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Corporate Governance 2022

Switzerland: Law & Practice
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Law and Practice

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1. INTRODUCTORY

1.1 Forms of Corporate/Business Organisations

The principal forms of corporate organisations in Switzerland are the stock corporation (*Aktiengesellschaft* (*AG*)) and the limited liability company (*Gesellschaft mit beschränkter Haftung* (*GmbH*) or LLC). The stock corporation (AG) is the most important company form; it is suitable for all sizes and types of business and is the only company form that can be listed on a stock exchange. Both the AG and LLC feature a separate legal personality, a predetermined capital divided into shares or quotas and a limitation of liability to their own assets.

1.2 Sources of Corporate Governance Requirements

The primary sources of law relating to corporate governance are the law on Swiss stock corporations (Article 620 et seq of the Swiss Federal Code of Obligations (CO)) and, for listed corporations, the Swiss Federal Act on Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading (the "Financial Market Infrastructure Act" or FinMIA).

The Swiss Parliament adopted a major revision of Swiss company law in June 2020. The most important changes concern the implementation of corporate governance regulations relating to gender quotas, extractive companies, the flexibilisation of the share capital, the permissibility of interim dividends and virtually held shareholder meetings, the strengthening of the (minority) shareholder participation rights and the formal integration of the Ordinance against Excessive Compensation in Listed Companies into statutory corporate law. The amendments will come into force on 1 January 2023.

FinMIA

The FinMIA regulates the organisation and operation of financial market infrastructure, and the conduct of financial market participants in securities and derivatives trading.

The FinMIA is further specified by three ordinances on stock exchanges and securities trading:

- the Financial Market Infrastructure Ordinance (FinMIO) is issued by the Swiss government (Federal Council) directly;
- the FINMA Financial Market Infrastructure Ordinance (FinMIO-FINMA) is issued by the Swiss Financial Market Supervisory Authority (FINMA); and
- the Takeover Ordinance (ToO) regulating public takeovers is issued by the Swiss Takeover Board (TOB).

In addition to the issuance of ordinances in its field of competence, the regulatory body FINMA also has the authority to issue directives (circulars). Relevant are the FINMA circular "Remuneration schedules" (2010/01, as amended 4 November 2020), addressing the minimum standards for remuneration schemes of financial institutions, the circulars "Corporate Governance – insurers" (2017/02, of 1 January 2017) and "Corporate Governance – banks" (2017/01, as amended 4 November 2020), both addressing corporate governance, risk management and the internal control system at insurance companies and banking institutions, respectively.

Listing Rules

The SIX Swiss Exchange AG (SIX) and the smaller BX Swiss AG (BX) stock exchanges are both self-regulatory organisations under the FinMIA, and have issued listing rules with specific reporting and disclosure requirements, partially amended by the new Financial Services Act (FinSA) as of 1 August 2021. To improve transparency on corporate governance, SIX Exchange Regulation, the regulatory division of SIX, has enacted the "Directive on Information Relating to Corporate Governance" ("SIX Directive Corporate Governance"), as last amended on 1 October 2021. It requires issuers with a main Swiss listing to disclose, in a separate chapter of their annual report, important information on the management and control mechanisms at the highest corporate level, or to give valid reasons for not doing so ("comply or explain").

In addition, the SIX "Directive on the Disclosure of Management Transactions" as amended 1 May 2018 obliges issuers with a main Swiss listing and (indirectly) their members of the board and executive management to disclose and report management transactions in their securities.

Furthermore, as of 1 January 2014, the Ordinance against Excessive Compensation in Listed Companies (OaEC) introduced a binding say-on-pay regime that had to be implemented for the first time for the business year 2016. The OaEC is applicable only to stock corporations governed by Swiss company law, whose shares are listed on a stock exchange in Switzerland or abroad. It does not apply, in particular, to companies that have only listed debt securities or non-voting participation certificates and, in general, not to any privately held companies. The OaEC will be integrated into the CO as part of the revision of Swiss company law, and thus the OaEC will be formally repealed on 1 January 2023.

Corporate Governance Standards

Moreover, the well-respected Swiss Code of Best Practice for Corporate Governance (SCBP), issued by economiesuisse, the most important association of Swiss businesses from all sectors of the economy, sets corporate governance standards in the form of non-binding recommendations ("comply or explain"). It primarily addresses Swiss public companies, but also serves as a guideline for non-listed Swiss companies and organisations of economic significance. It structures, integrates and reflects various provisions of Swiss legislation on corporate governance and accepted corporate practice and sets high standards of corporate governance which are accepted and observed by many companies in Switzerland.

SCBP recommendations cover, for instance, the definition of corporate governance, shareholder meetings, shareholders' rights to information and inspection, the composition of the board of directors and of board committees, the role of auditors, and the compensation for boards of directors and executive boards of public companies. The SCBP has been reviewed and revised with effect from February 2016. Currently, there is another revision ongoing, which will enter into force together with the revised Swiss company law (expected on 1 January 2023).

Institutional Investors

In addition, an important group of representatives of Swiss institutional investors (such as the Swiss Association of Pension Fund Providers and the Federal Social Security Funds), Swiss businesses (including the Swiss Business Federation, economiesuisse) and proxy advisers (Ethos) published the "Guidelines for institutional investors governing the exercising of participation rights in public limited companies". Unlike the SCBP, which primarily addresses listed companies, these non-binding guidelines are directed towards institutional investors and aim at enhancing good corporate governance by describing best practices for the exercise of participation rights in Swiss listed companies. The guidelines' importance increased when Swiss pension funds became obliged to exercise their voting rights and to disclose their voting decisions under the OaEC from 1 January 2014.

Finally, economiesuisse and SwissHoldings, the association of industrial and service companies in Switzerland, have issued an additional set of standards named "Fundamentals of effective compliance management". It sets out five principles of effective compliance management and is meant as a guideline for Swiss multinational enterprises.

1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares

Companies with publicly traded shares have to fulfil additional corporate governance requirements. In particular, the OaEC regulates the election and remuneration of the board of directors. The chairperson as well as each member of the board of directors, the members of the compensation committee and the independent proxy have to be appointed individually and annually by the shareholder meeting.

The board's proposal on the compensation of directors, the executive management (and, if any, the advisory board compensation) has to be submitted annually to the shareholders for a binding vote (binding say-on-pay). Further, the Listing Rules of the SIX and BX provide for specific reporting and disclosure requirements. In addition, the SIX Directive Corporate Governance requires SIX-listed companies to disclose, in annual business reports, important information on the management and control mechanisms at the highest corporate level, or to give valid reasons for not doing so ("comply or explain").

The SCBP also sets out non-binding recommendations regarding the corporate governance of large Swiss entities. The following analysis will provide further information regarding corporate governance requirements for publicly (and privately) held companies.

2. CORPORATE GOVERNANCE CONTEXT

2.1 Key Corporate Governance Rules and Requirements

Key corporate governance rules are addressed throughout the remainder of this chapter.

2.2 Environmental, Social and Governance (ESG) Considerations

According to the Swiss Corporate Social Responsibility Action Plan for 2020–2023, the Swiss government's approach focuses on sensitising domestic companies to ESG, offering support to companies seeking to address relevant issues, promoting transparency and establishing a best practice based on international standards. At the same time, there are additionally several legislative changes in process.

In July 2020, the Federal Act on Gender Equality of 24 March 1995 was modified to include reporting obligations on wage inequality. In broad terms, companies with 100 or more employees will be required to complete an equal-pay analysis every four years. The analysis must be audited by an independent, approved third party. The results of the analysis must be shared with the workforce and, if the company is listed, with its shareholders (in the appendix to the annual report).

Developments in the Swiss Federal Code of Obligations

Gender representation on the board of directors and in the executive board (Article 734f CO)

The 2020 revision of Swiss company law introduced guidelines on gender representation for the board of directors in listed companies (at least 30% of each gender) as well as for the executive board (at least 20% of each gender) under a "comply or explain" concept. Only listed Swiss companies which meet a certain threshold regarding the balance sheet total exceeding CHF20 million; the revenues exceeding CHF40 million; and the number of employees (at least 250 FTE in an annual average) for the last two business years are required to implement the gender quotas.

The threshold is calculated on the group level. Any company that does not meet the mentioned provisions will be required to state in its remuneration report the reasons for such imbalance, and the actions that are being taken to improve the situation. Privately held stock corporations may voluntarily submit to the gender quotas (opt-in). The introduction of the quotas is subject to multi-year conformance periods (2026 for boards of directors and 2031 for executive boards) but in practice significant changes in the composition of boards and senior managements are under way. The provision on gender representation has been in effect as of 1 January 2021.

Transparency in raw material companies (Article 964d-964i CO)

The provisions regarding the transparency in raw material companies have also been in force since 1 January 2021 and require companies which have to undergo an ordinary audit by law, and are either themselves or through a company that they control involved in the extraction of minerals, oil or natural gas or in the harvesting of timber in primary forests, to produce a report each year on the payments they have made to state bodies.

Transparency on non-financial matters (Article 964a-964c CO)

As of 1 January 2022, Parliament's indirect counter-proposal to the Responsible Business Initiative came into force, which led to changes regarding the transparency on non-financial matters and the due diligence and transparency regarding minerals and metals from conflict-affected areas and child labour.

The new provisions must be implemented for the first time for the 2023 financial year (ie, the reporting period starts with the 2023 financial year). This means that the report must be approved and signed by the board of directors and submitted to the shareholder meeting for approval for the first time in 2024. It must remain publicly available for at least ten years.

Swiss "companies of public interest", ie, Swiss listed companies and certain FINMA supervised financial institutions, have to submit an annual report on non-financial matters if they meet certain thresholds on annual average in two successive financial years (i) regarding the number of employees (at least 500 FTE) and (ii) either a balance sheet total exceeding CHF20 million or revenues exceeding CHF40 million. These companies are obliged to report on the risks of their business activities in the areas of the environment (in particular CO2 targets), social concerns, labour concerns, human rights and the fight against corruption, as well as on the measures taken against these risks. Violations of these reporting duties are punishable by criminal sanctions (fines). The newly introduced rules are largely based on known international provisions, such as Directive 2014/95/EU concerning non-financial reporting.

In order to further specify the environmental aspects of the reporting obligations on non-financial matters, the Swiss government is currently preparing an implementing ordinance relating to the reporting of climate issues. The consultation period ends on 7 July 2022. The ordinance provides for the mandatory implementation of the internationally recognised recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). Qualifying Swiss companies shall report on (i) the financial risk that a company incurs through climate-related activities and (ii) the impact of the company's business activities on the climate and the environment. This so-called double materiality perspective also corresponds to the approach of the EU.

Due diligence and transparency regarding minerals and metals from conflict-affected areas and child labour (Article 964j-964l CO)
Companies whose registered office, head office or principal place of business is in Switzerland with risks in the sensitive areas of child labour and so-called conflict minerals must further comply with special and far-reaching due diligence and reporting obligations. In particular, the due diligence and reporting obligations in the supply chain arise if they:

- import minerals or specific metals containing tin, tantalum, tungsten or gold from conflict-affected and high-risk areas into or process them in Switzerland; or
- offer products and services in relation to which there is a reasonable suspicion that they have been manufactured or provided using child labour.

In these cases, companies are obliged to set up an adequate management system and stipulate their supply chain policy and a system by which the supply chain can be traced, in order to identify and assess the risks of harmful impacts in their supply chain. In addition, these companies must draw up a risk management plan and take measures to minimise the risks identified. The report on the company's compliance with the due diligence obligations must be approved and signed by the board of directors. The board of directors must ensure that the report is published electronically immediately after approval and remains publicly available for at least ten years.

The Federal Council has additionally issued an implementing Ordinance on Due Diligence and Transparency for Minerals and Metals from Conflict-affected Areas and Child Labour (DDTrO), which also entered into force on 1 January 2022.

Private Sector ESG Disclosure Directives and Initiatives
Since 2017, SIX Swiss Exchange offers listed issuers the opportunity, by means of an opting in, to publish an issuer's commitment ESG principles by way of an annual sustainability report in accordance with an internationally recognised standard either in their annual report or a separately published report. Currently, issuers may use as a reporting standard the Global Reporting Initiative, the Sustainability Accounting Standards Board, the UN Global Compact and the EPRA (European Public Real Estate Association) Sustainability Best Practices Recommendations.

In practice, the number of companies listed on the SIX which do not report on responsibility or sustainability in their annual report is decreasing. In addition, there are several initiatives from the private sector, such as from the Swiss Bankers Association which has declared sustainable finance as one of its strategic priorities. Among other things, this led to the development of guidelines for the advisory process for private clients. In addition, certain Swiss proxy advisors have developed corporate governance and responsibility guidelines in connection with their voting guidelines.

3. MANAGEMENT OF THE COMPANY

3.1 Bodies or Functions Involved in Governance and Management
In a Swiss stock corporation, three bodies are involved in the governance and management: the shareholder meeting, the board of directors and the statutory auditors.

Shareholder Meeting
The shareholder meeting is the supreme authority as set forth by law and the articles of association. It decides the fundamental organisation of the company, elects the board of directors and takes the fundamental decisions.

Board of Directors
The board of directors is the executive body. Swiss corporate law provides that the board may pass resolutions on all matters not reserved to the shareholder meeting by law or the articles of association and shall manage the business of the company to the extent it has not delegated such management to individual members or to an executive management in accordance with organisational regulations.

Statutory Auditors
The statutory auditor is a controlling body as provided by law, elected by the shareholder meeting. However, in companies with fewer than ten full-time employees, shareholders may unanimously decide not to appoint an auditor. The scope of an auditor's duties depends on the nature and size of the enterprise; listed, large and mid-sized corporations are subject to an ordinary audit, while smaller corporations may be subject to a more limited financial audit only.

3.2 Decisions Made by Particular Bodies

Shareholder Meeting
The shareholder meeting defines the framework of the company's business activities. In doing so, the shareholder meeting has to decide upon the following matters as they are fundamental, non-transferable competences conveyed to the shareholder meeting under company law:

- adoption and amendment of the articles of association, including changes in the share capital, issuance of preferred shares, approval of mergers and changes in the company's corporate structure;
- approval or rejection of the annual business report, including the consolidated financial statements;
- approval or rejection of the use of the balance sheet profit and, in particular, the declaration of dividends;
- election of the members of the board of directors (within the scope of the OaEC, ie, in listed companies, elections must be held annually and individually for each board member, including the direct election of the chairperson);
- removal of the members of the board;
- election and removal of the members of the compensation committee and of the independent proxy (pursuant to the OaEC);
- election of the external auditors;
- approval or rejection of the compensation of the board, the executive management and, if any, the advisory board (pursuant to the OaEC);
- release of the members of the board of directors from liability (discharge); and
- all other matters that are by law or by articles of association reserved to the shareholder meeting (special audit pursuant to shareholders' information rights, liquidation of the company, etc).

The Board of Directors
The board of directors is responsible for the ultimate management and representation of the company. Its core duty is to determine the corporate strategy and allocate corporate resources (strategic governance). In general, the board is authorised to decide all matters that are not reserved to the shareholder meeting or to the auditors by law or by the articles of association, or delegated to the executive management based on organisational regulations.

Statutory law enumerates certain fundamental matters specifically reserved to the board. The following board responsibilities are non-delegable and inalienable:

- the ultimate management of the company – in particular, the duty to determine the corporate strategy and allocate the corporate resources (strategic governance);
- defining the fundamental organisational structure;
- setting up an accounting and financial control system (including an internal control system for medium-sized and larger businesses) as well as financial planning as far as necessary to manage the company;
- appointing and removing the management as well as granting of signing authority to the individuals authorised to act on behalf of the company;
- ultimately monitoring the individuals entrusted with management responsibilities, in view of compliance with the applicable law, the articles of association, regulations and directives;
- preparing annual business reports and shareholder meetings as well as implementing its resolutions;
- issuing the annual compensation report on the board's and executive management's compensation; and
- notifying the bankruptcy court if the company's liabilities are no longer covered by its assets (over-indebtedness).

Notwithstanding the non-delegable and inalienable nature of these responsibilities, the board of directors may delegate the preparation and execution of its resolutions to committees, but not the decision-making itself ("delegation of decision-shaping but not decision-making"). Companies often establish an audit committee, a compensation committee and/or a nomination committee.

Statutory Auditors

The statutory auditors serve as a controlling body by reviewing the annual accounts and the motions made by the board to the shareholder meeting on the allocation of the balance sheet profit and by reporting to the shareholder meeting whether the annual accounts comply with the statutory provisions, the articles of association and the applicable financial reporting standards.

3.3 Decision-Making Processes

The shareholder meeting is convened by the board of directors. The notice must include the agenda items and the boards' motions (and shareholders' motions, if any). Resolutions can only be made on motions relating to agenda items that were duly notified (see **5.3 Shareholder Meetings**). In general, the absolute majority of the votes represented is necessary to pass a resolution and conduct elections.

Resolutions

For certain important resolutions such as an authorised capital increase, the introduction of transfer restricted shares, etc, the law requires a qualified majority; ie, two thirds of the voting rights represented and the absolute majority of the nominal value of shares represented. A requirement for a qualified majority may also be increased for other matters by a resolution of the shareholder meeting which satisfies the proposed majority requirement.

In most companies, the principle of "one share, one vote" applies. The articles of association may, however, also provide for voting shares. These can often be found in family-controlled companies, both private and listed.

According to company law, the board of directors' resolutions may be made by a (relative) majority of the votes cast at the meeting. However, the articles of association and the organisational regulations may also require a quorum regarding the presence of a minimum of board members as well as a specific vote of the board. It is important to note that in the case of a tie, the chairperson has a casting vote, unless the articles of association provide otherwise.

Resolutions may also be taken by circular written resolution if no member requests a meeting.

4. DIRECTORS AND OFFICERS

4.1 Board Structure

Swiss company law generally provides for a one-tier board model. In practice, however, day-to-day management (except for the non-delegable and inalienable competencies of the board, see **3.2 Decisions Made by Particular Bodies**) is often, and typically in listed companies, delegated from the board to an executive management, thus leading to a two-tier board structure. Such rightful delegation excludes the directors' liability for damages relating to the delegated day-to-day management (but not the core duties) provided that the board applied the necessary care in selecting, instructing and supervising the management.

As a particularity, banks and private insurance companies are required by law to establish a two-tier structure with a functional and personal separation of operative management and supervision.

4.2 Roles of Board Members

Swiss company law does not specify the roles of the members of the board of directors in detail.

Chairperson

The chairperson of the board shall ensure the timely and appropriate information of the board members and the preparation of its meetings. The chairperson also acts as a primary contact person to the executive management, chairs the shareholder meeting, represents the company internally and externally, and generally ensures the proper functioning of the board. The duties of the chairperson are usually further specified in the organisational regulations.

Even though the law does not mention the position of the vice-chairperson, it is advisable to appoint one in case the chairperson is prevented from performing their duties. The scope of the vice-chairperson's duties shall be defined in the organisational regulations.

Other Appointments

In addition, the board of directors may appoint a secretary who does not need to be a member of the board. The secretary's duties are of a mere administrative nature relating to the board's tasks, such as taking the minutes.

The SCBP also recommends the role of a lead director; in particular, to prevent or address any potential conflict of interest situations. The lead director, an experienced non-executive member of the board, may be appointed in the event that a single individual assumes the functions of chairperson and CEO. The appointment of lead directors is not uncommon for listed companies in Switzerland.

4.3 Board Composition Requirements/ Recommendations

Regarding the composition of the board, current Swiss company law is flexible and the shareholders enjoy broad discretion. Swiss company law contains no rule on the maximum number of seats and no age restrictions on board members. Gender representation guidelines for the board of directors in listed companies (at least 30% of each gender) as well as for the executive board (at least 20% of each gender) under a "comply or explain" concept have been implemented as of 1 January 2021 for listed stock corporations (see **2.2 Environmental, Social and Governance (ESG) Considerations**).

Regulated Industries

In regulated industries – in particular, the financial industry – regulation strictly requires the members of the executive bodies of supervised institutions to grant assurance of proper business conduct and required knowledge and experience ("fit and proper"). According to FINMA, the main purpose of these requirements is to maintain public confidence in those institutions and to safeguard the reputation of the Swiss financial centre.

Assurance of proper business conduct covers matters of personal character (including criminal records) and professional qualifications required for the proper management of a supervised entity. The principal criterion used in assessing a person's suitability is their past and present business activity. As to the requirements regarding the composition of the board relating to independent directors, see **4.5 Rules/Requirements Concerning Independence of Directors**.

4.4 Appointment and Removal of Directors/Officers

Only the shareholders may vote on the appointment or the removal of any of the directors. This is permissible whenever a shareholder meeting is held and its agenda provides for the respective election or removal. Significant shareholders (see **5.3 Shareholder Meetings**) are entitled to request the board to convene an extraordinary shareholder meeting and put the requested items on the agenda.

Under the OaEC provisions (to be integrated in the amended Swiss company law as of 1 January 2023) for listed companies, the chairperson of the board of directors, each member of the board of directors and the members of the compensation committee must be appointed and (re-)elected individually and annually by the shareholder meeting. In non-listed companies, the elected board members may resolve on the board's organisation, constitution, its members' functions and notably appoint the chairperson among its elected members without a shareholders' vote.

Unless otherwise provided by the articles of association, the shareholder meeting passes resolutions on the election and removal of any director by an absolute majority of the votes represented at the respective meeting.

4.5 Rules/Requirements Concerning Independence of Directors

Swiss company law does not require business corporations to have independent directors. The SCBP, however, emphasises that well-founded decisions can emerge only by exchanging ideas and critical views between the board of directors and the executive management. It recommends that the majority of the board should consist of independent members, meaning non-executive members of the board of directors who have never or at least not for the last three years been members of the executive board and have no or comparatively minor business relations with the company.

According to the SCBP, where there is cross-involvement in other boards of directors, the independence of the member in question should be carefully examined on a case-by-case basis. The board of directors may define further criteria of institutional, financial or personal independence. The nomination committee should be predominantly composed of independent directors. For the compensation committee, only independent members of the board of directors should be proposed for election to the shareholders.

Banking and Insurance

For banking and insurance entities, FINMA has issued rules in its circulars "Corporate Governance – banks" (2017/01) and "Corporate Governance – insurers" (2017/02). Pursuant to these rules, at least one third of the board of a banking entity must consist of non-executive and independent directors. Board members are generally considered to be independent if they are not (and have not been during the past two years) engaged in any other function for the respective entity (including as auditor). Independent directors shall not maintain significant business relations with the entity that could lead to conflicts of interest and/or act on behalf of significant shareholders.

Information on Board Members

The SIX Directive Corporate Governance requires from listed companies the publication of information for each non-executive member of the board of directors regarding:

- whether they were a member of the management of the issuer or one of the issuer's subsidiaries in the three financial years preceding the period under review; and
- whether they have significant business connections with the issuer or one of the issuer's subsidiaries.

Conflicts of Interest

The statutory duty of care and loyalty requires the directors to perform their duties with due care and safeguard the interests of the company in good faith, including avoiding and properly addressing conflicts of interest. According to Swiss case law, resolutions taken by the board in disregard of existing material conflicts of interest of any board member participating in such votes may be null and void. In addition, if a director fails to comply with its duty and favours its own interests over those of the company, any shareholder may hold such a director, and potentially the board, liable for any damage caused by such a breach of the duty of loyalty, and seek indemnification (for D&O liability claims, see **4.8 Consequences and Enforcement of Breach of Directors' Duties**).

In practice, companies' organisational regulations will often provide for appropriate rules and measures in the case of a director's conflict of interest (such as disclosure of conflict, possible abstention from voting and/or meeting).

4.6 Legal Duties of Directors/Officers

The board of directors is responsible for the ultimate management and representation of the company. Its core duty is to determine the corporate strategy and allocate corporate resources (strategic governance). In general, the board is authorised to decide on all matters that are not reserved to the shareholder meeting or the auditors (by law or by the articles of association), or delegated to the executive management based on organisational regulations.

Statutory law enumerates certain fundamental matters specifically reserved for the board for decision-making (see **3.2 Decisions Made by Particular Bodies**).

4.7 Responsibility/Accountability of Directors

The board owes its fiduciary duties primarily to the company, and must represent it and act in its best interests. When determining the best interests of the company, the board, according to the prevailing legal opinion in Switzerland, shall consider the long-term interests of the shareholders as well as those of other stakeholders, such as the company's employees or creditors.

4.8 Consequences and Enforcement of Breach of Directors' Duties

The board members and the "de facto directors" (ie, persons not formally appointed as directors but who factually act as directors and significantly influence the company's decision-making process), as well as the members of executive management, are liable for damages caused by intentional or negligent breach of their duties. As a rule, D&O liability (directors' and officers' liability) is joint and several, and each director may be held personally liable. Under the business judgement rule as developed by Swiss case law, it is generally accepted that any business decision taken in a proper, unbiased and reasonably informed manner does not constitute a breach of obligations, even if it turns out to have been materially wrong in retrospect.

The expected level of care is generally assessed under an objective standard. Specialist knowledge may however lead to a raised standard when assessing the actions of an individual board member.

Liability Actions

D&O liability actions may be brought by the company, the shareholders, and, in the event of its bankruptcy only, the company's creditors. Shareholders' actions can be either direct if they suffered direct damage or as a derivative suit on behalf of the company if a shareholder has suffered indirect damage (ie, damage to the value of their shares resulting from damage suffered by the company). However, formal actions against board members are rather rare in practice. Many conflicts end with out-of-court settlements, frequently facilitated (and financed) by D&O insurers.

In addition, while Swiss company law contains some rules to address and ease the cost concerns that typically arise in the event of shareholder lawsuits, these rules do not effectively foster shareholders' actions, mainly because they are inapplicable to payments of advances to the courts. Finally, plaintiffs may also prefer actions against auditors, where deemed possible, in search of "deep pockets".

4.9 Other Bases for Claims/Enforcement Against Directors/Officers

In addition to the potential claims mentioned under **4.8 Consequences and Enforcement of Breach of Directors' Duties**, the board of directors of listed companies may be subject to criminal sanctions pursuant to the OaEC (to be integrated in the amended Swiss company law as of 1 January 2023) if it consciously, "against the board's better knowledge", authorises payments to members of the executive management or receives inadmissible remuneration in violation of the applicable say-on-pay regulations (ie, by paying forbidden golden handshake payments, etc). It follows that decisions on remuneration for the board and executive management and their subsequent payment or receipt, respectively, have to be carefully prepared in compliance with the OaEC.

As a principle, companies cannot validly preclude the liability of directors and executive management in advance. The annual shareholder meeting may, however, grant discharge to the directors and executive management, as well as to other organs of the company, for the preceding business year. As a consequence, the company itself and all shareholders voting in favour of the resolution are precluded from bringing an action against the directors and executive management with regard to facts known to the shareholder meeting at that time.

Often, companies seek D&O insurance coverage for their members of the board and executive management.

4.10 Approvals and Restrictions Concerning Payments to Directors/Officers

For private companies, it is generally the exclusive competence of the board to determine the remuneration of its members and of the executive management.

The Swiss Federal Supreme Court has persistently stated that the remuneration must be justifiable with a view to the general financial situation of the company as well as to the relative contributions of the individual board members to the company. This principle also follows from the duty of care and loyalty of board members, which only vaguely limits the board's discretion in determining the remuneration. The Supreme Court exercises restraint in reviewing remuneration decisions as it considers the companies' governing bodies to be best suited to address such issues.

In the event of apparently disproportionate remuneration – for example, when there is misappropriation of corporate funds – Swiss company law provides for a special action to recover damages suffered by the company. In addition, excessive misappropriation of funds could, under certain circumstances, also be relevant from a criminal law perspective (disloyal management). For certain financial institutions, the FINMA circular "Remuneration schemes" sets standards applicable to all employees, including executive management.

Say-on-Pay

Swiss companies with shares listed on a Swiss or foreign stock exchange, however, are obliged to annually submit the board's proposal on executive compensation to the shareholders for a binding vote (binding say-on-pay). The shareholder meeting has to vote separately on the proposed aggregate amount of compensation for each member of the board of directors, the executive management and, if any, the advisory board. However, in contrast to certain foreign legislations on executive pay, the Swiss OaEC (to be integrated in the amended Swiss company law as of 1 January 2023) does not impose a limit or maximum amount (cap) on remuneration.

Companies are required to set out the details of the vote on compensation in their articles of association. Various models are possible. It is, for example, possible to vote on fixed compensation for the term until the next ordinary shareholder meeting (prospective vote) or on a performance-based compensation for the closed financial year (retrospective vote). Often, major Swiss listed companies provide in their articles of association for a vote on a compensation cap, whereby the shareholders shall in advance vote on the maximum amounts of compensation for the respective governing bodies for the coming business year (prospective vote). In addition to such a prospective binding vote, some Swiss multinational companies also hold a (retrospective) consultative non-binding say-on-pay vote after the respective business year – a bit paradoxically – to address international market expectations and particularly voting guidelines of globally acting proxy advisers.

Specific types of executive benefits and compensations – such as loans, credits and pension benefits outside the occupational pension – require an explicit basis in the company's articles of association. This also applies to the maximum terms and the maximum notice periods for service or employment agreements with members of the board of directors and of the executive management. In any event, notice periods or fixed contract terms exceeding one year are impermissible.

Certain types of compensation to members of the board and executive management – eg, non-statutory severance payments ("golden parachutes"), undue advanced compensation ("golden hello") or certain types of transaction bonuses – are not allowed. The conscious ("against better knowledge") payment or receipt of impermissible compensation by members of the board of directors, the executive management, or the advisory board (if any) are punishable by imprisonment and fine.

Special Requirements During Public Bids

Following the launch of a public takeover offer, any amendments to executive agreements with executive management members may qualify as defensive measures and as such may not be altered subject to the approval by the shareholder meeting and a review and approval by the Takeover Board. Even in a pre-bid phase, the Takeover Board may, as case law demonstrates, declare changes to agreements of executive management null and void if fundamental principles of corporate law – in particular, the duty to act in the company's best interests – are disregarded.

4.11 Disclosure of Payments to Directors/Officers

Privately held companies are not required by law to specifically disclose the remuneration, fees, or benefits payable to their directors and executive management. Regarding publicly held companies, however, Swiss company law requires the disclosure of the respective aggregate remuneration amounts for each, the board and the executive management, and in addition the total compensation of each of the board members as well as the highest total compensation among the members of executive management (but not the specific compensation of the other members of executive management). Further specific disclosure requirements apply. That information is to be disclosed in a separate audited compensation report to the shareholders pursuant to the OaEC (the OaEC to be integrated in the amended Swiss company law as of 1 January 2023).

The SIX Directive Corporate Governance extends the above-mentioned requirement to all issuers with a primary listing at the SIX Swiss Exchange (ie, with no other main listing) whether incorporated in Switzerland or not. In addition, it requires disclosure of information on the basic principles and elements of compensation and share-ownership programmes as well as the method of its determination.

For banking entities, insurances, funds as well as branches thereof, FINMA has issued rules in its circular "Remuneration schedules". These rules contain the basic principles and general elements of compensation with regard to all employees, directors and officers of the company. However, implementation of these rules is only compulsory for larger banks and insurance companies.

5. SHAREHOLDERS

5.1 Relationship Between Companies and Shareholders

The shareholder meeting is the paramount body of a company. The shareholders are entitled to elect and remove the board of directors and the statutory auditors.

Swiss company law provides for a variety of rights of shareholders that may be categorised in participation and property rights, including the right to information and inspection, and the right to set the dividends. The SCBP emphasises the importance of comprehensive information of shareholders to enable them to exercise their rights on a fully informed basis.

5.2 Role of Shareholders in Company Management

The management of a company is by statutory law conveyed to the managing body (board of directors and executive management). Consequently, shareholders are not supposed to be involved in the management of the company (for their competences, see **3.2 Decisions Made by Particular Bodies**). Shareholders may, however, try to exert pressure and thus indirectly influence the decision-making process and actions of the board; for example, by formally requesting additional information or a non-binding vote in a shareholder meeting on a specific issue that falls within the competence of the board, by threatening or bringing removal motions relating to certain board members, or shareholders' suits against the company to protect their rights, or against liable directors or officers to penalise non-compliance with statutory duties and recover damages.

Some shareholder activists also use the media to make the relevant position of the (dissident) shareholder known to the public.

5.3 Shareholder Meetings

Ordinary and extraordinary shareholder meetings are a core element of corporate governance in Switzerland. The ordinary shareholder meeting takes place either physically or virtually (the latter due to COVID-19-regulations, to be replaced by corresponding company law provisions as of 1 January 2023) once a year within six months of the end of the financial year. Further, extraordinary shareholder meetings may be convened as and when required.

Convening a Meeting

In general, the board of directors convenes the shareholder meeting. Further, shareholder(s) who represent(s) at least 10% of the share capital or shares with a nominal value of CHF1 million may request the convening of a meeting (if the thresholds are not reduced in the articles). In order to hold a shareholder meeting, the notice convening the meeting must be given no later than 20 days before the date for which it is scheduled.

The notice must include the agenda items and the motions of the board of directors, and, if any, of the shareholders who have requested the meeting to take place or an item to be placed on the agenda. These formal invitation rules may be disregarded in the case of a universal meeting where all shareholders or representatives of all the company's shares are present.

Shareholder Participation

When conducting the meeting, shareholders are entitled to participate and exercise their rights in person or by a proxy. Based on the OaEC provisions (to be integrated in the amended Swiss company law as of 1 January 2023), shareholders of listed Swiss companies may also authorise an institutional proxy, the so-called independent proxy. Such an independent proxy needs to be elected by the shareholder meeting and is obliged to exercise the voting rights granted by the shareholders in accordance with his or her respective instructions.

Following the introduction of virtual shareholder meetings under the COVID-19 regulations, this possibility will be maintained under the revised Swiss company law.

5.4 Shareholder Claims

Under Swiss company law, D&O liability actions may be brought against the members of the board and executive management in accordance with Articles 754 et seq CO by:

- the company;
- the shareholders (see **4.8 Consequences and Enforcement of Breach of Directors' Duties**); and
- in the event of the company's bankruptcy, the company's creditors (see **4.8 Consequences and Enforcement of Breach of Directors' Duties**).

5.5 Disclosure by Shareholders in Publicly Traded Companies

Pursuant to the FinMIA, significant shareholders who acquire or sell equity securities (shares, any kind of rights to buy or sell including options or other financial instruments) of a Swiss listed company (or foreign company primarily listed on a Swiss stock exchange), thereby reaching or crossing the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 33.33%, 50% or 66.66% of the voting rights of the company, must notify the company and the stock exchange within four trading days. Within two additional trading days, the company shall disclose to the public any reports it has received concerning such changes in the ownership of its shares.

6. CORPORATE REPORTING AND OTHER DISCLOSURES

6.1 Financial Reporting

All companies are obliged to prepare an annual report with the annual accounts, composed of the balance sheet, the profit and loss statement, and the notes to the accounts. Larger companies additionally must draw up a cash flow statement and a management report. In general, the annual report must be made available to the company's shareholders. In private companies, however, it does not have to be disclosed to the public.

SIX-listed companies must publish (by ad hoc announcement) audited annual reports and unaudited half-yearly interim financial reports in accordance with International Financial Reporting Standards or, where permitted in the respective trading segment, with alternative recognised accounting standards (such as US GAAP or Swiss GAAP-FER).

6.2 Disclosure of Corporate Governance Arrangements

Contrary to privately held companies, listed companies and their shareholders have to fulfil certain reporting and disclosure requirements provided for by the SIX Listing Rules, starting with a duty to disclose significant shareholdings (see **5.5 Disclosure by Shareholders in Publicly Traded Companies**). Further requirements include the following.

Ad Hoc Publicity

As a rule, the company must immediately disclose to the market not publicly known, price-sensitive facts that occur in connection with the business activities of a listed company. A fact is considered price-sensitive if its disclosure is capable of triggering a significant change in market prices and of affecting a reasonable market participant in its investment decision (ex ante determination). A price change is significant if it is considerably greater than the usual price fluctuations.

The SIX Listing Rules and the SIX Directive on Ad Hoc Publicity have been partially revised in 2021, with the following main changes: the new regulations repeal the practice of per se price-sensitive information and leave the determination of whether information is price-sensitive to the issuer (other than for the annual and interim reports); ad hoc announcements containing price-sensitive information must now be flagged as such ("Ad hoc announcement pursuant to Article 53 LR") and be made separately available and easily identifiable on the issuer's website; additionally, issuers are required to implement adequate and transparent internal rules or processes to ensure the confidentiality of price-sensitive facts whose disclosure has been postponed.

Information on Management and Control Mechanisms

The SIX Directive Corporate Governance requires SIX-listed issuers to include in their annual report a separate corporate governance section concerning important information on the management and control mechanisms at the highest corporate level. Although information on remuneration is compulsory (see **4.10 Approvals and Restrictions Concerning Payments to Directors/Officers**), other broad categories of information – such as group and capital structure, board of directors, auditors, shareholder participation rights, change of control or defence measures, as well as information policy – may be dealt with in accordance with the principle of "comply or explain". If the issuer decides not to disclose certain information, it must explain why.

Management Transactions

The SIX Directive on the Disclosure of Management Transactions imposes obligations on listed issuers to disclose any buy-or-sell transactions concluded by the directors and members of the executive management in the respective issuer's equity securities or financial instruments. Each issuer has to ensure that its members of the board and executive management report each management transaction to the issuer within two trading days. The issuer has to publish the notified transaction via the SIX electronic reporting platform for the disclosure of management transactions within three trading days following such notification; the report will be shown without mentioning the individual's name.

6.3 Companies Registry Filings

Swiss companies must file relevant corporate information and changes thereof with the competent Cantonal Registry of Commerce; in particular, changes in the articles of association, such as changes of corporate purpose, capital structure, any share transfer restrictions, appointments to the board as well as other individuals authorised to sign on behalf of the company. This information is publicly available. Filings must be made upon occurrence and are also published electronically in the Swiss Official Gazette of Commerce.

7. AUDIT, RISK AND INTERNAL CONTROLS

7.1 Appointment of External Auditors

Depending on the size of the entity, a company has to submit its accounts and financial statements to an ordinary (full) audit or a limited audit. No audit requirement exists for smaller companies with less than ten full-time employees, if their shareholders unanimously resolve to opt out of the audit requirement. If there is an audit requirement, the company has to elect an appropriate qualified independent auditor. An ordinary audit of the annual accounts, and, if applicable, the consolidated accounts, is required for the following companies:

- public companies that trade their shares at the stock exchange, have bonds outstanding, or contribute at least 20% of the assets or of the turnover to the consolidated accounts of a listed company;
- companies that exceed two of the following thresholds in two successive financial years – a balance sheet total of CHF20 million, sales revenue of CHF40 million, and/or 250 full-time positions on annual average;
- companies that are required to prepare consolidated accounts;
- if the company's shareholders who represent at least 10% of the share capital request so; or
- if the articles of association provide for it or the shareholder meeting decides that the annual accounts are subject to an ordinary audit, even if the law does not require so.

An ordinary audit must be carried out by an external qualified auditor. If the company is not subject to an ordinary audit, it has to submit its annual accounts for a limited audit by a licensed independent auditor. With consent of all shareholders, a limited audit may be waived if the company does not have more than ten full-time employees.

Auditors are accountable and may be liable to the company and to the shareholders and creditors for losses arising from any intentional or negligent breach of their duties.

7.2 Requirements for Directors Concerning Management Risk and Internal Controls

Swiss financial reporting rules require that companies or groups of companies that have to submit their annual accounts to an ordinary (full) audit (see **7.1 Appointment of External Auditors**) are subject to a review and confirmation by the auditors as to the existence of an appropriate internal control system. There are, however, no statutory requirements for the specific establishment and effective organisation of the internal control system. This responsibility lies with the board of directors. An exception applies for banks and private insurance companies, for which FINMA has set forth specific requirements regarding risk management and internal controls in the relevant circulars ("Corporate Governance – banks" and "Corporate Governance – insurers", respectively).

Such companies additionally have to report on the company's risk assessment process and the identified material risks in the management report accompanying the annual financial statements. These provisions shall ensure that the corporate risk of medium-sized and large enterprises is regularly monitored and analysed. The ultimate responsibility lies with the board of directors, which has to evaluate material business-related risks in a forward-looking and systematic manner.

In addition, the SCBP also recommends that the board of directors should provide internal control and risk management systems that are suitable for the company; it shall refer to financial, operational and reputation-based risks.

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