The Corporate Governance Review

Thirteenth Edition

Editor
Will Pearce

The Law Reviews

THE CORPORATE GOVERNANCE REVIEW

THIRTEENTH EDITION

Editor
Will Pearce

THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
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www.thelawreviews.co.uk

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ISBN 978-1-80449-164-5

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

A&L GOODBODY LLP

ALLEN & GLEDHILL

BASAN ATTORNEY PARTNERSHIP

BOWMANS

BREDIN PRAT

DAVIS POLK & WARDWELL LONDON LLP

DELFINO E ASSOCIATI WILLKIE FARR & GALLAGHER LLP STUDIO LEGALE

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VIEIRA DE ALMEIDA

WACHTELL, LIPTON, ROSEN & KATZ

WKB WIERCIŃSKI, KWIECIŃSKI, BAEHR

YKVN

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PREFACE

Over the past 40 years, corporate governance rules applicable to publicly traded companies have developed around the world, building on the basic corporate law framework governing the relationship between a company, its directors and its shareholders. These rules have taken a different form and legal status depending on the jurisdiction in question, usually ranging from mandatory compliance, or voluntary compliance with mandatory regular public disclosure of non-compliance, through to simple voluntary compliance with best practice or investor expectations.

In general terms, a common framework for corporate governance rules now seen across many jurisdictions comprises some combination of mandatory compliance with corporate law and stock exchange rules (the former focused on substance and the latter focused on disclosure) and voluntary compliance with guidance or best practice recommendations from national or supranational accounting or governance bodies or organisations representing investors.

Initially, corporate governance rules – led in large part by action taken by the Securities and Exchange Commission in the US, following the collapse of Penn Central in 1970 and other corporate scandals of the 1970s and 1980s, and by the publication of the UK's Corporate Governance Code by the Cadbury Committee in 1992 – focused on best practice recommendations for the composition of public company boards (including the important role of independent non-executive directors); the role, responsibilities and composition of board committees; and, in the UK, the separation of the roles of CEO and chair.

Driven by accounting scandals, audit failures and a perceived lack of checks and balances on the risk taken by public company boards, including the collapse of Enron, which declared bankruptcy in 2001, corporate governance rules sought to strengthen the powers and expectations of and oversight exercised by audit committees and the role of internal audit, notably through the adoption of Sarbanes-Oxley in the US in 2002.

Over the 15 years that followed, investor focus switched to the risks taken by and rewards offered to executive management, ultimately resulting in a number of jurisdictions adopting some form of 'say-on-pay' regime to help guard against outsized compensation packages driving excessive risk-taking. Investors also demanded greater gender diversity on public boards, with a consensus view emerging that a more balanced board would offer better decision-making and improved long-term stewardship of public companies for the benefit of all investors. Having made significant progress on gender diversity, a similar approach (with industry-set targets for representation and regular public disclosure of progress) has been adopted in a number of jurisdictions to help progress ethnic diversity.

Most recently, the 'g' of governance has been joined by the 'e' of environmental and the 's' of social, with traditional governance teams at investors now expecting public companies to take a more holistic ESG approach to business. This has driven a number of jurisdictions

to require mandatory disclosure by public companies on environmental issues; the pay gap between executive management and the 'average' employee; and sustainability, supply chain and modern slavery issues.

To assist public companies, advisers and market participants alike, who are seeking to navigate this ever-evolving landscape, we are delighted to present the 13th edition of *The Corporate Governance Review*.

In this edition, we have included chapters covering 21 different jurisdictions. Each chapter provides an overview of the applicable corporate governance regime, roles and responsibilities of directors, details of required public disclosures of corporate governance-related matters, the rules of engagement with shareholders and the extent to which a public company can defend a takeover, together with an update of recent and forthcoming developments.

While every author has taken care to make this review comprehensive, up to date and accurate as at the publication date, please remember that each chapter provides only a summary and overview of a large body of law, regulation and market practice. If readers wish to explore specific issues that are of interest or pertinent to them, we suggest they seek detailed advice from suitably experienced counsel. Contact details for the authors are set out at the end of this review.

Finally, thanks to all of the authors, my colleague Sophie Vacikar Bessisso and Emily Wolfin at *The Law Reviews* for helping to pull together this edition.

Will Pearce
Davis Polk & Wardwell London LLP
London
April 2023

Chapter 17

SWITZERLAND

Tino Gaberthüel and Hans-Jakob Diem[1]

I OVERVIEW OF GOVERNANCE REGIME

The statutory corporate law set out in the Swiss Code of Obligations (CO) is the main source of Swiss corporate governance regulation, and applies to both private and public companies. As regards corporate governance, the provisions of the CO focus on transparency, shareholder rights and the principle of parity between the company's corporate bodies. The governance rules of the CO are rather liberal and provide companies with considerable flexibility as regards the set-up of their governance structure. However, on 1 January 2023, the main body of the general corporate law reform of June 2020 entered into effect. The new law has increased governance regulation, mainly by improving shareholder rights. In this context, the rules regarding compensation in listed companies that were formerly contained in an ordinance were incorporated into the revised CO. These rules set forth restrictions on certain remuneration practices and give shareholders a binding say on pay and the right to elect the chair of the board of directors, the members of the compensation committee and the independent proxy. The stock market law incorporated in the Swiss Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading and its accompanying ordinances also contain governance rules – in particular, the shareholders' duty to disclose significant participations – and general rules on public takeovers.

The SIX Swiss Exchange[2] (SIX) has issued its Listing Rules (SIX-LR)[3] and various implementing directives and circulars. These regulations set the ground for good governance with binding rules on periodic financial reporting and, in particular, ad hoc disclosure rules applicable to all SIX-listed companies. The SIX-LR are complemented by the Directive on Information Relating to Corporate Governance (SIX-DCG)[4] and the Directive on the Disclosure of Management Transactions (SIX-DMT).[5] The SIX-DCG requires listed companies to include a chapter on corporate governance in their annual report. The SIX Exchange Regulation AG, the independent regulatory body within the SIX organisation, issues focus review letters indicating the topics on which SIX's assessment will focus in the relevant reporting period.[6] The SIX-DMT requires companies to disclose transactions in its shares and related instruments by members of the board of directors or the management

1 Tino Gaberthüel and Hans-Jakob Diem are partners at Lenz & Staehelin.

2 SIX Swiss Exchange is the main stock exchange in Switzerland.

3 Available at www.ser-ag.com/en/topics/corporate-reporting.html.

4 Available, with the Guideline on the Corporate Governance Directive, at www.ser-ag.com/en/topics/corporate-reporting.html.

5 Available at www.ser-ag.com/en/topics/management-transactions.html.

6 Communiqués, available at www.ser-ag.com/en/topics/regular-reporting.html.

board. SIX is empowered to enforce its regulation through the SIX Exchange Regulation and the Sanctions Commission, which investigate violations and may impose sanctions. Their decisions and sanctions can be appealed to the independent Appeals Panel and, ultimately, to the SIX Arbitration Court.

Further, economiesuisse[7] issued a Swiss Code of Best Practice for Corporate Governance (the Code)[8] primarily for public corporations. The Code contains non-binding recommendations and guidelines with a special focus on the rights and duties of shareholders and the board of directors. The core objectives are ensuring transparency and checks and balances between management and control by the means of a comply or explain approach. The Code has recently been revised.

Independent proxy advisers (such as Ethos and zRating) regularly issue voting guidelines and corporate governance principles on which they base their proxy voting services and recommendations. Corporate governance is a key focus area of those guidelines. Despite the guidelines being non-binding, they have an influence on shareholder voting and public perception.

In addition to the regulations applicable to listed companies in general, there are specific rules on corporate governance applicable to banks, investment companies and insurance companies. The circulars on corporate governance, risk management and internal controls at banks and insurance companies, respectively, and the circular on remuneration schemes of financial institutions issued by the Swiss Financial Market Supervisory Authority are most relevant in this context.

II CORPORATE LEADERSHIP

i Board structure and practices

Swiss companies limited by shares are governed by the general meeting of shareholders and the board of directors. The board of directors and the shareholders' meeting each have their respective duties and competences. This reflects the principle of parity. The board of directors represents the company in relation to third parties and conducts the company's business within the limits of the corporate purpose. The board of directors is thus the company's responsible executive body that may represent the company and manage any matter not reserved to the shareholders' meeting by law or the articles of incorporation. However, Swiss company law allows flexible, individual governance structures. Except for the non-transferable duties, the board of directors may delegate its responsibilities to individual members of the board of directors, the chief executive officer or an executive board. In listed companies, the day-to-day management is almost always delegated to an executive board, resulting in a two-tier structure. This two-tier structure is mandatory for banks and security dealers.

The non-transferable responsibilities of the board of directors are:

a overall management of the company and the issuing of all necessary directives;

b the determination of the company's organisation;

c the organisation of the accounting, financial control and financial planning systems as required for the management of the company;

7 economiesuisse is the largest umbrella organisation representing the Swiss economy.

8 Available at www.economiesuisse.ch/en/publications/swiss-code-best-practice-corporate-governance.

d the appointment and dismissal of persons entrusted with managing and representing the company;
e overall supervision of the persons entrusted with managing the company – in particular, with regard to compliance with the law, articles of incorporation, operational regulations and directives;
f compilation of the annual report, preparation for the general meetings and the implementation of its resolutions;
g filing an application for a debt restructuring moratorium and notifying the court in the event that the company is over-indebted; and
h for listed companies, the preparation of the compensation report.

Listed companies are required to establish a compensation committee whose members are members of the board of directors and are elected annually by the general meeting of shareholders. The articles of incorporation have to set out the basic rules regarding the competencies of the compensation committee. The board of directors may establish other committees; the Code recommends an audit committee in addition to a compensation and nomination committee. The audit committee's members should have specific expertise in the areas of finance and auditing. Further, the audit committee and the nomination and compensation committee should be composed mainly of independent, non-executive members. Although the board of directors is ultimately responsible for the succession of the CEO and its members, the nomination committee establishes principles for and prepares the succession process.

As regards the remuneration of the board of directors and the management board of listed companies, the shareholders' meeting has an annual binding vote on the aggregate maximum compensation of the board of directors on the one hand and the executive board on the other hand. The basis for this is the compensation report, which must be prepared by the board of directors and which is, under certain circumstances, subject to a consultative vote by the general meeting of shareholders. The CO (as amended) further prohibits certain forms of remuneration, such as severance and similar payments (golden parachutes), advance compensation payments and payments linked to the purchase or sale of companies.

ii Directors

The board of directors may consist of one member or several members. If a company has issued different share classes, each share class may elect at least one representative to the board of directors. In practice, a board of directors consists of several members. The Code recommends that the composition of the board be diverse as regards expertise and gender. The revised CO provides for a gender quota for listed companies exceeding certain thresholds. In comparison with other jurisdictions, the Swiss approach is rather flexible. The aim is that each gender shall make up at least 30 per cent of the board of directors and at least 20 per cent of the executive board. The gender quota in accordance with the revised CO entered into force on 1 January 2021. Companies have five years (i.e., until 1 January 2026) to establish the 30 per cent quota in the board of directors and 10 years (i.e., until 1 January 2031) to establish the 20 per cent quota in the executive board. If companies do not achieve the target quotas within the transition period, they must explain in the compensation report the reason for the under-representation and the measures being taken to promote gender diversity in their corporate bodies.

Further, the Code stresses the importance of having a majority of independent, non-executive members in the board of directors. All board members have the same rights and duties. To ensure efficiency, the Code recommends that the board of directors shall not be too big. The appointment of a board secretary is not required. Pursuant to the CO, the term of office in non-listed companies is three years, unless the articles of incorporation state differently. For listed companies, the term of office is limited to one year (starting and ending at the annual meeting of shareholders). Re-election is possible. The members of the board of directors are elected by the shareholders' meeting. In listed companies, the chair must also be elected by the shareholders' meeting. In addition, in listed companies, the articles of incorporation have to limit the maximum number of activities that a member of the board of directors, the executive board or an advisory board may carry out in a comparable capacity in other enterprises with a commercial purpose.

Any member of the board of directors may request information about all matters concerning the company. Any member of the board of directors and the executive board is required to provide information during a board meeting. Outside board meetings, members of the board of directors may ask members of the executive board about the general business performance and, with the approval of the chair, about individual transactions. Inspection of files and records is possible only as far as it is necessary for a member of the board of directors to fulfil his or her duties.

Under the CO, unless the articles of incorporation state otherwise, each member of the board of directors can represent the corporation towards third parties. In practice, signing authority is regularly limited to joint signing authority by two. Moreover, at least one representative with individual signing power or two representatives with joint signing power must reside in Switzerland.

In a two-tier structure, the relationship between the board of directors and the management board must be governed by organisational regulations (by-laws). The Code recommends having a two-tier structure with a majority of non-executive board members and a separation of the functions of chair and CEO. If the company decides that the same person shall act as chair and CEO, the board of directors should establish certain control mechanisms to ensure appropriate checks and balances. For instance, an independent lead director who can independently convene and lead a board meeting should be appointed.

The board of directors must act in the best interest of the company as mandated by the duty of care and loyalty. Shareholders have to be treated equally in like circumstances. According to the general view, a company's interest encompasses the interests of the shareholders as well as those of the other stakeholders, with the sustainable growth of the company being the underlying principle and goal. There are no (strict) rules as to how the board should weigh the interests of the different stakeholders against each other. Ultimately, this weighing and other business decisions are a matter for the board's own diligent judgement. In various decisions of the Federal Supreme Court, the applicability of the business judgement rule has been confirmed. The prerequisites for the applicability of the business judgement rule are a diligent review or assessment process that is based on adequate information and documents and that is free of conflicts of interest. If these prerequisites are met, a court will assess only whether the board's decision was justifiable. If any of the prerequisites are not met, a court will conduct a full assessment.

Under Swiss corporate law, a conflict of interest is deemed to exist if a member of the board of directors or the executive management has individual interests that are opposed to the interests of the company or, more frequently, if he or she has a duty (based on law, contract

or otherwise) to pursue third-party interests that are opposed to the company's interests. If a member of the board of directors or the executive management suffers a conflict, he or she has the obligation to fully disclose the conflict to the board of directors. It is then up to the board, without the potentially conflicted member, to assess the situation and resolve on and implement appropriate measures as required to ensure that the conflict does not negatively affect the company. These measures include an abstention of the conflicted member from the decision and, depending on the circumstances, also from the deliberations, or the establishment of an independent committee consisting of the disinterested board members. If required to address a more serious and detrimental conflict, the board may also decide to shield the conflicted member from any critical information.

III CORPORATE DISCLOSURE

The regulations of SIX require listed companies to publish audited annual financial statements and non-audited half-year accounts in accordance with recognised reporting standards, such as the International Financial Reporting Standards or the US Generally Accepted Accounting Principles. Listed companies must include a corporate governance report in their annual reports. The information to be published in the corporate governance report is set out in the SIX-DCG and includes, among other things, information about the group and its capital structure, shareholders, change of control provisions and defence measures, and information about the members of the board of directors and executive board, basic rules of compensation, and share and option plans. Pursuant to the CO, the board of directors of a listed company is, in addition, required to prepare a compensation report. The remuneration paid directly or indirectly to current or former members of the board of directors or the executive board must be specified in the compensation report. For the board of directors, the compensation of each individual has to be disclosed, whereas for the executive board only the aggregate amount and the highest salary paid have to be indicated. Other than in the European Union, non-listed companies in Switzerland are not required to publish their annual reports.

External auditors must audit the annual financial statements and the compensation report. Auditors must comply with strict independence requirements. They are required to be independent of the board of directors, the executive board and major shareholders. Auditors may not conduct business for or engage in other ways with the company outside the audit work if those activities were to jeopardise their independence. Auditors cannot audit their own work or the work of persons close to them. Moreover, auditors are not allowed to audit companies in which they hold a direct or significant indirect participation or against which they have a substantial claim or debt. The lead auditor of an audit mandate must be changed every seven years. In addition, auditors must meet the qualification requirements of the Federal Act on the Admission and Supervision of Auditors. The qualification requirements concern professional education and an auditor's good standing.

In addition to financial reporting, certain companies are subject to non-financial reporting obligations, which are summarised in Section IV.

Listed companies have to publish price-sensitive information occurring in the sphere of the company (under ad hoc publicity rules) as well as management transactions. The Code recommends publishing the articles of incorporation on the company's website and making the organisational regulations available to shareholders.[9]

9 See also Section V.i for more details about the shareholders' right of inspection.

Shareholders have disclosure duties, too. If a person (acting alone or in concert with others) directly or indirectly acquires or disposes of shares of a listed company and reaches or crosses any of the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the voting rights of the company, that person is obliged to make a disclosure to the company and SIX. Separate disclosure duties exist for long positions (shares, long call and short put, etc.) and short positions (short call and long put, etc.). Netting of long and short positions is not permitted. These disclosures are published on the website of SIX.

As regards non-listed companies, an acquirer or a group of acquirers of shares representing 25 per cent or more of the share capital or voting rights must report the name and address of its ultimate beneficial owner to the company. Any change to the notified information must be reported within three months. This notification duty does not apply to listed companies. Further, if the shareholder is itself a listed company or is controlled by a listed company, then it is required to disclose only this fact and the corporate name and the seat of the listed company. The company is required to keep a register of the ultimate beneficial owners of shareholders holding 25 per cent or more of the share capital or voting rights. The notifications must be stored for 10 years. The register is not open to the public.

IV CORPORATE SOCIAL RESPONSIBILITY / ESG

A board of directors is responsible for the ultimate management of the company and must act in the company's best interests. Establishing adequate risk and compliance management is considered to be inherent to this duty and part of good corporate governance. A requirement of the board to establish a risk committee, however, is mandatory only for certain financial institutions. Most Swiss companies allocate the responsibility at board level to the audit committee or determine risk owners for different risk categories. The CO and the Code oblige the board of directors to establish an internal control system. To complement the Code, economiesuisse issued a position paper, the Fundamentals of Effective Compliance Management.[10] The core of these principles is that the board of directors and the executive board must set the tone from the top to implement effective compliance structures.

The Swiss perspective on whistle-blowing is rather cautious. In its position paper Fundamentals of Effective Compliance Management, economiesuisse states that a whistle-blowing system forms part of effective compliance management.[11] Although the European Union has adopted a specific directive on whistle-blowing and the protection of whistle-blowers,[12] Swiss law does not specifically address whistle-blowing. However, a board of directors has an inalienable duty to ensure effective supervision of the company, wherein whistle-blowing structures should be included. In addition, Swiss employment law implicitly protects whistle-blowers from being dismissed or otherwise discriminated as long as the act of blowing the whistle was proportionate. There was an effort to implement these implicit protections in Swiss employment law; however, the respective bill did not pass Parliament.

A board of directors' duty of care also covers aspects of corporate social responsibility, as acts against social values may harm the company and may pose financial, operational and reputational risks. The Code specifically states that a board of directors must avoid these risks.

10 Available at www.economiesuisse.ch/sites/default/files/publications/compliance_e_web.pdf.

11 cf Fundamentals of Effective Compliance Management, p. 10.

12 See Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

Swiss company law allows the board of directors and the executive board to take into account the interests of stakeholders other than the shareholders. Employment law, the Gender Equality Act and any legislation regarding environmental protection cover certain aspects of corporate social responsibility that must be observed by companies in general.

Under the SIX-DCG, listed companies may opt in to the duty to publish a sustainability report. If a company chooses to do so, SIX will publish the opting in on its website. Companies that have opted in are required to prepare a sustainability report in accordance with internationally recognised standards selected by SIX.[13]

Various revisions of the CO, including the counterproposal to the responsible business initiative that was rejected in a people's vote in 2020, have entered into force in the recent past, providing for additional duties in relation to environmental, social and governance (ESG) matters, especially in respect of non-financial disclosure and supply chain due diligence. On 1 January 2021, a first revision entered into effect that requires raw material producers to publish an annual report specifying payments and other valuable contributions to governmental bodies made during the previous financial year in excess of 100,000 Swiss francs. The first report has to be produced in 2023. On 1 January 2022, a broader set of rules came into effect. Similar to Directive 2014/95/EU (the Non-Financial Reporting Directive), these rules require larger listed companies and other 'public interest companies' to publish a non-financial report each year on environmental aspects (especially carbon dioxide targets), social and employment matters, as well as human rights and anti-corruption matters. The report will have to be approved by the shareholders' meeting and remain publicly available for 10 years. Companies that are subject to the new disclosure obligation will have to publish their first non-financial report in 2024. In addition, any Swiss company (other than small companies), whether listed or not, that (1) imports into, or processes in, Switzerland certain minerals (such as gold) from conflict or high-risk areas, or (2) offers goods or services for which there are reasonable grounds to suspect that child labour was involved has to comply with certain due diligence obligations, especially in relation to its supply chain. These due diligence duties have applied since 1 January 2023. Also, for the first time, in 2024, the board of directors will have to issue a report on compliance with the new due diligence duties. Although these new rules undoubtedly expand the duties of the board of directors of a Swiss company, they do not go beyond the legal framework of other jurisdictions, especially within the European Union. Importantly, the new rules do not establish a new, specific liability regime for Swiss companies or the boards of directors in relation to ESG matters such as environmental hazards in Switzerland or abroad.

V ENGAGEMENT WITH SHAREHOLDERS

i Shareholder rights and powers

Shareholders of Swiss companies have both financial and non-financial rights. Financial rights entail the right to receive dividends that have been resolved by the shareholders' meeting. Dividends can be distributed only from free reserves. Free reserves include disposable balance sheet profits and specifically dedicated reserves. In the event of the liquidation of a company, shareholders have a right to receive liquidation proceeds.

13 A list of companies that opted in and a list of accepted international standards are available at www.six-swiss-exchange.com/shares/companies/sustainability_reporting_en.html.

Non-financial rights include protection and participation rights. The main aspect of shareholders' protection rights is the relative requirement of the equal treatment of shareholders. In principle, one share means one vote, and every shareholder has at least one vote. Swiss law does not grant any special rights (super-voting or special dividend rights) to long-term shareholders. A company may issue different share classes and allocate different voting powers to those shares. This special voting power does not apply to a number of resolutions, such as the election of the auditors or a special audit. Certain resolutions of the shareholders' meeting require a higher quorum than the regular majority vote (e.g., a change of corporate purpose, limitation or exclusion of subscription rights, or limitation of transferability of shares). Another protective right is the subscription right of existing shareholders in the event of a capital increase. The subscription right may be limited or excluded for important reasons by a qualified shareholders' resolution. The action for liability and the right to challenge shareholder resolutions that violate the law or the articles of incorporation or to claim their annulment are further mechanisms to protect shareholders' rights.

Participation rights entail certain information and supervision rights. Shareholders must be provided with the annual financial statements and, if applicable, the auditor's report. In addition, at the shareholders' meeting, shareholders may demand information regarding the company's affairs from the board of directors and regarding the audit from the auditors. Shareholders holding 5 per cent or more of the share capital or voting rights also have the right to inspect the company's books and records. However, the information has only to be provided and the inspection of books and records has only to be permitted to the extent required for the exercise of shareholder rights and insofar as no business secrets or other company interest worthy of protection is jeopardised. Under certain circumstances, shareholders may demand that a special investigation be carried out.

Shareholders who, alone or together, hold 5 per cent or more of the share capital or voting rights in a listed company or 10 per cent or more of the share capital or voting rights in a non-listed company have the right to request that an extraordinary shareholders' meeting be convened. In addition, shareholders holding, alone or together, 0.5 per cent or more of the share capital or voting rights in a listed company or 5 per cent or more of the share capital or voting rights in a non-listed company can request that additional items be put on the agenda of a shareholders' meeting or that their proposals in respect of any agenda items be included in the invitation to the shareholders' meeting. If requested, the rationale put forward by the shareholder has to be printed in the invitation as well. During the shareholders' meeting, any shareholder, regardless of the size of his or her shareholding, can bring a proposal in respect of any item being on the agenda of the meeting.

The convocation to a general meeting of shareholders (including agenda items and proposals of the board of directors) must be made public at least 20 calendar days prior to the meeting. At the meeting, any shareholder has the right to express his or her view on any agenda item.

During the covid-19 pandemic, shareholders' meetings of Swiss listed companies were predominantly conducted without participation of the shareholders. As from 1 January 2023, shareholders' meetings must, in principle, be held as physical meetings again. However, the corporate law reform that entered into effect on 1 January 2023 (see Section I) introduced the possibility to hold meetings in hybrid form in which shareholders can participate either physically at the in-person meeting or virtually by electronic means. In addition, the new law permits companies to introduce the possibility of virtual-only meetings. Although proxy advisers view virtual shareholders' meetings with scepticism, a large number of Swiss

listed companies have adopted or are expected to adopt a respective provision in their articles of incorporation. Importantly, Swiss law ensures that the shareholders have the same participation rights (including the right to vote, to make proposals, to speak or to request information at the meeting) in virtual meetings as they have in physical meetings.

ii Shareholder duties and responsibilities

Under Swiss corporate law, shareholders of a company traditionally have the duty to pay only the issue price of the subscribed shares. It is the general prevailing view that shareholders of a company do not have a duty of loyalty in relation to the company, and that they are not liable for the company's obligations. In listed companies, shareholders must disclose their participation when crossing the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the voting rights; in unlisted companies, the beneficial owner has to be disclosed if a shareholder exceeds 25 per cent of the share capital or voting rights (see Section III).

There is no general code of best practice or guidelines for shareholders in Switzerland. However, in 2013, economiesuisse issued its Guidelines for Institutional Investors Governing the Exercising of Participation Rights in Public Limited Companies (the Investors' Code).[14] The Investors' Code sets out five principles governing how institutional investors should exercise their participation rights in public companies. The main goal is that institutional investors take seriously their responsibility towards clients with regard to ensuring long-term, effective corporate governance of the companies in which they are invested. According to the Investors' Code, institutional investors should systematically exercise their participation rights, and do so in the best interests of their clients. Furthermore, institutional investors shall communicate how they exercise their participation rights, including the underlying reasoning. Following the comply or explain approach, all investors who have agreed to implement the Investors' Code have to publish a statement of accountability wherein they explain any deviation from the Investors' Code.

Swiss law requires Swiss pension funds to exercise their voting rights in the election of board members, the chair, the members of the compensation committee and the independent proxy, and in respect of further items such as compensation. Pension funds must disclose annually to their clients how they have exercised their voting rights.

iii Shareholder activism and proxy advisers

Shareholder activism and proxy fights in Switzerland have increased during the past few years. One of most recent activist campaigns was that by Petrus Advisers against the leadership of Temenos, a Swiss provider of standardised banking software. Petrus Advisers requested the resignation by the chair and the CEO of Temenos, and that the board of directors carry out a strategy review, including in respect of a potential sale of the company. After Petrus Advisers had exercised public pressure during a few months, Temenos announced that its CEO and, after an interim period, its chair would retire. Other noteworthy recent activist campaigns include Third Point's intervention at Glencore and Bluebell's campaign at Richemont. It is expected that numerous other activist campaigns will occur in the next 12 to 18 months.

14 Available at www.economiesuisse.ch/en/publications/swiss-investors-code-downloads.

The demands of most activists in Switzerland (as elsewhere) target the composition of the board of directors (including the chair) and executive board (in particular, the CEO) and their compensation, a review of and change in strategy, or a sale, spin-off or other corporate reorganisation.

Swiss law does not provide for special provisions applicable to activist shareholders. In particular, shareholders are not allowed to inspect the share register. However, the corporate law reform that entered into effect on 1 January 2023 (see Section I) improved the position of activist shareholders in proxy fights by, among other things, lowering the hurdles for requesting extraordinary shareholders' meetings or the addition of items on the agenda or of motions in respect of any agenda items. Also, a board of directors is now required to print the rationale for any motions put forward by activist shareholders in the invitation to the shareholders' meeting, and the independent proxy is permitted to disclose generic information on the received voting instructions to the board only shortly prior to the meeting. It remains to be seen whether these changes, which are intended to enhance shareholder rights, more broadly will result in a significant increase of proxy fights between companies and activist shareholders.

In proxy fights, it is not uncommon for a company (and the activist shareholder) to engage a proxy solicitor to identify shareholders, to explain the board's (or shareholder's) position and arguments, and to convince shareholders to exercise their voting rights at the shareholders' meeting. Activist shareholders may challenge shareholder resolutions. Up to the end of 2020, as an interim measure, activists could request the blocking of the commercial register to prevent, or at least delay, the registration of a merger or capital increase. The register blocking was a simple and effective way of temporarily preventing entries in the commercial register. However, owing to its considerable potential for abuse, the register block was criticised. With the abolition of the register blocking as of 1 January 2021, an entry in the commercial register since then can be prevented only by means of (*ex parte*) precautionary measures.

Proxy advisers such as ISS, Glass Lewis and Ethos are also active in the Swiss market. Parliament adopted a motion requiring the government to propose new legislation addressing conflicts of proxy advisers on 3 June 2020, thereby instructing the Federal Council to submit an amendment to the law to disclose and avoid conflicts of interest of proxy advisers for listed companies and to take into account international developments in doing so. However, in the absence of a physical presence of these proxy advisers in Switzerland – namely, of ISS and Glass Lewis – it remains unclear how the required legislation would effectively be enacted.

iv Takeover defences

The Swiss takeover rules prevent a board of directors and management of a target company from taking frustrating actions without shareholders' approval after a tender offer has been formally announced. 'Frustrating actions' are defined as those that significantly alter the assets or liabilities of the target company (e.g., the sale or acquisition of any target company's assets at a value or price representing more than 10 per cent of the total consolidated balance sheet or contributing more than 10 per cent to the profitability of the target company, and the conclusion of contracts with members of the board of directors or senior management providing for unusually high severance payments). The target board is also prohibited from acquiring or disposing of treasury shares or respective derivatives and from issuing any conversion or option rights, unless those transactions are made in the context of pre-existing

employee share programmes or obligations under pre-existing instruments (such as pre-existing convertible bonds). In addition, the Swiss Takeover Board has the authority to object to defensive measures that manifestly violate company law.

However, the board may still take other steps to counter an unsolicited informal approach or formal offer, including seeking a white knight, running a public relations campaign or bringing legal action against the bidder, especially on the basis that the bidder has not complied with its disclosure obligations, or if the terms of its offer are not in line with the takeover rules. The board could also call an extraordinary shareholders' meeting and propose more effective defence measures, such as the sale of a material part of the business or the issuance of new shares. Apart from specific defence measures in response to a specific bid, the articles of incorporation of a number of listed Swiss companies contain preventive clauses, particularly transfer and voting rights restrictions, which an offeror will normally seek to have removed from the articles as a condition to closing. Under these circumstances, the board is generally perceived to have more leverage in discussions with a bidder, especially in relation to the financial terms of a proposed offer. However, staggered boards are not possible for Swiss listed companies, as board members must mandatorily be (re-)elected each year.

v Contact with shareholders

The main means of contact between a company and its shareholders is the annual general meeting of shareholders. In addition, shareholders may request special information from the company (see Section V.i). Listed companies are required to make ad hoc notifications of price-sensitive facts arising within the sphere of the company.

It is quite common for listed companies to entertain regular contact with their major shareholders and proxy advisers to explain the company's strategy and to better understand shareholder concerns. However, the principle of equal treatment of shareholders, ad hoc publicity and insider regulations, in principle, require the board to not disclose non-public price-sensitive information to selected shareholders. Any such contacts must be in the interest of the company. These contacts are often entertained by the chair, the lead director and investor relations.

The revised corporate law that entered into effect on 1 January 2023 improved communication with shareholders by facilitating the use of technology. For instance, the board may provide that it is possible for shareholders to have access to electronic remote voting (hybrid meetings, see Section V.iii).

VI OUTLOOK

As stated in the previous sections, the main body of the new Swiss corporate law entered into effect on 1 January 2023. Apart from the changes discussed above, the revised CO provided the following noteworthy amendments:

a the share capital of a company can, under certain circumstances, be denominated in a foreign currency;

b shares can have a minimum par value below 1 cent;

c the board of directors can be authorised to increase or reduce the company's share capital within a 'capital band' set forth in the articles of incorporation; and

d the requirements for distributions out of capital reserves and interim dividends have been clarified.

Companies have a two-year transition period (i.e., until 31 December 2024) to adapt their articles of incorporation and regulations to the revised law.

An area that will keep companies and their boards busy in the near to mid-term future is ESG. The developments in this area are rapid, both on a domestic and an international level. As from 2024, larger listed companies and other 'public interest companies' will have to publish an annual non-financial report on environmental aspects (especially carbon dioxide targets) and social and employment matters, as well as human rights and anti-corruption matters (see Section IV for more details). Pursuant to an ordinance of the Federal Council, as a principle, the environmental reporting will have to follow the Recommendations of the Task Force on Climate-related Financial Disclosures. In addition, Swiss companies with a presence or sales in the European Union may, under certain conditions, have to comply with the reporting requirements of the Corporate Sustainability Reporting Directive adopted by the Council and the European Parliament in November 2022. Companies will have to ensure that they monitor and comply with these increasing and rapidly developing national and international ESG requirements.

ISBN 978-1-80449-164-5