfstein informationsrechtlicher Prinzipien," in *Festschrift für Druey* (Zurich: Schulthess, 2002), pp. 791 *et seq.*; for further details, *inter alia*, see W. Wiegand, "Ad hoc-Publizität und Schadenersatz," in *Festgabe für Chapuis* (Zurich: Schulthess, 1998), pp. 143 *et seq.*; Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 10 n. 270 *et seq.*

[233] See section III B 3 above.

[234] It must be admitted, however, that the letter of the law apparently looks better than reality; court decisions of special audits are rare in Switzerland, although Article 697g of the CO aims to ease the burden of costs of the filing shareholders. If the judge approves the application for the initiation of a special audit, the judge shall charge the advance and the costs to the company (Article 697g(1) of the CO). If the general meeting of shareholders has agreed to the special audit, the company shall bear the costs (Article 697g(2) of the CO).

[235] For details, see E. Schmid, "Prozessuales zur aktienrechtlichen Verantwortlichkeitsklage," in *Festgabe für Forstmoser* (Zurich, Basel, and Geneva/Zurich and St. Gallen: Schulthess/Dike, 2008), pp. 601 *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.[236]

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)[237] and Article 756 para. 2 of the CO (liability action).[238] 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 other[239] 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.

[236] See P. Kunz, "Zur Auflösungsklage gemäss Art. 736 Ziff. 4 OR – Garant für ein indirektes Austrittsrecht?" in *Festschrift für Bär* (Bern: Stämpfli, 1998), pp. 235 *et seq.*

[237] If the lawsuit is dismissed, the judge shall allocate the costs in his own discretion between the defendant corporation and the plaintiff shareholder.

[238] 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).

[239] This strenuous competition seems to enhance, in particular, investigative journalism.

As pointed out above,[240] shareholder activism does not have a long tradition in Switzerland. In particular, shareholders' associations are rather rare.

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,[242] regularly organized as corporations, but the corporate governance standards are higher for the financial sector than for other Swiss corporations in general.[243] In accordance with specific laws,[244] for instance,[245] 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 drafts for codices of 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 "*Privatbanquiers*" (special category of private bankers) (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, K. Hopt, "Erwartungen an den Verwaltungsrat in Aktiengesellschaften und Banken. Bemerkungen aus deutscher und europäischer Sicht," SZW 80 (2008), 235 *et seq.*

[244] Banks: e.g., Article 8(2) of the Banking Ordinance (Bankenverordnung ["BanKV"]): SR 952.02; insurance companies: Article 13 *et seq.* of the Insurance Supervision Ordinance (Aufsichtsverordnung ["AVO"]): SR 961.011; see, *inter alia*, Forstmoser "Corporate Governance in der Schweiz," p. 29 fn. 33.

[245] Corporate governance should also be an issue for the "*Kantonalbanken*" (i.e., banks entirely or partially owned by the Swiss Cantons); see M. Pedergnana, R. Müller, and D. Piazza, "Corporate Governance: einige Gedanken zu den Kantonalbanken," in *Festschrift für von Büren* (Basel: Helbing Lichtenhahn, 2009), pp. 691 *et seq.*

("Swiss Foundation Code"),[246] for public companies ("Public Corporate Governance Code"),[247] for family enterprises ("Governance in Family Firms"),[248] and for non-profit organizations ("Swiss NPO Code").[249] Finally, the principles of good corporate governance bear some increased weight even for the Federal Administration of Switzerland – the Federal Council recently published two reports[250] in regard to this.[251]

Corporate social responsibility is a new topic for corporate law matters in Switzerland;[252] yet, the boards do not all have discretion to make charitable contributions.[253] It remains to be seen whether or not any legal consequences will result thereof.

VII Final conclusions and observations

A View from abroad

The international perception of today – based on reports, for instance, by the OECD and the WEF, respectively[254] – seems to be that corporate governance

[246] This private code was published in October 2005; for details, see T. Sprecher, "Der Swiss Foundation Code," *SAV-revue* 1 (2006), 13 *et seq*; for the latest version, see T. Sprecher, P. Egger, and M. Janssen (eds.), *Swiss Foundation Code 2009* (Basel: Helbing Lichtenhahn, 2009).

[247] A. Lienhard and K. Schedler, "Medizin gegen Interessenkonflikte bei staatlichen Unternehmungen: Anregungen zu Organisation, Führung und Aufsicht," NZZ 8 (2006), 15; see P. Böckli, "Corporate Governance: Der Staat in der Eigentümerrolle gegenüber seinen selbständigen Anstalten," in *Festschrift für Wildhaber* (Zurich/St. Gallen: Dike, 2007), pp. 1141 *et seq.*

[248] Available at www.ecgi.org/codes/documents/swisscode_family_firms_de.pdf; for corporate governance recommendations in this regard, see under the given link n. 41 *et seq.* Code G: Governance Guide for Families and their Businesses; see, *inter alia*, A. von Moos, "Corporate Governance im Familienunternehmen," ST 76 (2002), 1059 *et seq.*

[249] Swiss NPO Code dated March 31, 2006; available at www.swiss-npocode.ch/cms/images/swiss_npocode/swiss_npo_code_maerz_2010.pdf.

[250] Federal Council, *Corporate-Governance-Bericht* (September 13, 2006), available at www.admin.ch/ch/d/ff/2006/8233.pdf; Federal Council, *Zusatzbericht* (March 25, 2009), available at www.admin.ch/ch/d/ff/2009/2659.pdf.

[251] See OECD, available at www.oecd.org/document/33/0,3343,en_2649_33735_43714657_1_1_1_1,00.html.

[252] For further information, *inter alia*, see R. Watter and T. Spillmann, "Corporate Social Responsibility: Leitplanken für den Verwaltungsrat Schweizerischer Aktiengesellschaften," GesKR 2–3 (2006), 94 *et seq.*; P. Forstmoser, "Corporate Responsibility und Reputation – zwei Schlüsselbegriffe an der Schnittstelle von Recht, Wirtschaft und Gesellschaft," in *Liber Amicorum für Watter* (Zurich: Dike, 2008), pp. 197 *et seq.*

[253] See R. Watter and T. Rohde, "Die Spendenkompetenz des Verwaltungsrates," in R. Zäch (ed.), *Individuum und Verband: Festgabe zum Schweizerischen Juristentag 2006* (Zurich, Basel, and Geneva: Schulthess, 2006), pp. 329 *et seq.*

[254] See section III B 1 above.

in Switzerland is weak or average at best. This view is (or was) understandable, and recent developments particularly in the areas of auditing[255] on one side and of defensive measures against unfriendly takeover attempts by foreign investors[256] 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)[257] 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 corporation law[258] 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*)[259] ought to be rescinded; the present rules (Articles 685d *et seq.* of the CO) impede the market for corporate control.[260]

[255] See section III D 1 above. [256] See section II E above. [257] See section II B above.

[258] See section II A above.

[259] Starting the recent debate, see P. Kunz, "Die Vinkulierung als Geheimwaffe gegen unfreundliche Übernahmeversuche: Plädoyer für die Ergänzung der laufenden Aktienrechtsrevision um eine Vinkulierungs-Debatte," NZZ 268 (2007), 33; for a different view, see R. Watter and D. Dubs, "Was bedeutet Fairplay beim Kampf um die Kontrolle von Firmen?" NZZ 273 (2007), 29; some years earlier already, see Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 18 n. 65.

[260] For further details, see U. Schenker, *Schweizerisches Übernahmerecht* (Bern: Stämpfli, 2009), pp. 1 *et seq.*

(ii) *Exit rights*: the Swiss LLC laws, for instance, provide members with rights to exit the company (for example, Article 822 of the CO);[261] the Swiss corporation law should be amended accordingly for shareholders of corporations as well.[262]
(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;[263] 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 132 III 707 (of August 3, 2006): procedures in liability cases.

BGE 136 II 304 (of March 11, 2010): disclosure obligation for CfD (*Implenia/Laxey*).

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

[261] See C. Kaufmann, "Austritt und Ausschluss aus der GmbH," in *Festgabe für Forstmoser* (Zurich, Basel, and Geneva/Zurich and St. Gallen: Schulthess/Dike, 2008), pp. 267 *et seq.*
[262] Kunz, *Der Minderheitenschutz im schweizerischen Aktienrecht*, section 18 n. 63.
[263] *Ibid.*, section 18 n. 68.

TB recommendation of July 6, 2004: applicability of best price rule – not reviewed by a court.

TB recommendation of August 24, 2007: mandatory bid – not reviewed by a court.

TB order re *Ludama* of March 17, 2009: applicability of SESTA – not reviewed by a court.

B Literature

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C *Other sources*

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