Peter V. Kunz*

Swiss Corporate Governance – an Overview

1. Introduction

The key focus of this publication shall be on corporations and, in particular, on listed companies. Thus, corporate governance aspects in other areas of the law (e.g. public enterprises, banks and other financial intermediaries) have to be neglected.

Swiss company laws provide for the distinction between corporation organizations and partnership organizations.[1] The latter are outside the scope of this report; the former category consists of stock corporations (i.e. corporations)[2] and of limited-liability companies (i.e. LLCs).[3] Unlike in Germany, the LLCs do not yet bear the same weight in Switzerland as corporations do. Moreover, all listed companies are corporations.[4]

This publication will cover the legal aspects of Corporate Governance (CG) for corporations primarily under Swiss corporation law and Swiss stock exchange law.

* Full-tenure Professor for Business Law and Head of Department of Business Law at the University of Bern Law School (www.iwr.unibe.ch).

1 See, *inter alia*, A. MEIER-HAYOZ & P. FORSTMOSER, *Schweizerisches Gesellschaftsrecht*, 10th ed., Bern: Stämpfli 2007, § 2 para 8 *et seq.*, para 62 *et seq*.

2 *Aktiengesellschaften* (AG) in accordance with articles 620 *et seq*. Swiss Code of Obligations (CO); currently, the Swiss legislature is in the process of amending large parts of the corporation law – it is a *"grosse Aktienrechtsrevision"* (see, *inter alia*, P.V. KUNZ, Aktienrechtsrevision 20xx: *Jusletter* dated February 2, 2009, para 1 *et seq.*); Switzerland has 186,232 corporations (September 15, 2009).

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

4 Only a small fraction of corporations (some 400 companies) are listed companies, *i.e.* corporations with shares being publicly quoted and traded either at the SIX Swiss Exchange (SIX) in Zurich or at the BX Berne eXchange (BX) in Bern; OTC-companies do not qualify as listed companies under Swiss law. See: http://www.six-swiss-exchange.com (01.02.2010) and http://www.berne-x.com (01.02.2010).

2. General Information

2.1 Definition of CG and Swiss Corporate Law Reforms

2.1.1 Understanding

Switzerland does not have any official definition of CG. In fact, CG is not a legal term under Swiss law.[5] Most erudite commentaries pertaining to corporate law matters state that the term seems unclear and try to explain CG by referring to several international reports (e.g. to the Cadbury Report)[6] and their definitions[7] and to one particular Swiss code.[8]

In substance, the academic definition[9] combines on one side the internal CG (i.e. management, board of directors, auditors and their relations) and on the other side the external CG (i.e. relations with capital markets, customers, and employees).

2.1.2 Present Reforms

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

5 P.V. KUNZ, Corporate Governance – Tendenz von der Selbstregulierung zur Regulierung, in E.A. KRAMER & P. NOBEL & R. WALDBURGER (eds.), *Festschrift für Peter Böckli zum 70. Geburtstag*, Zurich: Schulthess 2006, 472.

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

7 See, *inter alia*, D. ZOBL, Was ist Corporate Governance?, in P. FORSTMOSER *et al.* (eds.), *Corporate Governance*, Zurich: Schulthess 2002, 9, n. 13; in general, see C. BÜHLER, Regulierung im Bereich der Corporate Governance, Zurich and St. Gallen: Dike 2009, 213 *et seq*.

8 See below 2.2.

9 P. BÖCKLI, Corporate Governance auf Schnellstrassen und Holzwegen, *ST* 2000 (74), 133 *et seq.*; R.H. WEBER, Insider v. Outsider in Corporate Governance, in P. FORSTMOSER *et al.* (eds.), *Corporate Governance*, Zurich: Schulthess 2002, 84 *et seq*.

10 See P.V. KUNZ, *Der Minderheitenschutz im schweizerischen Aktienrecht – Eine gesellschaftsrechtliche Studie (...) mit rechtsvergleichenden Hinweisen*, Bern: Stämpfli 2001, § 3 para 140 *et seq.*; F.R. EHRAT, Switzerland, in M.W. STECHER (ed.) *Protection of Minority Shareholders*, London: 1997, 224.

11 P. NOBEL, Corporate Governance und Aktienrecht, in H.C.VON DER CRONE *et al.* (eds.), *Festschrift für Peter Forstmoser zum 60. Geburtstag*, Zurich: Schulthess 2003, 328 *et seq*.

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

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

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

2.2 Legal Sources of CG in Switzerland

2.2.1 Regulation and Self-Regulation

Today, CG principles may be found in laws and ordinances on one side and in self-regulated codices on the other side. Historically, not regulation but rather self-regulation by business organizations formally introduced to and promoted CG (good corporate governance as a concept) in this country[17] – as is apparently the case in most countries:

– Business Association: *economiesuisse*, being the most influential association of Swiss businesses,[18] published for the first time in 2002 the Swiss Code of Best Practice (SCBP)[19] – primarily for listed corporations in Switzerland but also for "[n]on-listed economically significant companies".[20]

[13] For an overview, see P. BÖCKLI, Zum Vorentwurf für eine Revision des Aktien- und Rechnungslegungsrechts, *GesKR* 1/2006, 4 *et seq.*; H.-U. VOGT & E. SCHIWOW & K. WIEDMER, Die Aktienrechtsrevision unter Corporate Governance-Aspekten, *AJP* 2009 (18), 1359 *et seq.*

[14] Early observations, see J.N. DRUEY, Corporate Governance – Einige allgemeine Überlegungen, *GesRZ* 2002 (Sonderheft), 32 *et seq.*; P. BÖCKLI, Revisionsfelder im Aktienrecht und Corporate Government, *ZBJV* 2002 (138), 709 *et seq.*

[15] The Swiss Government, *expressis verbis*, referred to the CG in its legislation draft report to the Parliament: BBl 2008, 1591/1606 *et seq.*; the author proposed a Corporate Governance Ordinance, see KUNZ (n. 5), 493 *et seq.*; in general, see P. BÖCKLI, Corporate Governance und "Swiss Code of Best Practice", in H.C.VON DER CRONE *et al.* (eds.), *Festschrift für Peter Forstmoser zum 60. Geburtstag*, Zurich: Schulthess 2003, 263 *et seq.*

[16] One specific aspect of CG, *i.e.* the remuneration issue of management and board (pay, bonuses and other benefits), caused a particular political spin-off (BBl 2009, 299 *et seq.*) due to a citizen's initiative (commonly called "*Abzocker-Initiative*") which the Swiss population will vote in 2010.

[17] In general, see G. GIGER, *Corporate Governance als neues Element im schweizerischen Aktienrecht* (Diss. Zurich 2003), 55 *et seq.*; BÜHLER (n. 7), 41 *et seq.*

[18] www.economiesuisse.ch (01.02.2010); see KUNZ (n. 5), 485 *et seq.*

[19] For its legal nature, see BÖCKLI (n. 15), 284 *et seq.*

[20] Para 3 Preamble SCBP; see P. FORSTMOSER, Corporate Governance – eine Aufgabe auch für KMU?, in H.C. VON DER CRONE *et al.* (eds.), *Festschrift für Dieter Zobl zum 60. Geburtstag*, Zurich: Schulthess 2003, 475 *et seq.*; NOBEL (n. 11), 325 *et seq.*

– Stock Exchanges: the present two Swiss stock exchanges (i.e. SIX and BX), which are self-regulatory bodies submitting their regulations for approval to the Swiss Financial Market Supervisory Authority (FINMA), provide for numerous CG issues[21] – in particular improved transparency – in their Listing Rules including various Directives (LR).

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

The SIX self-regulation is preeminent[28] compared with the BX self-regulation due to the greater relevance of this stock exchange. The CG self-regulation by SIX[29] is based on various sources, i.e. the Listing Rules (e.g. concerning *Ad hoc* Publicity),[30] the Directive on Information relating to Corporate Governance (DCG),[31] the Directive on *Ad hoc* Publicity (DAH),[32] and the Directive on Disclosure of Management Transactions (DMT).[33]

2.2.2 Relationship

Although corporate regulation seems to dominate corporate self-regulation in Switzerland (as well as abroad), the latter will continue to keep an ongoing legal function.[34] In my view, the trend towards more CG regulation is well founded but must not overreach.

21 See BÜHLER (n. 7), 396 *et seq.*; KUNZ (n. 5), 483 *et seq.*

22 For a different emphasis, see P. BÖCKLI, Harte Stellen im Soft Law, *ST* 2002 (76), 1 *et seq.*

23 SCBP/2.2: "Corporate governance encompasses the full range of principles directed towards shareholders' interest seeking a good balance between direction and control and transparency at the top company level while maintaining decision-making capacity and efficiency".

24 Para 3 *et seq.* SCBP.

25 Para 6 SCBP.

26 Para 12 *et seq.*, para 21 *et seq.* SCBP.

27 Para 29 SCBP.

28 The revised SIX self-regulation came into effect on July 1, 2009, for an overview, see J. MORARD, Die revidierten Kotierungsregularien, *GesKR* 2/2009, 220 *et seq.*

29 See, *e.g.*, article 18 LR BX contains an *Ad hoc* Publicity regime which is, in essence, the same as the SIX's; in addition, BX also published a recommendation regarding CG ("*Empfehlungen zur Corporate Governance*").

30 See article 53 LR SIX ("Obligation to disclose potentially price-sensitive facts").

31 http://www.six-exchange-regulation.com/admission_manual/06_14-DCG_en.pdf (01.02.2010).

32 http://www.six-exchange-regulation.com/admission_manual/06_15-DAH_en.pdf (01.02.2010).

33 http://www.six-exchange-regulation.com/admission_manual/06_16-DMT_en.pdf (01.02.2010); see, *inter alia*, T. JUTZI, Die Offenlegung von Management-Transaktionen, in *Jusletter* dated March 17, 2008, para 1 *et seq.*

34 For further details, see KUNZ (n. 5), 495 *et seq.*; in general, see GIGER (n. 17), 73 *et seq.*

2.3 Capital Market Rules and CG

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

CG was never an explicit issue during the respective legislative discussions in the 1990s. Public takeovers of listed companies are governed today[36] by articles 22 *et seq.* SESTA and by the TOO which cover various CG aspects.

Recently, the Swiss takeover rules (including the disclosure of shareholdings according to article 20 SESTA) were fundamentally amended. In 2007, the Parliament[37] provided for several new and lower thresholds to notify shareholdings,[38] and as of 2009, the Takeover Board (TB) revised the TOO.[39] All reforms on laws and ordinances levels are aimed to make the takeover rules fairer and thereby to strengthen CG.

2.4 Specifics in Switzerland?

Traditionally, case law plays a minor role in Switzerland which is a civil law-country. This is generally true for CG issues. Some exceptions may be found in connection with public takeover situations, in particular, as well as with listed companies in general. The disputes usually remain in the domain of the administrative authorities and seldom reach Swiss courts.[40]

[35] Börsen- und Effektenhandelsgesetz (BEHG): SR 954.1; for an unofficial translation of the SESTA in English: http://www.six-exchange-regulation.com/download/admission/regulation/federal_acts/sesta_en.pdf (01.02.2010); in addition, some ordinances, executing SESTA, must be observed, too, in particular the Ordinance of the Takeover Board on Public Takeover Offers (TOO: SR 954.195.1).

[36] Prior to the SESTA legislation, the Swiss banks applied a self-regulated Swiss Takeover Code; see KUNZ, (n. 10), § 10 para 60 *et seq.* and 478 *et seq.*

[37] Unfriendly takeover attempts particularly by foreign investors (*e.g.* Scor/Converium, Laxey/Implenia, and Renova/Sulzer) led to swift amendments of the SESTA and of SESTA-ordinances – for background information, see P.V. KUNZ, Börsenrechtliche Meldepflicht in Theorie und Praxis, in *Liber Amicorum for Rolf Watter zum 50. Geburtstag*, Zurich 2008, 229 and 236 *et seq.*

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

[39] See R. TSCHÄNI & H.-J. DIEM & M. WOLF, Das revidierte Recht der öffentlichen Kaufangebote, *GesKR* 1/2009, 87 *et seq.*

[40] The Federal Supreme Court (*Bundesgericht*) in Lausanne has rendered some crucial judgments, however, regarding disclosure obligations and mandatory takeover offers, see *e.g.* Bundesgerichtsentscheid/BGE 130 II 530 (Quadrant).

Interesting CG precedents include: SIX (e.g. regarding *Ad hoc* Publicity),[41] TB recommendations on the rules for public takeover offers[42] until the end of 2008,[43] and FINMA orders (e.g. disclosure obligations according to article 20 SESTA).[44]

Listed companies represent just a minute part of all corporations in Switzerland. Moreover, in reality, many corporations with listed shares are controlled either by major shareholders or by entrepreneur families,[45] hence, they have only a small free float of buyable shares. In such a situation, sort of a Swiss speciality,[46] takeover activities are more or less non-existent.

Banks play a major role in Switzerland, be it for financing or for organizational tasks, in connection with public takeover matters. In this regard, banks need to pay careful attention and look out that they are not abused in "hidden shareholdings building tactics"[47] and that they are not active on both sides of a public takeover, i.e. doing business for the offering party and for the target company[48] – such banking behavior might lead to supervisory sanctions.[49]

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

42 The TB case law is, in fact, very important because it governs all public takeover bids (be they "friendly" or "unfriendly") including shares buy-back programs; overviews to precedents: *SZW* 2008 (80), 335 *et seq.*; *SZW* 2007 (79), 244 *et seq.*; *SZW* 2006 (78), 219 *et seq.*; *SZW* 2005 (77), 199 *et seq*.

43 Originally, the TB only had the authority to publish non-binding recommendations in takeover matters; due to a recent reform, the TB issues legally binding orders in this arena since 2009; TB recommendations or orders, respectively, may be appealed to the FINMA.

44 These orders are, in general, not published under Swiss law; see article 34 FINMAG.

45 P. FORSTMOSER, Corporate Governance in der Schweiz – besser als ihr Ruf, in P. FORSTMOSER *et al.* (eds.), *Corporate Governance*, Zurich: Schulthess 2002, 22 *et seq.* and 27, n. 28 (*e.g.* Hoffmann-La Roche, Schindler Holding AG, Vontobel Holding AG) – the main author of the SCBP was the general counsel of Schindler, therefore, the "special interests" of family-controlled listed companies may be discovered between the lines of this codex, see *Ibid* 27, n. 29.

46 FORSTMOSER (n. 45), 22 and 27; for further details, see P.V. KUNZ, Publikumsgesellschaften in der Schweiz – theoretische und praktische Ansätze zum Investorenschutz, *recht* 1997 (15), 136 *et seq*.

47 Shareholders might try to hide their shareholdings behind banks and thus disregard the disclosure obligation (article 20 SESTA); see, *inter alia*, R. WATTER & D. DUBS, Optionsstrategien bei Übernahmekämpfen, in *Mergers & Acquisitions X*, Zurich: 2008, 173 *et seq.*; T. JUTZI & S. SCHÄREN, Erfassung von Finanzinstrumenten im revidierten Offenlegungsrecht (...), *ST* 2009 (83), 570 *et seq*.

48 The state-owned Zürcher Kantonalbank (ZKB), the 4th largest banking group in Switzerland, was under investigation regarding the Sulzer-takeover discussions for allegedly being engaged on both sides; see FINMA order dated January 22, 2009: *GesKR* 2/2009, 262.

49 Regarding the *"Gewährsfrage"* for banks (i.e. guaranty for proper conduct): R. WATTER & D. DUBS, Wettlauf der "Waffensysteme" bei Unternehmensübernahmen (...), *NZZ* 2007 (19), 31.

2.5 Foreign Investments

In my view, foreign investors are apparently taking an increasing interest in Swiss listed companies (such is or at least was the case, e.g. with Scor/France, Renova/Russia, Everest and Victory/Austria, Laxey/UK); however, various public takeover attempts in 2006 and 2007, allegedly, showed serious illegalities[50] and initiated legislative steps to curb such tactics.

Switzerland's laws do not provide for any restrictions on foreign investments. And state funds regulation is unlike in other countries not planned by the Swiss government.[51]

Some years ago, though, many listed companies still had transfer restrictions on registered shares (*Vinkulierung*) in their articles of incorporation which specifically targeted foreign investors; these investment impediments were broadly rescinded in the 1990s.[52]

2.6 Corporate Scandals and Impact of Foreign Law in Switzerland

2.6.1 Motivation by Bankruptcies

Enron or other CG scandals did not take place Switzerland.[53] Yet, the bankruptcy or "grounding", respectively, of Swissair in 2001 was partly explained by failures and a breakdown in the company's CG; and several parliamentarians were thus motivated to formally ask for an improvement of CG in the corporation law.[54]

Remunerations at ABB – and at other listed companies – were also considered by many observers as a CG scandal.[55]

Finally, the financial market crisis of the years 2008-2009[56] has resulted in one particular CG issue, i.e. the FINMA wants to set certain guidelines for the remuneration in the entire financial sector (hence, not only for banks).[57]

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

[51] www.evd.admin.ch/aktuell/00120/index.html?lang=de (30.01.2008).

[52] FORSTMOSER (n. 45), 38; Swiss corporation law reduced the listed companies' discretion for consent or non-consent in this regard, *i.e.* only a few shares' transfer restrictions are legally possible, see article 685d CO.

[53] Perceived scandals are often the origin of calls for an improved CG; in general, see P. NOBEL, Corporate Governance und Gesellschaftsrecht (...), in *Festschrift für Hans Peter Walter*, Bern 2005, 397.

[54] For an overview of the CG requests in the Parliament, see *BBl* 2008, 1589; see, *inter alia*, NOBEL (n. 11), 333 *et seq*.

[55] Originally, Percy Barnevik and Göran Lindahl were supposed to be paid a total of CHF 233 million by ABB after leaving the company in 2001, see FORSTMOSER (n. 45), 24, n. 16.

2.6.2 Corporation Law Aspects – Reference

As pointed out above,[58] this country is – with a few interesting exceptions[59] – a traditional civil law country. However, foreign law has a much stronger impact in Switzerland than in other countries. This fact heightens, for instance, the relevance of comparative law studies.[60] Furthermore, a set of comparative law concepts exists for implementing foreign laws in Swiss law by formal or by informal means.[61]

Overall, the European Union (EU) and its laws are crucial[62] – and Switzerland has already adjusted[63] to this situation, more in substance than in form, even though it is presently not a member of the EU.

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

[56] The failure in CG worldwide seemed to deepen the crisis; see A. BOHRER, The Financial Crisis Impact, *GesKR* 2/2009, 144 *et seq*.

[57] See FINMA's draft of June 2009 ("Rundschreiben 2009/... Vergütungssysteme – Mindeststandards (...) bei Finanzinstituten" [...]): http://www.finma.ch/d/regulierung/anhoerungen/Documents/rs-verguetungssysteme-20090524-d.pdf (01.02.2010); the issue is still highly contested in Switzerland at the present time.

[58] See above 2.4.

[59] For instance, article 736 para 4 CO shows a common law approach with a broad discretion for courts in case of a dissolution of a corporation; in general, see, *inter alia*, P. BÖCKLI, Osmosis of Anglo-Saxon Concepts in Swiss Business Law, in *The International Practice of Law*, Basel 1997, 9 *et seq.*; W. WIEGAND, Americanization of Law: Reception or Convergence?, in *Legal Culture and the Legal Profession*, Oxford 1996, 137 *et seq*.

[60] P.V. KUNZ, Einführung zur Rechtsvergleichung in der Schweiz, *recht* 2006 (24), 37 *et seq*.

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

[62] This is the Federal Council's official policy; see, *inter alia*, the *Europabericht* 2006 dated June 28, 2006 (*BBl* 2006, 6828 *et seq.*, available at: http://www.admin.ch/ch/d/ff/2006/6815.pdf (01.02.2010), and the *Aussenpolitischer Bericht* 2009 dated September 2, 2009 (http://www.admin.ch/ch/d/ff/2009/6291.pdf (01.02.2010); *BBl* 2009, 6293 as well as 6320 *et seq.*).

[63] Recently, see P.V. KUNZ, "Sonderfall Schweiz"? – die Schweiz ist längst in "Europa" angekommen, *EWS* 3/2009, *ad* 57 (first page).

[64] For general information on this Swiss specific comparative law issue, see, *inter alia*, P. FORSTMOSER, Der autonome Nach-, Mit- und Vorvollzug europäischen Rechts (...), in *Festschrift für Roger Zäch*, Zurich 1999, 523 *et seq.*; B. SPINNER & D. MARITZ, EG-Kompatibilität des schweizerischen Wirtschaftsrechts. Vom autonomen zum systematischen Nachvollzug, in *Festschrift für Roger Zäch*, Zurich 1999, at 127 *et seq*.

[65] For example, the U.S. Securities Laws were taken into account drafting SESTA in the 1990s.

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

3. Internal Corporate Governance

3.1 The Board(s)

3.1.1 The One-Tier and Two-Tier Models

In form, the Swiss board concept follows the one-tier board model (articles 707 *et seq.*).[68] However, in substance, the corporation law proves to be so flexible that various models from abroad (e.g. Germany's two-tier board concepts with "*Vorstand*" on one side and "*Aufsichtsrat*" on the other side)[69] exist.[70]

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

3.1.2 Structural Elements in General

Regarding composition and maximum number of seats and duration of office,[72] the Swiss corporation law is very flexible. The shareholders enjoy broad discretion.[73]

[66] H. C. VON DER CRONE & K. ROTH, Der Sarbanes-Oxley Act und seine extraterritoriale Bedeutung, *AJP* 2003 (12), 139.

[67] Revisionsaufsichtsgesetz (RAG) dated December 16, 2005: http://www.admin.ch/ch/d/sr/2/221.302.de.pdf (01.02.2010) (SR 221.302).

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

[69] K. J. HOPT, The German Two Tier Board: Experiences, Theories, Reforms, in *Comparative Corporate Governance – The State of Art and Emerging Research*, Oxford 1998, 277 *et seq.*

[70] For an overview, see, *inter alia*, FORSTMOSER (n. 45), 28 *et seq.*; P. NOBEL, Monismus oder Dualismus (...), in *Verwaltungsrat und Geschäftsleitung*, Bern 2006, 9 *et seq.*; P. BÖCKLI, Konvergenz: Annäherung des monistischen und des dualistischen Führungs- und Aufsichtssystems, in *Handbuch Corporate Governance*, 2nd ed., Stuttgart 2009 – not yet published.

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

[72] The board members are elected for three years unless otherwise provided in the articles of incorporation; the term of office shall not exceed six years (article 710 CO); the Federal Council proposed for the present corporation law reform, as a general rule, one-year elec-

Indeed, no formal requirements – with the exception of being a person instead of a legal entity (article 707 para 3 CO) – must be fulfilled today for a board election;[74] previously, until 2008, Swiss law provided mandatory legal requirements for nationality and domicile.

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

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

3.1.3 Tasks and Powers

The primary task of the boards of directors is to safeguard the interests of the corporation in accordance with article 717 para 1 CO. Not all interests involved (e.g. shareholders, creditors) are necessarily in sync. Hence, the legal, economic and political discussions between proponents of the shareholder value concept and the stakeholder value concept are ongoing in Switzerland[80] – and still not resolved as of today.[81]

tion but the Parliament seems to go into a different direction; staggered boards are rare exceptions in Switzerland.

73 In general, see, R. WATTER & K. ROTH PELLANDA, Die "richtige" Zusammensetzung des Verwaltungsrates, in *Verantwortlichkeit im Unternehmensrecht III*, Zurich 2006, 47 *et seq*.

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

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

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

77 Different rules apply in Norway, see I. MEISSL AREBO, Mehr Damenhandtaschen – weniger Krawatten – In Norwegens Verwaltungsräten gilt die Frauenquote, *NZZ* 2006 (37), 25.

78 R. WATTER & K. ROTH PELLANDA, Geplante Neuerungen betreffend die Organisation des Verwaltungsrates, *GesKR Sondernummer Aktienrecht*/2008, 129 *et seq*.

79 See, *inter alia*, P. BÖCKLI, Schweizer Aktienrecht, 4 th, Zurich: Schulthess 2009, § 13 para 80 *et seq*.; KUNZ (n. 10), § 6 para 111 *et seq*., para 113; L. GLANZMANN, Das Proporzwahlverfahren (cumulative voting) als Instrument der Corporate Governance, in *Festschrift für Jean Nicolas Druey*, Zurich 2002, 401 *et seq*.

80 See, ZOBL (n. 7), 12; FORSTMOSER (n. 45), 21; GIGER (n. 17), 9 *et seq*.

81 In general, see P. FORSTMOSER, Profit – das Mass aller Dinge?, in *Festgabe zum Schweizerischen Juristentag 2006*, Zurich 2006, 55 *et seq*.

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

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

As of 2008, Swiss law provided for a new non-transferable and inalienable duty:[83] the board of each and every corporation – listed or non-listed – must execute a formal risk assessment which needs to be published in the annual financial statement's attachment (article 663b alinea 12),[84] in addition, the board assessment has to be audited.[85] In my view, the risk assessment was always part of the boards' duties under article 716a para 1 alinea 1 CO.

3.1.4 Functioning of Boards and Board Committees

The corporation law is flexible when it comes to the functioning of the boards of directors. For instance, corporate regulation in Switzerland does not require any committees,[86] yet, the SCBP and the LR contain rules and recommendations for several board committees (e.g. the Audit Committee,[87] the Compensation Committee, and the Nomination Committee).[88]

The board designates its chairman, or the shareholders may elect him if the articles of incorporation so provide (article 712 para 2 CO). The chairman heads the

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

[83] P. NOBEL, Risikomanagement als Aufgabe, in *Festschrift für Eugen Bucher*, Bern 2009, 552.

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

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

[86] However, particular functions may be delegated to committees (article 716a para 2 CO), see T. JUTZI, *Verwaltungsratsausschüsse im schweizerischen Aktienrecht* (Diss. Bern 2008), 4 *et seq*.; R. WATTER, Verwaltungsratsausschüsse und Delegierbarkeit von Aufgaben, in *Festschrift für Peter Forstmoser*, Zurich 2003, 183 *et seq*.

[87] In general, see P. BÖCKLI, *Audit Committee: Der Prüfungssausschuss des Verwaltungsrats auf Gratwanderung zwischen Übereifer und Unsorgfalt*, Zurich 2005, 5 *et seq*.; R. BAK, *Audit Committee* (Diss. Zurich 2006), 5 *et seq*.

[88] Para 21 *et seq*. SCBP.

board of directors and has the decisive vote in case of a tie unless otherwise provided for by the articles of incorporation (article 713 para 1 CO).[89]

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

The persons entrusted with the management of the company are appointed and removed by the board (article 716a para 1 alinea 4 CO), hence, the directors control the managers accordingly; moreover, the managers have an obligation to provide information at the board of directors' meetings (article 715a para 2 CO).

3.1.5 Lead Directors and Independent Directors

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

The lead director, an "experienced non-executive member" of the board,[91] shall be appointed if a single individual assumes joint responsibility at the top of the company (i.e. chairman and CEO). Lead directors are not uncommon with listed companies.

The independent director shall be a member of the various important committees of the board,[92] in this respect, as independent members of the board – according to self-regulation – only "non-executive members of the Board of Directors who never were or were more than three years ago a member of the executive management and who have none or comparatively minor business relations with the company" qualify.[93]

[89] In addition, the providing of appropriate information within the board of the directors is one of the core responsibilities of the chairman, see para 15 SCBP.

[90] It is the board's responsibility to appoint one person or two persons to be the Chairman and the Chief Executive Officer (CEO) of the corporation; see para 18 SCBP.

[91] Para 18 SCBP.

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

[93] Para 22 SCBP; in Switzerland, unlike in the USA under the SOX, it is legal for an audit committee member to be affiliated with the majority shareholder of the corporation (*e.g.* in group situations), thus, the formal independence standards seems to be somewhat lower; see H. C. VON DER CRONE & A. CARBONARA, Corporate Governance und Führungsorganisation in der Aktiengesellschaft, *SJZ* 2004 (100), 407 *et seq.* in particular n. 26; in general, see C. J. MEIER-SCHATZ, Der unabhängige Verwaltungsrat – Ein Beitrag zur Corporate-Governance-Debatte, in *Festschrift für Jean Nicolas Druey*, Zurich 2002, 479 *et seq.*

3.1.6 Information and Risk Management

Article 715a CO[94] is the legal basis for information flow in the board of directors and between its members, respectively:

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

Risk management by the board of directors is an integral part of the CG concept.[95] As pointed out above,[96] the new article 663b alinea 12 CO – as an example – stresses this aspect.

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

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

---

94 For further information, see BÖCKLI (n. 79), § 13 para 163 *et seq.*; P.V. KUNZ, Die Auskunfts- und Einsichtsrechte des Verwaltungsratsmitglieds, *AJP* 1994 (3), 572 *et seq.*

95 In general, see para 19 *et seq.* SCBP.

96 See above 3.1.3.

97 For general information, see, *inter alia*, M. ROTH (ed.), *Corporate Governance und Compliance*, Zurich 2009, 43 *et seq.*

98 *Inter alia*: http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-24.pdf (01.02.2010) (banks); and for the insurance business: http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-32.pdf (01.02.2010).

99 See BÜHLER (n. 7), 211 *et seq.*

100 Para 23 *et seq.* SCBP.

101 A.P. LEHMANN & K. ROTH PELLANDA, Agenda für ein (besseres) Risikomanagement durch den Verwaltungsrat, *GesKR* 3/2009, 328.

102 http://www.bj.admin.ch/bj/de/home/themen/wirtschaft/gesetzgebung/whistleblowing.html (01.02.2010).

103 For example, UBS AG's Audit Committee accepted such a guideline on August 11, 2003; it is published: http://www.ubs.com/1/ShowMedia/about/corp_responsibility/commitment_strategy/policies_guidelines?contentId=27536&name=AC_whistleb.pdf (01.02.2010).

3.1.7 Fiduciary Duties of Board Members

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

The Swiss corporation law of today – unlike some self-regulation[105] – does not yet contain detailed rules[106] regarding conflicts of interest of board members;[107] this shortfall will be remedied with the new Swiss corporation law in the future.[108]

Explicitly regulated is the conflict of interest situation regarding boards of listed companies in connection with public takeover offers. The board of directors of a target company shall submit a report to the corporation's shareholders laying out its position in relation to the offer (article 29 para 1 SESTA) – therein, in all detail, the conflict of interest must be disclosed.[109]

In all shareholder actions (e.g. liability lawsuits, challenges of general meetings' resolutions), the courts in Switzerland generally apply the business judgment rule on behalf of the boards and the corporations, respectively.[110] The judges follow a rather pragmatic approach in that respect, therefore, no clear standard exists.[111] In my view, however, the business judgment rule undermines shareholder protection and CG and thus needs examination.[112]

[104] The equal treatment obligation (article 717 para 2 CO) adds to the duty of care and the duty of loyalty according to article 717 para 1 CO.

[105] See para 16 SCBP.

[106] A minor exception is article 718b CO which resolves the potential conflict when a single person represents both himself and the company entering into an agreement with each other.

[107] In general, see P. FORSTMOSER, Interessenkonflikte von Verwaltungsratsmitgliedern, in *Liber Amicorum für Hermann Schulin*, Basel 2002, 9 *et seq.*; in general, see H. C. VON DER CRONE, Interessenkonflikte im Aktienrecht, *SZW* 1994 (66), 1 *et seq.*

[108] See article 717a draftCO (*e.g.* transparency by informing the chairman on a conflict of interest, duty to abstain) and article 717b draftCO (*i.e.* remuneration issues for listed companies); for further details: C. HUGUENIN, Insichgeschäfte im Aktienrecht, in *Festschrift für Peter Böckli*, Zurich 2006, 530 *et seq.*

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

[110] For further information, see KUNZ (n. 10), § 6 para 115 *et seq.*; A. R. GRASS, *Business Judgment Rule (…)* (Diss. Zurich 1998), 5 *et seq.*; A. NIKITINE, *Die aktienrechtliche Organverantwortlichkeit (…) – Konzeption und Ausgestaltung der "Business Judgment Rule" im Gefüge der Corporate Governance* (Diss. Zurich 2007), 125 *et seq.*; P. R. PEYER, Das "vernünftige" Verwaltungsratsmitglied, in *Wirtschaftsrecht in Bewegung*, Zurich 2008, 95 *et seq.*

[111] In the USA, in particular, one may detect – contrary to Switzerland – a rather analytical approach by the courts, see KUNZ (n. 10), § 6 para 125 *et seq.*

[112] See P.V. KUNZ, Richterliche Handhabung von Aktionärsstreitigkeiten – (…) zur "Business Judgment Rule", in *Festschrift für Jean Nicolas Druey*, Zurich 2002, 459 *et seq.*; for a dif-

3.1.8 Remuneration – the Political "Hot Potato" in Switzerland

One particular area of potential conflicts of interest is the remuneration of the corporation's agents (e.g. board members).[113] Three different angles of the legal issue may be tackled, i.e. the transparency regarding theses specific company's expenses, the power to decide about pay, bonuses, and other benefits, and finally the capping of remuneration.

Swiss corporations have a long history of not disclosing the board's and the management's remuneration. For listed companies, though, self-regulation (i.e. the LR SIX) brought some light to the matter some years ago, and the legislature followed in 2007 with a new article 663b *bis* CO providing not full but plenty of transparency in the attachment of the annual financial statement (the total amount for the board and the individual compensation of each member must be disclosed – however, management remuneration is less transparent).[114]

Today, in most corporations under Swiss law, the board of directors instead of the general meeting of the shareholders has the legal power to decide not only on the management remuneration but also on its own remuneration. As pointed out above,[115] a citizen's initiative to be voted in 2010 ("*Abzocker-Initiative*") aims to empower the shareholders,[116] and the Federal Council's latest proposal attempts to find some middle ground.[117] It remains to be seen what the outcome will be but the shareholders may receive decision making powers.

Swiss laws provide no capping whatsoever for board and management remunerations. Recently, the small "Young Socialists Party" (*Jungsozialisten*) started to collect signatures for a citizen's initiative with the title "1:12",[118] i.e. the new corporate rules shall be aimed at outlawing all remuneration which is more than 12 times higher than the lowest remuneration in a given company.[119] Many political

ferent view, see A.R. GRASS, Management-Entscheidungen vor dem Richter, *SZW* 2000 (72), 1 *et seq*.

[113] See, *inter alia*, B.M. BARTHOLD & M. WIDMER, Regulierung der variablen Vergütung?, *AJP* 2009 (18), 1389 *et seq*.

[114] For an overview, see R. WATTER & K. MAIZAR, Transparenz der Vergütungen und Beteiligungen von Mitgliedern des Verwaltungsrates und der Geschäftsleitung (...), *GesKR* 4/2006, 349 *et seq*.

[115] See above 2.1.

[116] See P. BÖCKLI, Doktor Eisenbart als Gesetzgeber? Volksinitiative Minder und bundesrätlicher Gegenvorschlag zu den Vergütungen an Verwaltungsrat und Geschäftsleitung, in *Festschrift für Anne Petitpierre-Sauvain*, Geneva 2009, 29 *et seq*.

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

[118] http://www.juso.ch/files/091006_Argumentarium-1_12-Initiative.pdf (01.02.2010).

[119] The citizen's initiative would introduce this capping rule for both listed and non-listed companies.

observers doubt, however, that the citizen's initiative will even be filed with the Swiss authorities.[120]

3.1.9 Civil Liability of Board Members

The board members' liability for damages in civil cases (articles 754 *et seq.*)[121] is not limited. In fact, each and every director is held liable with his or her entire assets. Moreover, the members of the board are both jointly and severally liable in a lawsuit. Mere negligence (*leichte Fahrlässigkeit*) in violating the board's duties is sufficient to trigger liability consequences (article 754 para 1 CO).

Plaintiff (s) against the board members may be either the damaged corporation or any shareholder or – in case of bankruptcy of the company – any creditor (article 754 para 1 CO and article 757 CO). Concrete cases are rare against board members but take place more often against auditors (i.e. "deep pockets").[122] In today's Swiss reality, most confrontations end with out-of-court-settlements often financed by D&O insurances.

3.2 The Shareholders

3.2.1 General Information

Equity investors convene and execute their rights in the general meetings of the corporation, hence, the ordinary or extraordinary general meetings are a core element of the CG in Switzerland.[123] Attempts at ranking of shareholders' protection levels are always somewhat arbitrary. In comparison with other countries,[124] Switzerland ranks somewhere in the middle in this regard. The Swiss standard regarding the CG, however, is perceived differently abroad.

For instance, a 1998 report by the Organization for Economic Cooperation and Development (OECD)[125] qualified Switzerland as very weak in CG matters. Recently, the World Economic Forum (WEF) in its Global Competitiveness Report

[120] Requirements for a citizen's initiative are, *inter alia*, 100,000 valid signatures within 18 months of the start.

[121] For an overview, see H. C. VON DER CRONE & A. CARBONARA & S. HUNZIKER, *Aktienrechtliche Verantwortlichkeit und Geschäftsführung*, Basel 2006, 1 *et seq*.

[122] See below 3.4.4.

[123] See, *inter alia*, U. BERTSCHINGER, Zuständigkeit der Generalversammlung der Aktiengesellschaft – ein unterschätzter Aspekt der Corporate Governance, in *Festschrift für Jean Nicolas Druey*, Zurich 2002, 309 *et seq.*; R. WATTER & K. MAIZAR, Aktionärsdemokratie – Über erweiterte Zuständigkeiten der Generalversammlung (...), in *Festschrift für Hans Michael Riemer*, Bern 2007, 403 *et seq*.

[124] For further details on 23 countries, see KUNZ (n. 10), § 17 para 7 *et seq*.

[125] OECD Business Sector Advisory Group on Corporate Governance – see FORSTMOSER (n. 45), 41 (Switzerland being "one of the last of the pack").

2009-2010[126] saw Switzerland ranked only 41st among 133 nations concerning the protection of minority shareholders' interests.[127]

3.2.2 Fiduciary Duties of Controlling Shareholders

In accordance with article 680 para 1 CO, shareholders have one and only one obligation under Swiss corporation law,[128] i.e. to contribute for a share the amount fixed at the time of issue (*Liberierungspflicht*); SESTA introduced at the end of the 1990s two additional obligations for equity investors in listed companies (article 20 SESTA: disclosure obligation; article 32 SESTA: mandatory takeover offer to the other shareholders).[129]

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

Nevertheless, majority and other controlling shareholders must respect legal boundaries. The board's duty in accordance with article 717 CO[133] is to make sure that these investors comply with the laws – even though the board members might be removed afterwards by controlling shareholders' votes in the general meeting (article 705 CO).

For example, the tunnelling by controlling shareholders[134] is illegal under Swiss law and has consequences based both on corporation law and on tax law.[135] In accordance with article 678 CO, shareholders who have unjustifiably and in bad faith received, e.g. shares of profits and interests as well as other performances of the company, are obliged to return them to the corporation (para 1/para 2); the

[126] http://www.weforum.org/pdf/GCR09/GCR20092010fullreport.pdf (01.02.2010).

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

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

[129] See below 4.1.2. and 4.2.2.

[130] See, *inter alia*, C. CHAPPUIS, La responsabilité de l'actionnaire majoritaire fondée sur la confidence, in *Responsabilité de l'actionnaire majoritaire*, Zurich 2000, 67 *et seq*.

[131] *E.g.* H. WOHLMANN, *Die Treuepflicht des Aktionärs* (Diss. Zurich 1968), 110 *et seq*.

[132] For further references and a detailed overview, see KUNZ (n. 10), § 8 para 31 *et seq*., para 44.

[133] See above 3.1.3.

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

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

damaged corporation and any of its shareholders may file an action (para 3) for which the current statute of limitations is five years.

3.2.3 Shareholders' Rights – in Particular Information Rights

Generally speaking, it is nearly impossible to describe the shareholders' rights under Swiss law in a fully satisfactory way in the limited space of this Country Report.[136]

As an overview,[137] the equity investor in corporations receives two sets of entitlements,[138] i.e. financial rights (e.g. dividends and pre-emptive rights) and non-financial rights (e.g. rights to call a general meeting and to participate at a general meeting, rights to speak and to vote at a general meeting, rights to file different actions against the corporation or the board members, respectively, and finally, a variety of information rights).

The many information rights (articles 696 *et seq.* CO)[139] are crucial for the protection of (minority) shareholders in Switzerland. Four information rights are pre-eminent under Swiss law, i.e. article 696 CO, article 697 CO, articles 697a *et seq.*, and article 697h CO:

– Article 696 CO: no later than 20 days prior to the ordinary general meeting of shareholders, the business report and, if there is one at all,[140] the auditors' report shall be made available at the corporation's domicile for inspection (article 696 para 1 CO);[141] a shareholder may request these documents in copy after approval by the general meeting (article 696 para 3 CO). In business reality in Switzerland, most companies are much more forthcoming in favor of their investors.[142]

– Article 697 CO: any shareholder is entitled to request information from the board at the general meeting concerning the "affairs of the corporation" (article

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

[137] See, *inter alia*, MEIER-HAYOZ & FORSTMOSER (n. 1), § 16 para 167 *et seq.*; KUNZ (n. 10), § 1 para 197 *et seq.*

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

[139] For details, see P.V. KUNZ, *OR Kommentar – Schweizerisches Obligationenrecht*, 2nd ed., Zurich 2009, para 1 *et seq.* to the articles 696 – 697h CO.

[140] See below 3.4.1 and 3.4.2.

[141] Thus, the corporation does not provide that, for instance, copies are sent out to the shareholders.

[142] Not surprisingly, many non-listed companies in Switzerland provide their shareholders with copies of these documents; the listed companies usually make the documents available through their webpages.

697 para 1 CO).[143] Furthermore, any shareholder has the right to inspect the books and files of the company if the general meeting or the board of directors has granted the respective authorization (article 697 para 3 CO).

– Article 697a *et seq.* CO: at the beginning of the 1990s, the Parliament implemented in Swiss corporation law the special audit (articles 697a *et seq.* CO: *Sonderprüfung*),[144] which was inspired by foreign models (e.g. Germany).[145] The special audit aims to enhance the information level of shareholders so that they are in a better position to file, for instance, a liability action against the board members.

  Only facts, hence not legal issues, may be subject to a special audit on which the general meeting must vote in any case; the facts must be necessary for exercising the shareholders' rights (article 697a para 1 CO). If the general meeting does not approve[146] the special audit, only those shareholders meeting certain share capital requirements[147] may go to court at all (article 697b para 1 CO). Afterwards, a rather complicated back-and-forth between one shareholder and the corporation ensues (articles 697c *et seq.* CO).

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

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

Switzerland – unlike Germany – does not have a group corporate law. Nevertheless, some rules and precedents exist which are important for groups. For example, the shareholders of the parent company are, under certain preconditions, entitled

[143] Under article 697 para 2 CO, the information may be refused if business secrets or another company's interests are endangered; the board has some discretion in this regard, yet, the shareholder might file an action if the information is unjustifiedly refused (article 697 para 4 CO).

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

[145] For a comparative law perspective, see A. CASUTT, *Die Sonderprüfung im künftigen schweizerischen Aktienrecht* (Diss. Zurich 1991), § 2 para 3 *et seq.*

[146] If the general meeting accepts the request, the judge may be asked to appoint a special auditor within 30 days (article 697a para 2 CO).

[147] Representations of at least 10 percent of the share capital of the corporation or of shares with at least a nominal value of CHF 2 million are required.

to inspect the books and files of other group companies,[148] and the specific disclosure obligation under article 697h CO applies to the consolidated financial statements as well.

3.2.4 Institutional Investors and Shareholder Activism

Only a few publications in Switzerland[149] – unlike in Germany[150] – cover the legal specifics of and issues surrounding institutional investors (e.g. pension funds).[151] In fact, institutional investors were a dormant issue for many decades – one disputed issue is whether or not institutional investors may claim privileged information.[152] Recent calls from politicians and other sides are trying to convince institutional investors to get more involved as shareholders.

It might be expected under economic aspects[153] that institutional investors are (or should be) active shareholders but the reality in Switzerland looks different. In general, Switzerland does not qualify as country with a strong shareholder activism.

In comparison, for instance, with the USA or with Germany or even with Japan, nearly no investors' protection association exist,[154] and shareholders advisory committees (SAV)[155] are basically unknown in Switzerland.

Slowly but steadily, in my view, the situation might change in favor of CG. Over the last few years, one small organization – called Ethos – is successfully active *vis-à-vis* several well-known listed companies in Switzerland in order to improve their CG.[156] Furthermore, the Swiss Pension Funds Association (ASIP)[157] called upon its

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

[149] See M. RUFFNER, Aktive Grossaktionäre: Neue Herausforderungen für das Aktienrecht?, in *Aktuelle Fragen zum Wirtschaftsrecht*, Zurich 1995, 233 *et seq.*; H. R. KÜNZLE, Die Ausübung des Aktien-Stimmrechts durch Institutionelle Vertreter und Institutionelle Anleger und die Corporate Governance in der Schweiz und den USA, in *Festschrift für Peter Forstmoser*, Zurich 2003, 415 *et seq*.

[150] For further information on Germany, see, *inter alia*, K. U. SCHMOLKE, Institutionelle Anleger und Corporate Governance (...), *ZGR* 2007, 701 *et seq*.

[151] There is no legal definition of institutional investors; in general, see T. SPILLMANN, *Institutionelle Investoren im Recht der (echten) Publikumsgesellschaften* (Diss. Zurich 2004), 226 *et seq.*; WEBER (n. 9), 97 *et seq*.

[152] The issue is discussed, *inter alia*, by WEBER (n. 9), 86 *et seq.*; BÖCKLI (n. 79), § 13 para 700 *et seq.*; KUNZ (n. 10), § 8 para 78 *et seq*.

[153] For further details, see M. RUFFNER, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft – Ein Beitrag zur Theorie der Corporate Governance*, Zurich 2000, 436 *et seq*.

[154] Overview, see KUNZ (n. 10), § 6 para 68 *et seq*.

[155] KUNZ (n. 10), § 6 para 75 *et seq*.

[156] http://www.ethosfund.ch/ (01.02.2010).

[157] http://www.asip.ch/ (01.02.2010).

members to get more involved and to actively execute the shareholders' rights in general meetings.[158]

3.3 Labor

3.3.1 Employees' Participation in Boards of Directors?

From a legal viewpoint, employees are creditors of the companies and not equity capital providers. Therefore, they are primarily protected by Swiss labor law (as part of the CO) and by Swiss bankruptcy law in case of financial distress. Corporation law also provides for creditors' protection under certain aspects[159] but creditors are not entitled to the protective tools granted to shareholders (e.g. participating in general meetings, challenging such resolutions, being elected to the board of directors).

Formerly, a board member had to be a shareholder of the corporation; this requirement was rescinded as of the year 2008. Today, thus, an employee of the company may be elected to the board but a mandatory rule – as in Germany – does not exist in Switzerland. Employees' participation on boards is not part of Swiss tradition. It remains to be seen whether or not political initiatives in the other direction[160] will be successful.

Creditors' interests are also affected by corporate restructuring (e.g. mergers and spin-offs). On July 1, 2004, the Swiss Mergers Act (MA)[161] came into effect. Even though the creditors, as in the other areas of corporate law, do not have participation rights or, in particular, decision making powers, their interests must be safeguarded by both the boards of directors and by the shareholders in the general meetings.[162]

3.3.2 Trade Unions

Compared to other Western European countries, trade unions in Switzerland play a minor role. Only approximately every fourth employee is a member of a trade union. Switzerland is as a consequence of this fact, one of Western Europe's coun-

[158] http://www.asip.ch/files/news/?id=350eff26373a052f0d152ced672c5f69 (01.02.2010) (ASIP's guidelines dated November 11, 2005).

[159] Transparency and information rights are not only very important for shareholders but also for creditors; see, P.V. KUNZ, Transparenz für den Gläubiger der Aktiengesellschaft, *SJZ* 2003 (99), 53 *et seq*.

[160] In connection with the present reform of the corporation law, some discussions are still ongoing, *e.g.* Travail.Suisse No. 5 dated March 30, 2009 ("Aktienrechtsrevision: Arbeitnehmer in den Verwaltungsrat"); see http://www.travailsuisse.ch/de/system/files/PD+Aktienrecht+-+Arbeitnehmer+in+Verwaltungsrat.doc (01.02.2010).

[161] Fusionsgesetz (FusG): SR 221.301; for a detailed overview, see P.V. KUNZ, Das neue Fusionsgesetz (FusG), in *Entwicklungen im Gesellschaftsrecht I*, Bern 2006, 185 *et seq*.

[162] For further information, see P.V. KUNZ, Arbeitsrecht – Neuerungen aufgrund des Fusionsgesetzes, in *Aktuelle Probleme des Arbeitsrechts*, Zurich 2005, 71 *et seq*., 84 *et seq*.

tries with the lowest rate of employees organized in a trade union. About 750,000 employees are members of one of the trade unions to this day.[163] Since the 1970s, trade unions in Switzerland have lost around a sixth of their members.

There are two major trade union federations in Switzerland which contain approximately two-thirds of all trade unionists.[164] Other trade unionists are organized in independent trade unions. Current topics of trade unions are for instance full employment, fair salaries, enhancement of the conditions of employment and equal opportunities for all employees.[165]

3.4 Audit

3.4.1 Recent Legislative Reform

As pointed out above,[166] the Enron scandal in the USA and the ensuing legislation abroad (in particular, SOX) had a direct impact on Switzerland. The amended rules in the Swiss Code of Obligations (articles 727 *et seq.* CO)[167] and the new legislation supervising the auditors by a regulator, indeed, changed the CG landscape considerably.[168]

An analysis regarding CG and auditing shows, in my view, both improvements (e.g. the introduction of a supervisory authority for all auditing firms in Switzerland)[169] and some shortfalls (i.e. first, the rule that smallest corporations may opt-out of the auditing process[170] which was mandatory beforehand for all corporations; second, the introduction of mere review auditing for small corporations with a lower independence standard for the auditors;[171] and perhaps third, the presently discussed capping of auditors' liability).[172]

[163] Bundesamt für Statistik, Gewerkschaften und andere Arbeitnehmerorganisationen: Zahl der Mitglieder 1960-2008, available at: http://www.bfs.admin.ch/bfs/portal/de/index/infothek/lexikon/bienvenue___login/blank/zugang_lexikon.Document.20867.xls (01.02.2010).

[164] Swiss Federation of trade unions, Der SGB und seine Gewerkschaften, 2008, 9 *et seq.*, available at: http://www.sgb.ch/downloads/Broschuere_SGB_deutsch.pdf (01.02.2010).

[165] Swiss Federation of trade unions, Der SGB und seine Gewerkschaften, 2008, 11, available at: http://www.sgb.ch/downloads/Broschuere_SGB_deutsch.pdf (01.02.2010).

[166] See above 2.6.

[167] See below 3.4.2 and 3.4.3; for further details, see P. BÖCKLI, *Revisionsstelle und Abschlussprüfung nach neuem Recht*, Zurich 2007, 5 *et seq.*

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

[169] See below 5.2.2.

[170] See below 3.4.2.

[171] See below 3.4.2.

[172] See below 3.4.4.

3.4.2 Mandatory Auditing by External Auditors?

Until recently, all corporations in Switzerland – unlike the LLC – faced mandatory external auditing. As of the year 2008, the applicable Swiss laws were amended.[173] Thus, as a general rule, all companies (excluding the partnerships) have to be audited notwithstanding their specific legal forms (corporation or LLC), however, three "types of auditing" exist, i.e. regular auditing, review auditing, and opting-out of auditing.

Only larger corporations, which meet specific thresholds[174] or other requirements (e.g. all listed companies) must have regular auditing under the new rules (article 727 CO).[175] Smaller corporations, i.e. all corporations not meeting the particular thresholds and requirements for regular auditing, though, may resolve for review auditing with a lower standard (article 727a CO). Finally, the smallest corporations[176] can even "just say no" to any auditing at all (opting out of the auditing process in accordance with article 727a para 2 CO).

3.4.3 Tasks and Independence Levels

The regular auditors shall examine, and later report on, whether the annual accounts as well as the proposals of the board concerning the use of the balance sheet profits comply with the law and the articles of incorporation (articles 728a *et seq.*); specifically, the regular auditors must check the internal control system (article 728a para 1 alinea 3 CO).[177] The review auditors, in comparison to the regular auditors, have fewer tasks in accordance with articles 729a *et seq.*, e.g., the internal control system is not an issue.

The auditors' independence always proves to be a critical and an often thorny issue for CG purposes.[178] In Switzerland as of today, however, the independence

[173] KUNZ (n. 5), 489 *et seq.*

[174] Exceeding two of the following three thresholds in the course of two consecutive business years triggers the regular auditing obligation according to article 727 para 1 alinea 2 CO: balance sheet assets of minimum CHF 50 million, turnover of minimum CHF 20 million, 50 employees per year (on average).

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

[176] Corporations with 10 or fewer employees on an average yearly basis may opt out with the consent of all shareholders (article 727a para 2 CO), *i.e.* no auditing is done.

[177] The requirement of an internal control system is new to Swiss law and highly disputed; for further information, see P. BÖCKLI, *Existenz eines internen Kontrollsystems. Eine neue Prüfpflicht der Revisionsstelle, Die Unternehmung*, 2007, 463 *et seq.*; L. MÜLLER, Das interne Kontrollsystem bei KMU, in *Wirtschaftsrecht in Bewegung*, Zurich 2008, 317 *et seq.*; BÜHLER (n. 7), 245 *et seq.*

[178] See, *inter alia*, J. N. DRUEY, Die Unabhängigkeit des Revisors, *SZW* 2007 (79), 439 *et seq.*; R. WATTER, Nicht exekutives Mitglied des Verwaltungsrates und Unabhängigkeit der Revisionsstelle, in *Festschrift für Jean Nicolas Druey*, Zurich 2002, 659 *et seq.*

requirements are different depending on whether a regular audit or a review audit is to be done.[179]

Generally speaking, of course, all auditing must be independent which is emphasized by article 728 para 1 CO and by article 729 para 1 CO. As an additional general rule, however, the regular auditors (article 728 CO) must meet a higher standard of independence than the review auditors (article 729 CO); the main difference between the auditing providers is that the review auditors are allowed to offer bookkeeping and other services, e.g. legal and tax counselling, to the corporations to be reviewed by them (article 729 para 2 CO).[180]

3.4.4 Civil Liability of Auditors

Swiss corporation law expressly provides for the audit liability in article 755 CO. All persons engaged in the audit of the annual accounts and the consolidated financial statements etc., i.e. involved in auditing processes, are liable not only to the corporation but also to the shareholders and to the creditors for all the damages caused by intentional or negligent violations of their auditing duties.[181]

If several persons are liable for damages, any one of them is liable jointly and severally with the others (article 759 CO). This rule seems to endanger auditors if a claimant focuses on them rather than on the board members due to an alleged "deep pocket theory".[182]

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

The Federal Council in its first proposal (*bundesrätlicher Vorentwurf*), suggesting limitation caps in case of negligence of CHF 10 million for private corporations and of CHF 25 million for listed corporations, expressly referred to Germany and Austria. In my view, such a provision would not be in line with general liability

[179] See above 3.4.2.

[180] Under the former Swiss law, such combinations of auditing services, bookkeeping services and other counselling services were generally frowned upon, thus, in my view, the independence standards were stricter.

[181] For information on auditors' civil liability, see U. BERTSCHINGER, Verantwortlichkeit der Abschlussprüfer im Schweizer Recht (...), in *Aktuelle Probleme der Abschlussprüfung*, Vienna 2006, 70 *et seq*.

[182] It must be pointed out, though, that under Swiss law, joint and several liability exists only to the extent that the damage is attributable to the auditor based on his own fault and his personal circumstances (article 759 para 1 CO); in general, see R. BAHAR & R. TRIGO TRINDADE, Revision des Verantwortlichkeitsrechts: Differenzierte Solidarhaftung (...), *GesKR Sondernummer Aktienrecht*/2008, 149 *et seq*.

laws in Switzerland and qualify as a privilege for auditors.[183] Nevertheless, most commentaries are in favor of such a provision.[184]

4. External Corporate Governance

4.1 Takeover Regulation

4.1.1 Overview

As pointed out above,[185] the self-regulation on public takeover matters was replaced at the end of the 1990s with the SESTA and with various ordinances of the Federal Council, of the FINMA and of the TB. In addition to these statutory rules, the precedents by the TB – until the end of 2008 came recommendations and since then legally-binding orders – and some court decisions played and do play a crucial role for public takeovers in Switzerland.

Several aspects of stock exchange laws may paint the picture on external corporate governance for listed companies. In the following, therefore, Swiss law shall be explained regarding e.g. mandatory bids,[186] squeeze-out rules,[187] and disclosure obligations.[188]

4.1.2 Mandatory Offers and Price Rules

Article 32 SESTA provides for a mandatory offer by equity investors under certain conditions.[189] Whoever – directly, indirectly or acting in concert with third parties – acquires equity securities (of a listed company) which, added to equity securities already owned, exceed the threshold of 33 1/3 percent of the voting rights of an offeree company, whether or not such rights may be exercisable, shall be under an obligation to make an offer to acquire all listed equity securities of the company (article 32 para 1. SESTA).[190]

[183] For discussion, see W. DORALT, Haftungsbegrenzung für die Revisionsstelle – Notwendigkeit oder Privileg?, *SZW* 2006 (78), 168 *et seq*.

[184] See, *inter alia*, R. A. CAMPONOVO & PETER BERTSCHINGER, Haftungsreform für die Abschlussprüfung (...), *ST* 2007 (81), 256 *et seq*.; D. WIDMER & R. A. CAMPONOVO, Haftung der Revisionsstelle (...), *ST* 2008 (82), 110 *et seq*.; R. WATTER & A. M. GARBASKI, La responsabilité solidaire du réviseur selon le projet de révision du droit de la société anonyme: changement de paradigme?, *SZW* 2009 (81), 235 *et seq*.; U. BERTSCHINGER, Verantwortlichkeit der Revisionsstelle – Aktuelle Fragen und Perspektiven, *ZSR* 2005 II (124), 598 *et seq*., 602 *et seq*.

[185] See above 2.3.

[186] See below 4.1.2.

[187] See below 4.1.4.

[188] See below 4.2.2.

[189] See, *inter alia*, C. KÖPFLI, *Die Angebotspflicht im schweizerischen Kapitalmarktrecht* (Diss. Zurich 1999), 1 *et seq*.

[190] Fur further information, inter alia, see R. TSCHÄNI & J. IFFLAND & H.-J. DIEM, *Öffentliche Kaufangebote*, Zurich 2007, para 32 *et seq*.; KUNZ (n. 10), § 10 para 124 *et seq*.

The corporation may either withdraw[191] or at least ease[192] the shareholders' (or rather equity investors') obligation by inserting respective provisions in the articles of incorporation. Thus, a decision may be taken by the shareholders in the corporation's general meeting.

If a mandatory offer is triggered, the price offered shall be at least as high as the stock exchange price at that time and – for further protection of the other shareholders – shall not be lower than 25 percent of the highest price paid by the offeror for equity securities of the target company in the preceding 12 months (article 32 para 5 SESTA). A mandatory offer may be settled in the form of an exchange of securities only if a cash payment is offered as an alternative.[193] Further ordinance rules safeguard the shareholders' interests in this regard.[194]

TB precedents introduced some years ago – not only for mandatory offers but for all public takeovers in Switzerland – the best price rule (post-bid) into Swiss law.[195]

4.1.3 Defensive Measures

From the moment a public takeover offer is published, the board of directors of the offeree company is strictly limited in its defensive measures.[196] In particular, the target corporation shall not enter into any legal transactions which would have the effect of significantly altering the assets or liabilities of the company (article 29 para 2 SESTA).

For example,[197] the offeree company shall be deemed to be acting unlawfully, if it sells or acquires assets of which the value or price exceeds 10 percent of the balance sheet total, or if it sells or pledges any parts of the business that forms part of the main subject matter of the offer and that have been specified as such by the

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

[192] Opting-up, *i.e.* the listed company may raise the threshold in its articles of incorporation from 33 1/3 percent to a maximum 49 percent of the voting rights (article 32 para 1 *ad finem* SESTA).

[193] Until the end of 2008, this takeover rule protecting minority shareholders was provided for by precedents – the latest reform, however, implemented this rule in article 43 para 2 SESTO-FINMA; for background information, see J. ESSEBIER & M. GLATTHAAR, Öffentliche Tauschangebote und die Pflicht zum alternativen Barangebot, *SZW* 2009 (81), 191 *et seq*.

[194] In general, articles 28 *et seq*. SESTO-FINMA (Stock Exchange Ordinance-FINMA: SR 954.193) and articles 40 *et seq*. SESTO-FINMA (section titled "Determination of the Offer Price").

[195] For further details and an overview, see S. SCHÄREN, Best Price Rule im schweizerischen Übernahmerecht, *ST* 2008 (82), 449 *et seq*.

[196] Once the offer is published, in addition, the target company shall notify the TB in advance about any defensive measure that it is considering (article 35 TOO).

[197] See, in particular, article 36 TOO (unlawful defensive measures) and article 37 TOO (inadmissible defensive measures); for details, see BÜHLER (n. 7), 326 *et seq*.

offeror ("crown jewels"), or enters into contracts with directors and officers of the company that provide unusually high remuneration in the event of their leaving the corporation ("golden parachutes").

Interestingly, decisions taken in the general meetings of the shareholders are not subject to the restrictions mentioned above and may be implemented irrespective of whether they were adopted before or after publication of the public takeover offer (article 29 para 2 SESTA). Therefore, certain defensive measures – e.g. the implementation of registered shares' transfer restrictions by the articles of incorporation – are legal under Swiss law.[198]

4.1.4 Squeeze-out Rules

Finally, article 33 SESTA provides for a squeeze-out or a freeze-out, respectively, of minority shareholders. An offeror, who upon expiry of the offer period, holds more than 98 percent of the voting rights of the target company may, within three months petition the court to cancel the outstanding listed equity securities (article 33 para 1 SESTA).[199] According to article 33 para 1 *ad finem* SESTA, the offeror shall file an action against the offeree company, and the remaining shareholders are entitled to participate in these proceedings.

Following the final court decision, the target company shall reissue the cancelled equity securities and allot them to the offeror. The compensation – to be paid by the offeror – is the payment of the offer price or the fulfilment of the exchange offer in favor of the holders of the equity securities, which have been cancelled (article 33 para 2 SESTA).

4.2 Disclosure and Transparency

4.2.1 Accounting

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

Today, self-regulation (i.e. by the Swiss Institute of Certified Accountants and Tax Consultants [Treuhand-Kammer][200] and its foundation as well as by the SIX)[201] is more important for choosing the accounting system. The most important self-

[198] For an overview, see BÜHLER (n. 7), 341 *et seq.*

[199] *Inter alia*, see P.V. KUNZ, Einige Aspekte zur Kraftloserklärungsklage, *SZW* 1999 (71), 181 *et seq.*; KUNZ (n. 10), § 10 para 182 *et seq.*; P. NOBEL, Börsengesetz: Zur Kraftloserklärung von Resttiteln aus früheren öffentlichen Kaufangeboten, *SZW* 1998 (70), 37 *et seq.*

[200] KUNZ (n. 5), 479.

[201] One issue is the true and fair view-approach which is contrary to the CO accounting principles, see FORSTMOSER (n. 45), 34.

regulated system[202] is the Swiss GAAP FER, a principles-based accounting standard closer to the IFRS[203] than to the US GAAP.[204] The particular SIX listing depends, for instance, on the accounting choice.[205]

4.2.2 Disclosure Obligations Including the Listing Prospectus

As pointed out above, Swiss laws – both regulations (i.e. CO and SESTA) and also self-regulations – contain many rules on detailed disclosure and on higher transparency,[206] for example, periodic transparency in accordance with article 696 CO,[207] disclosure obligations by shareholders according to article 20 SESTA,[208] and *Ad hoc* Publicity.[209]

Finally, the listing prospectus, which must provide sufficient information for competent investors (article 27 para 1 LR SIX),[210] is regulated by the listing rules.[211] The listing prospectus must contain, according to article 28 LR SIX, all information prescribed in Scheme A of the SIX listing rules (e.g. name and business address of all board members, disclosure of any criminal judgments or investigations regarding business affairs).[212]

5. Enforcement

5.1 Available Sanctions and Their Relevance

5.1.1 Overview

Sanctions in connection with CG matters may be either civil (e.g. actions by shareholders against board members or against general meeting resolutions)[213] or

[202] Swiss self-regulation takes into account international trends, see M. SPADIN, Internationalisierung der Rechnungslegung in der Schweiz, in *Wirtschaftsrecht in Bewegung*, Zurich 2008, 337 *et seq*.

[203] IFRS: International Financial Reporting Standards.

[204] US GAAP: US Generally Accepted Accounting Principles.

[205] The listing in the SIX's Main Standard requires either US GAAP or IFRS; for the Domestic Standard, however, Swiss GAAP FER is sufficient; see article 51 LR SIX with further reference to the Directive Financial Reporting (DFR: in particular, its article 6).

[206] In general, see WEBER (n. 9), 86 *et seq*.

[207] See above 3.2.3.

[208] See above 2.3; the statutory thresholds of shareholdings to be disclosed under article 20 SESTA are the following: 3 percent, 5 percent, 10 percent, 15 percent, 20 percent, 25 percent, 33 1/3 percent, 50 percent,, and 66 2/3 percent; for further details, see articles 7 *et seq*. SESTO-FINMA; in general, see P. M. KISTLER, *Die Erfüllung der (aktien- und börsenrechtlichen) Meldepflicht (...)* (Diss. Zurich 2001), 1 *et seq*.

[209] See above 2.2.

[210] For further information, see F. M. HUBER & P. HODEL & C. STAUB GIEROW, *Praxiskommentar zum Kotierungsrecht der SWX Swiss Exchange*, Zurich 2004, 211 *et seq*.

[211] See articles 27 *et seq*. LR SIX.

[212] http://www.six-exchange-regulation.com/admission_manual/04_03-SCHA_de.pdf (01.02.2010).

[213] See below 5.3.2.

administrative (e.g. by the supervisory authorities) or criminal (e.g. notice by target companies to prosecutors or investigations by criminal authorities).[214]

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

The effectiveness of Switzerland's sanctions system was never examined. Therefore, not more than an educated guess exists. In my view, though, the Swiss sanctions system for CG issues seems rather weak. If the analysis shows a shortcoming of a sanction, however, the calls for a remedy are rather quick in Switzerland; the sanction system based on the voting rights suspension action (article 20 para 4*bis* SESTA) is illustrative.[215]

5.1.2 Examples of Legal Sanctions

In *Ad hoc* Publicity matters the SIX has a long reputation on being lenient on the issuers. In my view, this seems not to be a general rule.[216] The Sanction Committee of the SIX may either reprimand or fine the companies for violating its rules.[217] Until mid 2009, the maximum fine which could be levied by the SIX was only CHF 200,000 but this potential sanction was considerably strengthened to CHF 10 million (article 61 para 1 alinea 2 LR SIX).[218]

Late in 2007, a new sanction for violating the disclosure obligations by investors in listed shares came into force, i.e. the voting rights suspension action. At the request of FINMA, the company or one of shareholders, the judge may suspend for a period of up to five years the exercise of voting rights by any person who has breached the obligation to notify when buying or selling the holding (article 20 para 4*bis* SESTA).[219]

[214] The Swiss Penal Code (SPC: SR 311.0) contains various CG crimes, e.g insider trading (article 161 SPC), or manipulation of the stock market (article 161*bis* SPC).

[215] See below 5.1.2.

[216] http://www.six-exchange-regulation.com/enforcement/sanction_decisions/adhoc_publicity_de.html (01.02.2010).

[217] Recent decisions by the SIX Sanctions Committee on *Ad hoc* Publicity violations: reprimand (January 31, 2008), and fines of CHF 10,000 (November 19, 2007), of CHF 30,000 (April 16, 2009), of CHF 50,000 (March 25, 2009), and of CHF 100,000 (November 19, 2007).

[218] Article 61 para 1 LR SIX provides, in case of negligence, a fine of up to CHF 1 million, and in case of wrongful intent, a fine of up to CHF 10 million.

[219] See, *inter alia*, P.V. KUNZ, Die Stimmrechtssuspendierungsklage im revidierten Börsenrecht – Eine neue Sanktion bei Meldepflichtverletzungen mit grossem Drohpotential, *SZW* 2008 (80), 280 *et seq.*; R. WATTER & C. RAMPINI & T. CANDRIAN, Praktische Aspekte der Stimmrechtssuspendierungs-Klage nach Art. 20 Abs. 4*bis* BEHG, in *Festschrift für Roland von Büren*, Basel 2009, 793 *et seq.*; if the violation of article 20 SESTA took place in connection with a public takeover offer, not the FINMA but the TB may file an action in court (article 20 para 4*bis ad finem* SESTA).

The voting rights suspension action of article 20 para 4*bis* SESTA seems to be rather ineffective today with the FINMA as a claimant in court. Therefore, a reform is planned. In the future, the FINMA shall not file an action in court against the alleged violator of disclosure obligations but get the power to issue an order to suspend the voting rights of such an equity investor,[220] thus, the sanction process will become much quicker than today.

5.2 Supervision

5.2.1 Non-Listed Companies

Some commentaries abroad ask how shareholder protection and CG may be improved and point out: "In view of the difficulties and expense faced by minority shareholders in seeking judicial relief and the traditional reluctance of the courts to interfere in corporate affairs, [solutions] may lie in the use of an administrative agency (…)".[221]

Today, in Switzerland, no general supervisory authority for non-listed corporations exists. And in my view, the introduction of some sort of a protective "agency for shareholders", which was discussed earlier on, would need to be rejected for being contrary to Swiss traditions and corporate concepts of personal responsibility.[222]

There is one authority for all (non-listed and listed) corporations which guarantees general transparency and thus a minimum CG, i.e. the Commercial Register (CR) of each Canton of Switzerland. It might be argued – and it sometimes is by erudite commentaries[223] – that the registrar of the CR ought to check in detail the corporations' filings (e.g. the establishing of a company or the amendments of the articles of incorporation) thereby enhancing shareholder protection and the CG aspects. Yet, this is contrary to today's Swiss law.[224]

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

[220] Report dated January 29, 2009 (Expertenkommission Börsendelikte und Marktmissbrauch, 86); http://www.efd.admin.ch/dokumentation/zahlen/00578/01375/index.html?lang=de&download=M3wBUQCu/8ulmKDu36WenojQ1NTTjaXZnqWfVpzLhmfhnapmmc7Zi6rZnqCkkIN5e3Z+bKbXrZ2lhtTN34al3p6YrY7P1oah162apo3X1cjYh2+hoJVn6w== (01.02.2010).

[221] See NOTES, *Freezing Out Minority Shareholders*, Harv. L. Rev. 1961 (74), 1643; emphasis added.

[222] KUNZ (n. 10), § 6 para 298 *et seq*. and para 301.

[223] See A.I. DE BEER, Minderheitenschutz durch erweiterte Kognitionsbefugnis des Handelsregisterführers, *ZSR* 1995 (114 I), 81 *et seq*.

[224] For further details and additional references, see KUNZ (n. 10), § 6 para 239 *et seq*.

5.2.2 Listed Companies

As pointed out above, several authorities have supervisory powers *vis-à-vis* listed companies. Reference is made, e.g., to the TB with its recommendations and its orders, respectively, in connection with public takeover offers, to the FINMA with its orders regarding violations of article 20 SESTA (disclosure obligations), and to the SIX with reprimands and fines concerning violations of the LR (*Ad hoc* Publicity, accounting principles etc.).

Starting on September 1, 2007, a new supervisory authority for auditing firms was introduced, i.e. the Auditors' Supervisory Agency (*Revisionsaufsichtsbehörde* or RAB).[225] The RAB does not supervise the listed companies but rather their auditors (*sic*) which need to attain a certain standard of expertise and excellence in auditing.[226] Therefore, the RAB improves CG at least indirectly for listed companies.

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

5.3 Shareholders

5.3.1 Personal Responsibilities

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

The equity investors are called upon to look out for themselves – if they are not interested or not willing to protect themselves and to fight for their own and for their rights, why should anyone else (e.g. the authorities) serve as their guardians?[227] In this regard, the Swiss corporation law provides, for example, many

[225] See http://www.revisionsaufsichtsbehoerde.ch/docs/content_blau_right.asp?id=30483&sp=D&domid=1063 (01.02.2010).

[226] According to article 727b para 1 CO, for instance, the accounting of listed companies must be audited only by a supervised auditing firm (*staatlich beaufsichtigtes Revisionsunternehmen*) which owns a specific certificate from the RAB; only some 30 auditing firms in Switzerland have this particular qualification.

[227] For information on this fundamental issue, see KUNZ (note 10), § 6 para 5 *et seq*.

opportunities to file shareholders' lawsuits in courts[228] which emphasizes the level of CG in Switzerland.[229]

One particularity under Swiss law, which may be different from the legal situation abroad, concerns the *Ad hoc* Publicity – self-regulation (i.e. the LR) instead of regulation provides for this transparency-promoting rule. It is under dispute whether or not the shareholder may claim damages for the violation of the *Ad hoc* Publicity principle.[230]

5.3.2 Shareholders' Lawsuits – Examples

As pointed out above,[231] information rights and particularly the right of shareholders for a special audit (articles 697a *et seq.*)[232] are fundamental for CG. In addition, the three most important lawsuits for shareholders are, in my view, the following:

– Liability Action (articles 752/754 *et seq.* CO):[233] both board members and highest managers of the corporation may be liable for damages if they caused the damage by an intentional or negligent violation of their duties; plaintiff may either be the corporation or any shareholder (article 754 para 1 CO) or – in bankruptcy cases – a creditor (article 754 CO). The statute of limitations is five years (article 760 CO).

– Challenging of General Meetings' Resolutions (articles 706 *et seq.* CO): any shareholder or the board may take legal action against the corporation to challenge resolutions of the general meeting (not of the board) which violate either the law or the articles of incorporation (article 706 para 1 CO). The right to sue lapses, however, if the lawsuit is not filed within two months after the general meeting (article 706a para 1 CO).

– Request for the Corporation's Dissolution (article 736 alinea 4 CO): shareholders representing at least ten percent of the share capital may request the dissolution of the company for valid reasons; instead of dissolution, the judge may

[228] Overview, see P.V. KUNZ, *Die Klagen im Schweizer Aktienrecht*, Zurich 1997, 19 *et seq.*

[229] BÜHLER (n. 7), 280 *et seq.*

[230] In general, see J. KÖNDGEN, Die Ad hoc-Publizität als Prüfstein informationsrechtlicher Prinzipien, in *Festschrift für Jean Nicolas Druey*, Zurich 2002, 791 *et seq.*; for further details, *inter alia*, see W. WIEGAND, Ad hoc-Publizität und Schadenersatz, in *Festgabe für Jean-Pierre Chapuis*, Zurich 1998, 143 *et seq.*; KUNZ (n. 10), § 10 para 270 *et seq.*

[231] See above 3.2.3.

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

[233] For details, see E. F. SCHMID, Prozessuales zur aktienrechtlichen Verantwortlichkeitsklage, in *Wirtschaftsrecht in Bewegung*, Zurich 2008, 601 *et seq.*

decide on another solution appropriate in the circumstances and acceptable to the interested parties – in fact, this action may enhance the "exit solution" for minority shareholders.[234]

The major concern for the plaintiffs in shareholder lawsuits, in Switzerland and also abroad, is usually the costs aspect (including the lawyers' fees). Swiss corporation law contains some rules to ease these concerns, in particular, article 706a para 3 CO (shareholder challenging general meetings' resolutions)[235] and article 756 para 2 CO (liability action).[236] However, these rules do not effectively promote shareholders' actions, primarily because they do not apply to payments of advances to the court (*Gerichtskostenvorschüsse*).

5.4 Others

Since Switzerland's business is often rooted in business associations, non-legal sanctions – such as peer pressure – must not be underestimated. In addition, the media being in competition with each other[237] scrutinizes business behavior and alleged CG shortfalls in great detail. In fact, business news has been big news in Switzerland over the last few years.

As pointed out above,[238] shareholder activism does not have a long tradition in Switzerland. In particular, shareholders' associations are rather rare.

6. Other Matters

6.1 Financial Institutions

CG is currently the main legal issue in terms of Swiss corporation law matters.[239] Furthermore, CG had and still has a traditional role in the area of banks and other financial intermediaries (e.g. insurance companies).

Financial institutions in Switzerland are, with a few notable exceptions,[240] regularly organized as corporations, but the CG standards are higher for the financial

[234] See P.V. KUNZ, Zur Auflösungsklage gemäss Art. 736 Ziff. 4 OR – Garant für ein indirektes Austrittsrecht?, in *Aktienrecht 1992 – 1997*, Bern 1998, 235 *et seq.*

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

[236] If the shareholder, based upon the factual and legal situation, had sufficient cause to file an action, the judge shall divide the costs in his discretion between the plaintiff shareholder and the corporation, which is not the defendant, to the extent they are imposed on the defendant (*e.g.* a board member).

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

[238] See above 3.2.4.

[239] See above 2.1.

sector than for other Swiss corporations in general.[241] In accordance with specific laws,[242] for instance,[243] banks' and insurance companies' direction and control must be separated. Therefore, personal unions of chairman and CEO are specifically banned.

6.2 Private Codes by Self-Regulators

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

Non-official proposals and private drafts for codices of business organizations and other interest groups are made, for example, for foundations ("Swiss Foundation Code"),[244] for public companies ("Public Corporate Governance Code"),[245] for family enterprises ("Governance in Family Firms"),[246] and for non-profit-organizations ("Swiss NPO-Code").[247] Finally, the principles of good CG bear some increased

[240] Banking business: *e.g.* Raiffeisen banks are co-operative companies (*Genossenschaften*), and all Privatbanquiers [special category of private bankers] (*e.g.* in Geneva) must be either partnerships or sole entrepreneurs under the law; insurance business: *e.g.* Mobiliar.

[241] This might heighten the expectations *vis-à-vis* board members of banks; see, in general, K. J. HOPT, Erwartungen an den Verwaltungsrat in Aktiengesellschaften und Banken. Bemerkungen aus deutscher und europäischer Sicht, *SZW* 2008 (80), 235 *et seq*.

[242] Banks: *e.g.* article 8 para 2 BanKV (SR 952.02); insurance companies: article 13 *et seq*. AVO (SR 961.011); see, *inter alia*, FORSTMOSER (n. 45), 29, n. 33.

[243] CG should also to be an issue for the Kantonalbanken (*i.e.* banks entirely or partially owned by the Swiss Cantons), see M. PEDERGNANA & R. MÜLLER & D. PIAZZA, Corporate Governance – einige Gedanken zu den Kantonalbanken, in *Festschrift für Roland von Büren*, Basel: 2009, 691 *et seq*.

[244] This private code was published in October 2005; for details, see T. SPRECHER, Der Swiss Foundation Code, *SAV-revue* 1/2006, 13 *et seq*.; for the latest version, see T. SPRECHER & P. EGGER & M. JANSSEN (eds.), *Swiss Foundation Code 2009*, Basel 2009; details for the regulatory framework: A. FISCHER, Corporate Governance bei Stiftungen – von der Selbstverständlichkeit des Guten, in *Festschrift für Peter Böckli*, Zurich 2006, 645 *et seq*.

[245] A. LIENHARD & K. SCHEDLER, Medizin gegen Interessenkonflikte bei staatlichen Unternehmungen – Anregungen zu Organisation, Führung und Aufsicht, *NZZ* 2006 (8), 15; see P. BÖCKLI, Corporate Governance: Der Staat in der Eigentümerrolle gegenüber seinen selbständigen Anstalten, in *Festschrift für Luzius Wildhaber*, Basel 2007, 1141 *et seq*.

[246] http://www.ecgi.org/codes/documents/swisscode_family_firms_de.pdf (01.02.2010); for CG-recommendations in this regard, see para 41 *et seq*.; see, *inter alia*, A. VON MOOS, Corporate Governance im Familienunternehmen, *ST* 2002 (76), 1059 *et seq*.

[247] Swiss NPO-Code dated March 31, 2006, for an English translation of this codex, see http://www.swiss-npocode.ch/download/The%20Swiss%20NPO%20Code%20E%20def%20020080625.pdf (01.02.2010).

weight even for the Federal Administration of Switzerland – the Federal Council recently published two reports[248] in regard to this.[249]

Corporate social responsibility is a new topic for corporate law matters in Switzerland;[250] yet, the boards have not all discretion to make charitable contributions.[251] It remains to be seen whether or not any legal consequences will result thereof.

7. Final Conclusions, and Observations

7.1 View from Abroad

The international perception of today – based on reports, for instance, by the OECD and the WEF, respectively[252] – seems to be that the CG in Switzerland is weak or average at best. This view is (or was) understandable, and recent developments particularly in the areas of auditing[253] on one side and of defensive measures against unfriendly takeovers attempts by foreign investors[254] on the other side might confirm this prejudice.

In my view, though, the winds have changed in Switzerland over the last few years. In particular, this decade's developments self-regulation (SCBP as well as SIX regulations)[255] levelled the playing fields between Switzerland and foreign countries. Thus the country reached the international standards for CG some years ago.

Moreover, the present legislative reform of Swiss corporation law[256] will further increase Switzerland's standing in this regard. The Swiss CG standards in the future will be much higher above average – and hopefully, the international community will take better notice in the future. Some areas of the Swiss corporation law of the future, indeed, may even play a role model for other countries.

[248] Corporate-Governance-Bericht dated September 13, 2006, see: http://www.admin.ch/ch/d/ff/2006/8233.pdf; Zusatzbericht dated March 25, 2009: http://www.admin.ch/ch/d/ff/2009/2659.pdf (01.02.2010).

[249] OECD: http://www.oecd.org/document/33/0,3343,en_2649_33735_43714657_1_1_1_1,00.html (01.02.2010).

[250] For further information, *inter alia*, see R. WATTER & T. SPILLMANN, Corporate Social Responsibility – Leitplanken für den Verwaltungsrat Schweizerischer Aktiengesellschaften, *GesKR* 2-3/2006, 94 *et seq.*; P. FORSTMOSER, Corporate Responsibility und Reputation (...), in *Liber Amicorum for Rolf Watter*, Zurich 2008, 197 *et seq*.

[251] See R. WATTER & T. ROHDE, Die Spendenkompetenz des Verwaltungsrates, in *Festgabe zum Schweizerischen Juristentag 2006*, Zurich 2006, 329 *et seq*.

[252] See above 3.2.1.

[253] See above 3.4.1.

[254] See above 2.5.

[255] See above 2.2.

[256] See above 2.1.

7.2 The Future of CG in Switzerland

Notwithstanding the encouraging signs above, some legal improvements on CG aspects are not yet final and currently endangered by political opposition in the Swiss Parliament (e.g. the election duration for board members might not be shortened to one year). And certain areas of the CG remain to be improved. Hence, the CG in Switzerland faces a long road to success.

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

– Transfer Restrictions: The legality of transfer restrictions for listed registered shares (*Vinkulierung*)[257] ought to be rescinded; the present rules (articles 685d *et seq.* CO) impede the market for corporate control.[258]

– Exit Rights: The Swiss LLC-laws, for instance, provide members with rights to exit the company (e.g. article 822 CO);[259] the Swiss corporation law should be amended accordingly for shareholders of corporations as well.[260]

– Restricted Personal Liability: The legislature should not introduce any limitation on auditors' personal liabilities in order to not privilege this profession.

– Removal of Directors by the Court: Finally, the Swiss corporation law should provide for an action to remove board members from this position;[261] today, only the shareholders in a general meeting may remove the directors with majority vote (art. 705 para 1 CO).

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

[257] Starting the recent debate, see P.V. KUNZ, Die Vinkulierung als Geheimwaffe gegen unfreundliche Übernahmeversuche – Plädoyer für die Ergänzung der laufenden Aktienrechtsrevision um eine Vinkulierungs-Debatte, *NZZ* 2007 (268), 33; for a different view, see R. WATTER & D. DUBS, Was bedeutet Fairplay beim Kampf um die Kontrolle von Firmen?, *NZZ* 2007 (273), 29; some years earlier already, see KUNZ (n. 10), § 18 para 65.

[258] For further details, see U. SCHENKER, *Schweizerisches Übernahmerecht*, Bern 2009, 1 *et seq.*

[259] See C. KAUFMANN, Austritt und Ausschluss aus der GmbH, in *Wirtschaftsrecht in Bewegung*, Zurich 2008, 267 *et seq.*

[260] KUNZ (n. 10), § 18 para 63.

[261] KUNZ (n. 10), § 18 para 68.