Swiss Corporate Law – Past, Present, and Future: Reflections on European Influences

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I. Introduction

1. Switzerland and the “Outside World”

Political and other stereotypes regarding Switzerland (and Swiss people) often emphasize terms like “neutrality” and “independence” on one side. On the other side, and with less effort to be friendly, the “little Alpine Democracy” is considered “unworldly” or even “quixotic”. To counter these views, Switzerland attempts to foster a good image of itself abroad – and usually succeeds. Nevertheless, feelings of envy prove a challenge. Contrary to prejudices, in general, Switzerland and most Swiss are not “anti-foreigner” at all. For instance, Swiss people traditionally enjoy traveling abroad, and Swiss businesses cultivate close ties with businesses in other countries. Furthermore, crossborder student exchanges as well as mutual post docs programs have been a long tradition. Finally, Switzerland has been “exporting” and “importing” legislation for many decades.1

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2 Popular initiatives (Eidgenössische Volksinitiativen), crucial instruments of Switzerland’s direct democracy, may indicate the contrary, e.g., the “Anti-Mass Immigration Initiative” (see section 1.3. b below); moreover, due to another popular initiative (i.e., the “Anti-Minarets Initiative”) which was adopted in 2009, the Federal Constitution of the Swiss Confederation (PC: SR 101) now reads: “The construction of minarets is prohibited” (Article 72 para. 3 PC) – overall, however, Swiss “nativism” is non-existent, and Article 72 para. 3 PC does not reach as far as, for example, Oklahoma’s “Save our State Amendment”.

3 For example, most law firms, specializing in business law, expect associates to study abroad for one or two years in LL.M. programs etc. (in particular in the USA or in
When it comes to human rights and diplomatic mediation (gute Dienste), Switzerland plays an acknowledged leading role or the global stage. Geneva has been host city for the European Headquarters of the United Nations since 1966. Moreover, Switzerland is actively involved as member in various international (business) organizations – e.g., IMF and OECD – of which some are domiciled in Switzerland (e.g., WTO, FSB and WIPO).

2. European Union

a) Non-Membership

Unlike France, Italy, Great Britain, Austria and 20 other countries, Switzerland is presently not a member state of the European Union (EU). Due to a notorious "EU scepticism" among Swiss people, the likelihood of membership in the foreseeable future seems rather slim. Today's relations between the EU and Switzerland as a non-member are legally complex and are getting more complicated despite common economic interests.

The working relationship, not surprisingly, is a close one. Instead of regular EU membership, however, a network of bilateral international agreements (the "Bilaterals I", adopted in 2000, and the "Bilaterals II" of 2005) is the legal basis consisting of more than 120 treaties including 18 core agreements. This Bilateralism, following the rejection by the Swiss people of the EEA, is the main cornerstone of Swiss foreign policy towards the EU. 11

b) European (and EU) Influences

Neither Swiss company law nor Swiss financial markets laws are parts of these bilateral agreements with the EU. Thus, EU Company Law Regulations

4 Great Britain; see, e.g., Wiegand, Die Rezeption amerikanischen Rechts, ZBJV 1mbln (1988) 227.
4 See section II. 1. below. For details, see, e.g., Kuntz, Amerikanisierung, Europisierung sowie Internationalisierung im schweizerischen Wirtschafts-)Recht, recht 30 (2012) 57. It should also be noted that Switzerland is currently party to more than 480 international agreements (Staatsverträge).
5 The World Trade Organization is domiciled in Geneva.
6 The Financial Stability Board is domiciled in Basel (with the Bank for International Settlements).
7 The World Intellectual Property Organization is domiciled in Geneva.
8 According to Swiss law, the EU qualifies as a "supranational community". Thus, the accession would need to be put to a popular vote of the People and the 26 Cantons (Kantone). See Article 140 para. 1 letter b FPC.
9 The "Anti-Mass Immigration Initiative" might endanger the relationship between the EU and Switzerland; see section I. 3. b) below.
10 The accession of Switzerland to the European Economic Area or EEA (Europäischer Wirtschaftsraum - EWR) was rejected in 1992 by both the People and the Cantons.
11 The future of this policy seems uncertain; see section I. 3. b) below.

on one side and EU Company Law Directives on the other side are not applicable in Switzerland nor to Swiss companies. Nevertheless, the Swiss Government, or Federal Council (Rindererat), often allows the EU to take the lead and voluntarily incorporates EU policies into Swiss legislation. 12

Legislative harmonization with "Europe" seems to be an explicit goal of Swiss lawmakers regarding Swiss company law policy. In 2000, for example, it was officially proclaimed in connection with the Swiss Merger Act. 13

"Auf Grund der internationalen Vernetzung der schweizerischen Wirtschaft empfiehlt es sich, das Gesellschaftsrecht unabhängig vom Beitritt zur Europäischen Union mit dem Recht unserer Nachbarstaaten zu harmonisieren. (...)" 14

In addition to the neighboring countries' influences (in particular that of Germany), the EU has been predominant for Switzerland's recent legal developments:

"In fact, the EU has become the main focus of Swiss foreign policy over the last few years. Accordingly, the legal importance of European law in general and of EU law in particular has steadily grown (...) Informally, Switzerland tries to align its legal system with EU law (...)" 15

3. Popular Initiatives

a) The "Rip-Off Initiative"

The remuneration of directors and managers in publicly listed companies is an emotional topic in international corporate governance discussions. 16 Switzerland has been a frontrunner in company law developments in this arena. 17

A popular initiative, commonly known as the "Rip-Off Initiative" (Abzockenerinitiative) – which some call the "Greedy Bastards Initiative" – was adopted in

12 For further details, see Kuntz, Gesellschaftsrecht der Europäischen Union (EU) – Übersicht sowie rechtsetzende Bedeutung für die Schweiz, in: Entwicklungen im Gesellschaftsrecht VI, 2011, p. 179 et seq. and p. 210 et seq. There are various mechanisms in Switzerland by which foreign law "enters" into Swiss law: see section II. 1. b) ad finem below and section II. 2. below.
13 Fusionsgesetz or Fug (SR 221.321).
16 Corporate governance has been the main focus of Swiss company law policy over the past few years; see, e.g., Kuntz, Switzerland – The system of corporate governance, in: Comparative Corporate Governance – A Functional and International Analysis, 2013, p. 868 et seq.; Büscher, Regulierung im Bereich der Corporate Governance (Häbel, Zürich), 2009, passim.
17 The new Swiss system exceeds all comparable provisions concerning remuneration in other countries; the author wrote an expert opinion for Economiesuisse: Kuntz, Eidgenössische Volkswirtschaft "gegen die Abzocker" ("..."), Justletter February 4, 2013, passim.
2013 by large margins of the general population (67.3 per cent) and by a majority of the voters in all 26 Cantons.

Article 99 para. 3 letter a FC provides, among others, that at a corporation’s general annual meeting, a vote will be held on the total amount “of all remuneration (money and the value of benefits in kind) given to the board of directors, the executive board and the board of advisors”. In addition, board members must be elected “on an annual basis”. Pension funds have to disclose how they voted on these particular subjects in the general meeting.

Because of this initiative by the Swiss people, unfortunately, pending revisions of Swiss company law were suspended. Currently, there is a Federal Council ordinance in force (i.e., VegAV), which was implemented last year. This ordinance remains in force until the legislature completes the forthcoming amendment of Swiss corporate law (Aktienrechtsrevision). It is still unclear if and when the reform will take place.

b) The “Anti-Mass Immigration Initiative”

The future of “non-member cooperation” between Switzerland and the EU appears cloudy. Switzerland adopted, by a narrow vote, in 2014 the “Anti-Mass Immigration Initiative” (Masseneinwanderungsinitiative) with quantitative limits and quotas for foreigners who want to immigrate to Switzerland. The provisions seem to violate the “Free Movement of Persons Agreement” between Switzerland and the EU and, thus, to endanger the already fragile relationship between the parties. Article 121a FC (Control of immigration) provides:

“Switzerland shall control the immigration of foreign nationals autonomously. The number of residence permits for foreign nationals in Switzerland shall be restricted by annual quantitative limits and quotas. (...) The annual quantitative limits and quotas for foreign nationals in gainful employment must be determined according to

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18 Article 95 para. 3 letter d FC: “Persons violating [these rules] can be imprisoned for a term not exceeding three years and can be subject to a fine not exceeding six times their annual remuneration”.
19 Verordnung gegen übermäßige Vergütungen bei börsennotierten Aktiengesellschaften (VegAV) or “Rip-OFF Ordinance” (SR 221.33).
20 For a short overview, see, e.g., Kunte, Schweiz: Abkehrerkollateral, in: Audit Committee Quarterly I/2014, p. 26 et seq.
21 See section V.2 below.
22 See section VI.2 below.
23 See section I.2 above.
24 Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit (SR 5 142 112 461).
25 The details shall be regulated in a future law: Article 121a para. 5 FC; the transitional rules provide that international agreements, which contradict this FC Article, “must be renegotiated and amended within three years of its adoption” (transitional provision: Article 197.11, para. 2 FC); Article 121a FC might undermine the “Bilateralism” see section I.2 above.
26 Swiss Civil Code and formally, its Part Five–Swiss Code of Obligations (CO); SR 222.
27 Overview: Kunte (n. 15), p. 4 et seq.
30 Kunte (n. 15), n. 5.
and legal systems abroad.\textsuperscript{32} Political and legal preferences have been to draw primarily from the laws of its neighboring countries. But there is a "new sheriff in town", i.e., the EU. In conclusion: The former Americanization is today’s Europeanization of legislation in Switzerland.\textsuperscript{33}

Nowadays, Swiss laws contain many legal transplants from abroad – and in all likelihood, most of the time, politicians are not aware of this fact, and legislative implementations thus go unopposed. Switzerland knows a variety of "mechanisms" so that foreign law may "enter" through "door openers" into Swiss law.\textsuperscript{34} Such "door openers" may be found in legislation\textsuperscript{35} on one side and in adjudication\textsuperscript{36} on the other side.

2. Swiss Law and "Door Openers"

a) Legislation

Various "door openers" (e.g., pressure or deceit in references) allow international law (particularly European law) to be taken into account in Swiss legislation\textsuperscript{37} – also in connection with company law amendments in Switzerland. Drafting a Federal act, the Swiss Government must formally explain its context within international law;\textsuperscript{38} in general, however, there is no legal obligation to harmonize Swiss laws with foreign law.\textsuperscript{39}

Swiss company law revisions regarding auditing rules in the CO\textsuperscript{40} and a new Swiss Law on Audit Supervision,\textsuperscript{41} as a first example, were "forced" by international pressure following the U.S. Sarbanes Oxley Act;\textsuperscript{42} therefore, this legislation is referred to as "Lex Americana".\textsuperscript{43} Most corporate law provisions,

\textsuperscript{32} For practical results, in general, see Kohler, Le droit européen à l’aide de l’interprétation du droit suisse, in: Die Europakompatibilität des schweizerischen Wirtschaftsrechts: Konvergenz und Divergenz, 2012, p. 41 et seq.

\textsuperscript{33} For further details, see Kunst (n. 4), p. 44 et seq.

\textsuperscript{34} Kunst, Instrumente der Rechtsvergleichung in der Schweiz bei der Rechtssetzung und bei der Rechtsanwendung, ZVG\textsuperscript{r}Wiss 158 (2009)31 et seq. and 39 et seq.

\textsuperscript{35} See section II. 2. a) below.

\textsuperscript{36} See section II. 2. b) below.

\textsuperscript{37} Kunst (n. 15), n. 11 et seq.

\textsuperscript{38} Article 141 Parliament Act (SR 171.10) provides: "The Federal Council shall submit its bills to the Federal Assembly together with a dispatch. In the dispatch, the Federal Council shall provide justification for the bill and if necessary comment on the individual provisions. In addition, it shall explain (...) the relationship with European law (...)" (emphasis added); this legislative "door opener" may be called "EU-Kompatibilitätsprüfung".

\textsuperscript{39} Transparency and not "legislative conformity" is the goal; thus, the Swiss Parliament stays free regarding if, when and how to legislate (yet, the politicians will do their jobs with open eyes towards the laws abroad).

\textsuperscript{40} Articles 727 et seq. CO.

\textsuperscript{41} Revisionausschussgesetz or RAG (SR 221.302).

\textsuperscript{42} See, e.g., Weikl, SCEx twing zum Schaubeschränk (...), ST 80 (2006) 166 et seq.

\textsuperscript{43} Walder, Das Revisionausschusstrechts als Lex Americana?, ST 82 (2008) 854.

\textsuperscript{44} For instance, the Swiss Stock Exchange Act or SESTA (i.e., Bundesgesetz über die Börse und den Effektenhandel – Börsengesetz – BEHG: SR 954.1) and its investors’ disclosure obligations according to Articles 20 et seq. SESTA were tacitly "inspired" by the US securities legislation.

\textsuperscript{45} See section II. 3. c) below.

\textsuperscript{46} Kellerhals, Von der gesellschaftlichen Ziele zur Internationalisierung des schweizerischen Wirtschaftsrechts: der Verweis auf international anerkannte Standards gemäß Art. 8 Abs. 3 BEHG, in: Festschrift für Zehli, 2024, p. 375 et seq. See.

\textsuperscript{47} See section IV. 2. a) below.

\textsuperscript{48} For an overview, see Kunst (n. 15), n. 18 et seq.

\textsuperscript{49} See section II. 2. a) above.

\textsuperscript{50} However, Swiss provisions resulting from more international pressures or from deceit (see section II. 2. a) above – must not be interpreted in accordance with their "foreign origins".


\textsuperscript{52} As least a part of the Federal Act on Collective Investment Schemes or CISA (Kollektivanlagegesetz – KAG: SR 951.31) represents a "Lex Europaeus", in particular, the new company form "Investment Company with Variable Capital" (société d’investissement à capital variable – SICAV) Articles 36 et seq. CISA.

\textsuperscript{53} Decisions by the Federal Supreme Court (Bundesgerichtshof), e.g., BGE 129 III 350 reason 6 or BGE 130 III 190 reason 5.5.1; see, e.g., Wiegand/Brühl, Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft,
Swiss corporate law— including future amendments—is not a “Lex Europaea” and, therefore, needs to be interpreted autonomously.

3. Swiss Company Law

a) Focus on Stock Corporations

Swiss company law is primarily located in the Swiss Code of Obligations (i.e., Articles 530 et seq. CO). The legislative distinction between partnerships (Personsengesellschaften) and corporations (Köpferchaften) is part of the Swiss corporate legal system as is the case in most corporate law systems abroad. For many decades, company law legislation in Switzerland has, generally, neglected partnerships (e.g., general partnerships) and limited partnerships.

Partnerships limited by shares (Kommanditaktiengesellschaften: Article 764 et seq. CO), a hybrid company form, play no significant role in Switzerland either. EU company law, too, neglects partnerships due to the general lack of transnational aspects—however, with the exception of the European Interest Grouping or EEIG (Europäische wirtschaftliche Interessengemeinschaften oder EIW). More relevant for the reality of the Swiss business world are corporations, i.e., stock corporations or companies limited by shares (Aktiengesellschaften or AGs: Articles 620 et seq. CO), on one hand, and limited liability companies or LLCs (Gesellschaften mit beschränkter Haftung or GmbH) on the other hand. According to Articles 828 et seq. CO, special provisions apply to coop-

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54 See section V. 2 below.
55 Kunz, Aktienrechtrevision 20xx, Justletter February 1, 2009, n. 47.
56 The Federal Supreme Court rejected the qualifications as “Lex Europaea” regarding the special audit according to Articles 697 et seq. CO (Sonderprüfung: BGF 133 III 148 (2011) 5. 3.; see e.g., Heckenkemper Ursula, Gedanken zur Methode der richterlichen Rechtsvergleichung im Bereich des Zivilrechts, in: Die Rechtsvergleichung in der Rechtsprechung, 2014, p. 125.
57 Financial Market Laws contain additional company law provisions; see section II. 3 b) below.
58 Körperschaften (Article 552 et seq. CO); the Swiss General Partnership resembles the “offene Handelsgesellschaft” (OHG) in Germany.
59 Kommanditgesellschaften according to Articles 594 et seq. CO generally, they function like the “Kommanditaktiengesellschaft” (KG) in Germany.
60 Finally, Articles 553 et seq. provide for the Simple Partnerships (einfache Gesellschaften), i.e., the “Gesellschaften bürgerlichen Rechts” (GmbH or BgR-Gesellschaften) under German company law.
61 EEIG may be qualified as partnership under national laws (e.g., in Germany and in Austria).
62 See, e.g., Zweijeger/Klette (n. 28), p. 167
63 See section III. 1. below.
64 Kunz, Kreuzfahrt durchs schweizerische Finanzmarktrecht, 2014, p. 10 et seq.
65 See section IV. 1. b) below; first example: disclosure obligations for investors (Articles 20 et seq. SESA); second example: prohibition of personal unions—i.e., Chairperson and CEO in banks (Article 3 para. 2 letter a BA).
66 For an overview, see Kunz, Corporate Governance—Tendenzaus der Selbstregulierung zur Regulierung, in: Festschrift für Böckli, 2006, p. 480 et seq.
67 Para. 15 WPfG: “ad hoc publicity” is not only an EU standard (i.e., Article 7 and Article 17 of the Regulation [EU] No 596/2014 [..] on market abuse [..]) but really an international standard (it is also implemented, for instance, in Chinese law).
68 See section IV. 2. a) below.
69 See, e.g., Kunz (n. 66), p. 482.

b) Federal Competence

Nowadays, Article 122 para. 1 FC provides: “The Confederation is responsible for legislation in the field of civil law (...), i.e., including company law. A materially identical provision was enacted in 1874. Thus, company law legislation became a Federal competence in the 19th century; before then, there existed various Cantonal corporate laws. Most company forms are regulated in Articles 530 et seq. CO.

In addition, some Financial Market Laws (Finanzmarktesetze) contain company law provisions. They provide either for new company forms (e.g., SICAV, in accordance with Articles 36 et seq. CISA) or for specific company law rules regarding companies in certain industries (e.g., banks and insurance companies) or companies whose shares are listed; in particular, their corporate governance is affected by these additional provisions.

c) Regulation v. Self-Regulation

Swiss company law is contained primarily in regulations (Regulierung), namely in various Federal acts, such as CO, SESTA, or CISA. In recent years, however, “private rules” by private (business) organizations—called: self-regulation—have become increasingly important. Financial markets laws as well as company law contain many self-regulatory “provisions”. Locations may seem random; corporate governance mechanisms (e.g., “ad hoc publicity”) may either be regulated (as in Germany)! or self-regulated (as in Switzerland).

The violation of self-regulation—being mere “soft law”—consequently leads to “softer sanctions” (e.g., reprimands, private fines etc.) than the violation of a law or regulation. Generally, two versions of self-regulations exist in
III. The Past of Swiss Corporate Law

1. Regulation

Contrary to some "nativist" and "anti-EU" views, Swiss company law was always – and fundamentally – influenced from abroad.70 Concerning partnerships, for instance, "old" German law was formative. In the 19th century, French law – particularly the "Code de Commerce" of 1807 – was reflected in the Canons' corporate laws.71

The "first" Swiss corporate law of 188174 took the corporate laws of a variety of European countries into account:

"Unser Entwurf hat, alle diese legislativen Vorgänge in England, Frankreich und Deutschland bewusst, für die privatwirtschaftliche Bildung korporativer Vereine [e.g., corporations] […] einer Reihe von Normen aufgestellt […]".75

Stock corporations were regulated at national level, for the first time in 1883. However, the company form of GmbH (LLC) was not implemented until 1936 when the first major amendment of the Swiss corporate law took place; company laws in Germany (1892) and in France (1925) strongly influenced the Swiss LLC legislation.76

The second "Swiss corporate law of 1936"77 emphasized, for the first time in Switzerland, the necessity of minority shareholders' protection even though corporate governance as such was not an explicit issue. In addition to "shareholder value", the rules for stock corporations also provided for "stockholder value" (e.g., creditors' protection).

2. Self-Regulation

In Switzerland, stock exchanges for the trading of shares were established rather late (e.g., Geneva: 1856; Basel: 1876; Zurich: 1877) and were within the competence of the Cantons. Therefore, for many decades, legislation for public companies at national level had been non-existent. Public takeovers of stock corporations with listed shares in Switzerland, were subject to self-regulation,78 i.e., the "Swiss Takeover Code", until the late 1980s.79

With the coming into force of SESTA in 1997/1998, the few stock exchanges for listed shares (in particular, the SIX Swiss Exchange [Schweizer Börse] in Zurich and the BX Berne-Exchange) had to adopt Listing Rules (i.e., LR SIX and LR BX) and other compulsory self-regulations.80 A specific legal reference was, and still is, a "door opener" for international law into Listing Rules.81

"The stock exchange [e.g., SIX and BX] shall take into account internationally recognized standards" (Article 8 para. 3 SESTA).

In 2002, Economiesuisse, the umbrella business organization in Switzerland, published its first Swiss Code of Best Practice (SCBP)82 – a voluntary self-regulation without any government involvement – which was applicable to the organization’s members; its inspiration by other corporate government

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70 For an overview, see Zulauf, Koorregulierung statt Selbstregulierung, Jusletter November 4, 2013, p. 15 et seq.
71 For further details, see Buck-Hedh/Dieckmann, Selbstregulierung im Privatrecht, 2010, p. 35 et seq.
72 Regarding the (self-regulatory) listing rules of stock exchanges in Switzerland, Article 4 para. 2 SESTA provider: "A stock exchange must submit its regulations and any amendments thereof to FINMA [i.e. the supervisory authority] for approval"; see, generally, Watter/Dubs, Bedeutung und Zukunft der Selbstregulierung im Kapitalmarktrecht, ST 79 (2005) 743.
73 There is no involvement of the state; the Swiss Code of Best Practice (SCBP) by Economiesuisse is an example, see section IV.2.b) below.
75 For further details, see Bühler, Die Aktiengesellschaft in den kantonalen Gesetzge- bungen bis zum aktiven Obligationenrecht 1881-1883, in: Aktienrecht im Wandel, vol. I, 2007, p. 290 et seq. (n. 4 and n. 7 et seq. and n. 68 et seq.).
76 See, inter alia, Kuntz, Der Minderheitsschutz im schweizerischen Aktienrecht (Habil. Bern), 2015, para. 3 n. 22 et seq.
77 Official statement by the Federal Council in its dispatch: BBl 1882 I 222; two German legislative sources, i.e., Allgemeines Deutsches Handelsgerichtsabch 1861 and "Dresdner Entwurf" of 1865, were preeminent: Zweigeirt/Kötz (n. 28), p. 167.
codes abroad (e.g., in Germany) was obvious.\footnote{SCBP 2002 Preamble n. 1 refers, e.g., to "international discussions", the "Caldubury Report", the "Hampel Report" and the "German Corporate Governance Code".} In 2007, Economiamuisse published an amended second version of the SCBP.\footnote{Again, the SCBP 2002 Preamble n. 1 mentioned (updated) "international discussions", the "Combined Code", the "Rapport Viennese" and the "Baum Commission"; see, e.g., Bieber, Corporate Governance und ihre Regulierung in der Schweiz, ZGR 41 (2012) 235 et seq. The latest amendment was published in 2014; see section IV.2.b. below.}

IV. Current Swiss Corporate Law

1. Regulation

a) Swiss Corporate Law

Today's "third" Swiss corporation law came into force at the beginning of the 1990s.\footnote{The Swiss corporate law, in force today, seems generally compatible with EU company law, although some "Swiss Finishes" exist. In the following, of course, only arbitrary references may be made as an overview (focused on corporate governance).} In many countries, new corporation laws were adopted in the 1960s and in the 1970s. Not surprisingly, therefore, the Federal Council took a crossborder look in its draft of 1983.\footnote{The primary objective of the board of directors is to protect the interests of the Corporation. The members' fiduciary duties are provided for in Article 717 CO.\footnote{The members of the board of directors and third parties engaged in managing the company's business must perform their duties with due diligence and safeguard the interests of the company in good faith. They must afford the shareholders equal treatment in like circumstances.}} The respective dispatch referred to corporate laws in the EU, in particular those of Germany, France, Italy, the Netherlands, Belgium and Great Britain.\footnote{The Swiss corporate law, in force today, seems generally compatible with EU company law, although some "Swiss Finishes" exist. In the following, of course, only arbitrary references may be made as an overview (focused on corporate governance).}

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Formally, the Swiss board concept is based on the one-tier board model ("monistic" model) which is accepted in EU law (Articles 707 et seq. CO). In substance, however, Swiss corporation law is so flexible—and non-mandatory—that different models from abroad (e.g., Germany's two-tier board concept}
accurate.102 Be that as it may, (minority) shareholders’ rights are at the core of Swiss corporate law. Ranking the levels of corporate minority protection is somewhat arbitrary, of course, but — in comparison with other countries — Switzerland seems to be somewhere in the middle.

Shareholders receive two sets of entitlements for general meetings, namely financial rights (Vermögenrechte), such as dividends and pre-emptive rights, along with non-financial rights (Mitarbeiterrechte), such as the right to call a general meeting and to participate as well as to speak and to vote there. Crucial for the protection of minority shareholders are their many information rights; four information rights according to Articles 696 et seq. CO are pre-eminent: availability of the annual report; rights to information (Anfragen) and inspection (Einsicht); and right to a “special audit” (Sonderprüfung).

The Swiss corporation law provides a variety of shareholders’ actions; some of them are regulated by statutory law,103 for example, the liability action against members of the board of directors (Articles 754 et seq. CO), challenging resolutions of the general meeting (Article 706 et seq. CO), and request for the corporation’s dissolution (Article 736 no. 4 CO).

Due to the “Rip-OFF Initiative”104,105 many disputed corporate governance issues concerning directors’ and managers’ remuneration (in particular, “say on pay” by shareholders, legal bans on “golden good-byes” and on “golden hellos”, disclosure obligations of pension funds on their voting in general meetings) are already implemented in today’s applicable ordinance,106 (and additionally “safeguarded” by possible criminal sanctions).107

100 Between the three bodies of stock corporations, i.e., the general meeting, the board of directors and the auditors, there exists no clear hierarchy but rather “checks and balances”.

101 The legal possibility of complaints in this area of the law looks better on paper than in business reality; in fact, actions by shareholders are rarely filed in Switzerland — mostly because they are either too costly or too slow or both, in my view, today’s corporate law discussions should focus on these issues.

102 See section III. 3. a) above.

103 See section III. 3. a) ad finem above; in the future, there will be a new amendment of the CO and of the Stock corporation law: see section V. 2. below.

104 Presently, there is a dispute as to the legality of criminal sanctions in an ordinance (nulla poena sine lege). In my view, the criminal provisions are illegal: Kneze, Leit- planken zur Umsetzung der “Abschöler”-Initiative, NZW No. 53 (2013) 19; for the same legal view, see, e.g., Brandi/Wyss/Zysset, Nulla Poena sine Lege, Justi- ter May 27, 2013, n. 83; for the contrary view, see, e.g., Henninger, Die Strafbestim- mungen der Verordnung gegen übermässige Verschärfungen bei börsenkotierten Ak- tienvereinigungen, AJF 24 (2015) 66 et seq. and 76. From a comparative perspective, no other country worldwide provides criminal sanctions as tough as Switzerland.

105 Swiss Federal Law on Banks and Savings Banks (Banking Act, BA): SR 952.0 (Bafin).

106 See section II. 3. b) above.

107 See section III. 2. above.

108 Legal aspects of corporate governance play an important role in connection with “transactions”; see, e.g., Butler, Corporate Governance and Capital Market Trans- actions in Switzerland (Habek, Zürich), 2005, passim.

109 For further details, see Ordinance of the Takeover Board on Public Takeover Offers (SR 954.195.1).

110 See e.g. Kneze (n. 16), p. 874.

111 Article 20 para. 1 SESTA: “Whoever directly or indirectly or acting in concert with third parties acquires or sells for their own account securities or purchase or sale rights relating to securities in a company domiciled in Switzerland whose equi- 

108ity securities are listed in whole or in part in Switzerland, or a company not domici- 

108led in Switzerland whose equity securities are mainly listed in whole or in part in 

108 Switzerland, and thereby attains, falls below or exceeds the threshold percentages of 3, 5, 10, 15, 20, 25, 33 1/3, 50 or 66 2/3 of voting rights, whether or not such rights may be exercised, must notify the company and the stock exchanges on which the equity securities in question are listed”.

112 In addition to the law, an ordinance of FINMA is crucial, in particular, Article 9 et seq. Ordinance of the Swiss Financial Market Supervisory Authority on Stock Ex-

112changes and Securities Trading (SR 954.193).


114 Article 3 para. 2 letter A: “(…) the bank must create separate bodies for its management on the one hand and for its direction, supervision and control on the other (…)”.

115 Article 13 para. 1 Swiss Federal Ordinance on the Supervision of Private Insurance Companies (Insurance Supervision Ordinance, ISO); SR 961.511.

116 Article 7 Stock Exchange Ordinance (of the Federal Council); “In terms of personal- 

116net, the management must be independent of the body in charge of supervision, regu- 

116lation and control” (SR 994.11).
2. Self-Regulation

a) SIX

With respect to compulsory self-regulation of corporate governance, the Listing Rules of SIX and other self-regulations (e.g., the Directive Corporate Governance (DCG) of SIX)\footnote{17} are applicable to stock corporations with listed shares. This "soft law" is amended from time to time by SIX or by BX (and later approved by FINMA),\footnote{17} always with a conscious look at listing rules of foreign jurisdictions. In my view, an international standardization seems to take place (accepted and followed by SIX and BX, too).\footnote{17}

Regarding "ad hoc publicity", for instance, Article 53 LR SIX\footnote{10} provides that (comparable to various listing rules abroad):

"The issuer must inform the market of any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts which are capable of triggering a significant change in market prices. The issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact. "Disclosure must be made so as to ensure the equal treatment of all market participants."\footnote{124}

In addition to the LR SIX, this stock exchange adopted, inter alia, a specific directive for corporate governance purposes which clearly states: "Internationally recognised standards are taken into account" (Article 1 DCG SIX).\footnote{122} The information to be published in the companies’ annual reports (Geschäftsberichte) is indicated in the Annex to the DCG.\footnote{127} The principle of "comply or explain" (for which there exists no convincing translation)\footnote{127} applies to said information, as in most listing rules of other stock exchanges.\footnote{125}

b) Economieuisse

The adoption or publication, respectively, of self-regulatory "Corporate Governance Codes" is not only state of the art in the USA and in European countries (including Switzerland since 2002)\footnote{128} but has also been adopted in the BRIC-states (i.e., Brazil, Russia, India and China)\footnote{127} and even in some developing countries. Thus, such codes represent an international standard. Sometimes (as in Switzerland), codes being "soft law" and self-regulation – precede later regulation in corporation laws.\footnote{125}

Economieuisse published its latest SCBP in 2014.\footnote{127} Following the lead of the two former versions (i.e., 2002 and 2007), the SCBP of 2014 is not only intended for public companies but also for "non-listed, economically significant companies or organisations" (excerpt from the Preamble). The SCBP of 2014 does not represent a revolution\footnote{127} but rather a soft evolution of business understanding regarding corporate governance in Switzerland.\footnote{131}

In contrast to many codes abroad, for instance, neither the SCBP of 2002 nor the SCBP of 2007 contained the principle "comply or explain"; therefore, the new guideline\footnote{122} is an innovation for Economieuisse. Generally, if only in the Preamble, Corporate Social Responsibility orCSR\footnote{127} and – as business guideline – sustainability (Nachhaltigkeit) are emphasized.\footnote{124} Finally, Article

124 The Green Paper 2011 – see section V. 1. a) below – translates "comply or explain" with the German expression "Mittragen oder Begründen" which is virtually never used in Switzerland.

125 Article 7 DCG SIX: "(...) If the issuer refrains from disclosing certain information (according to the Annex), a specific reference to this effect must be included in the CR-report, and substantial grounds must be given for each individual case in which information is not disclosed".

126 See section III. 2. above.


128 See, generally, Fleischer, Zukunftsfragen der Corporate Governance in Deutschland und Europa, ZKG 45 (2011) 155 et seq.


130 For example, the SCBP 2014 consciously omits the principle of "one share = one vote".


132 Preamble and, e.g., Article 27 alinea 3 SCBP 2014.


134 Article 9 alinea 4 SCBP 2014: "The Board of Directors should be guided by the goal of sustainable corporate development" (emphasis added).
V. The Future of Swiss Corporate Law?

1. EU Company Law Basics

a) Green Papers

Company law in general and corporate governance in particular are important EU business policy issues in order to foster global efficiencies and the competitiveness of enterprises. For an "outsider" (being from Switzerland), however, it is not easy to keep track of all respective publications. Sometimes, in fact, there seems to be a lack of legislative coordination. The following overview summarizes some aspects that may be interesting for Swiss policymakers.

Switzerland was not involved in the European Corporate Governance Forum which was active between 2004 and 2011. However, legislation in this area is established based, in particular, on an Action Plan on modernising EU company law (2003). Nevertheless, the Forum strongly influenced the corporate governance self-regulations in Switzerland. Innumerable publications on these legal aspects followed over the years. In connection with the global financial crisis in 2007/2008, the EU Commission published the Green Paper "Corporate governance in financial institutions and remuneration policies" (2010). The Green Paper pointed out corporate governance issues, e.g., conflicts of interest, failures of the board of director and risk management. The 2010 Green Paper was the stepping stone for another Green Paper on listed companies in general, one year later: In

135 The draft of a new Swiss corporate law goes a significant step further by providing a percentage threshold for representation of women (and men): see section V.1. below. Furthermore, Article 12 alinea 3 SCBP 2014 suggests BDoD diversification: "The Board of Directors should guarantee that there is an appropriate diversity among its members."

136 The European Corporate Governance Forum published annual reports.


138 See sections IV.2. above.


140 The Green Paper recommended "to ensure the right balance between independence and skills" of the board members (para. 5.1, alinea 1); furthermore, it asked: "Should the number of boards on which a director may sit be limited (for example, no more than three at once)?" (Q 1.1.5: or: "Should combining the functions of chairman of the board of directors and chief executive officer be prohibited in financial institutions" (Q 1.2.) – this has been the case in Switzerland for many years: see section IV.1(b) above.

b) Latest Action Plan etc.

More recently, in 2012, the EU Commission published another Action Plan on company law (entitled "European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies"). It points out three primary lines of future EU company law action; i.e., enhancing transparency, engaging shareholders and supporting companies' growth and their competitiveness. Not surprisingly, the EU has no intention whatsoever of challenging today's coexistence of different board structures (i.e., one-tier board versus two-tier board) on one side. On the other side, and following up on the Green Paper 2011, the Action Plan underlines again the "need for greater diversity" on boards and seeks future proposals "on improving the gender balance among non-executive directors of listed companies".


142 Green Paper 2011, p. 4 (emphasis added); consequently, the Green Paper asks: "Should any corporate governance measure be taken at EU level for listed companies? Should the EU focus on promoting development and application of voluntary codes for non-listed companies?" (Q 2).

143 Green Paper 2011, p. 6 et seq. (1.1.3. Gender diversity) asks: "Should listed companies be required to ensure a better gender balance on boards? If so, how? (...?)" (Q 6); apparently, Swiss debates did not realize that the Green Paper 2011 did not support "gender quotas" as such: "The introduction of measures such as quotas or targets to ensure gender balance in boards, however, is not sufficient if companies do not adopt diversity policies that contribute to work-life balance for women and men and encourage notably the mentoring, networking and adequate training for management positions that are essential for women wanting to follow a career path that leads to eligibility for board positions" (p. 7).


145 Action Plan 2012, p. 4 et seq. – interestingly, the EU aims for an "overarching codification exercise" of EU company law (ibid. p. 5), thus, the Commission "will therefore prepare the codification of major company law directives and their merger into a single instrument" (ibid. p. 15).

146 Action Plan 2012, p. 5.

147 See section V.1.a) ad finem above.

148 Action Plan 2012, p. 6 – yet, implementation of a "gender quota" is not suggested; the German version points out, though in a "closely" way, that the diversity goal seems to be just "ausgegewogenes Verhältnis" between men and women ("Aktionsplan 2012", p. 6).
Furthermore, the principle "comply or explain" shows weaknesses and ought to be improved. In connection with remuneration, moreover, a better shareholder oversight on remuneration is proposed, unlike in Switzerland (as a direct result of the "Rip-Off Initiative"), the shareholders shall vote only on the remuneration policy and on the remuneration reports of the companies but not on the "total amount" of all remuneration. 159

Apparently, the highly emotional issue of "gender diversity" represents a top priority of EU company law policy. In 2012, the EU commission published the Proposal for a Directive in this regard which also influenced the current discussion in Switzerland. 155 "The purpose of the proposal is to substantially increase the number of women on corporate boards (...) by setting a minimum objective of a 40% presence of the underrepresented sex among the non-executive directors of companies listed on stock exchanges."

In 2014, finally, Commission Recommendations on "the quality of corporate governance reporting (comply or explain)" 154 (and – on the same date – a Proposal for a new Directive on "the encouragement of long-term shareholder engagement") 155 were published. The main purpose of these documents is, in particular (and in short), to improve the "explain" element of the principle "comply or explain".

2. Swiss Regulation

Predictions on future legislation – be it for company law or for other areas of the law – is always speculative. Taking into account the indisputable influences of European company law on Swiss company law in the past (and still today), it seems clear that, in the future, EU company law basics 156 will still have an impact. 157 Presently, Switzerland is in the process of adopting a "fourth" Swiss corporate law.

159 Action Plan 2012, p. 6: "(...) the explanations provided by the companies are often insufficient." 150 See section I.3. a) above. 151 Proposal of an EU Directive (...) "on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures" of November 14, 2012: COM(2012) 614/1, today; the directive is not in force (yet). 152 The Federal Council refers to this proposal in the dispatch (see section V.2. below). 153 Proposal of an EU Directive on "gender balance", p. 1 (emphasis added) and Article 4 (ibid. on p. 28 et seq.); Swiss politicians (and the Federal Council) ought to take note that the proposal targets not "managements" but only board of directors – and their non-executive members; the Swiss proposal takes a more aggressive approach by including management as well (see section V.2. below).


Its first draft and the Federal Council in its dispatch (2007) 158 emphasized the partial harmonization with EU company law, 159 at least in spirit. However, due to the "Rip-Off Initiative", 160 the legislative work was suspended some years ago. Nowadays, a second draft of this latest "große Aktienrechtsrevision 20Xx" 161 is being intensely debated, 162 with respect to EU company law, the Federal Council (once again) underscores:


The Report CO 2014 of the Federal Council discusses various projected innovations which cannot be presented in detail in the present article. 164 Primary emphasis was laid on Corporate Governance in general and on Checks and Balances in particular. 165 The corporate governance shall also be improved for stock corporations without listed shares (i.e., private AG), for instance, by providing better information rights to private shareholders. 166 The internationalization of Swiss company law becomes obvious with the proposal that foreign currencies shall be allowed as equity capital (Aktienkapitalierung).
tal) – not only Swiss Francs as is the case today. 167 Foreign shareholders’ participation in general meetings will be improved by electronic means (e.g., general meeting by internet). 168 With the new Kapitalbund according to Articles 635a et seq. draftCO 2014, a cutting-edge “Swiss Finish” was invented; these rules will enhance the flexibility of the board of directors in corporate finance matters. 169

The Federal Council seems to play a practical joke concerning gender diversity because the draft provision – in today’s wording – promises more than it could fulfill. Referring to the Proposal of an EU Directive COM(2012) 614, 160 the Swiss legislative project aims at a gender quota of 30 percent (women or men) for both board and management of listed companies; 170 the “joke” may be seen in the lack of any sanctions in cases of violations. 171

The concept is based on indirect compulsion and on the hope for voluntary improvement of the gender situation due to “failure disclosures” in remuneration reports (Vergütungsberichte). 172 Generally, in my view, a “gender quota” is a superficial and patriarchal approach 173 and might prove – if actually sanctioned – to be a business threat. Today, it seems rather unlikely that such a provision will be implemented in Swiss corporate law.


170 See section V. 1. b.

171 For further details, see Report CO 2014, p. 42 et seq. (para. 1.3.5).

172 Proposal EU Directive on “gender balance” (only for non-executive BöD members and not for management), p. 13 and Article 6 para. 1 provide for sanctions: “The provisions must be effective, proportionate and dissuasive and may include the following measures: (a) administrative fines; (b) nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors made contrary to the national provisions adopted pursuant to [the EU Directive]” (emphasis added; ibid. p. 26).

173 Article 734a draft CO 2014: “Sofort nicht jedes Geschlecht mindestens zu 30 Prozent im Verwaltungsrat und in der Geschäftsleitung vertreten ist, sind im Vergütungsbericht (...) anzugeben: 1. die Gründe, weshalb die Geschlechter nicht je zu mindestens 30 Prozent vertreten sind und 2. die Massnahmen zur Förderung des weniger stark vertretenen Geschlechts” (emphasis added).

VI. Concluding Remarks

1. International Switzerland

The following rule – irrespective of personal ideology or political conviction – seems indisputable: Swiss Business Law is international law (and “is” means: today). Moreover, Switzerland has never ever been a “legislative island”. In any case, the “good old times” of successful “legal exports” from Switzerland to other countries are long gone, and “legal imports” or legal transplants from abroad, respectively, are widespread in Swiss law. This is as a whole, neither good nor bad, but just a fact.

Personally, the author admits to be EU skeptical “M.E. hat die EU in der heutigen (und in der absehbaren) Form keine langfristige Perspektive (...). Sollte die EU in 25 Jahren als Staatenverband weiterhin bestehen, wäre dies eine Überraschung.” Nevertheless, turning a blind eye would be a dumb strategy in connection with the EU. The EU plays today – as well as in the foreseeable future – a dominant role for Swiss law in general and for Swiss business law (Schweizer Wirtschaftsrechte) in particular. In fact, EU law “enters” into Switzerland’s legislation through various “door openers” (e.g., international agreements with the EU or Bilaterialism, EU Kompatibilitätspflichten und automoner Nachvollzung von EU Recht). The same is true in Swiss adju-

lern Unternehmen (“KMUs”) which are also a subject of Swiss corporate governance. Forsommer, Corporate Governance – eine Aufgabe auch für KMUs?, in: Bestellschrift für Zelli, 2004, p. 475 et seq.; Nobel, Corporate Governance und Aktienrecht – Bedeutung für KMUs, in: Bestellschrift für Forommer, 2003, p. 325 et seq.

Kanz (n. 165), p. 908 n. 248.

Kanz (n. 165), p. 908 n. 249.

185 A (private) Swiss Foundation Code was published in 2009, see Sprecher, Der Schweizer Foundation Code, SAV Revue 1 (2020) 13 et seq.

186 The Federal Council has published a variety of reports over the years (e.g., 2006 and 2009) on corporate governance in the Federal administration of Switzerland.

187 In general, see Kanz (n. 4), passim.

188 See section II. 1. a) above.

189 See section II. 1. b) above.

190 Today’s law students better prepare themselves (e.g., by studying abroad during or after their studies in Switzerland and by learning English).

191 Kanz (n. 4), p. 53 (emphasis omitted): this is not “wishful thinking”, in my medium-term view, however, the “Eurozierung” will be replaced by an “Internationaleisierung” and legislative dominances by China and by international organization (see ibid, p. 51 et seq.).

192 See section II. 2. a) above.

193 See section II. 2. b) above; for details, see, e.g., Klett, Der Einfluss europäischen Rechts auf die schweizerische Rechtsprechung im Vertragsrecht, rechts 26 (2008) 227 et seq.; Walser, Das rechtsvergleichende Element – Zur Auslegung vereinbarten, harmonisierten und rezipierten Rechts, ZSR 126 (2007) 259 et seq.

194 This was Switzerland’s merger qualification by an OECD report in 1998; for details, see Kanz (n. 165), p. 887.

195 Kanz (n. 165), p. 909.

196 See section II. 3. a) above.

197 See section IV. 2. b) above.

198 See sections II. 3. c) and IV. 2. a) above.

199 See section III. 2. a) above.

200 See section V. 2. above.

201 See NZZ No. 60 (2013) 23 ("Ablehnung des Bundesbericht – Die Vorlage der Regierung zur Aktienrechtsreform ist nicht mehr möglicher.


my view, the project should not be suspended or delayed but rather concentrated on essential elements of Swiss corporation law.202
Nothing is perfect — and the author would like to close with a ceterum censeo: Maybe the worst "Swiss Finish" and a really bad corporate governance mechanism — indeed a legal anomaly in worldwide comparison — is the system of transfer restrictions of registered shares according to Articles 685d et seq. CO (Vindelierung von Namensaktien).203 The present rules impede the market for corporate control and undermine corporate governance. Therefore, they ought to be rescinded. It is clear, however, that this will never happen.204

202 Already some years ago, this was the author’s view as outside expert for the Swiss corporate law revision in the Federal Parliament: Kunz (n. 55), n. 53 et seq.
204 For further details, see Kunz (n. 55), n. 106 et seq. In fact, the transfer restriction will be strengthened in order to grant boards even more powers to defend the companies (or maybe their jobs) against “activists” and other shareholders (ibid. n. 112 et seq.).