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Willem J L Calkoen

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this ninth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society, and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and management, and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, more and more shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust.

What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well. Recently, we see that governments want to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in R&D. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management with new risks entering such as a digitalised world and cybercrime is an essential part of directors' responsibilities, as is the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders, regulations and the press?

Each country has its own measures; however, the chapters of this book also show a convergence. Understanding differences leads to harmony. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2019

Chapter 25

SWITZERLAND

Hans-Jakob Diem and Tino Gaberthüel[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. The CO applies to 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 current governance rules of the CO are rather liberal and provide companies with considerable flexibility as regards the setup of their governance structure. Note that a pending revision of the CO will increase governance regulation, mainly by increasing shareholder rights.[2] In this context, the Swiss Ordinance against Excessive Compensation in Listed Companies (OaEC), which came into force in 2014, will be incorporated into the CO. The OaEC introduced restrictions on several remuneration practices and gives shareholders a binding say on pay as well as 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 (FMIA) and its accompanying ordinances also contain governance rules, in particular the shareholders' duty to disclose significant participations as well as general rules on public takeovers.

The SIX Swiss Exchange[3] (SIX) issued the Listing Rules (SIX-LR)[4] 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 in relation to Corporate Governance (SIX-DCG)[5] and the Directive on the Disclosure of Management Transactions (SIX-DMT)[6]. The SIX-DCG requires listed companies to include a chapter on corporate governance in their annual report. The SIX Exchange Regulation, the independent regulatory body within the SIX organisation, issues

1 Hans-Jakob Diem and Tino Gaberthüel are partners at Lenz & Staehelin in Zurich, Switzerland. The authors would like to thank Rebecca Schmid for her contribution to this chapter.

2 See Section VI.

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

4 Available at https://www.six-exchange-regulation.com/en/home/issuer/obligations/corporate-governance.html.

5 Available together with the Guideline on the Corporate Governance Directive at https://www.six-exchange-regulation.com/en/home/issuer/obligations/corporate-governance.html.

6 Available at https://www.six-exchange-regulation.com/en/home/issuer/obligations/management-transactions.html.

focus review letters indicating the topics on which SIX's assessment will focus in the relevant reporting period.[7] The SIX-DMT requires companies to disclose transactions in its shares and related instruments by members of the board of directors or the management 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[8] issued the Swiss Code of Best Practice for Corporate Governance (Code)[9] 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 as well as checks and balances between management and control by the means of comply or explain.

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 regulations. Despite such regulations being non-binding, they have a significant influence on shareholders' voting and public perception.

Besides the regulation 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. On a day-to-day basis, the board of directors represents the company in relation to third parties and conducts the 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. In reality, the management of the day-to-day business (except for the non-transferable and inalienable duties of the board) is regularly delegated. In listed companies, the management is usually delegated to the chief executive officer (CEO) or an executive board, resulting in a two-tier structure. Such two-tier structure is mandatory for banks and security dealers.

Any matters that have not been allocated to the shareholders' meeting by law or the articles of incorporation are the responsibility of the board of directors. Except for

7 Communiqués, available at https://www.six-exchange-regulation.com/en/home/issuer/obligations/corporate-governance.html.

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

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

the non-transferable duties, the board of directors may delegate its responsibilities to individual members of the board of directors or to third parties (the executive board). The non-transferable responsibilities of the board are:

a the 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;
d the appointment and dismissal of persons entrusted with managing and representing the company;
e the overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, articles of association, operational regulations and directives;
f compilation of the annual report, preparation for the general meetings and the implementation of its resolutions;
g the notification of the court in the event that the company is over-indebted; and
h for listed companies, the preparation of the compensation report as requested by the OaEC.

The board of directors may establish special committees. The Code recommends the establishment of an audit committee and a compensation and nomination committee. The audit committee's members should have specific expertise in the area of finance and audit. Moreover, the OaEC requires listed companies to establish a compensation committee whose members must also be members of the board of directors and who are elected by the general meeting of shareholders.[10] The articles of incorporation must set out the basic rules of the activities of the compensation committee. Further, the audit as well as the nomination and compensation committee should mainly be composed of independent, non-executive members. While the board of directors is ultimately responsible for the succession of the CEO as well as its members, the nomination committee establishes principles for and prepares the succession process.

The main rules regarding the remuneration of the board of directors and the management board of listed companies are set out in the OaEC (and will be transferred into the CO once the pending revision will have been completed and approved by the legislator. For more information on the status of this revision, see Section VI). The shareholders' meeting has a binding vote on the remuneration of the board of directors and the executive board. The basis for this is the compensation report, which must be prepared by the board of directors and which is subject to a consultative vote by the general meeting of shareholders. Moreover, pursuant to the OaEC, certain forms of remuneration are prohibited, 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 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, the board of directors consists of several members. The Code recommends that

10 Article 733 Draft CO.

the composition of the board be diverse as regards expertise and gender. The revised draft CO provides for a gender quota for listed companies exceeding certain thresholds.[11] In contrast to other jurisdictions, the Swiss approach is rather soft. It is envisaged that each gender shall make up at least 30 per cent in the board of directors and at least 20 per cent in the executive board.[12] If the quotas are not met, the report on compensation must specify the reasons for missing the quotas as well as the planned measures to reach the quotas in the future. It is contemplated that companies will have five years to establish the quota in the board of directors and 10 years to do so in the executive board.[13]

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. Pursuant to the revised draft CO, the appointment of a secretary by the board of directors will no longer be required.[14] Pursuant to the CO, the term of office is generally three years unless the articles of incorporation state differently. However, for listed companies, the OaEC limits the term to one year. 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, the OaEC requires that the company's articles of incorporation 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 other legal entities or other organisations registered in the Commercial Register (or a similar register abroad).

Any member of the board of directors may request information on all matters relating to the company. Any member of the board of directors and the executive board is required to provide information during a board meeting. Outside of board meetings, members of the board of directors may ask members of the executive board about the general business performance and, upon special request, about individual transactions. Inspection of files and records is only possible 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. Moreover, at least one representative with individual signing power or two representatives with joint signing power must reside in Switzerland.

In the case of a two-tier structure, the relationship between the board of directors and the management board must be governed in the organisational regulations. 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

11 Article 734f Draft CO; the vote on the introduction of a gender quota was won with 95 to 94 votes in the 2018 summer session of the National Council.

12 A minority of the National Council was in favour of a higher quota, i.e. a representation of each gender of at least 40 per cent in the board of directors and at least 30 per cent in the executive board.

13 The commission of the National Council deviated from the draft bill of the Federal Council and intended to abolish Article 734f 10 years after the entering in force of the new legislation. The National Council, however, rejected such proposal with 97 to 94 votes.

14 This is, in essence, because the function of the secretary was rarely used in practice and could, therefore, be disposed of in the view of the Federal Council (Dispatch of the Federal Council on the partial revision of the CO, BBl 2017 399, 567). The National Council did not deviate from this proposed amendment.

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 must be treated equally in like circumstances. According to the general view, the company's interest encompasses the interests of the shareholders as well as 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, the Court will only assess whether the board's decision was justifiable. If any of the prerequisites are not met, the Court will conduct a full assessment. However, a board decision based on a conflict of interest is not *per se* a violation of the board's duty of care.

Under Swiss corporate law, a conflict of interest is deemed to exist if a board member 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 board member suffers from a potential conflict, he or she has an obligation to disclose such information to the chair or the entire board. It is then up to the board, without the potentially conflicted member, to assess the situation and resolve upon and implement appropriate measures as required to ensure that the conflict does not negatively affect the company. Such 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. The draft CO set forth a specific provision dealing with conflicts of interest of board members.[15] However, the commission of the National Council found the provision to be too broad with regard to the fact that conflicts of interest can have a wide range of nuances. The National Council followed this reasoning and voted against the introduction of the new provision with 143 to 53 votes.

III DISCLOSURE

SIX requires listed companies to publish audited annual financial statements and non-audited half-year accounts in accordance with common reporting standards, such as the IFRS or US GAAP. 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 on the group and capital structure, shareholders, change of control provisions and defence measures as well as information on the members of the board of directors and executive board, basic rules of compensation and share and option plans. Pursuant to the OaEC, the board of directors is required to prepare a compensation report. The remuneration paid directly or indirectly to current or former

15 Article 717a Draft CO.

members of the board of directors or the executive board must be listed in the compensation report. For the board of directors, the compensation of each individual must be disclosed, while for the executive board, only the aggregate amount and the highest salary paid have to be disclosed.

The external auditors must audit the annual financial statements as well as the compensation report. Auditors must comply with strict independence requirements. They must 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 such activities were to endanger 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 the auditor's good standing.

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.[16]

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, such person is obliged to make a disclosure to the company and SIX. Separate disclosure duties exist for long positions (shares, long call, short put, etc.) and short positions (short call, long put, etc.). Netting of long and short positions is not permitted. Such disclosures are published on the website of SIX.

As regards non-listed companies, an acquirer of bearer shares must report his or her name, date of birth, nationality and address to the company. In addition, an acquirer or a group of acquirers of registered or bearer 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. The company is required to keep a register of the holders of bearer shares and 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 RESPONSIBILITY

The board of directors is responsible for the executive 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 is, however, only mandatory 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,

16 Also see Section V.i for more details on the shareholders' right of inspection.

economiesuisse issued the Principles on Effective Compliance Management (Compliance Principles).[17] 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. The Compliance Principles state that a whistle-blowing system forms part of effective compliance management,[18] while Swiss company law does not yet address whistle-blowing explicitly. However, the board of directors has an inalienable duty to ensure effective supervision over the company, wherein whistle-blowing structures should be included. In addition, Swiss employment law implicitly protects whistle-blowers from being dismissed or otherwise discriminated against as long as the act of blowing the whistle was proportionate. Along with the pending revision of the CO, these implicit protective measures shall be implemented in Swiss employment law by explicitly determining when and how a whistle-blower can report a misconduct under any laws or regulations in a legally protected and authorised way.[19]

The board of directors' duty of care also covers aspects of corporate social responsibility (CSR), as acts against societal values may harm the company and may pose financial, operational and reputational risks. The Code specifically states that the board of directors must avoid such risks. Swiss company law allows the board of directors and the executive board to take into account interests of stakeholders other than the shareholders. Employment law, the Gender Equality Act and any legislation regarding environmental protection cover certain CSR aspects must be observed by companies in general.

Under the SIX-DCG, companies may opt in on the duty to publish a sustainability report. If a company chooses to do so, SIX will publish the opting in on its website. In the case of opting in, companies are required to prepare a sustainability report in accordance with internationally recognised standards selected by SIX.[20]

In 2016, a popular initiative of the Swiss Coalition for Corporate Justice (SCCJ) aimed at increasing corporations' human rights and environmental protection efforts was submitted, and it will be put to a Swiss people's vote some time in the future. The initiative proposes that companies should be required to conduct due diligence on human rights and environmental sustainability for their businesses in Switzerland and abroad. Otherwise, they should become liable for violations of national and international human rights and environmental standards taking place in their business activities in Switzerland and abroad.[21] The Federal Council, as well as several political parties, have rejected the initiative.

17 Available at https://www.economiesuisse.ch/en/node/32263.

18 Compliance Principles, p. 10.

19 In this regard, the Federal Council published an additional dispatch and a revised draft bill on 21 September 2018, which was a reaction to the fact that the parliament, due to its lack of comprehensibility and structure, had rejected the original draft in 2015. However, the main focus of the amended draft remains the same.

20 A list of companies who opted in as well as the list of accepted international standards are available at https://www.six-swiss-exchange.com/shares/companies/sustainability_reporting_en.html.

21 The SCCJ's arguments and the submitted initiative are available at http://konzern-initiative.ch/?lang=en.

V SHAREHOLDERS

i Shareholder rights and powers

Shareholders of Swiss companies have financial as well as non-financial rights. Financial rights entail the right to receive dividends that have been resolved by the shareholders' meeting. Dividends can only be distributed 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.

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 power to such 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., change of corporate purpose, limitation or exclusion of subscription rights, 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 have to be provided with the annual financial statements and, if applicable, the auditor's report. In addition, shareholders may demand further information regarding the business of the company and the audit process. Shareholders may also request to inspect the company's books and correspondence as far as such inspection does not harm business secrets or other shareholders' interests. Shareholders may demand the performance of a special audit.

Shareholders who, alone or as a group, hold 10 per cent or more of the share capital or a participation of at least 1 million Swiss francs have the right to request the convening of a shareholders' meeting. In addition, shareholders holding, alone or as a group, 10 per cent or more of the share capital or a participation of at least 1 million Swiss francs can request that additional items are put on the agenda of a shareholders' meeting. Any shareholder, regardless of the size of his or her shareholding, can bring a proposal to any agenda item of a shareholders' meeting. The pending revision of the CO envisages lowering the mentioned thresholds to facilitate the performance of these rights. Under the revised draft CO, it is currently contemplated that, for listed companies, shareholders holding at least 5 per cent of the share capital shall be permitted to request the convening of a shareholders' meeting and shareholders holding at least 0.5 per cent of the share capital shall be permitted to request that an item be put on the agenda of a shareholders' meeting.[22]

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 shareholders' meeting. At the shareholders' meeting, any shareholder has the right to express his or her view on any agenda item.

22 The National Council voted for an increase of the threshold to put items on the agenda from 0.5 to 3 per cent.

ii Shareholders' duties and responsibilities

Under Swiss corporate law, shareholders of a company traditionally only have the duty to pay 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 (see Section III).

There is no general code of best practice or guideline for shareholders in Switzerland. However, economiesuisse issued the 'guidelines for institutional investors governing the exercise of participation rights in public limited companies' (Investors' Code) in 2013.[23] 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 interest 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.

The binding OaEC requires pension funds to exercise their voting rights in the election of the board members, the chair, the members of the compensation committee and the independent proxy, as well as regarding further items such as compensation. Pension funds must additionally disclose to their clients on an annual basis how they have exercised their voting rights.

iii Shareholder activism

Shareholder activism in Switzerland has increased considerably over the past few years. Most recent activist campaigns include Cevian Capital's campaign against Panalpina's chair, who as a result had to resign from office. Cevian Capital further played an important role in the sale of a majority stake of ABB's power grids division to Hitachi, which was the largest Swiss M&A transaction in 2018. A further recurring name on the list of activist shareholders is Daniel Loeb, who, through his investment company Third Point, repeatedly raises demands to Nestlé, including the desire to sell Nestlé's stake in L'Oréal.

In Switzerland, the demands of most activists target the composition of the board of directors and executive board (in particular the CEO) as well as their compensation, a review of and change in strategy, or corporate restructurings. Proxy advisers such as ISS, Glass Lewis and Ethos are also active in the Swiss market. For instance, in connection with Credit Suisse's annual general meeting of 2017, Ethos campaigned for and proposed the rejection of the compensation of the board of directors, as well as of the re-election of the chair. Even though Ethos was not successful and shareholders followed the board's recommendations, the campaign led to extensive discussions regarding the performance of Credit Suisse.

Swiss law does not provide for special provisions applicable to shareholder activists. In particular, shareholders are not allowed to inspect the share register. Moreover, the board of

23 Available at http://www.economiesuisse.ch/en/publications/swiss-investors-code-downloads.

directors is not required to distribute to the company's shareholders any statements made by activist shareholders. As a consequence, the board of directors entertains private conversations and settlement discussions with the activist and, if such discussions are not successful, a public proxy fight between the board and the activist is started. In proxy fights it is not uncommon for the company to engage a proxy adviser to identify shareholders, to explain the board's position and arguments, and to convince shareholders to exercise their voting rights at the shareholders' meeting. Activist shareholders may challenge shareholder resolutions. Moreover, as an interim measure, activists may request the blocking of the commercial register to prevent or at least delay the registration of a merger or capital increase. In the context of the pending revision of the CO, it was discussed whether shareholders should be granted a right to inspect the share register. In the end, such right has not been incorporated in the revised draft CO.

iv Takeover defences

The Swiss takeover rules prevent the board of directors and management of the 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; 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 such 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 PR 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 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 such 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. Since the OaEC came into effect, listed companies are no longer permitted to have staggered boards, as board members may only be elected for one 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, as described above, shareholders may request special information from the company. 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 its major shareholders and proxy advisers to explain the company's long-term 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 pending revision of the CO also intends to improve communication with shareholders by facilitating the use of technology. For instance, listed companies shall be required to offer shareholders the possibility to request registration in the share register by electronic means (e.g., email).[24] In addition, it is contemplated that shareholders shall have the possibility of electronic remote voting.[25] Under the OaEC, listed companies are already required to provide shareholders the opportunity to grant electronic proxies to the independent proxy.

Institutional investors and proxy advisers have gained relevance over the past few years. In this context, the Investors' Code introduced the duty for institutional investors to inform their shareholders about how they exercise their voting rights. The OaEC follows the same principle, and requires pension funds to actually exercise their voting rights as regards certain agenda items, such as the election and compensation of board members. In addition, pension funds must disclose on an annual basis to their clients how they have exercised their voting rights.

VI OUTLOOK

As mentioned above, Swiss corporate law is undergoing significant revision.[26] The key amendments will be the following:

- *a* creating more liberal provisions for the establishment of corporations as well as provisions regarding the capital structure (for instance, the introduction of capital bands to create more flexibility for capital increases and decreases);
- *b* improving corporate governance and shareholder rights;
- *c* modernising shareholders' meetings by the increased use of electronic and digital means;
- *d* transferring the rules of the OaEC into the CO;
- *e* implementing gender quotas;
- *f* further smaller adaptations, for instance as regards provisions on corporate restructuring, reserves and own shares; and
- *g* implementing transparency provisions for companies active in commodity trading similar to the newly adopted EU regulations.

24 Article 686b Draft CO. The National Council decided to include said provision in Article 686 Paragraph 2 bis.

25 Article 701c et seqq. Draft CO.

26 After the revised Draft CO had been debated by the National Council in the summer of 2018, the Council of States was supposed to debate the Draft CO in the winter of 2018. However, its preparatory commission for legal affairs amended the draft in many ways (e.g., it eliminated the possibility for capital bands and went beyond the requirements stipulated in the OaEC in various respects). As a result, the Council of States rejected to debate the Draft CO, and instead sent it back to the commission for legal affairs, which will have to come up with new proposals now.

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