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## **Regulating Corporate Governance following the "Swiss Muesli" Recipe\***

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*The Swiss legal framework on corporate governance is – even after the so called "Minder" initiative has been approved by Swiss voters bringing a series of new stringent provisions on mandatory governance of public companies regarding primarily board and management remuneration – mainly based on a market-driven self-regulation approach and points out the significance of maintaining the decision-making capacity and efficiency at the top company level. The "Swiss Code of Best Practice for Corporate Governance" is governed by the provisions contained in corporation law. Its purpose is to set out guidelines and recommendations but not to force Swiss companies into a straightjacket. Each company should retain the possibility of putting its own ideas on structure and organization into practice. This article shows that, in view of the time pressure driving new legislation, the Swiss "Muesli" approach combining corporate law, on the one side, with self regulated*

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\* This article is based on the speech the author made on the meeting of the European Company Law Experts (ECLE) in Cologne of September 27, 2012. The main objective of the ECLE is to advise on European Union rule making in the field of company law with an emphasis on regulation of stock listed companies, corporate governance and capital market regulation affecting companies.

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*codices on the other side, still constitutes a contemporary and sustainable regulatory concept. In this way, act and code can complement each other to a democratically legitimized, flexible and market-oriented regulation.*

## I. Introduction

Being the regulator of corporate governance, the state is called upon to weigh the entrepreneurial freedom required in order for businesses to thrive against the legitimate interests of shareholders and other stakeholders warranting protection. In doing so, it may not interfere in the decision-making process of executive bodies but rather should only ensure that an appropriate balance is struck between direction and control in a company.

The government has every interest in companies prospering, and it must provide to them the freedom to develop the structures that they deem appropriate for successfully developing their business. At the same time, however, it must ensure that supervision and accountability are guaranteed. Consequently, the central challenge lies in finding the right degree of regulation and freedom.

## II. Regulation of Corporate Governance in Switzerland

### 1. Company Law Framework of Corporate Governance

#### 1.1 *The Company Law in effect since 1991*

With this in mind the Swiss legislator already took essential decisions in principle pertaining to corporate governance in the company law in effect

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since mid-1992. It circumscribed in clear-cut terms the organisational structure of listed companies according to the so called *parity principle of corporate bodies* and accorded the board of directors and the general meeting of shareholders specific *non-transferable and inalienable core powers*.<sup>1</sup> In doing so, it anticipated one central postulate of corporate governance before this concept was even commonly used.

Art. 716a of the Swiss Code of Obligations (CO) is particularly important as it forms the backbone of Switzerland's "mixed system" between the extremes of a classical one tier and a two-tier board model. It contains four decisive corporate governance rules:<sup>2</sup>

(i) The overall responsibility for *establishing strategy* – the "ultimate decision making power" – does not lie with management but with the board of directors. The board of directors decides what objectives are to be pursued and the financial and other resources to be employed to this end.

(ii) The board of directors possesses *overall organisational and financial responsibility*.

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<sup>1</sup> Art. 698, 716, 716a and 716b CO. See regarding parity principle Peter Forstmoser/Arthur Meier-Hayoz/Peter Nobel, *Schweizerisches Aktienrecht*, Berne 1996, § 20 N.10 et seq.; Eric Homburger, *Kommentar zum schweizerischen Zivilgesetzbuch, Obligationenrecht, Aktiengesellschaft*, Zurich 1997, Art. 698 N. 513; Arthur Meier-Hayoz/Peter Forstmoser, *Schweizerisches Gesellschaftsrecht*, 10th ed., Berne 2007, § 16 N. 352; Peter Bockli, *Schweizer Aktienrecht*, 4th ed., Zurich/Basel/Geneva 2009, § 12 N. 3 and § 13 N. 284 et seq.; Christoph B. Bühler, *Regulierung im Bereich der Corporate Governance*, Zurich 2009, N. 611.

<sup>2</sup> Georg Krneta, *Praxiskommentar Verwaltungsrat*, 2nd ed., Zurich 2005, N. 1174 et seq.; Meier-Hayoz/Forstmoser (fn. 1), § 16 N. 410 et seq.; Rolf Watter/Katja Roth Pellanda, in: Honsell/Vogt/Watter (eds.), *Basler Kommentar, Obligationenrecht II*, 3rd ed., Basel 2008, Art. 716a N. 1 et seq.; Bockli (fn. 1), § 13 N. 279 et seq.; Bühler (fn. 1), N. 616 et seq.



(iii) The board of directors is responsible for the *supervision* of management and *compliance*.

(iv) The board of directors may appoint *committees* from among its members to which it may delegate specific supportive tasks, *but not* its ultimate, final decision-making powers.

Art. 716b CO enables the board of directors to delegate the actual *executive management* of business to a *management board*, similar to the two tier board system stipulated by German law. *Delegation* is the usual case in practice; it is subject to the provision of the aforementioned *non-transferable and inalienable core powers reserved to the board of directors* set out in so-called "organisational rules"<sup>3</sup>. These rules correspond somewhat to bylaws under American corporate law. Therefore, combined with its supervisory tasks, a Swiss board of directors retains the powers of an executive body and, as such, is positioned between a German supervisory board and a German management board in terms of its function.

The statutory cornerstones of corporate governance are supplemented by general guiding principles that are seated at a relatively high level of abstraction:<sup>4</sup> reference is made to the *duty of care and the duty of loyalty* of the board of directors and of management board established in Art. 717 para. 1 CO. These obligations also ultimately extend to the duty to implement principles of a timely corporate governance adapted in keeping with specific exigencies.<sup>5</sup>

This means that company law essentially sets out the discretionary and policy-making framework, however leaves companies a relatively large measure of freedom to develop their own corporate governance in line with their own individual requirements. The law also contains various highly determinant specific stipulations with regard to transparency requirements in particular that leave the board of directors virtually no margin of discretion in their implementation.<sup>6</sup> Art. 663b<sup>bis</sup> CO in particular requires listed companies to provide a detailed disclosure of

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the *compensation*, holdings, and the conversion and option rights of the board of directors and executive management. An individual disclosure is required for each board of directors member; the total for executive management and the highest compensation accorded an executive management member must also be disclosed.<sup>7</sup>

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<sup>3</sup> For more details see Peter Forstmoser, *Organisation und Organisationsreglement der Aktiengesellschaft*, Zurich 2011; see also Irene von Moos-Busch, *Das Organisationsreglement des Verwaltungsrates*, Diss. Zurich 1995; Andreas Kummer, *Organisationsreglement in der Aktiengesellschaft, Entscheidendes Instrument für die "Best Practice"*, ST 80 (2006) 916 et seq.; Katja Roth Pellanda, *Organisation des Verwaltungsrates*, Diss. Zurich 2007, 100 et seq.; Bühler (fn. 1), N. 639; Böckli (fn. 1), § 13 N. 321 et seq.

<sup>4</sup> Peter Böckli, *Corporate Governance und "Swiss Code of Best Practice"*, in: von der Crone et al. (eds.), *Neuere Tendenzen im Gesellschaftsrecht*, FS Peter Forstmoser, Zurich 2003, 257 et seq., 267.

<sup>5</sup> Krneta (fn. 2), N. 1641; Ines Pöschel/Rolf Watter, *Rechtliche Pflichten und Verantwortung der Führungsorgane – Praktische Hinweise und Empfehlungen*, ST 80 (2006) 816 et seq.; Bühler (fn. 1), N. 642; Christa Sommer, *Die Treuepflicht des Verwaltungsrats gemäss Art. 717 Abs. 1 OR*, Diss. Zurich 2010, 10.

<sup>6</sup> Böckli (fn. 4), 263.

<sup>7</sup> Vgl. Peter Nobel, *Board and Management Compensation, Ein Inventar rechtlicher Art*, Zurich 2007, 60 et seq.; Roland Müller/Lorenz Lipp/Adrian Plüss, *Der Verwaltungsrat, Ein Handbuch für die Praxis*, 3rd ed., Zurich 2007, 125; Rolf Watter/Karim Maizar, Honsell/Vogt/Watter (eds.), *Basler Kommentar, Obligationenrecht II, Art. 530–1186 OR*, 3rd ed., Basel 2008, Art. 663b and Art. 663c; Bühler (fn. 1), N. 654 et seq.; Böckli (fn. 1), § 8 N. 471 et seq.



## 1.2 Reform of Company Law

In the wake of a series of financial scandals involving major corporations such as *Swissair*<sup>8</sup> and *ABB*<sup>9</sup> in 2001, a relatively large number of *parliamentary motions* were submitted with the objective of having the *Federal Council* – Switzerland’s supreme executive body – subject the existing body of law to a review in terms of corporate governance.<sup>10</sup>

Based on the findings of various expert reports,<sup>11</sup> the Swiss Parliament<sup>12</sup> passed a preliminary draft bill in 2005 for a *transparency law* that compels listed companies to provide detailed disclosures of the holdings and compensation of board of directors and executive management members.<sup>13</sup>

The Federal Council launched the so-called "*major*" *company law reform* with its dispatch of December 2007. This reform is actually partial in nature in that existing statutory cornerstones of corporate governance are left untouched for the most part whereas various specific, in part significant amendments will be implemented. The following takes front and centre stage in this context: the options for shareholders to influence their company and the regulation of top salaries in listed companies.<sup>14</sup>

Whoever initially had the impression that, after the long tale of woe associated with the last major company law reform from 1968 to 1991, the draft bill would be passed quickly and without much fanfare was in for a disappointment. Due to the popular initiative spearheaded by mouthwash manufacturer Thomas Minder in February of 2008 "against fat-cat pay deals"<sup>15</sup>, which triggered an emotionally-charged political debate on the compensation of the top executives of listed companies, Swiss company law reform has again come to a standstill. The decisive event that has determined the further course for resuming the suspended reform took place in March 2013. The Swiss people then had to cast their vote on whether they prefer the restrictive regulation of compensation at the constitutional level proposed by the Minder initiative or whether they opt instead for the more moderate counterproposal passed at the statutory level in the Parliament’s spring session. The arguably most significant difference between the two proposals lied in how shareholders are able to exercise their say with regard to the compensation of board of director’s members and executive management. The Minder initiative demands that formal approval on the total compensation of board of directors and executive management members should be mandatory at each annual general meeting. By contrast, the counterproposal passed by the Swiss Parliament sought to leave it up to the individual company to establish by way of the articles of association as resolved by shareholders whether the resolution of the general meeting pertaining to the compensation of executive management should possess a binding

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or merely a consultative effect. In contrast to the initiative, the counterproposal did not provide for any criminal prosecution where compensation rules are violated.<sup>16</sup>

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<sup>9</sup> Werner Catrina, *ABB – Die verratene Vision*, Zurich 2003, 1 et seq.; Beat Brenner, *Corporate Governance bei ABB*, in: *NZZ Fokus* No. 19, Checks and Balances in Unternehmen, Zurich 2004, 30.

<sup>10</sup> For an overview see Peter Böckli/François Dessemontet/Claire Huguenin, *Expert Report of the Working Group "Corporate Governance" for Partial Revision of Company Law*, Zurich 2004, 36. See particularly the motion Felix Walker regarding "Corporate Governance in der Aktien gesellschaft" of June 20, 2001.

<sup>11</sup> Interim Report of the Working Group "Corporate Governance" of March 25, 2003.

<sup>12</sup> Federal Government accompanying Report on proposed Legislation to amend the Code of Obligations ("Transparency in relation to remuneration of members of the board of directors and the executive board") of June 23, 2004, *BBl* 2004, 4471 et seq.

<sup>13</sup> See remarks at fn. 7.

<sup>14</sup> For an overview see Rolf Watter, *Die "grosse" Schweizer Aktienrechtsrevision, Eine Standortbestimmung per Ende 2010*, Zurich 2010; Hans-Ueli Vogt/Emanuel Schiow/Karin Wiedmer, *Die Aktienrechtsrevision unter Corporate Governance-Aspekten*, *AJP* 18 (2009) 1359 et seq.

<sup>15</sup> *BBl* 2008, 2577 et seq.

<sup>16</sup> See Peter Forstmoser, *Die Entschädigung der Mitglieder von Verwaltungsrat und Topmanagement – Binsenwahrheiten, Missverständnisse und ein konkreter Vorschlag*, in: Trigo Trindade/Peter/Bovet (eds.), *Economie Environnement Ethique*, Zurich 2009, 145 et seq.; Peter



On March 3, 2013 Swiss voters overwhelmingly backed the initiative giving shareholders sweeping authority over executive pay.<sup>17</sup> However, the outcome of the "Minder" initiative with regard to various items continues to be uncertain. First of all, a constitutional amendment providing for new corporate law rules, cannot be self-executing. The implementation of the "Minder" initiative with 24 substantive points, will thus be a matter of parliamentary law-making. Nevertheless *Thomas Minder* put into the amendment the supplement that for the period of time until the law enters into force and effect, the Federal government shall, within one year from the adoption of the amendment, issue the necessary implementing provisions.<sup>18</sup> Thus, the Ordinance implementing "Minder" might already enter into force on January 1, 2014. Since companies will need to properly prepare and organize their shareholders' meetings there will likely be a period subsequent to the day of entering into force and effect to adapt the articles of association and the regulations to the new law, so that the first ordinary shareholders' meetings to be affected by the new provisions might be the ones to be held in 2015.<sup>19</sup>

## 2. Regulated Self-Regulation by the SIX Swiss Exchange

Outside the bounds of company law, Art. 8 para. 1 of the Swiss Stock Exchange Act obligates stock exchanges to regulate the admission of securities for trading. Following from this authorisation, in its *Listing Rules* the SIX Swiss Exchange has established, among other things, what *information* must be disclosed by issuers.

As is the case in most European countries, however in contrast to Germany<sup>20</sup>, Swiss securities exchanges are not public-law entities but rather are constituted as companies under private law. As such, their rules must be qualified as *regulated self-regulation measures*.<sup>21</sup>

I would like to underscore the *Corporate Governance Directive*<sup>22</sup>, which the SIX Swiss Exchange issued on the basis of its statutory-based self-regulation powers and on the basis of relevant provisions of its Listing Rules.<sup>23</sup> The Directive compels issuers to make available to investors specific *key corporate governance information*, to wit:<sup>24</sup>

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Markt und Verantwortung, FS Klaus J. Hopt, Berlin 2010, 3003 et seq.; Christoph B. Bühler, Vergütungen an Verwaltungsrat und Geschäftsleitung: Volksinitiative "gegen die Abzockerei" und Gegenentwürfe, in: Watter (ed.), Die "grosse" Schweizer Aktienrechtsrevision, Eine Standortbestimmung per Ende 2010, Zurich 2010, 247 et seq.; Christoph B. Bühler, Showdown in der Vergütungsfrage: Volksinitiative "gegen die Abzockerei" oder indirekter Gegenentwurf des Parlaments, GesKR Online 1/2012, 1 et seq.; Hans Caspar von der Crone/Benedict Burg, Salärgovernance und Markt für Führungskräfte, in: Sethe et al. (eds.), Kommunikation, FS Rolf H. Weber, Zurich 2011, 311 et seq.

17 Roughly 68% of those who voted supported the "Minder" initiative. See Neil Maclucas, Swiss Back Executive-Pay Controls, *The Wall Street Journal* of March 3, 2013.

18 Art. 197 Item 8 of the Federal Constitution.

19 See Lukas Glanzmann, Die "Abzocker-Initiative" und ihre Folgen, Eine Annäherung an Art. 95 Abs. 3 BV, GesKR Online 1/2013, 1 et seq.; Hans-Ueli Vogt/Manuel Baschung, Wie weiter im Aktienrecht nach der Annahme der Volksinitiative "gegen die Abzockerei"?, GesKR 2013, 5 et seq.; Peter V. Kunz, Leitplanken zur Umsetzung der "Abzocker"-Initiative, NZZ No. 53 of March 5, 2013, 19; Christoph B. Bühler, Vergütungsrecht «Ad interim»: Übergangsfristen und Sofortmassnahmen, ST 2013, 332 et seq.

20 With respect to self-regulation of stock exchanges in Germany and the United Kingdom see Klaus J. Hopt, Vergleichende Corporate Governance, Forschung und internationale Regulierung, ZHR 175 (2011) 444 et seq., 453 et seq.

21 See Albrecht Langhart, Rahmengesetz und Selbstregulierung, Diss. Zurich 1993, 323; Rolf Watter/Dieter Dubs, Bedeutung und Zukunft der Selbstregulierung im Kapitalmarktrecht, ST 79 (2005) 743 et seq., 747; Bühler (fn. 1), N. 158 et seq. und N. 1046 et seq.; Böckli (fn. 1), § 7 N. 15 und § 18 N. 59; dissenting opinion by Daniel Daeniker, Thesen und Haftung für Ad hoc-Publizität, GesKR 1 (206) 139 et seq., 145, who qualifies the Listing Rules as contractual in nature.

22 DCG of October 29, 2008, in force since July 1, 2009.

23 Art. 1, 4, 5 and 49 para. 2 Listing Rules.

24 Art. 4 and Appendix 1 of DCG, see also Comments of SIX Swiss Exchange to the Corporate Governance Directive of September 20, 2007.





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- (i) Details pertaining to the *group structure* and *significant shareholders* or groups of shareholders.
- (ii) Specific details relating to the *capital structure*, such as authorised and conditional capital.
- (iii) Specific particulars on the *members of the board of directors and executive management*, such as their professional career, their business relations with the company, other functions and their *position within the group*.
- (iv) Articles of association provisions by virtue of which issuers depart from discretionary statutory provisions pertaining to the *participation rights of shareholders* (e.g. voting-rights restrictions, qualified quorums etc.).
- (v) Departures in the articles of association from the statutory triggering threshold concerning the *duty to make an offer* under the Stock Exchange Act (opting-out or opting-up) and the content of contractual *clauses on changes of control*.
- (vi) The duration of *audit engagements* including the term of office of the lead auditor, the amount of auditing fees and all other consultancy service fees.

The *comply or explain*-principle extends to all disclosures in the notes of an annual report. This means that where an issuer departs from the Directive in a disclosure item, it must include a justification in the annual report.<sup>25</sup>

The self-regulation of stock exchanges does not interfere in the internal checks and balances within a company in terms of corporate governance and does not impose any conditions pertaining to a company's individual governance mechanisms, but rather its focus is on *enhancing transparency in a listed company's operations*.

### III. Recommendations of the "Swiss Code of Best Practice for Corporate Governance"

At the same time as the Corporate Governance Directive was issued, *economiesuisse*, the federation of Swiss businesses, issued its "Swiss Code of Best Practice for Corporate Governance" in 2002.<sup>26</sup>

#### 1. Purpose and Legal Significance of the Swiss Code

The preamble of the Swiss Code outlines its *purpose and legal significance*; reference is made to the following explanation:

"The purpose of the Swiss Code is to set out guidelines and recommendations, but not force Swiss companies into a straightjacket. Each company should retain the possibility of putting its own ideas on structuring and organization into practice."

Hence, the Swiss Code emphasises the discretionary freedom of companies and is restricted to *legally non-binding recommendations* of best management practice and supervision.<sup>27</sup>

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<sup>25</sup> Art. 7 DCG; with respect to this principle see Bühler (fn. 1), N. 62 f. and 1122 et seq., and Böckli (fn. 1), § 14 N. 242 et seq.

<sup>26</sup> The triggering event for the elaboration of the Swiss Code of Best Practice for Corporate Governance was probably the listing of the shares of big Swiss public companies like Novartis AG and UBS AG at the New York Stock Exchange (No. 4 SCBP); see Christoph B. Bühler, Corporate Governance: Schweizer "Best Practice" im Lichte des Sarbanes-Oxley Act, in: Nobel (ed.), Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz, Berne 2004, 231 et seq., 240; Christoph B. Bühler, US Corporate Governance Reform: Impact on NYSE-Listed Swiss Companies, in: Jean Nicolas Druey/Peter Forstmoser (eds.), Schriften zum neuen Aktienrecht, 2nd ed., Zurich 2004, 26; Böckli (fn. 1), § 14 N. 221.

<sup>27</sup> See Peter Forstmoser, Corporate Governance, Regeln guter Unternehmensführung in der Schweiz, Zurich 2002, 45 et seq.; Gion Giger, Corporate Governance als neues Element im schweizerischen Aktienrecht, Diss. Zurich 2003, 71; Hans Caspar von der Crone/Antonio Carbonara/Larissa Marolda Martinez, Corporate Governance und Führungsorganisation in der



In contrast to a prevailing international trend,<sup>28</sup> the Swiss Code is still not subject to compliance by

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companies as a precondition for listing on the Swiss Stock Exchange according to the "comply or explain" principle. Consequently, there is *no obligation under stock exchange law to comply with the Swiss Code*. It constitutes "soft law"<sup>29</sup> based entirely on private autonomy, and ultimately also *does not possess any democratic legitimacy*. By formulating best practice recommendations, the Swiss Code enjoys widespread acceptance in the marketplace because it shows practical solution approaches that are based on expertise and experience. It compensates its legal legitimacy gap so to speak by being *objectively convincing in and of itself*.<sup>30</sup>

## 2. Understanding of the Concept of Corporate Governance on which the Swiss Code is based

The *guiding principle of the Swiss Code* is a balanced relationship between direction and control in a company and the creation of *transparency*. However – as explained before – a basic condition should be that no constraints should be applied to the decision-making ability and efficiency of corporate management.<sup>31</sup>

The *focus is on the interests of shareholders*, to whose concerns an entire section is devoted at the beginning. By contrast, other stakeholders are not addressed at all or only implicitly. This may seem odd in a *contemporary* context since corporate governance is no longer strictly a company law issue but has long since become the subject of an interdisciplinary discussion conducted at the international level in a market environment in which other stakeholder groups in companies and the marketplace are taken into account.<sup>32</sup>

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Aktiengesellschaft, SJZ 100 (2004) 405 et seq.; Krmeta (fn. 2), N. 1112; Bühler (fn. 1), N. 1260; Böckli (fn. 1), § 14 N. 201 und 247 et seq.

28 In the European Community, 20 of 22 corporate governance codices are based on the principle of "comply or explain". See Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States of September 23, 2009, 143. See also Yannick Hausmann/Elisabeth Bechtold-Orth, Corporate Governance in Europa: Quo vadis? Eine Analyse der aktuellen Entwicklungen aus der Sicht der Schweiz, GesKR 5 (2011) 359 et seq., 368; Christoph B. Bühler, "Swiss Code of Best Practice for Corporate Governance": Anpassungsbedarf im Spiegel der internationalen Entwicklung, Vier Vorschläge "de praxi melioranda" und ein "caveat", GesKR 5 (2011) 477 et seq., 484.

29 See Peter Nobel/Heinz Zimmermann, Regulierung – Überregulierung – Selbstregulierung aus juristischer und ökonomischer Sicht, in: Nobel (ed.), Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz, Berne 2005, 53 et seq., 72; Monika Roth, Soft Law – Ordnungsvisionen in flux, Eine Standortbestimmung mit Fokus auf compliance-relevante Fragestellungen, Berne 2006, 61 et seq.; Bühler (fn. 1), N. 50 et seq.

30 Christian Kirchner, Regulierung durch Unternehmensführungskodizes (Codes of Corporate Governance), in: Wolfgang Ballwieser (ed.), BWL und Regulierung, Zeitschrift für betriebswirtschaftliche Forschung, Düsseldorf, zfbf-Sonderheft 48 (2002) 93 et seq., 96; Bühler (fn. 1), N. 1266; Böckli (fn. 1), § 14 N. 322.

31 Preamble to the Swiss Code.

32 See Gion Giger, Corporate Governance als neues Element im schweizerischen Aktienrecht, Diss. Zurich 2003, 9 et seq.; Peter Forstmoser, Profit – das Mass aller Dinge?, in: Individuum und Verband, Festgabe zum Schweizerischen Juristentag 2006, Zurich 2006, 55 et seq., 60; Christoph B. Bühler, Regulierung der Corporate Governance in einem dynamischen internationalen Umfeld, GesKR 1 (2006) 60 et seq.; Bühler (fn. 1), N. 349 et seq.; Holger Fleischer, Shareholders vs. Stakeholders: Aktien- und übernahmerechtliche Fragen, in: Hommelhoff/Hopt/von Werder (eds.), Handbuch Corporate Governance, 2nd ed., Munich 2009, 185 et seq.; Hanno Merkt, Selbstkontrolle und Staatsaufsicht bei der Corporate Governance, in: Hommelhoff/Hopt/von Werder (eds.), Handbuch Corporate Governance, 2nd ed., München 2009, 683 et seq.; Hopt (fn. 20), 448 f.; Till Talaulicar, Normierungseffekte der Co-Regulierung von Standards guter Corporate Governance, ORDO 62 (2011) 269 et seq.; Patrick C. Leyens, Corporate Governance: Grundsatzfragen und Forschungsperspektiven, in: Allmendinger et al. (eds.), Corporate Governance nach der Finanz- und Wirtschaftskrise, Tübingen 2011, 3 et seq., 6 et seq.



### 3. Content of the Swiss Code

The areas covered by the Swiss Code are *embedded in prevailing company law*. The Swiss Code largely fleshes out *basic principles outlined in law* and provides board and top management best practice recommendations for utilising their scope for action under the law.<sup>33</sup> In doing so, it implicitly expresses that good corporate governance is basically nothing other than "*properly understood company law*"<sup>34</sup>.

#### 3.1 Recommendations on fostering the Decision-Making of Shareholders

Like the German Corporate Governance Code<sup>35</sup>, however in contrast to Anglo-Saxon corporate governance codes<sup>36</sup>, the Swiss Code of Best Practice for Corporate Governance starts out at the very beginning with shareholder interests and places basic decision-making in listed companies in the hands of the general meeting as provided for by law, and goes on

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to address items such as the description of the company's purpose, changes in capital, the appointment of management and audit bodies, and the approval of the annual financial statements.

Hardly any of these first eight recommendations, which deal specifically with shareholder relations, cause a stir in management circles. Yet this does not make them any less significant for they hold the board of directors and management to a clear-cut fundamental attitude,<sup>37</sup> that is

- (i) shareholders *are to be taken seriously*,
- (ii) *decision-making* is to be facilitated in meetings of shareholders, and
- (iii) *communication* is to be improved between the company and its capital providers.

#### 3.2 Implementation Proposals for Compliance by the Board of Directors with its Management Responsibility

The guidelines of the Swiss Code pertaining to the *responsibilities of the board of directors*<sup>38</sup> in performing its management duties ensue in part explicitly and in part implicitly from applicable company law. The recommendations concerning the *duties of the board of directors*<sup>39</sup> and the *delegation of management*<sup>40</sup> in particular are lifted virtually verbatim from the law. *Additional* implementation proposals may also be taken from the Swiss Code particularly with regard to the following points:

- (i) Every effort should be made to achieve a *well-balanced composition* of the board of directors in terms of its size, requisite capabilities and independence so as to enable *independent decision-making* while engaging in a critical exchange of ideas with executive management.<sup>41</sup>

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33 Forstmoser (fn. 24), 49; Bühler (fn. 1), N. 1385 et seq.

34 Peter Nobel, Corporate Governance und Aktienrecht, Bedeutung für KMU?, in: von der Crone et al. (eds.), Neuere Tendenzen im Gesellschaftsrecht, FS Forstmoser, Zurich 2003, 325 et seq., 341; Bühler (fn. 1), N. 1386.

35 No. 2 of German Corporate Governance Code of May 26, 2010.

36 Section E. UK Corporate Governance Code of June 2010; also N. 6.1 Cadbury Report of December, 1 1992.

37 Böckli (fn. 1), § 14 N. 247.

38 Nos. 9–28 SCBP.

39 No. 10 SCBP corresponds with Art. 716a para. 1 CO.

40 No. 11 SCBP corresponds essentially with Art. 716b para. 1 and 2 CO.

41 No. 12 SCBP.





(ii) The board of directors establishes suitable *procedures* for its work and ensures that *information is prepared* by the chairman and management *so that it is organised and well presented*.<sup>42</sup>

(iii) The Swiss Code contains a requirement that members of the board should arrange their personal and business affairs on the whole so that *conflicts of interests*<sup>43</sup> with the company are minimised right from the outset. There is a clear-cut requirement incumbent upon involved parties to recuse themselves – a requirement that cannot be derived directly from the law.<sup>44</sup>

(iv) The fleshed-out recommendations for the board of directors structuring the board suggest that *committees* should be appointed which are comprised of board members who are as independent as possible for the purpose of preparing and executing the board's decisions.<sup>45</sup> The Swiss Code recommends three committees in particular in keeping with the model designed by *Cadbury*<sup>46</sup> and later taken over internationally: the audit committee, the compensation committee and the nominating committee.

### ***3.3 Recommendations for Strengthening the Control Function of External Auditors***

As to auditing, clause 29 of the Swiss Code of Best Practice for Corporate Governance is content with a reference to statutory provisions and applicable independence guidelines.<sup>47</sup> The following items in particular are relevant: the provisions on the audit subject-matter and the requirements to be satisfied by the qualification and independence of the auditors as set out in Art. 727 et seq. CO, in the Swiss Audit

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Supervision Act<sup>48</sup>, and in the current independence guidelines issued by the Swiss Institute of Certified Accountants and Tax Consultants<sup>49</sup>.

### ***3.4 Disclosure of Key Information pertaining to Corporate Governance***

Also with regard to the *disclosure* of specific key information on corporate governance, the Swiss Code makes exclusive reference to the *Disclosure Directive of the SIX Swiss Exchange*<sup>50</sup>.

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<sup>42</sup> Nos. 14 and 15 SCBP.

<sup>43</sup> No. 16 SCBP.

<sup>44</sup> This is derived from the general duty of loyalty of the board of directors pursuant to Art. 717 para. 1 CO. See Böckli (fn. 1), § 13 N. 633; Peter Forstmoser, Interessenkonflikte von Verwaltungsratsmitgliedern, in: Vogt/Zobl (eds.), *Der Allgemeine Teil und das Ganze – Liber Amicorum für Herman Schulin*, Basel 2002, 178 et seq.; sceptically about one general strike rule for corporate bodies: Hans Caspar von der Crone, Interessenkonflikte im Aktienrecht, SZW 66 (1994) 1 et seq., 5. See also Michael Lazopoulos, Interessenkonflikte und Verantwortlichkeit des fiduziarischen Verwaltungsrates, Diss. Zurich 2004, 135; Thomas Alexander Steininger, Interessenkonflikte des Verwaltungsrates, Diss. Zurich 2011, 106.

<sup>45</sup> Nos. 21 et seq. SCBP. The legal basis for the appointment of executive committees by the board of directors is to be found in Art. 716a para. 2 CO. See also von der Crone/Carbonara/Marolda Martinez (fn. 27), 405 et seq.; Meier-Hayoz/Forstmoser (fn. 1), § 16 N. 406 et seq.; Böckli (fn. 1), § 13 N. 405 et seq.; Bühler (fn. 1), N. 630.

<sup>46</sup> No. 4.21 of the “Report of the Committee on the Financial Aspects of Corporate Governance” of December 1, 1992.

<sup>47</sup> See Bühler (fn. 1), N. 1319.

<sup>48</sup> Federal Act on the Licensing and Oversight of Auditors of December 16, 2005 (RAG, SR 935.71).

<sup>49</sup> Swiss Institute of Certified Accountants and Tax Consultants, Independence Guidelines 2007, of December 6, 2010.

<sup>50</sup> See remarks at fn. 17 et seq.



## 4. Adaptation of the Swiss Code in keeping with Current Developments

### 4.1 No Institutionalised Procedure for Reviewing and Amending the Swiss Code

Since the Swiss Code is not based on a legal instrument enacted by a government authority, either directly or indirectly, it should not come as any surprise that – contrary to the German concept<sup>51</sup> – *no institutionalised procedure* and *no state commission* are established for the purpose of continuously reviewing the Swiss Code to determine whether it requires *adaptation* in keeping with changing exigencies.

Despite the widespread intensive discussion on the colourful phenomenon of corporate governance<sup>52</sup> in the international arena it is nonetheless surprising that the Swiss Code has remained *unchanged* for the most part since being issued ten years ago. This means that the guidelines of the Swiss Code continue to be based on the 2002 status quo.

Yet the Swiss Code is by no means outmoded. In Switzerland it continues to constitute the most important guideline for best corporate governance practice, whose high degree of acceptance and success are beyond question. However, the Swiss Code will not be able to continue to have this sustained effect unless it is adapted in line with significant new developments.

### 4.2 Specific Amendments of the Swiss Code with regard to the Compensation of Board of Directors and Executive Management in 2007

The Swiss Code was *amended in 2007* as a spontaneous reaction to the public debate on the compensation of the top management of listed companies.<sup>53</sup> *Economiesuisse* decided to issue specific recommendations and explanations in a *separate annex* to the Swiss Code<sup>54</sup> concerning the way boards of directors should deal with the compensation of board members and executive management:<sup>55</sup>

I would like to lay emphasis on the following items:

(i) The *compensation system* for top corporate executives should contain fixed and variable portions and should reward conduct that is *geared to success in the medium and long term*.<sup>56</sup>

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51 Preamble last paragraph of the German Code: “As a rule the Code will be reviewed annually against the background of national and international developments and be adjusted, if necessary”. The German Corporate Governance Codex Commission has regularly complied with this rule, subject to the years 2004 and 2011. See Till Talaulicar, Normierungseffekte der Co-Regulierung von Standards guter Corporate Governance, ORDO 62 (2011) 269 et seq., 274; Hopt (fn. 20), 460.

52 See Holger Fleischer, Zukunftsfragen der Corporate Governance in Deutschland und Europa: Aufsichtsräte, institutionelle Investoren, Proxy Advisors und Whistleblowers, ZGR 40 (2011) 155 et seq.; Hopt (fn. 20), 444 et seq.; Klaus J. Hopt, Corporate Governance – Zur nationalen und internationalen Diskussion, in: Hopt/Wohlmannstetter (eds.), Handbuch Corporate Governance von Banken, München 2011, 4 et seq.; Gregor Bachmann, Corporate Governance nach der Finanzkrise, AG 56 (2011) 181 et seq.; Patrick C. Leyens, Corporate Governance: Grundsatzfragen und Forschungsperspektiven, in: Allmendinger et al. (eds.), Corporate Governance nach der Finanz- und Wirtschaftskrise, Tübingen 2011, 3 et seq.; in Switzerland: Yannick Hausmann/Elisabeth Bechtold-Orth, Corporate Governance in Europa: Quo vadis?, GesKR 4 (2011) 359 et seq.; Andreas Bohrer, Corporate Governance in the era of “Too Big To Fail”, GesKR 4 (2011) 326 et seq.; Bühler (fn. 25), 477 et seq.

53 See the respective explanations and references at fn. 16.

54 Karl Hofstetter, Fünf Jahre Swiss Code of Best Practice, Sonderbericht zur Frage der Entschädigung von Verwaltungsrat und Management in Publikumsgesellschaften, Zurich 2007.

55 The Annex was adopted by the executive board on September 6, 2007 and was published on October 15, 2007.

56 No. 4 Annex 1 SCBP.



(ii) Companies should, as a matter of principle, *not grant any golden parachutes or severance packages*.<sup>57</sup>

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(iii) The board of directors should prepare a *compensation report* every year for the annual meeting of shareholders that discloses the significant criteria that were applied for calculating the variable compensation elements.<sup>58</sup>

(iv) The board of directors *should include the shareholders' meeting in the debate on the compensation system in a suitable manner*.<sup>59</sup> The shareholders' meeting should *either* formally acknowledge the compensation report by way of the discharge resolution pertaining to the directors' actions and accept it, *or* it should conduct a separate *consultative vote* on the compensation report.<sup>60</sup>

What is interesting in this context is that with this "soft law" solution the Swiss Code outlined the fundamentals for a compensation solution that is now to be enacted in an even more stringent manner into "hard law" according to the aforementioned "*Minder*" initiative five years on. This example reveals the motivation for self-regulation: the respective industry concerned is countering the political pressure that has mounted by proactively engaging in its existing discretion for regulation, and in so doing is seeking to avoid undesirable or excessively drastic measures on the part of the government or at any event delay them as long as possible.

### ***4.3 Examination of a "Light" Reform and Supplementing the Swiss Code with Separate Guidelines for the Exercise of Participation Rights on the Part of Institutional Investors***

In July 2010 the *UK Stewardship Code* initiated an international discussion on a stronger inclusion of institutional investors in corporate governance. They were to be advised to disclose their voting conduct and exercise their voting powers responsibly.<sup>61</sup> In the process *proxy advisors* – who provide institutional investors various services – also became the target of criticism.

As was to be expected, the European Commission also got involved in the debate, addressing the inclusion of institutional investors and the role of proxy advisors in its *Green Paper on a European Framework for Corporate Governance* of April 2011.<sup>62</sup>

These considerations are not new in *Switzerland* either. In its 2002 version the Swiss Code appeals to responsible behaviour on the part of institutional investors already at the beginning; they are to ensure that beneficial owners should be able to determine how shareholders' rights are exercised.<sup>63</sup>

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<sup>57</sup> No. 6 Annex 1 SCBP.

<sup>58</sup> No. 8 Annex 1 SCBP. This compensation report recommended by the Swiss Code has to be distinguished from the duty to disclose compensations of the top management, which has to be carried out in accordance with Art. 663b CO in the annex to the balance sheets.

<sup>59</sup> No. 9 Annex 1 SCBP.

<sup>60</sup> See also Federal Supreme Court Rulings BGE 100 II 388; Böckli (fn. 1), § 12 N. 42; Hans-Ueli Vogt, *Aktionärsdemokratie*, Zurich 2012, 47 et seq.; Bühler (fn. 1), N. 671 et seq.; Martina Isler, *Konsultativabstimmung und Genehmigungsvorbehalt zugunsten der Generalversammlung*, Diss. Zurich 2010, 1 et seq.; Salim Rizvi, *Die Kompetenzen der Generalversammlung im Spannungsverhältnis zu den Kompetenzen des Verwaltungsrates*, Berne 2011, 241 et seq.

<sup>61</sup> See Holger Fleischer/Christian Strothotte, *Ein Stewardship Code für institutionelle Investoren: Wohlverhaltensregeln und Offenlegung der Abstimmungspolitik als Vorbild für Deutschland und Europa?*, AG 56 (2011) 221 et seq.; Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, *Modern Law Review* 73 (2010) 1004 et seq.; Michael McKersie, *The Stewardship Code and the pattern of engagement by institutional shareholders with listed companies*, *Capital Markets Law Journal* 2010, 439 et seq.; Iain MacNeil, *Activism and collaboration among shareholders in UK listed companies*, *Capital Markets Law Journal* 2010, 419 et seq.; Bühler (fn. 1), 482 et seq. and 487.

<sup>62</sup> European Commission, *Green Paper – The European corporate governance framework of 5 April 2011*, COM (2011) 164 final.

<sup>63</sup> No. 1 SCBP.



The *Minder popular initiative* mentioned at the beginning now demands that pension funds should be obliged in the future to disclose their voting practice and to vote at the shareholders' meetings of listed companies in the interests of their members. The latter is essentially a confirmation of current law without a specific code of conduct being derivable from it.<sup>64</sup>

As a result of this development, *economiesuisse* decided in February of 2011 to take up the topic of the

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exercise of voting rights on the part of institutional investors by focussing on this issue in reforming the Swiss Code and to otherwise exercise restraint and amend it only in individual points. It then commissioned a working group to look into supplementing the Swiss Code by *adding guidelines pertaining to institutional investors and their proxy advisors*.<sup>65</sup> The findings of this working group were discussed with selected representatives of Swiss companies, institutional representatives and other interested parties; they have been published in January 21, 2013.

Proceeding from the premise that institutional investors should *abide by their responsibility* in exercising their participation rights by adhering to the "*comply or explain*" principle, discussion in Switzerland seems to be concentrating on the circumstance that, in following the guidelines of the UK Stewardship Code,

institutional investors are to be called upon to *enter into a dialogue with the board of directors* of the affected companies and

to *exercise their participation rights* in the interest of their investors *in a responsible and transparent manner*.<sup>66</sup>

## IV. Conclusion

With the anticipated reform of transparency concerning the compensation of executive bodies, the approval of the "*Minder*" initiative limiting "fat cat" executive pay and the "major" reform of company law now relaunched, the legislator has recently made it clear that central corporate governance issues such as control by shareholders and the interaction between the shareholders' meeting and executive bodies are to remain the subject of *statutory law*. Where the task is to weigh the interests of the various stakeholders in a company against public interests in an authoritative manner, this can only be done by the legislator due to reasons of *democratic legitimacy*. The enactment of laws may also be necessary on account of associated *legal constraints*. In going about regulation, the *coherence of company law* must be maintained.

Nevertheless *self-regulation by the stock exchange* or *codes of conduct* has not become obsolete as regulatory instruments. In view of the enormous time pressure to which legislative processes are increasingly being subjected in the area of corporate governance, a more contemporary approach nevertheless continues to be perceived in the regulatory model in which framework legislation is combined with self-regulation:

In the *self-regulation directives*, *stock exchanges* achieve the public-law protection objectives of the legislator in an autonomous manner for the most part. In doing so, they retain the requisite scope to be able to adapt to fast-paced changing market requirements in a timely manner. In the area of corporate governance the stock

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<sup>64</sup> See Art. 49 para. 2 lit. b of the Ordinance on Occupational Retirement, Survivors' and Disability Pension Plans (BVV 2) of April 18, 1984, as of January, 1 2012 (SR 831. 441. 1) which already requires that the board sets rules with respect to the exercise of shareholders participation rights. See also Peter Bockli, *Doktor Eisenbart als Gesetzgeber?* in: Trinidad/Peter/Bovet (eds.), *Economie Environnement Ethique, Liber Amicorum Petitpierre-Sauvain*, Lausanne 2009, 29 et seq., 39; Bühler (fn. 16), 272.

<sup>65</sup> Guidelines for institutional investors governing the exercising of participation rights in public limited companies, published by ASIP, Swiss Federal Social Security Funds, *economiesuisse*, Ethos, SwissBanking, SwissHoldings, as of January 21, 2013.

<sup>66</sup> See Beat Gygi, *Corporate Governance als Wachstumsgeschäft, Unternehmensführungen in einem immer dichter werdenden Netz von Vorgaben und Regulierungen*, NZZ No. 4 of January 6, 2012.



exchange banks primarily on the *publication of information on issuers and their business operations*.

Regulation by way of *guidelines with a recommendation status in codes of conduct* is warranted in areas in which, although there is a need for broad *discretionary freedom*, there are practical and internationally recognised *benchmarks* which affected parties can use as a guideline.<sup>67</sup>

This pertains in particular to the *institutional implementation of the principle of checks and balances* in listed companies. Statutory law and corporate governance codes can supplement one another so as to form a market-consistent and flexible order that possesses democratic legitimacy.<sup>68</sup>

Corporate governance codes may *not* be allowed to degenerate to *quasi legislation* in which their recommendations are interpreted as laws and they are overloaded with parallel rules already set out in law

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and with detailed annexes. A code of conduct is not to be used to establish another level of regulation.<sup>69</sup>

The Swiss Code must remain *lean* if it is to achieve something and must concentrate on a few, clear-cut requirements. The longer, the more complex and the more detailed it is, the less notice management will take of it.

As such, the "Swiss muesli" recipe has also proven itself as an effective approach to regulate corporate governance in Switzerland: to the flexible and tasteless basic mass of "soft law" add raisins and a few domestic nuts or hard core requirements so that the whole thing remains quite edible and easy to digest for non-legal eagles.

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<sup>67</sup> Christian Kirchner, *Regulierung durch Unternehmensführungskodizes (Codes of Corporate Governance)*, in: Ballwieser (ed.), *BWL und Regulierung, Zeitschrift für betriebswirtschaftliche Forschung*, Düsseldorf, zfbf-Sonderheft 48 (2002) 101; Böckli (fn. 1), § 14 N. 322; Bühler (fn. 1), N. 1266; Axel v. Werder, *Ist Schweigen wirklich Gold? – Corporate Governance-Publizität bei konditionierten Kodexbestimmungen*, in: Joost/Oetker/Paschke (eds.), *FS Säcker*, München 2011, 527 et seq.

<sup>68</sup> Hopt (fn. 20), 457.

<sup>69</sup> See also Bachmann (fn. 49), 193; Klaus J. Hopt, *Corporate Governance in Europa: Neue Regelungsaufgaben und Soft Law*, *GesRZ Sonderheft Corporate Governance* 2002, 4 et seq., 9; see also Bühler (fn. 1), N. 1260; Bühler (fn. 28), 478 and 488.