

Switzerland

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1. GENERAL INFORMATION ON THE CORPORATE GOVERNANCE OF COMPANIES

1.1 Describe the corporate bodies of a company and the management powers granted to each of them. Which corporate bodies are mandatory and which can be appointed on a voluntary basis?

In a corporation limited by shares (*société anonyme* or SA/*Aktiengesellschaft* or AG) (the Corporation), the corporate bodies are: (a) the general meeting of shareholders; (b) the board of directors; and (c) the statutory auditors. In a limited liability company (*société à responsabilité limitée* or Sàrl/*Gesellschaft mit beschränkter Haftung* or GmbH) (the LLC), the corporate bodies are: (a) the general meeting of quotaholders; (b) the managers; and (c) the statutory auditors.

The rules governing the general meeting of shareholders/quotaholders (the GM) and the statutory auditors are substantially the same for the Corporation and the LLC and the developments made below in relation to the Corporation are applicable to the LLC.

The GM is the supreme authority of the Corporation and is mandated by law. The following powers are granted by law to the GM and may not be delegated to any other corporate body:

- adopting and amending the articles of association;
- appointing and removing the members of the board of directors and the auditors;
- approving the annual report and the consolidated financial statements;
- approving the annual financial statements and resolving on the distribution of dividends;
- voting the annual directors liability discharge;
- resolving on the following issues which are by law reserved to the shareholders' meeting: share capital increase; share capital reduction; limitation or suppression of the rights of first subscription; creation of extraordinary reserves; appointment of special auditor; dissolution of the corporation; and appointment and removal of liquidators.

In addition, the GM has the powers which have been granted to it by the articles of association of the Corporation, provided such powers are not powers which by law belong to the board of directors. In practice the powers of the GM are usually not extended beyond the powers mandated by law as the formalities required to hold a GM make it ill suited to take managerial decisions. Institutional joint venture is the area where the grant of powers going beyond the mandatory powers is frequently seen.

The board of directors (the BoD) is the executive body of the Corporation. Swiss corporate law provides that the BoD: (i) may pass resolutions on all matters which have not been reserved to the GM by law or the articles of association; and (ii) shall manage the business of the Corporation to the extent it has not delegated such management. The delegation of the management powers of the BoD is limited by law and the following powers may not be delegated by the BoD to the Corporation's officers or to any other third party:

- approving the ultimate direction of the business of the Corporation and giving the necessary instructions;
- determining the organisation of the Corporation ;
- determining the accounting, financial control and the financial planning of the Corporation, to the extent necessary for the management of the Corporation;
- appointing and removing the persons to which the BoD has delegated the management and representation of the Corporation;
- supervising the persons to which the BoD has delegated the management of the company, in particular from the point of view of their compliance with the law, the articles of incorporation, by-laws and instructions from the BoD;
- preparing the annual report and the GM and carrying out the resolutions adopted by the GM;
- notifying the bankruptcy court if liabilities of the Corporation exceed its assets.

The statutory auditors (the Auditors) are also a mandatory body of the Corporation. However for Corporations with less than 10 full time employees, the shareholders can decide through a unanimous resolution of the GM not to appoint any Auditor. In practice, most Corporations appoint Auditors.

The scope of the Auditors' duties will depend on the nature and size of the Corporation. Corporations which are listed, which have issued bonds or which cross certain financial or operational thresholds (balance sheet, revenue or number of employees) are subjected to a full-fledged financial audit. Corporations which do not fall within one of the above categories are only subject to a more limited financial audit although such Corporations may decide to voluntarily subject themselves to the full-fledged financial audit.

1.2 What is the most common system of corporate governance? Are there any alternative systems?

For most small and mid-sized private Corporations, the most common system of corporate governance remains the minimum standard required by law: the GM, the BoD and the Auditors. Even for small or mid-sized Corporations where this may not be required, it is considered good practice to retain Auditors.

Swiss corporate law does not require Corporations to maintain committees for certain specific tasks. However, the Code of best practice of *economiesuisse* (the Code), which is the essential guidebook for

corporate governance of public companies (or large privately held companies), recommends a committee structure with an audit committee, a compensation committee and a nomination committee. The usual practice is for all these committees to be composed of non-executive directors. The creation of committees of the BoD usually corresponds to a functional allocation of tasks within the BoD and not to a formal delegation of power from the BoD to such committees. Consequently the committees prepare the decisions of the BoD and its members advise the BoD accordingly, but the power to decide remains with the BoD. Provided the BoD retains all the powers which by law can not be delegated, it is entirely possible to formally delegate certain decisional powers to a committee of the BoD (eg compensation committee)

1.3 Is it possible to appoint a legal entity as a director of the company?

Legal entities are not eligible as members of the BoD or as a manager of an LLC.

1.4 Does the concept of alternate or substitute directors exist in your jurisdiction?

This concept does not exist under Swiss law.

2. APPOINTMENT, REVOCATION, RESIGNATION AND REPLACEMENT OF DIRECTORS

2.1 Describe the manner in which directors are appointed and the term of their office. Can directors be re-elected? Can foreign citizens be appointed as directors?

The directors are appointed by resolution of the GM. The BoD will put the election of the directors on the agenda of the GM and will outline the proposals of the BoD in this respect. The election of the directors usually requires only a majority resolution. The articles of association can however provide for a qualified majority.

It is customary for publicly listed companies and for large privately held companies to have a nomination committee whose task will be to make recommendations regarding vacancies to be filled on the BoD.

The shareholders do not have to follow the recommendation of the nomination committee and may vote in favour of candidates which have not been vetted by the nomination committee.

The duration of a director's term is set forth in the articles of association but Swiss law currently provides that such term cannot exceed six years. Directors can be re-elected, unless the articles of association provide otherwise. In publicly listed companies and large privately held companies, the usual term for a director is one year. It is however possible to provide for longer terms and create a staggered board. Directors can be re-elected. There is no limit to the number of terms in the law, but the articles of association may provide for certain limits, such as the member's age or the number of consecutive terms.

Part of Swiss corporate law is currently under revision and such revision contemplates that for listed companies the default duration for directors' term will be one year, unless the articles of association provide otherwise. In any event, the term for directors of a listed company may not exceed three years under the contemplated revision. Directors of listed companies will however remain re-eligible. This revision will be submitted to the vote of the Swiss people in the second semester of 2012.

Foreign citizens can be appointed as directors. There is no requirement for the directors to be Swiss residents. However, each Corporation or LLC is required to have at least one representative with a residence in Switzerland. Such representative can be either a director or an officer of the company.

2.2 Are there any specific requirements which a person must satisfy to be appointed as a director? Which are the causes, if any, of non-eligibility, incompatibility or forfeiture of the directors' office?

Directors must be individuals. Legal entities may not act as director of a Corporation or manager of an LLC. Besides the legal prohibition for any person involved in the audit of the Corporation (including employees of the statutory auditor) from simultaneously sitting on the BoD, Swiss corporate law does not provide for specific causes of non-eligibility, incompatibility or forfeiture. As directors have a duty of loyalty towards the Corporation, it is generally considered that a director who would regularly be in a situation of conflict of interest with the Corporation, should not accept an appointment as director, as he would be unable to discharge its obligations properly. The Corporation may provide in its articles of association for eligibility or forfeiture criteria, such as domicile, nationality or professional qualification. The Corporation may impose certain obligations on the directors to retain their position, such as an obligation to remain independent or a non-competition obligation. The Corporation and its shareholders are free to set these criteria or to impose certain obligations on the directors, but such criteria or obligations should not be arbitrary or abusive or incompatible with the obligation to treat all shareholders or group of shareholders fairly.

2.3 In which cases can directors be revoked?

Directors can be revoked by the GM at any time by a majority resolution (unless the articles of association provide for a qualified majority). The only exception is for Corporations who have issued several classes of shares. For such Corporations, Swiss corporate law provides that each class of shares is entitled to one class representative on the BoD. The GM may only revoke a class representative on the BoD if there is good cause for such revocation. However, each class of shares retains the right to request at any time the revocation of its class representative. If the GM does revoke the class representative as requested by the corresponding class of shares, such class representative can remain on the BoD as ordinary member, not as class representative.

The BoD does not have the right to revoke any of its members. It is a power

that rests exclusively with the GM. The BoD may suspend one of its members provided: (i) there is legitimate cause for such suspension (eg blatant breach of the director's fiduciary duties); and (ii) the BoD immediately summons an extraordinary GM to resolve on the revocation of the director.

Before revoking or suspending a director, particular attention should be paid to labour law as a revocation or suspension of a director may be valid from a Swiss corporate law standpoint while amounting to a breach of Swiss labour law, resulting in significant liabilities for the Corporation.

2.4 What are the causes of termination of directors' office? In which cases, if any, will the entire board of directors terminate as a consequence of the termination of some of the directors?

As indicated above, the GM is the sole body of a Corporation which has the power to revoke a director and such revocation is valid from a Swiss corporate law point of view regardless of the cause for such termination. There is no circumstance where the revocation of some of the directors would automatically result in the entire BoD terminating, except if a provision to that effect were inserted in the articles of association. However, such a provision would not have any interest in practice, given that the revocation of directors can be resolved by the GM at any time irrespective of the cause and that such right may not be validly eliminated or restricted.

2.5 How are directors replaced after their revocation, resignation or termination of their office for other reasons?

The power to replace a director who has been revoked or who has resigned early rests exclusively with the GM. Unless the articles of association provide for a specific or minimum number of directors and the revocation or termination results in the Corporation no longer being in compliance with its articles of association, there is no obligation to immediately replace a revoked or resigning director. The BoD may decide to wait for the next ordinary GM to propose a new candidate and it may also propose not to replace the departed director.

2.6 What are the publicity requirements concerning the appointment, revocation, resignation and replacement of directors?

Any appointment, revocation, resignation and replacement of directors have to be notified to the Commercial Register and such information is then published in the Swiss Commercial Gazette. The composition of the BoD (past and present) is also available on the website of the Commercial Register.

The filing made to the Commercial Register is not constitutive: a director is appointed or revoked as of the date the GM passes the corresponding resolution or as of the date the director effectively resigns. However, good faith third parties remain entitled to rely on the entries in the Commercial Register. It is therefore important in practice to proceed with the appropriate filing with the Commercial Register immediately.

3. RELATIONSHIP BETWEEN DIRECTORS AND THE COMPANY

3.1 What is the legal nature of the relationship between the company and its directors (mandate, employment or other)? Is the company liable for social security charges for its directors?

The relationship between a Corporation and its directors is in principle a mandate. That being said, it is not uncommon for the director and the Corporation to be bound in parallel by an employment relationship. This is typically the case for managing directors to whom the managerial duties of the BoD have been delegated and for executive directors. It is generally considered that non-executive directors are only bound by a mandate relationship.

Compensation paid by the Corporation to its directors is considered in Switzerland as a salary from a social security point of view. The Corporation will be required to deduct from such compensation the portion of social security premiums due by the directors and will then pay to the relevant authorities the amount so deducted together with the portion of social security premiums due by the Corporation itself.

3.2 Are directors always entitled to a compensation for their office? How is such compensation determined? Are specific forms of compensation (such as participation in the profits, stock options, fringe benefits or others) common?

Swiss corporate law does not require that directors be compensated for their office. In practice, non-executive directors are always compensated. For executive directors, their compensation is usually set forth in their employment agreement and there is usually no separate consideration payable for the office of director.

Compensation of the directors may very rarely be decided by the GM or mandated by a specific provision in the articles of association. In practice, the power to set the compensation of the directors is usually left to the BoD. In listed companies and large privately held companies, this task is frequently delegated to a compensation committee.

It is usual in listed companies and large privately held companies that a portion (usually up to 50 per cent) of the compensation of directors be paid in blocked shares or stock options.

Following a constitutional initiative, the Swiss people will vote in the second half of 2012 on whether or not the compensation of directors and officers of publicly listed companies should be subjected to fairly restrictive provisions. Although it is too early to predict the result of such a vote, it is safe to say that the compensation of directors and officers of publicly listed companies will become more strongly regulated in Switzerland. It is very likely that the compensation of the BoD and the top management will be submitted to the approval of the GM and that more extensive disclosure obligations will be enacted. It is also likely that the payment of a signing bonus and severance package (golden parachute) will be prohibited unless approved by a qualified majority of the GM, which would make them very difficult to use in practice.

3.3 Describe the rules applying to the situations of conflict of interest between the company and its directors.

The duty of a director is to always act in the interest of the Corporation, including when he or she is in a conflict of interest situation. If the director fails to act in the interest of the Corporation and favours his or her own interests over those of the Corporation and thereby causes damage to the Corporation, he or she will be liable towards the company for such damage. Any shareholder will have the right to bring a derivative action against such director and seek indemnification on behalf of the Corporation. Swiss corporate law does not provide for specific provisions to address conflict of interest situations. There is in particular no legal requirement on a director to abstain from attending meetings of the board or from casting his or her vote at such meeting when he or she is in a situation of conflict of interest. Corporations will often adopt internal regulations to set out the appropriate course of action for directors in conflict of interest situations (such as disclosure, abstention from the meeting, abstention from voting or withdrawal/resignation/revocation from the BoD).

4. DIRECTORS' OBLIGATIONS

4.1 What are the main obligations of directors of a company?

As indicated above (see question 1), there is a presumption of power in favour of the BoD. Swiss corporate law provides that the BoD may pass resolutions on all matters not reserved to the general meeting by law or the articles of association. Consequently unless the BoD has validly delegated to one or more directors (managing directors) certain of its powers, the main obligations of the director of a Corporation is to attend the BoD meetings, to participate to the deliberations and votes of the BoD's meetings, summon extraordinary BoD meetings whenever the situation of the Corporation warrants such a meeting and generally comply with its duty of care and duty of loyalty towards the Corporation. For Corporations who have created committees within the BoD or who have allocated (but not formally delegated) certain tasks to individual directors, such directors have to attend the relevant committees and generally prepare for the BoD the items for decision which will then be formally resolved upon by the BoD.

4.2 What is the level of diligence required upon directors? Does the 'Business Judgment Rule' apply to directors and to what extent?

A director owes a duty of care and a duty of loyalty towards the Corporation. The duty of care requires the director to act in the same way as a diligent and competent director would have acted when placed in the same circumstances. The compliance of a director with his or her duty of care is therefore assessed by reference to an objective standard (ie the hypothetical diligent and competent director), unless a director is an expert in a certain field in which case the duty of care of such director will be assessed by reference to a diligent and competent director having the same level of expertise in the relevant field.

In practice, the fact that the actual compliance of a director with his or her duty of care is assessed by reference to an objective standard does not mean

that Swiss courts are systematically second-guessing the decisions made by directors or the BoD. When Swiss courts assess the decisions of the BoD, the key consideration is not so much whether the BoD took the right decision but whether the process leading to that decision was reasonable and professional. In other words, Swiss courts will defer to a decision of the BoD (even if such decision subsequently proved ill-advised) provided such decision appeared reasonable at the time and was taken after the directors considered all factors which diligent and competent directors would have considered in the same circumstances. It is therefore important for the BoD to document the decision-making process with references to the advice received from legal or financial advisers or from in-house experts within the Corporation.

4.3 Are directors subject to a non-competition obligation?

Directors have a duty of loyalty towards the Corporation. This duty of loyalty requires them to further proactively the interests of the Corporation and to abstain from any action which could harm those interests. That a director would discourage the Corporation from pursuing a profitable venture in order for him or her to pursue it directly, or to propose the same venture to a third party, would typically amount to a breach of loyalty on the part of the director. Swiss corporate law therefore does set hard and fast rules on non-competition and all directors' actions which may be in competition with the Corporation have to be assessed from the perspective of their compliance with such director's duty of loyalty towards the Corporation.

For directors who sit on the board of several Corporations, Swiss corporate law neither provides for any dilution of the duty of loyalty nor does it prescribe an order of precedence between the duties of loyalty owed to several Corporations by a director. It is generally considered that a director should not accept a position on the BoD of a Corporation which is in direct competition with another Corporation on the BoD of which such director already sits. When a director sits on the BoD of two Corporations which end up in a situation of conflict of interests, the rule for the director should be to abstain from participating in the meetings and votes in both companies, which may very well be problematic in itself if the matter is highly confidential (eg the director sits on the BoD of two companies who intend to acquire the same target company).

5. RESOLUTIONS OF DIRECTORS AND BOARD OF DIRECTORS

5.1 Describe the matters that normally fall within the powers of directors and/or board of directors, as well as those matters that are reserved to the competence of the shareholders' meeting.

As indicated above (see question 1), there is a presumption of power in favour of the BoD. Swiss corporate law provides that the BoD may pass resolutions on all matters not reserved to the general meeting by law or the articles of association.

Firstly, the BoD is responsible for the strategy which the Corporation is to pursue. In practice, the strategy will be principally formulated and proposed by the management, but it is submitted to the BoD for discussion and approval. The BoD is further responsible for the form of organisation and the

corporate structure of the Corporation. In the same logic, the BoD appoints the members of the management and grants any power of representation. As a further consequence of the non-delegable responsibility of the BoD for the Corporation's organisation, the BoD supervises the persons to whom it has delegated any power of representation. Supervision encompasses in essence three core duties: the duty to select the authorised representatives, the duty to instruct the authorised representatives and the duty to supervise the authorised representatives.

This implies that the BoD has a duty to carefully pick the authorised representatives and make an informed choice, as it is in practice one of the most important decisions they are called to take. The BoD has to instruct the management clearly and has to set the relevant goals to be achieved. Finally, the BoD has to carefully supervise the activity of the authorised representatives by requesting periodical reports and ascertaining that these reports are accurate. In practice it is expected that the BoD challenges the management regularly and thoroughly to make sure that the BoD is properly informed at any given time.

Secondly, the BoD is responsible for the preparation of the financial statements of the Corporation and the annual report to the shareholders. It has to take all organisational measures to ensure that the financial statements are established in accordance with the accounting principles applicable to the Corporation and that these accounting principles are consistently applied and that the accounts are accurate. For that purpose, the BoD is responsible for the design of the internal control system and the establishment of a control environment which ensures the accuracy of the accounts. It is one of the tasks of the external auditors to report on the existence of an adequate internal control system of the Corporation.

Thirdly, the BoD is responsible for ensuring that management and all authorised representatives comply with the law, the articles of association, the by-laws and any instruction of the BoD. In practice, this means that the BoD requests from management the appointment of adequate staff to ensure ongoing compliance throughout the organisation.

Fourthly, the BoD is responsible for ensuring that the risks associated with the business are properly evaluated and managed. Finally, the BoD creates an internal audit function to review the control environment of the company, the internal control system and the compliance mechanisms. Internal audit reports directly to the BoD or the Audit Committee.

Fifthly, the BoD is responsible for the enforcement of the capital protection provisions of the law. It has to undertake the necessary recapitalisation measures in case of capital loss and it is responsible for notifying the bankruptcy court, if the capital is entirely lost, ie if third party liabilities exceed the assets of the company.

Finally, the BoD is responsible for calling the general meeting of the shareholders and to submit audited accounts for approval. It publishes the annual report to the shareholders. The general meeting of the shareholders must be held within six months from the end of the business year.

For the matters which belong by law to the GM please refer to question 1.

5.2 Describe the manner in which the board of directors is convened and how meetings can be held (eg written consent in lieu of a meeting or other, video or telephone conferences). Can a board of directors be held without a formal call?

Swiss corporate law does not prescribe the manner in which the BoD has to be convened or how meetings can be held. It is up to the Corporation to either set in the organisational rules of the BoD or, more rarely, in the articles of association, the provisions which govern the summon and the holding of BoD meetings. Corporations may therefore provide that BoD meetings are summoned by fax, letter or email. Corporations may also provide that BoD meetings may be held through conference call or videoconference or through other electronic means. Swiss corporate law requires the BoD meetings be minuted and the minutes executed by the chairman and the secretary of the BoD. Provided all directors are present and consent to such process, a BoD meeting can be validly held without a formal call.

Swiss corporate law authorises written resolutions of the BoD provided none of the directors requires a formal meeting of the BoD to discuss any of the matters to be resolved upon.

Swiss corporate law prescribes at least one BoD meeting per year and the Code recommends one BoD meeting per quarter or more often if the business of the Corporation so requires.

5.3 Which is the quorum necessary to pass a resolution?

Swiss corporate law provides that the resolutions of the BoD are made by the majority of the votes cast but does not prescribe a quorum to pass a resolution. It is customary for the organisational regulations of the BoD (and more rarely for the articles of association) to provide for a quorum for the BoD meetings.

Each member of the BoD has one vote. The chairman has a casting vote, unless the articles of association provide otherwise.

5.4 Is it possible to challenge directors' resolutions? If so, by whom and in when?

A shareholder, a member of the BoD (who did not vote in favour of the resolution) or any other person having a legitimate legal interest, may in very rare and serious circumstances challenge resolutions of the BoD which are null and void, such as:

- any resolution withdrawing or limiting the rights of shareholders or directors which result from mandatory provisions of law;
- any resolution limiting the rights of shareholders or directors to control the company;
- any resolution disregarding the fundamental structures of the Corporation (eg resolution of the BoD on matters which do not belong to the BoD) or violating the provisions protecting the stated capital of the Corporation;
- any resolution of the BoD which has been passed by a BoD which had not been properly summoned;

- any resolution of the BoD which has been passed in breach of any quorum or qualified majority requirements.

There is no minimum percentage of capital required from a shareholder to challenge a board resolution which is null and void. Except for the very exceptional cases outlined above, the decisions of the BoD are never null and void and may thus not be challenged.

6. DELEGATION OF POWERS TO SINGLE DIRECTORS

6.1 Is it possible that the corporate bodies delegate certain powers to single (managing) directors or to a committee (executive committee) of the Board? If so, describe in which circumstances and to what extent. Are there any matters that cannot be delegated?

Swiss corporate law allows the BoD to formally delegate its management duties to a single managing director, to certain officers of the Corporation or to an executive committee. For such delegation to be valid the articles of association of the Corporation should authorise it and the organisational rules of the BoD should set out the scope of such delegation. The organisational rules of the BoD may either: (i) provide that all managerial duties of the BoD are delegated except for the tasks which by law can not be delegated; or (ii) provide that only specific duties are delegated and any duties not specifically listed remain with the BoD. In practice, it is usual for Swiss companies to delegate the managerial duties to a managing director or to the senior management of the company, while providing that for certain type of transactions or for undertakings which exceed certain thresholds (eg duration or amount) the approval of the BoD is required.

The delegation of the managerial duties of the BoD is limited by law and the following duties may not be delegated by the BoD to the Corporation's officers or to any other third party:

- approving the ultimate direction of the business of the Corporation and giving the necessary instructions;
- determining the organisation of the Corporation ;
- determining the accounting, financial control and the financial planning of the Corporation, to the extent necessary for the management of the Corporation;
- appointing and removing the persons to which the BoD has delegated the management and representation of the Corporation;
- supervising the persons to which the BoD has delegated the management of the company, in particular from the point of view of their compliance with the law, the articles of incorporation, by-laws and instructions from the BoD;
- preparing the annual report and the GM and carrying out the resolutions adopted by the GM;
- notifying the bankruptcy court if liabilities of the Corporation exceed its assets.

6.2 What are the rights and the duties of the delegating corporate body in respect to the delegated director (eg information rights, duty of supervision, etc)?

The BoD which has decided to delegate to a managing director, to the senior management or to an executive committee all or part of the BoD powers which can be delegated has a duty to properly choose the persons to which such powers are delegated. The BoD has to ensure that the persons to whom it delegates certain powers have the abilities and competences to exercise these powers in the interest of the Corporation. The BoD also has the duty to precisely instruct the persons to whom it delegates certain powers so that such persons know precisely what their responsibilities are, the goals which they are expected to achieve and to whom they have to report. The BoD have the obligation to supervise the persons to whom it delegates certain power to ensure that such persons are wielding the delegated powers in compliance with the organisational rules of the Corporation and are taking the right decisions. The BoD requests from such persons regular reports and ascertains that these reports are accurate. In particular it is expected that the BoD will question the management regularly and thoroughly to make sure that it is properly informed of the situation of the Corporation at any given time.

6.3 What is the level of diligence requested from the delegating corporate body compared to the diligence requested from the managing director?

With respect to powers which have been validly delegated, the level of diligence which is required from the BoD corresponds to the level of diligence which could be expected from a diligent and professional director placed in the same circumstances with respect to the appointment, instruction and supervision of the persons to which certain powers were delegated. In other words, the BoD will not be directly responsible for the decision of a managing director but will be liable if it was deficient in selecting, instructing or supervising such managing director.

The diligence requested of the managing director is the same duty of care and duty of loyalty which is required from any member of the BoD (see answers to questions 4.2 and 4.3)

6.4 Does the circumstance that the powers were delegated to a managing director mitigate the potential liability of the delegating corporate body? If so, in which cases and to which extent?

The circumstance that the powers were properly delegated to a managing director changes the nature of the BoD responsibility. The BoD is not responsible directly for the decisions taken by the managing director but will nevertheless be held liable for the damages resulting from such decision if the BoD is found to have breached its duty of care in selecting, instructing and supervising the managing director.

6.5 Can directors delegate some of their powers to third parties?

The position of director is personal and a director cannot delegate his or her

powers to a third party. In particular a director cannot appoint a third party to attend any meeting of the BoD in its stead. Swiss corporate law authorises the BoD to delegate its powers to a managing director or to one or several members of the senior management. From the perspective of the members of the BoD, it is advisable to delegate day-to-day managerial duties to carefully selected, instructed and supervised managers or managing directors and to retain in the BoD only the powers which cannot be delegated or for which the BoD has put internal procedures in place which allow the BoD to pass a resolution in compliance with its duty of care.

7. CIVIL LIABILITY OF DIRECTORS

7.1 Describe the types of civil liability that directors may incur and the situations which may give rise to such a liability.

The directors of a Corporation are liable to the Corporation, to the shareholders and to the creditors of the Corporation for any losses or damages resulting from the breach of their fiduciary duties (duty of care and duty of loyalty). If such breach has caused loss or damage only to the Corporation, a shareholder can only bring a legal action for the indemnification of the Corporation (derivative action). If the breach of fiduciary duty is causing direct loss or damage to the shareholder (as opposed to indirect damage resulting from the loss or damage suffered by the Corporation), then such shareholder can bring a legal action against the breaching director and seek direct indemnification of its damage. The plaintiff (ie the Corporation or a shareholder) will have to prove: (i) the breach of the director's fiduciary duties; (ii) the damage suffered by the Corporation or the shareholder itself; (iii) the causation between the breach of fiduciary duty and the damage; and (iv) that the breach is the result of a wilful action or negligence of the director. If the board of directors has lawfully delegated the day-to-day business to a third party such as the management, the board is, however, exempt from liability provided that it can show that the management has been carefully selected, instructed and supervised.

7.2 Which subjects can bring a liability action against directors?

Liability actions against directors can be brought by the Corporation itself, any shareholder of the Corporation or any of its creditors. If the breach of fiduciary duty by a director is causing direct loss or damage to a shareholder or to a creditor (as opposed to indirect damage resulting from the loss or damage suffered by the Corporation), then such shareholder or creditor can bring a legal action against the breaching director and seek direct indemnification of its damage. If the breach of fiduciary duty by a director is causing only direct loss or damage to the Corporation (and consequently an indirect damage to the shareholders and potentially the creditors) then only the Corporation or the shareholders (but not the creditors) can bring a liability action (shareholders' derivative action). If the Corporation is adjudicated bankrupt, the liability action against the director will be conducted primarily by the bankruptcy estate. If the bankruptcy estate does not want to pursue such liability action, it will assign these rights to the

shareholders and/or the creditors of the Corporation who are willing to continue (and finance) such court action.

7.3 What are the statutes of limitation and the procedure of each liability action?

The statutes of limitation for each liability action is five years from the date when the claimant became aware of the losses or damages incurred and in any event 10 years from the date when the breach of fiduciary duty occurred.

If the indemnification claims against the directors derive from the breach of criminal statute which provides for a longer statute of limitation, then the indemnification claim is subject to this longer statute of limitation.

7.4 May a director be exonerated from liability? If so, in which cases?

Swiss corporate law provides that directors are exonerated from their liability towards the Corporation (as opposed to their direct liability towards the shareholders or the creditors) if the GM has voted to grant them a liability discharge. It is customary in Switzerland for the BoD to propose that the GM grants the liability discharge on a yearly basis.

The vote of the GM has no effect on the liability of the directors towards the creditors of the Corporation. The vote of the GM is not binding on the shareholders who have voted against the discharge but in this case such shareholders have to initiate a liability action against the directors within six months of the GM vote or their right to sue the directors will automatically lapse.

The discharge granted by the GM to the directors covers exclusively actions or omissions of the directors which were known to the shareholders who voted for the discharge. It does not cover any action or omission which was not known by the shareholders at the time of the discharge vote.

7.5 Can directors of a holding company be liable for damages caused to the controlled company?

Unless the director of a holding company may be considered as a *de facto* corporate body of the controlled company, he or she will not be held liable towards the controlled company or its creditors for damages caused to the controlled company. Such a director may be considered as a *de facto* corporate body if it interferes with the management of the controlled company in disregard of the corporate organisation of the controlled company. Typically the director of a holding company who would directly instruct officers or employees of the controlled company (even though he or she has no legal standing to do so) would be considered as a *de facto* director and be held liable for any loss or damage resulting from the breach of the duty of care or loyalty owed to the controlled company.

7.6 Specific analysis of liability in case of insolvency or bankruptcy.

The BoD is responsible for the enforcement of the provisions of Swiss corporate law protecting the stated capital of the Corporation. It has to undertake the necessary recapitalisation measures in case of capital loss and

it is responsible for notifying the bankruptcy court if the capital is entirely lost, ie if third party liabilities exceed the assets of the Corporation. If the BoD fails to notify the bankruptcy court when the Corporation becomes over-indebted, the directors will be held liable for any increase of the Corporation's over-indebtedness from the moment when the BoD should have notified the bankruptcy court to the moment when such notification was actually made.

The power to notify the bankruptcy court belongs to the BoD and cannot be delegated. Therefore notification made by one director is not sufficient. In practice, if a director considers that the Corporation is over-indebted and that a notification to the bankruptcy court should be made but is unable to convince a majority of the BoD, then such director should resign his position immediately and notify the BoD of the reason behind such resignation.

8. TAX LIABILITY OF DIRECTORS/CRIMINAL LIABILITY OF DIRECTORS

8.1 What are the most common white collar crimes committed by directors in your jurisdiction?

The most common white collar crimes that could be committed by directors in Switzerland would be fraud, tax fraud, embezzlement, money laundering and fraudulent bankruptcy.

8.2 Can a company, as a legal person, be held liable, together with its directors, for the crimes committed by them in the company's interest?

In Switzerland, the principle is that a company can be held liable for the crimes committed by its directors or employees only if the individual director or employee who actually committed the crime remains unidentified due to the faulty internal organisation of the company. To the extent the individual director or employee who committed the crime can be identified, then the company will not be held liable.

By exception, for a limited number of infractions, a Swiss company can be held criminally liable alongside the individual director or employee who has committed the crime (even if such director or employee has been identified) if the company did not take all measures which could be reasonably expected from it to prevent such crimes. This regime applies to the crimes of: (i) aiding and abetting a criminal organisation (Article 260ter Swiss Criminal Code (SCC)); (ii) terrorism financing (Article 260quinquies SCC); (iii) money laundering (Article 305bis SCC); and (iv) active corruption in the private and public sector and grant of benefits (Article 322ter, 322quinquies and 322septies paragraph 1 SCC and Article 4a of the Law on Unfair Competition).

There are other exceptions provided in Swiss tax laws where the Corporation can be fined for tax fraud committed by its directors or employees, who themselves will be held criminally liable (Article 57 of the Federal Law on the harmonisation of direct taxes and Article 181 of the Federal Law on Direct Federal Tax).

Swiss social security law typically provides that the directors are criminally liable for infractions committed by them such as withholding social security contributions from salaries without paying these amounts to the competent

authorities. In certain instances the Corporation may be jointly liable for fines inflicted on the directors.

8.3 Where the company can be held liable for the crimes committed by its directors, how can the risks of a potential ‘criminal’ liability of the company be mitigated?

For the crimes which do not enter into the second category identified under question 8.2, the risks of a potential criminal liability of the company can be mitigated by internal procedure which enables the company to identify the actual author of the crime. If the actual author is identified, then the company will not be liable under the SCC.

For the second category of crimes identified under question 8.2, the company can mitigate the risks of potential criminal liability by maintaining state of the art compliance procedures aimed at preventing such crimes such as stringent KYC and/or PEP policies, anti-bribery policies, etc.

8.4 Where the company can be held liable for the crimes committed by its directors, describe the penalties to which such a company may be subject.

The penalty to which the company may be subject is a fine of up to CHF 5 million (Article 102 SCC). In addition, the criminal judgment may be published and the company may be held liable to the state for a monetary claim corresponding to the proceeds of the crime.

9. OTHER PERSONS ACTING AS DIRECTORS

9.1 Are there any specific rules applying to persons who act as directors of the company without being formally appointed?

Article 754 of the Swiss Code of Obligations which governs the liability of directors towards the Corporation, its shareholders and creditors explicitly provides that the persons who were in charge of the management of the Corporation, such as persons who act as directors without being formally appointed, will be held responsible to the Corporation, its shareholders and creditors to the same extent as duly appointed director.

The Corporation who has knowingly tolerated persons acting as its directors without being formally appointed will be bound by any agreement which falls within the corporate purpose of such Corporation and which has been entered on behalf of the Corporation by the *de facto* director.

9.2 Can the persons who act as directors without being formally appointed be held liable as directors?

Yes. See answer to question 9.1.

10. INTERNAL AUDITORS

10.1 Do companies appoint internal auditors or boards of auditors? If so, is such appointment mandatory and in which cases?

Swiss corporate law does not require companies to appoint internal auditors or a board of auditors. As indicated above, one of the tasks of the BoD which

cannot be delegated is the supervision of the persons to whom the BoD has delegated the management of the company, in particular from the point of view of their compliance with the law, the articles of incorporation, by-laws and instructions from the BoD. The fact that the ultimate responsibility of the Corporation's compliance with laws, regulations and its own articles of association and by-laws rests with the BoD does not mean however that the BoD of a Swiss Corporation should not appoint internal auditors or a board of auditors if it considers that such bodies are warranted in view of the size and scope of business of the Corporation.

The Code recommends that listed Corporations appoint internal auditors and in certain regulated industries (such as the bank industry) internal auditors are actually mandated by the law regulating such industry.

In practice, all Swiss listed Corporations and many large privately held Corporations appoint internal auditors or a board of auditors because they (or their directors) recognise that the compliance function is an integral part of a well managed company.

10.2 Describe the rules concerning the appointment, revocation, resignation and replacement of internal auditors and the relevant publicity requirements.

Swiss corporate law does not regulate the appointment, revocation, resignation and replacement of internal auditors. The Code recommends that the audit committee of the BoD be composed exclusively of non-executive directors. Internal auditors will typically be employees of the Corporation. In certain regulated industries, such as the banking industry, the regulation is more detailed with the requirements that the members of the internal audit be independent from the senior management and report directly to the BoD.

10.3 Are there any specific requirements which a person must satisfy to be appointed as an internal auditor? Which are the causes, if any, of non-eligibility, incompatibility or forfeiture of the auditors' office?

As this is an area which is not specifically regulated by Swiss corporate law, the BoD is free to devise the criteria which candidates to the position of internal auditors have to satisfy, it being understood that in so doing the BoD has to comply with its fiduciary duties.

10.4 Are internal auditors always entitled to a consideration? How is such consideration determined?

As internal auditors are typically employees of the Corporation, they will be entitled to a salary. The level of compensation will be agreed between the Corporation and the internal auditor at the time he or she is hired or retained for such function.

10.5 What are the powers and duties of internal auditors or boards of auditors within the company?

The powers and duties of internal auditors will be set both in their employment agreement and the internal regulation of the Corporation, in

particular the line of reporting on any issue discovered in the course of the internal audit.

10.6 Where a board of internal auditors is appointed, describe its decision making process.

The decision making process of a board of internal auditors would be set out in the by-laws of the Corporation. In practice its decision making process will typically be inspired by the one applied at the level of the BoD.

10.7 Describe the rules governing the liability of internal auditors.

Internal auditors are typically employees of the Corporation and their liability is no different from the liability of any other employees under Swiss labour law.