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.[1] Nevertheless, feelings of envy prove a challenge.

Contrary to prejudices, in general, Switzerland and most Swiss are not "anti-foreigner" at all.[2] For instance, Swiss people traditionally enjoy travelling 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.[3] Finally, Switzerland has been "exporting" and "importing" legislation for many decades.[4]

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1 Tourists still love the Swiss Alps, Swiss Cheese Fondue and Swiss Watches (yet, they hate today's currency situation with an overvalued Swiss Franc); for other "visitors" to Switzerland, of course, Swiss Banks are no longer on their "to do lists" due to recent developments regarding banking secrecy.

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 I. 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 (FC: SR 101) now reads: "The construction of minarets is prohibited" (Article 72 para. 3 FC) – overall, however, Swiss "nativism" is non-existent, and Article 72 para. 3 FC does not reach as far as, for example, Oklahomas'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 on 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[5], FSB[6] and WIPO[7]).

2. *European Union*

a) Non-Membership

Unlike France, Italy, Great Britain, Austria and 24 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.[8] Today's relations between the EU and Switzerland as a non-member are legally complex and are getting more complicated[9] despite common economic interests.[10]

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

Great Britain); *see, e.g.*, *Wiegand*, Die Rezeption amerikanischen Rechts, ZBJV 124bis (1988) 227.

4 See section II. 1. below. For details, *see, e.g.*, *Kunz*, Amerikanisierung, Europäisierung sowie Internationalisierung im schweizerischen (Wirtschafts-)Recht, recht 30 (2012) 37. It should also be noted that Switzerland is currently party to more than 4'800 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 FC.

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 (*Bundesrat*), 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" (*Abzocker-initiative*) – which some call the "Greedy Bastards Initiative" – was adopted in

12 For further details, *see Kunz*, Gesellschaftsrecht der Europäischen Union (EU) – Übersicht sowie rechtsvergleichende 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 FusG (SR 221.301).

14 Dispatch (*Botschaft*) of the Federal Council: BBl 2000, p. 4515 at n. 209 (emphasis added).

15 *Kunz*, Dealing with International Law and European Law: Overview of the "Swiss Approach", Jusletter July 2, 2012, n. 25 (emphasis omitted).

16 Corporate governance has been the main focus of Swiss company law policy over the past few years; *see, e.g.*, *Kunz*, Switzerland – The system of corporate governance, in: Comparative Corporate Governance – A Functional and International Analysis, 2013, p. 868 *et seq.*; *Bühler*, Regulierung im Bereich der Corporate Governance (Habil. Zurich), 2009, passim.

17 The new Swiss systems exceeds all comparable provisions concerning remuneration in other countries; the author wrote an expert opinion for Economiesuisse: *Kunz*, Eidgenössische Volksinitiative "gegen die Abzockerei" (...), Jusletter February 4, 2013, *passim*.

2013 by large margins of the general population (67,9 per cent) and by a majority of the voters in all 26 Cantons:

Article 95 para. 3 letter a FC[18] 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.*, VegüV),[19] which was implemented last year.[20] This ordinance remains in force until the legislature completes the forthcoming amendment of Swiss corporate law (*Aktienrechtsrevision*);[21] it is still unclear if and when the reform will take place.[22]

b) The "Anti-Mass Immigration Initiative"

The future of "non-member cooperation" between Switzerland and the EU appears cloudy.[23] 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[24] and, thus, to endanger the already fragile relationship between the parties. Article 121a FC (Control of immigration) provides:

"[1]Switzerland shall control the immigration of foreign nationals autonomously. [2]The number of residence permits for foreign nationals in Switzerland shall be restricted by annual quantitative limits and quotas. (...). [3]The annual quantitative limits and quotas for foreign nationals in gainful employment must be determined according to

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 börsenkotierten Aktiengesellschaften (VegüV) – or "Rip-Off Ordinance" (SR 221.331).

20 For a short overview, *see, e.g.*, *Kunz*, Schweiz: Abzockerregulierung, 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 0.142.112.681).

Switzerland's general economic interests, while giving priority to Swiss citizens. (...). [4]No international agreements may be concluded that breach this Article"[25].

II. Fundamentals

1. Legal Transplants

a) "Exports"

In the late 19th and early 20th centuries, maybe surprisingly, Switzerland was an influential and major "legal exporter" of Swiss civil law.[26] Its civil law was "exported",[27] for example, to Japan, China (democratic period), Taiwan, Peru, Italy, Greece and to other countries in the Middle East and in Northern Africa.[28] The most impressive legislative "export success" occurred with Turkey which adopted the Swiss civil law in 1926.[29]

Swiss legislation was highly respected in most countries and "liked abroad due to its democratic basis and the simplicity of its wording and structure";[30] in fact, *"Swiss Made"* was always – and still is today – broadly accepted as a seal of approval. From time to time, Switzerland's civil law is even mentioned as a feasible "role model" for a future European Civil Code (*Europäisches Zivilgesetzbuch*)[31] – only time will tell.

b) "Imports"

Instead of implementing "Swiss Finishes", recent legislative policy in Switzerland seems to make a conscious effort to harmonize laws with other nations

25 The details shall be regulated in a future law: Article 121*a* 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 provisions: Article 197 11. para. 2 FC); Article 121*a* FC might undermine the "Bilateralism": *see* section I. 2. a) above.

26 Swiss Civil Code and – formally, its Part Five –Swiss Code of Obligations (CO): SR 220.

27 Overview: *Kunz* (n. 15), n. 4 *et seq.*

28 See, *e.g.*, *Bucher*, Das Schweizerische Obligationenrecht – ein Markstein und ein Vorbild, NZZ No. 132 (2006) p. 31; in general, *Zweigert/Kötz*, Einführung in die Rechtsvergleichung, 3rd ed. 1996, p. 175 *et seq.*

29 For further details, *see, e.g.*, *Hirsch*, Das Schweizerische Zivilgesetzbuch in der Türkei, SJZ 50 (1954) 337; *Rainer*, Europäisches Privatrecht – Die Rechtsvergleichung, 2nd ed. 2007, p. 233; *Zweigert/Kötz* (n. 28), p. 176.

30 *Kunz* (n. 15), n. 5.

31 *See, e.g.*, *Kramer*, Der Stil eines zukünftigen europäischen Vertragsgesetzes – die schweizerische Privatrechtskodifikation als Vorbild?, ZBJV 144 (2008) 905; *Rainer* (n. 29), p. 234 (Vorbild für Europa).

and legal systems abroad.[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.[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.[34] Such "door openers" may be found in legislation[35] on one side and in adjudication[36] on the other side.

2. *Swiss Law and "Door Openers"*

a) Legislation

Various "door openers" (*e.g.*, pressure or eclecticism or references) allow international law (particularly European law) to be taken into account in Swiss legislation[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;[38] in general, however, there is no legal obligation to harmonize Swiss laws with foreign law.[39]

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

32 For practical results, in general, *see Kohler*, Le droit européen á l'aide de l'interprétation du droit suisse, in: Die Europakompatibilität des schweizerischen Wirtschaftsrechts: Konvergenz und Divergenz, 2012, p. 41 *et seq.*

33 For further details, *see Kunz* (n. 4), p. 44 *et seq.*

34 *Kunz*, Instrumente der Rechtsvergleichung in der Schweiz bei der Rechtssetzung und bei der Rechtsanwendung, ZVglRWiss 108 (2009) 31 *et seq.* and 39 *et seq.*

35 *See* section II. 2. a) below.

36 *See* section II. 2. b) below.

37 *Kunz* (n. 15), n. 11 *et seq.*

38 Article 141 Parliament Act (SR 171.10) provides: "[1]The Federal Council shall submit its bills to the Federal Assembly together with a dispatch. [2]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".

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).

40 Articles 727 *et seq.* CO.

41 Revisionsaufsichtsgesetz or RAG (SR 221.302).

42 *See, e.g., Weibel*, SOX zwingt zum Schulterschluss (...), ST 80 (2006) 106 *et seq.*

43 *Walter*, Das Revisionsaufsichtsrecht als Lex Americana?, ST 82 (2008) 854.

as a second example, are "inspired" by rules (and experiences) abroad;[44] thus, legislation is almost always eclectic – not only in Switzerland.

Finally, and as a third example for company law amendments, the statutory reference in Article 8 para. 3 SESTA may be mentioned which provides (for the self-regulatory Listing Rules of stock exchanges)[45] to "take into account internationally recognized standards".[46] On this legal basis "entered", for example, the accounting principle "true and fair view" as well as the "ad hoc publicity"[47] – crucial elements for corporate governance reasons.

b) Adjudication

In interpreting Swiss laws, the courts' adjudication in particular and application of law in general by the administrative authorities may take foreign law into consideration; provided, certain criteria are met.[48] In my view, however, courts are not allowed generally to use a "comparative adjudication method" (*rechtsvergleichendes Auslegungselement*). As a result of the separation of powers, only certain *qualified* legislative "door openers" (*e.g.*, statutory gaps [*echte Gesetzeslücken*] or statutory references[49] to foreign laws)[50] are acceptable.

In certain rare cases, the Swiss legislature intends to directly implement EU legislation (*autonomer Nachvollzug von EU-Recht*),[51] *i. e.*, when the Swiss laws represent "*Leges Europaeae*";[52] the interpretation of such acts must be in accordance with EU law (*europarechtskonforme Auslegung*).[53] However,

44 For instance, the Swiss Stock Exchange Act or SESTA (*i. e.*, Bundesgesetz über die Börsen 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.

45 *See* section II. 3. c) below.

46 *Kellerhals*, Von der gesetzlichen Pflicht zur Internationalisierung des schweizerischen Wirtschaftsrechts: der Verweis auf international anerkannte Standards gemäß Art. 8 Abs. 3 BEHG , in: Festschrift für Zobl, 2004, p. 375 *et seq.*

47 See section IV. 2. a) below.

48 For an overview, *see Kunz* (n. 15), n. 18 *et seq.*

49 *See* section II. 2. a) above.

50 However, Swiss provisions resulting from mere international pressures or from eclecticism – *see* section II. 2. a) above – must not be interpreted in accordance with their "foreign origins".

51 *See, e.g., Spinner/Maritz*, EG-Kompatibilität des schweizerischen Wirtschaftsrechts: Vom autonomen zum systematischen Nachvollzug, in: Festschrift für Zäch, 1999, p. 127 *et seq.*

52 At least a part of the Federal Act on Collective Investment Schemes or CISA (Kollektivanlagengesetz – KAG: SR 951.31) represents a "Lex Europaea", in particular, the new company form "Investment Company with Variable Capital" (société d'investissement á capital variable – SICAV): Articles 36 *et seq.* CISA.

53 Decisions by the Federal Supreme Court (*Bundesgerichtsentscheide*), *e.g.*, BGE 129 III 350 reason 6. or BGE 130 III 190 reason 5.5.1.; *see, e.g., Wiegand/Brülhart*, Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft,

Swiss corporate law – including future amendments[54] – is *not* a "*Lex Europaea*"[55] and, therefore, needs to be interpreted autonomously.[56]

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).[57] The legislative distinction between partnerships (*Personengesellschaften*) and corporations (*Körperschaften*) 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[58] and limited partnerships[59]).[60]

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 Economic Interest Grouping or EEIG (*Europäische wirtschaftliche Interessenvereinigung* or EWIV).[61]

More relevant for the reality of the Swiss business world are corporations, *i. e.*, stock corporations or companies limited by shares (*Aktiengesellschaften* or AG: Articles 620 *et seq.* CO), on one hand, and *limited liability companies* or LLC (*Gesellschaften mit beschränkter Haftung* or GmbH) on the other hand. According to Articles 828 *et seq.* CO, special provisions apply to cooperatives (*Genossenschaften*). In the following, though, the focus will be on stock corporations and the Swiss corporate law (*Aktienrecht*).

in: Swiss Papers on European Integration, 23 (1999), p. 5 *et seq.*; *Wiegand*, Zur Anwendung von autonom nachvollzogenem EU-Privatrecht, in: Festschrift für Zäch, 1999, p. 171 *et seq.*

54 *See* section V. 2. below.

55 *Kunz*, Aktienrechtsrevision 20xx, Jusletter February 2, 2009, n. 47.

56 The Federal Supreme Court rejected the qualification as "*Lex Europaea*" regarding the special audit according to Articles 697a *et seq.* CO (*Sonderprüfung*): BGE 133 III 184 reason 3. 5. ; *see*, *e.g.*, *Heckendorn Urscheler*, Gedanken zur Methode der richterlichen Rechtsvergleichung im Bereich des Zivilrechts, in: Die Rechtsvergleichung in der Rechtsprechung, 2014, p. 105.

57 Financial Market Laws contain additional company law provisions: *see* section II. 3 b) below.

58 *Kollektivgesellschaften* (Articles 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 "*Kommanditgesellschaften*" (KG) in Germany.

60 Finally, Articles 530 *et seq.* provide for the Simple Partnerships (*einfache Gesellschaften*), *i. e.*, the "*Gesellschaften bürgerlichen Rechts*" (GbR or BGB-Gesellschaften) under German company law.

61 EEIG may be qualified as *partnership* under national laws (*e.g.*, in Germany and in Austria).

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.[62] Thus, company law legislation became a Federal competence in the 19th century; before then, there existed various Cantonal corporate laws.[63] Most company forms are regulated in Articles 530 *et seq.* CO.

In addition, some *Financial Market Laws* (*Finanzmarktgesetze*) contain company law provisions.[64] 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.[65]

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[66] contain many self-regulatory "provisions". Locations may seem random; corporate governance mechanisms (*e.g.*, "*ad hoc publicity*") may either be regulated (as in Germany)[67] or self-regulated (as in Switzerland).[68]

The violation of self-regulation – being mere "*soft law*" – consequently leads to "*softer sanctions*" (*e.g.*, reprimands, private fines etc.)[69] than the violation of a law or regulation. Generally, two versions of self-regulations exist in

62 *See*, *e.g.*, *Zweigert/Kötz* (n. 28), p. 167

63 *See* section III. 1. below.

64 *Kunz*, Kreuzfahrt durch's schweizerische Finanzmarktrecht, 2014, p. 10 *et seq.*

65 *See* section IV. 1. b) below; first example: disclosure obligations for investors (Articles 20 *et seq.* SESTA); 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 – Tendenz von der Selbstregulierung zur Regulierung, in: Festschrift für Böckli, 2006, p. 480 *et seq.*

67 Para. 15 WpHG; "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.

Switzerland,[70] *i. e.*, compulsory self-regulation (*unechte Selbstregulierung*), which is based on a legal delegation by an authority,[71] and voluntary self-regulation (*echte Selbstregulierung*) – the former version needs an approval by an agency,[72] whereas the latter version does not.[73]

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.[74] Concerning partnerships, for instance, "old" German law was formative. In the 19th century, French law – particularly the "Code de Commerce" of 1808 – was mirrored in the Cantons' corporate laws.[75]

The *"first" Swiss corporate law* of 1881[76] took the corporate laws of a variety of European countries into account:

> "Unser Entwurf hat, alle diese legislativen Vorgänge in England, Frankreich und Deutschland benu[t]zend, für die privatwillkürliche Bildung korporativer Vereine [*e.g.*, corporations] (...) eine Reihe von Normen aufgestellt (...)".[77]

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

70 For an overview, *see Zulauf*, Koregulierung statt Selbstregulierung, Jusletter November 4, 2013, n. 15 *et seq.*

71 For further details, *see Buck-Heeb/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 provides: "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.

74 Overview: *Kunz* (n. 12), p. 210 *et seq.*

75 For further details, *see Bühler*, Die Aktiengesellschaft in den kantonalen Gesetzgebungen bis zum alten 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*, *Kunz*, Der Minderheitenschutz im schweizerischen Aktienrecht (Habil. Bern), 2001, para. 3 n. 25 *et seq.*

77 Official statement by the Federal Council in its dispatch: BBl 1880 I 222; two German legislative sources, *i. e.*, Allgemeines Deutsches Handelsgesetzbuch of 1861 and "Dresdner Entwurf" of 1865, were preeminent: *Zweigert/Kötz* (n. 28), p. 167.

place; company laws in Germany (1892) and in France (1925) strongly influenced the Swiss LLC legislation.[78]

The *"second"* Swiss corporation law of 1936[79] 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: 1850; 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,[80] *i. e.*, the *"Swiss Takeover Code"*, until the late 1980s.[81]

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.[82] A specific law reference was, and still is, a "door opener" for international law into Listing Rules:[83]

> "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)[84] – a voluntary self-regulation without any government involvement[85] which was applicable to the organization's members; its inspiration by other corporate government

78 French law was the primary model because – in the view of the Federal Council – the German law led to "unleugbaren Missbräuchen und Auswüchsen": BBl 1928 I 271; *see Kunz* (n. 12), p. 211.

79 For further details, *see Kunz* (n. 76), para. 3 n. 56 *et seq.* and n. 105 *et seq.*

80 *Langhart*, Rahmengesetz und Selbstregulierung (Diss. Zurich) 1993, p. 374 et seq.

81 This self-regulation was inspired by various codes from abroad; *see*, *e.g.*, *Strazzer*, Das öffentliche Übernahmeangebot im Kapitalmarktrecht der Schweiz unter besonderer Berücksichtigung des Verhältnisses zwischen Bieter und Aktionär (Diss. Zurich), 1993, p. 96 *et seq.*; *Bernet*, Die Regelung öffentlicher Kaufangebote im neuen Börsengesetz (BEHG) (Diss. Basel), 1997, p. 37 *et seq.*. For further details (*e.g.*, regarding the history and the legislative developments), *see Kunz* (n. 76), para. 10 n. 60 *et seq.*

82 *See* section II. 3. c) above.

83 *See* section II. 2. a) *ad finem* above.

84 *See*, *e.g.*, *Böckli*, Corporate Governance und "Swiss Code of Best Practice", in: Festschrift für Forstmoser, 2003, p. 257 *et seq.*; *Bühler* (n. 16), n. 1250 *et seq.*; *Kunz* (n. 16), p. 872.

85 *See* section II. 3. c) above.

codes abroad (*e.g.*, in Germany) was obvious.[86] In 2007, Economiesuisse published an amended second version of the SCBP.[87]

IV. Current Swiss Corporate Law

1. Regulation

a) Swiss Corporation Law

Today's "third" Swiss corporation law came into force at the beginning of the 1990s.[88] 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.[89] The respective dispatch referred to corporate laws in the EU, in particular those of Germany, France, Italy, the Netherlands, Belgium and Great Britain.[90]

The Swiss corporate law, in force today, seems generally compatible with EU company law, although some "Swiss Finishes" exist.[91] In the following, of course, only arbitrary references may be made as an overview (focused on corporate governance):[92]

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

86 SCBP 2002 Preamble n. 1 refers, *e.g.*, to "international discussions", the "Cadbury Report", the "Hampel Report" and the "German Corporate Governance Code".

87 Again, the SCBP 2007 Preamble n. 1 mentioned (updated) "international discussions", the "Combined Code", the "Rapport Viénot" and the "Baum Commission"; *see, e.g., Bühler*, 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.

88 The main legislative aim was to improve shareholders' protection (and thus corporate governance); *see Kunz* (n. 16), p. 871.

89 Developments in the EU company law at the beginning of the 1990s were on many politicians' minds; *see*, generally, *Dessemontet*, Droit des sociétés, in: Die Europaverträglichkeit des schweizerischen Rechts, 1990, p. 377 *et seq.*

90 Dispatch of the Federal Council: BBl 1983 II 756 *et seq.*

91 For further details, *see, e.g., Böckli*, Schweizer Aktienrecht, 4th ed. 2009, Einleitende Bemerkungen, n. 70 *et seq.*

92 For further details regarding corporate governance in accordance with Swiss corporate law, *see Kunz* (n. 16), p. 868 *et seq.* For a general introduction to Swiss corpoation law in German, *see Böckli* (n. 91) *passim*; *Meier-Hayoz/Forstmoser*, Schweizerisches Gesellschaftsrecht, 11th ed., 2012), para. 16 (p. 419 *et seq.*); *von der Crone*, Aktienrecht, 2014, *passim*.

of *Vorstand* and *Aufsichtsrat*) may be implemented by Swiss corporations[93] which is often the case,[94] particularly with listed companies.

The Swiss corporation law is also very flexible with respect to structural elements of the board of directors (*e.g.*, composition, maximum number of seats or duration of office). Generally, the shareholders enjoy a broad discretion in composing the board.[95] Thus, for instance, statutory law (unlike some articles of association) does not provide for any age limits. This flexibility might be reduced in the future with a gender quota for the board of directors (and management).[96] In my view, cumulative voting on the board of directors is legal,[97] though uncommon in Switzerland.

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:[98]

> "[1]The members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith. [2]They must afford the shareholders equal treatment in like circumstances"[99].

Article 698 para. 1 CO points to the shareholders' general meeting as its "supreme governing body" (*oberstes Organ*) which, in my view, is not entirely

93 *See, e.g., Forstmoser*, Monistische oder dualistische Unternehmensverfassung? Das Schweizer Konzept, ZGR 32 (2003) 688 *et seq.*; *Nobel*, Monismus oder Dualismus: ein corporatologisches Scheinproblem?, in: Verwaltungsrat und Geschäftsleitung, 2006, p. 9 *et seq.*; *Böckli*, Corporate Boards in Switzerland, in: Corporate Boards in Law and Practice, 2013, p. 653 *et seq.*

94 In fact, the concepts are not so different in the business world: *Böckli*, Konvergenz: Annäherung des monistischen und des dualistischen Führungs- und Aufsichtssystems, in: Handbuch Corporate Governance, 2nd ed. 2009, p. 255 *et seq.*; in Switzerland, this may take place by means of a delegation of management authorities to individual board members (*Delegierte des VR*): Article 716*a* para. 2 CO.

95 Until 2008, in contradiction with EU company law, Swiss corporate law provided mandatory legal requirements for the nationality and domicile of board members.

96 *See* section V. 2. below.

97 *Kunz* (n. 16), p. 880; *see* also *Glanzmann*, Das Proporzwahlverfahren (cumulative voting) als Instrument der Corporate Governance, in: Festschrift für Druey, 2002, p. 401 *et seq.*

98 See *e.g. Kunz* (n. 16), p. 883 *et seq.* Finally, according to Article 716*a* CO, board members have a variety of additional inalienable and non-transferable duties (*e.g.*, overall management of the company", "determination of the company's organization", "compilation of the annual report" etc.).

99 The shareholders of Stock Corporations, however, have no obligations (not even controlling shareholders): "A shareholder may not be required, even under the articles of association [Statuten], to contribute more than the amount fixed for subscription of a share on issue" (Article 680 para. 1 CO).

accurate.[100] 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 (*Vermögensrechte*), such as dividends and pre-emptive rights, along with non-financial rights (*Mitwirkungsrechte*), 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 (*Auskunft*) 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,[101] 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",[102] 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[103] (and additionally "safeguarded" by possible criminal sanctions[104]).

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 I. 3. a) above.

103 *See* section I. 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: *Kunz*, Leitplanken zur Umsetzung der "Abzocker"-Initiative, NZZ No. 53 (2013) 19; for the same legal view, *see, e.g.*, *Brand/Wyss/Zysset*, Nulla Minder-poena sine lege, Jusletter May 27, 2013, n. 83; for the contrary view, *see, e.g.*, *Heiniger*, Die Strafbestimmungen der Verordnung gegen übermässige Vergütungen bei börsenkotierten Aktiengesellschaften, AJP 24 (2015) 66 *et seq.* and 76. From a comparative perspective, no other country worldwide provides criminal sanctions as tough as Switzerland.

b) Financial Markets Laws

Various financial markets laws in Switzerland (*e.g.*, SESTA or BA[105]) contain company law rules[106] which mostly regulate good corporate governance. This is true, for instance, regarding public takeovers (formerly self-regulated[107]) of public companies or stock corporations with listed shares, respectively:[108] Articles 22 *et seq.* SESTA[109] provide, among others, for transparency and fairness in connection with public takeovers.[110] Moreover, Article 20 SESTA[111] represents the legal basis[112] for investors' disclosure obligations.

Furthermore, corporate governance is important, for example, for financial intermediaries such as banks. In this regard, Article 3 para. 2 letter a BA provides a prohibition of personal unions (*Verbot von Personalunionen*),[113] *i. e.*, chairman and CEO of banks must be different natural persons (*besondere Organe für die Geschäftsführung einerseits und für die Oberleitung, Aufsicht und Kontrolle andererseits*).[114] Similar provisions are in force for insurance companies on one side[115] and for stock exchanges on the other side.[116]

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

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.*, *Bohrer*, Corporate Governance and Capital Market Transactions in Switzerland (Habil. Zurich), 2005, *passim*.

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

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

111 Article 20 para. 1 SESTA: "Whosever 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 equity securities are listed in whole or in part in Switzerland, or a company not domiciled in Switzerland whose equity securities are mainly listed in whole or in part in 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 Exchanges and Securities Trading (SR 954.193).

113 *See, e.g., Iseli*, Führungsorganisation im Aktien-, Banken- und Versicherungsrecht (Diss. Zurich), 2007, n. 698 *et seq.*

114 Article 3 para. 2 letter a BA: "(...) 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 961.011.

116 Article 7 Stock Exchange Ordinance (of the Federal Council): "In terms of personnel, the management must be independent of the body in charge of supervision, regulation and control" (SR 954.11).

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)[117] 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),[118] 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).[119]

Regarding "ad hoc publicity", for instance, Article 53 LR SIX[120] provides that (comparable to various listing rules abroad):

> "[1]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. [2]The issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact. [3]Disclosure must be made so as to ensure the equal treatment of all market participants".[121]

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).[122] The information to be published in the companies' annual reports (*Geschäftsberichte*) is indicated in the Annex to the DCG;[123] the principle of "comply or explain" (for which there exists no convincing translation)[124] applies to said information, as in most listing rules of other stock exchanges.[125]

117 In addition to Listing Rules (*Kotierungsreglement*) and Additional Rules (*Zusatzreglemente*), there are various Directives (*Richtlinien*), Circulars (*Rundschreiben*) and Communiqués (*Mitteilungen*).

118 *Kunz* (n. 16), p. 872.

119 The Action Plan on modernising EU company law and enhancing corporate governance (2003) suggested encouraging the convergence of national codes by means of a *European Corporate Governance Forum* (Commission Decision: 2004/706/EC: Article 2) which was mandated from 2004 until 2011.

120 For the *former* system (*i. e.*, Article 72 oldLR SIX), *see Kunz* (n. 76), para. 10 n. 267; for further details, *see*, *e.g.*, *v. Fischer*, Die Ad-hoc Publizität nach Art. 72 Kotierungsreglement (unter besonderer Berücksichtigung der Haftungsfrage) (Diss. Bern), 1999, *passim*; *Hsu*, Ad-hoc-Publizität (Diss. Zurich), 1999, *passim*.

121 Under certain preconditions, the postponement of disclosure is possible (*see* Article 54 LR SIX); materially the same contents are provided for in Article 18 LR BX.

122 Additional *SIX Directives*: *Kunz* (n. 16), p. 873 n. 33 and 34.

123 Information to be disclosed in the annual reports are, *e.g.*, group structure and significant shareholders (including cross-shareholdings), capital structure, members of the board of directors (BoD) and their vested interests, tasks and areas of responsibility for each BoD committee, and shareholders' participations rights.

b) Economiesuisse

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[126]) but has also been adopted in the BRIC-states (*i. e.*, Brazil, Russia, India and China)[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.[128]

Economiesuisse published its latest SCBP in 2014.[129] 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[130] but rather a soft evolution of business understanding regarding corporate governance in Switzerland:[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[132] is an innovation for Economiesuisse. Generally, if only in the Preamble, Corporate Social Responsibility or CSR[133] and – as business guideline – sustainability (*Nachhaltigkeit*) are emphasized.[134] 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 CG-report, and substantial grounds must be given for each individual case in which information is not disclosed".

126 *See* section III. 2. above.

127 For further details, *see Steins Bisschop*, Globalization: selected developments in corporate law, in: Globalization and Private Law, 2010, p. 211 *et seq.* and p. 217 *et seq.*

128 *See*, generally, *Fleischer*, Zukunftsfragen der Corporate Governance in Deutschland und Europa, ZGR 40 (2011) 155 *et seq.*

129 *Hofstetter*, Swiss Code of Best Practice for Corporate Governance 2014, ST 89 (2015) p. 171 *et seq.*

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

131 *See*, *e.g.*, *Frick*, Der neue Swiss Code of Best Practice for Corporate Governance 2014, GesKR 4/2014, p. 431 *et seq.*

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

133 *See*, generally, *Kunz*, Wirtschaftsethik durch Wirtschaftsrecht?, in: Berner Gedanken zum Recht, 2014, p. 217 *et seq.* and p. 231 *et seq.*

134 Article 9 alinea 4 SCBP 2014: "The Board of Directors should be guided by the goal of *sustainable corporate development*" (emphasis added).

12 alinea 2 SCBP of 2014 provides: "The Board of Directors should be comprised of male and female members. (...)".[135]

V. The Future of Swiss Corporation 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 policy-makers.

Switzerland was not involved in the European Corporate Governance Forum which was active between 2004 and 2011[136] and which was established based, in particular, on an Action Plan on modernising EU company law (2003).[137] Nevertheless, the Forum strongly influenced the corporate governance self-regulations in Switzerland.[138] 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).[139] The Green Paper pointed out corporate governance issues, *e.g.*, conflicts of interest, failures of the board of directors[140] 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 percent threshold for representation of women (and men): *see* section V. 1. below; furthermore, Article 12 alinea 3 SCBP 2014 suggests *BoD diversity*: "The Board of Directors should guarantee that there is an appropriate diversity among its members".

136 The European Corporate Governance Forum published annual reports.

137 Action Plan 2003 ("Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward": COM[2003] 284 of May 21, 2003).

138 *See* sections IV. 2. above.

139 COM(2010) 284 of June 2, 2010.

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.); 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.

2011, the EU Commission published the Green Paper "The EU corporate governance framework"[141] which was – and still is – broadly discussed in Switzerland. For example, it shifts the exclusive focus on listed companies and it states: "Corporate governance guidelines for unlisted companies may need to be encouraged".[142] In Switzerland, the EU reflections on "gender diversity" regarding the composition of board of directors composition were (and are) controversial, however.[143]

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").[144] It points out three primary lines of future EU company law actions,[145] *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)[146] on one side. On the other side, and following up on the Green Paper 2011,[147] 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".[148]

141 COM(2011) 164 of April 4, 2011.

142 Green Paper 2011, p. 4 (emphasis added); consequentially, the Green Paper asks: "Should any corporate governance measure be taken at EU level for unlisted 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).

144 Action Plan 2012: COM(2012) 740 of December 12, 2012.

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 "cloudy" way, that the diversity goal seems to be just "*ausgewogeneres Verhältnis*" between men and women ("Aktionsplan 2012", p. 6).

Furthermore, the principle "comply or explain" shows weaknesses[149] 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.[150]

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[151] which also influenced the current discussion in Switzerland:[152] "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".[153]

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 corporation law.

149 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; 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. 5 (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.

154 2014/208/EU of April 9, 2014.

155 COM(2014) 213 of April 9, 2014.

156 *See* section V. 1. above.

157 *See*, generally, *Hausmann/Bechtold-Orth*, Corporate Governance in Europa: Quo vadis? Eine Analyse der aktuellen Entwicklungen aus Sicht der Schweiz, GesKR 3/2011, p. 359 *et seq.*

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:

> "Die Schweiz ist staatsvertraglich nicht zur Übernahme des einschlägigen Sekundärrechts der Europäischen Union (EU) im Bereich des Gesellschaftsrechts verpflichtet. Nichtsdestotrotz wäre eine völlig eigenständige Rechtsentwicklung des schweizerischen Gesellschaftsrechts problematisch. Der Vorentwurf steht in weiten Teilen mit dem massgeblichen Recht der EU im Einklang. Auf eine Übernahme der einschlägigen europäischen Vorschriften wurde jedoch dort verzichtet, wo diese materiell nicht überzeugen".[163]

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 (*Aktienkapi-*

158 The legislative project was started in 2005; *see*, *e.g.*, *Kunz*, Status quo der "grossen Aktienrechtsrevision" – Ein legislatives Mammutprojekt für das 21. Jahrhundert, in: Entwicklungen im Gesellschaftsrecht III, 2008, p. 125 *et seq.*

159 Dispatch of the Federal Council: BBl 2008 p. 1630 *et seq.*

160 *See* section I. 3. a) above.

161 For further details, *see Kunz* (n. 55), *passim*.

162 Explanatory Report of the Federal Council dated December 2, 2014 on the Revision of the Swiss corporate law (Report CO 2014); recently, *see*, *e.g.*, *Poggio/Zihler*, Vorentwurf zur Revision des Aktienrechts, ST 89 (2015) 93 *et seq.*; *Vogt*, Freiheit und Zwang im Aktienrecht, NZZ No. 15 (2015) p. 21; the public hearing (*Vernehmlassung*) for the new Swiss corporation law lasted until March 15, 2015 (business organizations seem reluctant and claim an "overregulation"); be that as it may, the Federal Council's dispatch is expected at the end of 2016.

163 Report CO 2014, p. 58 (para. 1. 4. 1); in addtion, the Report states: "Der Vorentwurf berührt die internationalen Verpflichtungen der Schweiz nicht und wirkt sich nicht auf die geltenden Abkommen mit der Europäischen Union aus" (*ibid.* p. 210).

164 Unfortunately, there are no English translations for the Report CO 2014 or the respective bill (*i.e.*, draft CO 2014) on the other side.

165 *See* Report CO 2014, p. 42 *et seq.*

166 Today, shareholders are entitled to information from the board of directors only at the general meeting: Article 697 para. 1 CO; in the future, private shareholders will be entitled to such information in writing, and respective questions must be answered (to all shareholders) twice a year: *see* Article 697 para. 1 draft CO 2014.

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 *Kapitalband* according to Articles 653s *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,[170] the Swiss legislative project aims at a gender quota of 30 percent (women or men) for *both* board and management of listed companies ;[171] the "joke" may be seen in the lack of any sanctions in cases of violations:[172]

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*).[173] Generally, in my view, a "gender quota" is a superfluous and patriarchal approach[174] 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.

167 Report CO 2014, p. 18 *et seq.* (para. 1.3.1.1); Article 621 draft CO 2014: "[1]Das Aktienkapital beträgt mindestens 100 000 Franken. [2]Zulässig ist auch ein Aktienkapital in der für die Geschäftstätigkeit wesentlichen ausländischen Währung. (...)".

168 Articles 701c *et seq.* draft CO 2014 (Article 701d draft CO 2014: "Cybergeneralversammlung"); in general, *see Kunz*, Evolution ins 21. Jahrhundert – oder: Zukunft der Generalversammlung (...), AJP 20 (2011) 161; *Pöschel*, Generalversammlung und Internet (...), in: Die "grosse" Schweizer Aktienrechtsrevision, 2010, p. 223 *et seq.*

169 *See*, *e.g.*, *Büchler*, Das Kapitalband (Diss. Zurich), 2012, *passim*; *Gericke*, Kapitalband: Flexibilität in Harmonie und Dissonanz, in: Die "grosse" Schweizer Aktienrechtsrevision, 2010, p. 113 *et seq.*; *Kunz*, Grundpfeiler des Eigenkapitals (...), in: Gesellschafts- und Kapitalmarktrecht in Deutschland, Österreich und der Schweiz, 2014, p. 89.

170 *See* section V. 1. b).

171 For further details, *see* Report CO 2014, p. 40 *et seq.* (para. 1. 3. 5).

172 Proposal EU Directive on "gender balance" (only for non-executive BoD members and not for managements), p. 13 and Article 6 para. 2 provide for *sanctions*: "The sanctions 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 734e draft CO 2014: "Sofern 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).

174 See *Kunz*, Es braucht keine Frauenquote, Die Nordwestschweiz/Aargauer Zeitung, December 30, 2014, p. 20 (columne).

Swiss laws (*e.g.*, the CO and the Labor Statute) grant a variety of rights to employees. The EU states that employees' involvement in connection with companies "may take the form of information, consultation and participation in the board".[175] The first two forms (*i.e.*, information and consultation) have been parts of Swiss law for many years; in my view, however, an employees' participation in the board of directors will not be implemented in the foreseeable future.

3. Swiss Self-Regulation

In the future, SIX (and BX) as well as Economiesuisse will always adopt their corporate governance self-regulations with a conscious look at international (in particular, European) company law developments. In my view, such an approach seems advisable to improve, for instance, the "explain" element of the principle of "comply or explain"[176] which is applicable for Swiss listed companies based on self-regulation.[177]

The self-regulatory future is always open and rather uncertain. This is as true for Switzerland as for every other country and for the EU. But undoubtedly "corporate governance is *en vogue* and represents today's main political focus regarding corporate law in Switzerland"[178] – including self-regulation by self-regulators.

Today's nearly exclusive focus on self-regulation for listed companies will be adjusted and expanded, in due course, in accordance with questions and discussions following, for instance, the European Paper 2011.[179] Corporate governance will become a topic, for example,[180] regarding groups of companies (*Konzern-Governance*),[181] KMU or SMEs,[182] family enterprises (*i.e.*,

175 Action Plan 2012, p. 11 concludes: "The Commission will identify and investigate potential obstacles to trans-national employee share ownership schemes, and will subsequently take appropriate action to encourage employee share ownership throughout Europe" (*ibid.*); the Green Paper 2011, p. 17 *et seq.* also emphasized the need for "employee share ownership".

176 In "non-comply cases", the companies' discretion seems too broad as to what and how to "explain"; the EU tries to remedy this problem with a Commission Recommendation and a Proposal for a new Directive: *see* section V. 1. b) *ad finem* above.

177 *See* sections IV. 2. a)/b).

178 *Kunz* (n. 16), p. 871 ad n. 16 (emphasis in original).

179 Green Paper 2011, p. 4: *see* section V. 1. a) *ad finem* above.

180 For an overview, *see* Kunz (n. 16), p. 907 *et seq.*

181 *See*, *e.g.*, *Blanc*, Corporate Governance dans les groupes de sociétés (Diss. Lausanne), 2010, *passim*; *Forstmoser*, Corporate Governance in verbundenen Unternehmen, in: Die vernetzte Wirtschaft, 2004, p. 151 *et seq.*; *Hofstetter*, Corporate Governance im Konzern, in: Festschrift für Forstmoser, 2003, p. 301 *et seq.*

182 Traditionally (and due to the lack of cross-border aspects), EU company law policy does not focus on small and medium-sized enterprises (SMEs) – however, this might change as pointed out (with additional references) in the Action Plan 2012, p. 13 *et seq.*; this is different in Switzerland which is dominated by "kleinen und mitt-

governance in family firms),[183] non-profit organizations (Swiss NPO Code),[184] foundations (foundation governance)[185] and public administrative bodies.[186]

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).[187] Moreover, Switzerland has never ever been a "legislative island". In any case, the "good old times" of succesful "legal exports" from Switzerland to other countries are long gone,[188] and "legal imports" or legal transplants from abroad, respectively, are widespread in Swiss law.[189] This is as a whole, neither good nor bad, but just a fact.[190]

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 'Staatenverbund' weiterhin bestehen, wäre dies eine Überraschung".[191] 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 Wirtschaftsrecht*) in particular. In fact, EU law "enters" into Switzerland's legislation through various "door openers" (*e.g.*, international agreements with the EU or Bilateralism, EU *Kompatibilitätsprüfung* and *autonomer Nachvollzug* von EU Recht).[192] The same is true in Swiss adjudication (particularly, by the Federal Supreme Court, *e.g.*, by means of "*europarechtskonforme Auslegung*").[193]

leren Unternehmen" ("KMU") which are also a subject of Swiss corporate governance: *Forstmoser*, Corporate Governance – eine Aufgabe auch für KMU?, in: Festschrift für Zobl, 2004, p. 475 *et seq.*; *Nobel*, Corporate Governance und Aktienrecht – Bedeutung für KMU?, in: Festschrift für Forstmoser, 2003, p. 325 *et seq.*

183 *Kunz* (n. 16), p. 908 n. 248.

184 *Kunz* (n. 16), p. 908 n. 249.

185 A (private) Swiss Foundation Code was published in 2009; *see Sprecher*, Der Swiss Foundation Code, SAV Revue 1 (2006) 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 Kunz* (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 *Kunz* (n.4), p. 53 (emphasis omitted); this is not "wishful thinking", in my medium-term view, however, the "Europäisierung" will be replaced by an "Internationalisierung" and legislative dominances by China and by international organizations (*see ibid.* p. 51 *et seq.*).

192 *See* section II. 2. a) above.

2. Regulation and Self-Regulation

The long-standing international perception seems to be that Switzerland has only a weak or average corporate governance concerning Swiss public companies.[194] In fact, this view is not true any longer: "In my view (...) the winds have changed in Switzerland over the last few years".[195] Consequently, there is a level playing field when it comes to corporate governance aspects – Switzerland may not be the "leader" but is, at a minimum, in the "leading group". Q: Does this matter? A: Yes; Q: Does anybody really care? A: No!

Concededly, Swiss self-regulation in company law matters[196] is nothing to brag about. The self-regulators seemed, for quite some time, to be a little bit "out of sync" with international developments in corporate governance. Overall, they were mostly one step behind; after all, Economiesuisse closed the gap with last year's amendment of the SCBP 2014.[197] The Listing Rules and other self-regulation of SIX and BX are "internationally compatible".[198]

Somewhat begrudgingly, the author must confess: Today's "rip-off" provisions, in an ordinance of the Federal Council,[199] seem to make Switzerland the front runner in company law matters – but this is not necessarily a good development; current Swiss law goes much further than foreign regulations (*e.g.*, regarding general meeting votes on "total amounts" of the remuneration or on disclosures by pension funds). Foreign jurisdictions presently only observe but do not adopt Swiss law. And what will happen in the future?

The latest Federal Council's legislative proposals for the Swiss corporate law,[200] *i. e.*, for the next "*grosse Aktienrechtsrevision*", are extremely controversial (*e.g.*, the gender quota for both the board of directors and managers) – however, "if" and "when" this could take effect, still seems uncertain.[201] In

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

194 This was Switzerland's meager qualification by an OECD report in 1998; for details, *see Kunz* (n. 16), p. 887.

195 *Kunz* (n. 16), p. 909.

196 *See* section II. 3. c) above.

197 *See* section IV. 2. b) above.

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

199 *See* section I. 3. a) above.

200 *See* section V. 2. above.

201 *See* NZZ No. 60 (2015) 23 ("Abfuhr für den Bundesrat – Die Vorlage der Regierung zur Aktienrechtsrevision ist nicht mehrheitsfähig").

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 (*Vinkulierung 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.*

203 *See, e.g., Bernasconi/Bernasconi-Mamie*, Mandatory and Non-mandatory Rules in Swiss Corporate Law – an Overview, in: Swiss Reports Presented at the XVIth International Congress of Comparative Law, vol. II (2002) 352 *et seq.*; *Kunz* (n. 16), p. 909.

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.*).