



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

Who is not afraid of being a company director ?

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National Report of Switzerland

Jérôme NICOLAS

Python & Peter
2 Rue Charles-Bonnet,
1206, Geneva, Switzerland
+41 (0)22 702 15 15
jnicolas@pplex.ch

General Reporter:

Dylan CASAER, Olislaegers & De Creus, Brussels, Belgium

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1. The legal position/status of a director and/or managing director in the different jurisdictions ?

1.1 How to define the mandate of a director / managing director from a legal perspective ? Distinctive factors between the mandate of director and the mandate of managing director;

A **director** (« *Administrateur* »; « *Mitglied der Verwaltung* ») is a member of the board of directors.

According to Art. 716 para 2 of the Swiss Code of Obligations (SCO), "*The board of directors manages the business of the company, unless responsibility for such management has been delegated.*"

According to art. Art. 716b para 1 SCO, "*the articles of association may authorise the board of directors to delegate the management of all or part of the company's business to individual members or third parties in accordance with its organisational regulations.*"

According to art. Art. 716b para 3 SCO "*Where management of the company's business has not been delegated, it is the responsibility of all the members of the board of directors.*"

According to art. Art. 718 para 1 and 2 SCO, "*The board of directors represents the company externally. Unless the articles of association or the organisational regulations stipulate otherwise, every member has authority to represent the company. The board of directors may delegate the task of representation to one or more members (managing directors) or third parties (executive officers).*"

The mandate and duty of each director is therefore to manage the business of the company and to represent the company externally, unless responsibility for such management and representation has been delegated.

A **managing director** (= "*Administrateur délégué*"; "*Delegierte*") is a member of the board of directors, to whom the board of directors has delegated the tasks of management and representation.

1.2 Terminology : difference between managing director and CEO...

In theory, as Chief of the "Executive Officers" ("*Directeurs*"; "*Direktoren*"), the **CEO** is not a member of the board of directors, but a third party in the sense of Art. 718 para 2 SCO, to whom the board of directors has delegated the tasks of management and representation.

In practice however, the CEO is often not only the Chief of the Executive Officers, but also a member of the board of directors (often the Chairman), which corresponds to the French system of the "*Président Directeur Général or PDG*".

1.3 Distinction between aspects of employment law and aspects of company law :

- What is the contractual relation with the Company ?

The contractual relation between a company and its directors and /or executive officers is debated in the Swiss case law and legal literature.

In principle, a **director** or a **managing director** is considered to have a mandate relation with the Company, or a sui generis contract similar to a mandate, but depending on the circumstances, he may in addition, have an employment relation with the Company.

In principle, an **executive officer** is considered to have an employment relation with the Company, but depending on the circumstances, he may in addition, have a mandate relation with the Company or a sui generis contract similar to a mandate.

- Under what status does a director / managing director carry out his/her tasks : can a director and/or managing director carry out his/her duties as an employee ?

A **director** or a **managing director** in principle carries out his tasks and duties under his mandate status, but depending on the circumstances he may in addition carry out his tasks and duties under an employment status.

When both contractual relations co-exist, which tasks and duties are carried out under which status depend on the particular circumstances of each specific case.

- Are there typical rights /obligations related to the mandate of director / managing director ?

According to Art. 715 and 715a SCO, directors (or managing directors) have the following **rights**:

“Art. 715 (*Right to convene meetings*)

Any member of the board of directors may request that the chairman convene a meeting without delay, but must state the reasons for his request.

Art. 715a (Right to information and inspection)

1 Any member of the board of directors may request information on any company business.

2 At meetings, all members of the board of directors and all persons entrusted with managing the company's business are obliged to give information.

3 Outside meetings, any member may request information from the persons entrusted with managing the company's business concerning the company's business performance and, with the chairman's authorisation, specific transactions.

4 Where required for the performance of his duties, any member may request the chairman to have books of account and documents made available to him for inspection.

5 If the chairman refuses a request for information, a request to be heard or an application to inspect documents, the board of directors rules on the matter.

6 Rulings or resolutions of the board of directors conferring on the directors more extensive rights to obtain information or inspect documents are reserved."

According to art. Art. 716 to 717 and 725 SCO, directors (or managing directors) have the following **duties**:

Art. 716 (III. Duties 1. In general)

1 The board of directors may pass resolutions on all matters not reserved to the general meeting by law or the articles of association.

2 The board of directors manages the business of the company, unless responsibility for such management has been delegated.

Art. 716a (2. Non-transferable Duties)

1 The board of directors has the following non-transferable and inalienable duties:

- 1. the overall management of the company and the issuing of all necessary directives;*
- 2. determination of the company's organisation;*
- 3. the organisation of the accounting, financial control and financial planning systems as required for management of the company;*
- 4. the appointment and dismissal of persons entrusted with managing and representing the company;*

5. 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;

6. compilation of the annual report⁴⁴⁷, preparation for the general meeting and implementation of its resolutions;

7. notification of the court in the event that the company is overindebted.

2 The board of directors may assign responsibility for preparing and implementing its resolutions or monitoring transactions to committees or individual members. It must ensure appropriate reporting to its members.

Art. 716b (Delegation of business management)

1 The articles of association may authorise the board of directors to delegate the management of all or part of the company's business to individual members or third parties in accordance with its organisational regulations.

2 These regulations regulate the management of the company's business, stipulate the bodies required to carry this out, define their duties and, in particular, regulate the company's internal reporting. On request, the board of directors issues information in writing concerning the organisation of the business management to shareholders and company creditors with a demonstrable interest warranting protection.

3 Where management of the company's business has not been delegated, it is the responsibility of all the members of the board of directors.

Art. 717 (IV. Duty of care and loyalty)

1 The members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith.

2 They must afford the shareholders equal treatment in like circumstances.

Art. 725 (VII. Capital loss and overindebtedness 1. Duty to notify)

1 Where the last annual balance sheet shows that one-half of the share capital and the legal reserves are no longer covered, the board of directors must without delay convene a general meeting and propose financial restructuring measures.

2 Where there is good cause to suspect overindebtedness, an interim balance sheet must be drawn up and submitted to a licensed auditor for examination. If the interim balance sheet shows that the claims of the company's creditors are not covered, whether the assets are appraised at going concern or liquidation values, the board of directors must notify the court unless certain company creditors

subordinate their claims to those of all other company creditors to the extent of the capital deficit.

3 If the company does not have an auditor, the licensed auditor must comply with the reporting duties of the auditor conducting a limited audit.”

- What are the rights in the event of termination/dismissal ?

The dismissal of a director (or managing director) and the termination of his mandate relation with the Company (or of his sui generis contract similar to a mandate) primarily follow the rules of the mandate. It is therefore in particular possible to terminate such contract at any time with immediate effect.

If the director (or managing director) has in addition an employment relation with the Company, such relation may however only be terminated following the specific rules of the employment contract, for instance in particular the notice period, the protection from wrongful termination and the protection from termination at an inopportune juncture.

According to art. Art. 726 SCO (VIII. Dismissal and suspension):

“1 The board of directors may dismiss committees, managing directors, executive officers, registered attorneys and other commercial agents that it has appointed at any time.

2 The registered attorneys and commercial agents appointed by the general meeting may be suspended from their duties at any time by the board of directors, providing a general meeting is convened immediately.

3 Claims for compensation by persons dismissed or suspended are reserved.”

2. What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director / managing director ?

- Distinction between listed and not listed companies

The Swiss Business Federation (“Economiesuisse”) has issued in 2002 a “Swiss code of best practice for corporate governance” (The “Swiss Code”), which sets out guidelines and recommendations for public limited companies.

The Swiss Code does not only have an important impact on the listed companies, but also on the non-listed economically significant companies or organizations (also in other legal forms) which often take into account the recommendations of the “Swiss Code” in developing their guidelines.

Regarding the Board of Directors and Executive Management, the Swiss Code provides as follows:

“a Functions of the Board of Directors

9 The Board of Directors, which elected by the shareholders, is responsible for the strategic direction of the company or the group.

- *The Board of Directors should determine the strategic goals, the general ways and means to achieve them and the individuals charged with management.*
- *In its planning it should ensure the fundamental harmonization of strategy and finances.*

10 Swiss company law lays down the inalienable and non-transferable primary functions of the Board of Directors.

— *The primary functions are:*

- 1. the ultimate direction of the company and the giving of the necessary directives;*
- 2. the establishment of the organization;*
- 3. the structuring of the accounting system and of the financial controls as well as financial planning, insofar as necessary to manage the company;*
- 4. the appointment and removal of the persons entrusted with the management and representation of the company;*
- 5. the ultimate supervision of the persons entrusted with the management, with regard, in particular, to compliance with the law, the Articles of Association, regulations and directives;*
- 6. the preparation of the annual report as well as the preparation of the general shareholders' meeting and the implementation of its resolutions;*
- 7. the notification of the court in case of an excess of indebtedness over assets. (Art. 716a [1] Swiss Code of Obligations).*

11 Subject to the provisions of the Articles of Association the Board of Directors should lay down the powers and responsibilities of the persons in charge of managing the business.

- *The Board of Directors should ensure that management and control functions are allocated appropriately.*
- *If the Board of Directors delegates management responsibilities to a Managing Director or to a separate Executive Board, it should issue organizational regulations with a clear definition of the scope of the powers conferred. As a rule it should reserve to itself the power to approve certain significant business transactions.*

b Composition

12 A well-balanced membership of the Board of Directors should be sought for.

- *The Board of Directors should be small enough in numbers for efficient decision- making and large enough for its members to contribute experience and knowledge from different fields and to allocate management and control functions (section 21 ff.) among themselves. The size of the Board should match the needs of the individual company.*
- *Members of the Board of Directors should be persons with the abilities necessary to ensure an independent decision-making process in a critical exchange of ideas with the Executive Management.*
- *The majority of the Board should, as a rule, be composed of members who do not perform any line management function within the company (non-executive members).*
- *If a significant part of the company's operations is abroad, the Board of Directors should also include members having long-standing international experience or members from abroad.*

13 The Board of Directors should plan for the succession of its members and ensure that members receive continuing education.

- *The ordinary term of office for members of the Board of Directors should, as a rule, not exceed four years. Adequately staggered terms of office are desirable.*
- *The Board of Directors should plan the succession of its members and lay down the criteria for selecting candidates.*
- *The Board of Directors should ensure that newly elected members receive appropriate introduction and that Board Members, where required, receive further training with respect to their responsibilities.*

c Procedures and Chairmanship of the Board of Directors

14 The Board of Directors should determine the procedures appropriate to perform its function.

- *The Board of Directors should, as a rule, meet at least four times a year according to the requirements of the company. The Chairman should ensure that deliberations are held at short notice whenever necessary.*
- *The Board of Directors should review regulations it has issued at regular intervals and amend them as required.*
- *The Board of Directors may obtain at the company's expense independent advice from external experts on important business matters.*
- *The Board of Directors should discuss annually its own and its members' performance.*

15 The Chairman is responsible for the preparation and conduct of meetings; the providing of appropriate information is one of his core responsibilities.

- *The Chairman is entrusted with conducting the Board of Directors in the company's interest. He should ensure that procedures relating to preparatory work, deliberation, passing resolutions and implementation of decisions are carried out properly.*
- *The Chairman should ensure in mutual cooperation with the Executive Management that information is made available in good time on all aspects of the company relevant for decision-making and supervision. The Board of Directors should receive, as far as possible prior to the meeting, the well presented and clearly organized documentation; if that is not possible, the Chairman should make the documentation available prior to the meeting allowing, sufficient time for perusal.*
- *As a rule persons responsible for a particular business should be present at the meeting. Anyone who is indispensable for answering questions in greater depth should be available.*

d Dealing with conflicts of interest and advance information

16 Each member of the Board of Directors and Executive Board should arrange his personal and business affairs so as to avoid, as far as possible, conflicts of interest with the company.

- *Should a conflict of interest arise, the member of the Board of Directors or Executive Management concerned should inform the Chairman of the Board. The Chairman, or Vice-Chairman, should request a decision by the Board of Directors which reflects the seriousness of the conflict of interest. The Board shall decide without participation of the person concerned.*
- *Anyone who has interests in conflict with the company or is obligated to represent such interests on behalf of third parties should not participate to that extent in decision-making. Anyone having a permanent conflict of interest should not be a member of the Board of Directors or the Executive Management.*
- *Transactions between the company and members of corporate bodies or related persons should be carried out “at arm’s length” and should be approved without participation of the party concerned. If necessary, a neutral opinion should be obtained.*

17 The Board of Directors should regulate the principles governing ad hoc publicity in more detail and take measures to prevent insider-dealing offences.

- *The Board of Directors should consider in particular whether appropriate action (e.g. “close periods”) should be taken with regard to purchasing and selling securities of the company or other sensitive assets during critical periods, e.g. in connection with take-over projects, before media conferences or prior to announcing corporate results.*

e Chairman of the Board of Directors and President of the Executive Management: joint or separate function

18 The principle of maintaining a balance between direction and control should also apply to the top of the company.

- *The Board of Directors should determine whether a single person (with joint responsibility) or two persons (with separate responsibility) should be appointed to the Chair of the Board of Directors and the top position*

of the Executive Management (Managing Director, President of the Executive Board or Chief Executive Officer).

- *If, for reasons specific to the company or because the circumstances relating to availability of senior management makes it appropriate, the Board of Directors decides that a single individual should assume joint responsibility at the top of the company, it should provide for adequate control mechanisms. The Board of Directors may appoint an experienced non-executive member (“lead director”) to perform this task. Such person should be entitled to convene on his own and chair meetings of the Board when necessary.*

f Internal control system dealing with risk and compliance

19 The Board of Directors should provide for systems for internal control and risk management suitable for the company.

- *The internal control system should be geared to the size, the complexity and risk profile of the company.*
- *The internal control system should, depending on the specific nature of the company, also cover risk management. The latter should apply to both financial and operational risks.*
- *The company should set up an Internal Audit function which should report to the Audit Committee or, as the case may be, to the Chairman of the Board.*

20 The Board of Directors should take measures to ensure compliance with applicable rules.

- *The Board of Directors should arrange the function of compliance according to the specific nature of the company. It may also allocate compliance to the internal control system.*
- *The Board of Directors should review at least once a year whether the principles of compliance applicable to themselves and the company are sufficiently known and are constantly observed.*

g Committees of the Board of Directors

21 The Board of Directors should form committees to perform defined tasks.

- *The Board of Directors should appoint committees from amongst its members responsible for carrying out an in-depth analysis of specific business related or personnel matters for the full Board in preparation for passing resolutions or exercising its supervisory function.*
- *The Board of Directors should appoint the members as well as the Chairman of each committee and determine its procedures. Otherwise, the rules applying to the Board of Directors should apply accordingly to the committees.*
- *The Board may combine the functions of several committees provided that all their members fulfil the respective qualifications.*
- *The committees should report to the Board of Directors on their activities and findings. The overall responsibility for duties delegated to the committees remains with the Board of Directors.*

22 As regards committee members, particular rules on independence should be applied.

- *It is recommended that a majority of the members of certain committees be independent. Independent members shall mean non-executive members of the Board of Directors who never were or were more than three years ago a member of the executive management and who have no or comparatively minor business relations with the company.*
- *Where there is a cross membership in Boards of Directors, the independence of the respective member should be carefully examined case by case.*
- *The Board of Directors may lay down further criteria of independence.*

Audit Committee

23 The Board of Directors should set up an Audit Committee.

- *The Committee should consist of non-executive, preferably independent members of the Board of Directors.*
- *A majority of members, including the Chairman, should be financially literate.*

24 *The Audit Committee should form an independent judgment of the quality of the external auditors, the internal control system and the annual financial statements.*

- *The Audit Committee should form an impression of the effectiveness of the external audit (the statutory auditors or, if applicable, the group auditors), and the internal audit as well as of their mutual cooperation.*
- *The Audit Committee should additionally assess the quality of the internal control system, including risk management and should have an appreciation of the state of compliance with norms within the company.*
- *The Audit Committee should review the individual and consolidated financial statements as well as the interim statements intended for publication. It should discuss these with the Chief Financial Officer and the head of the internal audit and, separately, should the occasion warrant, with the head of the external audit.*
- *The Audit Committee should decide whether the individual and consolidated financial statements be recommended to the Board of Directors for presentation to the General Shareholders' Meeting.*
- *The Audit Committee should assess the performance and the fees charged by the external auditors and ascertain their independence. It should examine compatibility of the auditing responsibilities with any consulting mandates.*

Compensation Committee

25 *The Board of Directors should set up a Compensation Committee*

- *A majority of the Compensation Committee should consist of non-executive and independent members of the Board of Directors.*
- *The Chairman of the Board respectively the President of the Executive Management should, as a rule, be consulted except when their own remuneration is under review.*
- *The Compensation Committee should draw up the principles for remuneration of members of the Board of Directors and the Executive Management and submit them to the Board of Directors for approval.*

26 *The Committee should see to the defining of a remuneration policy, primarily at top company level.*

- *The Compensation Committee should take care that the company offers an overall package of remuneration, which corresponds to performance and the market, in order to attract and retain persons with the necessary skills and character.*
- *The remuneration should be demonstrably contingent upon sustainable company success and the individual contribution by the person in question. False incentives should be avoided.*
- *The dilution effect caused by share option schemes for senior managers should be minimized and the conditions for exercising options shall not be modified subsequently in favour of the option holders.*
- *Contracts of employment with top managers should contain such provisions on termination of employment as are commensurate with market conditions and which protect the company's interest. In case of early termination of a top management contract only such severance compensation should be paid which is either owed due to the contract or which has been negotiated in compatibility with the interests of the company.*

Nomination Committee

27 *The Boards of Directors should set up a Nomination Committee.*

- *The Nomination Committee should lay down the principles for the selection of candidates for election or re-election to the Board of Directors and prepare a selection of candidates in accordance with these criteria.*
- *The Nomination Committee may also be assigned responsibilities in connection with the selection and assessment of candidates for top management.*

h Particular circumstances

28 *The rules contained in this Code may be adapted to actual circumstances, depending on the shareholder structure and size of the company.*

- *Companies with active major shareholders (including subsidiaries listed on the stock exchange) as well as small and medium-sized enterprises*

may adapt or simplify the guidelines. Such companies should implement in their own way an appropriate arrangement for the assessment of the external audit, a functionally efficient internal control system, the remuneration policy for members of the Board of Directors and the Executive Management and the succession policy for the Board of Directors.

- *Small and medium-sized companies may assign responsibilities to individuals instead of setting up committees or have the full Board of Directors perform these tasks.”*

3. Liability of a company director / managing director ?

- Civil liability :
 - contractual liability and liability on the basis of “tort”;
 - liability towards the company and liability towards third parties;

The conditions for liability of company directors / managing directors are

- a damage;
- an unlawful breach of duty;
- a natural (or factual) and adequate causality between the breach of duty and the damage;
- a fault

According to Art. 754 SCO (III. Liability for administration, business management and liquidation) :

“1 The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties.

2 A person who, as authorised, delegates the performance of a task to another governing officer is liable for any losses caused by such officer unless he can prove that he acted with all due diligence when selecting, instructing and supervising him.”

Only the company's shareholders' meeting can release the directors / managing directors from liability (Art. 698 para 2 ch. 5 SCO).

According to Art. 758 SCO “The resolution of release adopted by the general meeting is effective only for disclosed facts and only as against the company and

those shareholders who approved the resolution or who have since acquired their shares in full knowledge of the resolution. The right of action of the other shareholders lapses six months after the resolution of release.”

In case of delegation of powers according to Art. 716b SCO, the liability of directors is limited. Indeed, if they can prove that they acted with all due diligence when selecting (cura in eligendo), instructing (cura in instruendo), and supervising (cura in custodiendo) the managing directors or executive officers to whom they delegated their duties, they should not be held liable.

- Criminal liability

As directors have a position of guarantor of the company's assets, several criminal provisions may apply.

On the one hand, a director may be criminally liable for his own behavior (Personal Criminal Liability). The following articles may for instance apply:

- Criminal Management (Art. 158 para 1 Criminal Code)
- False Statements about Commercial Business (Art. 152 Criminal Code)
- False Statements to the Commercial Register Authorities (Art. 153 Criminal Code)
- Breach of Manufacturing or Trade Secrecy (Art. 162 Criminal Code)
- Criminal Liability in Case of Bankruptcy
- Mismanagement (Art. 165 para 1 Criminal Code)
- Fraudulent bankruptcy and fraud against seizure (Art. 163 Criminal Code)
- Reduction of assets to the prejudice of creditors (Art. 164 Criminal Code)
- Bribery (Art. 322 ter and following Criminal Code)
- Etc.

On the other hand, a director may also be liable as head of the company for criminal acts in which he did not participate directly but that were committed within the company.

According to Art. 29 Criminal Code : “A special obligation, the violation of which establishes or increases criminal liability, and which is incumbent only on the legal entity, the company or the sole proprietorship¹⁵, is attributed to a natural person, if that person acts: a. as a governing officer or as a member of a governing officer of a legal entity; b. as a company member; c. as an employee with independent decision-making authority in his field of activity within a legal entity, a company or a sole proprietorship¹⁶; or d. without being a governing officer, member of a governing officer, company member or employee, as the *de facto manager*”.

This provision is a general norm applicable to any offenses having as a condition of fulfillment the violation of a special duty which obliges the company. If the duty is incumbent upon the company, its violation will be attributed to the person who acted on behalf of the company. In other words, corporate directors or employees with independent decision-making authority may be held liable for an offense which would normally bind the company on whose behalf they act.

For example, criminal management, as provided for under Article 158 of the Criminal Code, requires the existence of a duty of management and safeguard. This duty of management and safeguard can be an obligation of a company toward a third party. However, as a company cannot be held liable for such an offense, the offense will be attributed to the relevant corporate director or employee with independent decision-making authority.

Notably, however, this provision does not create a presumption of responsibility for the persons listed under Article 29 of the Criminal Code. They are only liable for the offense if they effectively took part in the perpetration of the offense.

- Noteworthy specific liabilities ?
- Are there in your jurisdiction over the last few years more court cases involving company directors or managing directors ?

4. Are there any recent changes in remuneration legislation / policies for company directors / managing directors ?

- Fixed remuneration
- Variable compensation (bonus etc)
- Stock options
- Golden parachute

1. A Federal Act of 7 October 2005 on “**Transparency in relation to remuneration of members of the board of directors and the executive board**” entered in force on 1 January 2007. It contained in particular the following amendments of the SCO:

“Art. 663b bis

1 Companies whose shares are listed on a stock exchange must provide the following additional information in the notes to the balance sheet:

1. all remuneration distributed directly or indirectly to current members of the board of directors;

- 2. all remuneration distributed directly or indirectly to persons entrusted by the board of directors with all or some of the company's management activities (executive board);*
- 3. all remuneration distributed directly or indirectly to current members of the board of advisors;*
- 4. all remuneration distributed directly or indirectly to former members of the board of directors, executive board and board of advisors where such remuneration relates to past activities as a governing officer of the company or is not customary market practice;*
- 5. all remuneration distributed directly or indirectly to close associates of the persons specified in numbers 1–4 where such remuneration is not customary market practice.*

2 In particular, the following are deemed to be remuneration:

- 1. fees, salaries, bonuses and account credits;*
- 2. shares of profits paid to board members and commissions, participation in turnover and other forms of participation in the business results;*
- 3. benefits in kind;*
- 4. allocations of shares and conversion and option rights;*
- 5. severance payments;*
- 6. guarantee and pledge commitments in favour of third parties and other collateral commitments;*
- 7. waivers of claims;*
- 8. expenditures giving rise to or increasing occupational benefit entitlements;*
- 9. all payments and benefits for additional work.*

3 The following must also be stated in the notes to the balance sheet:

- 1. all loans and credit facilities extended to the current members of the board of directors, executive board and board of advisors that are still outstanding;*
- 2. loans and credit facilities to former members of the board of directors, executive board and board of advisors that were extended on conditions other than the customary market conditions and are still outstanding;*
- 3. all loans and credit facilities to close associates of the persons specified in numbers 1 and 2 that were extended on conditions other than the customary market conditions and are still outstanding.*

4 The information provided on remuneration and credit must include:

- 1. the amount for the board of directors as a whole and the amount for each member, specifying the name and function of the member concerned;*
- 2. the amount for the executive board as a whole and the highest amount for each member, specifying the name and function of the member concerned;*
- 3. the total amount for the board of advisors as a whole and the amount for each member, specifying the name and function of the member concerned.*

5 Remuneration and credits to close associates must be shown separately. The names of such associates need not be given. In other respects the provisions governing information on remuneration and credit to members of the board of directors, executive board and board of advisors apply mutatis mutandis.

Art. 663c

1 Companies whose shares are listed on a stock exchange must specify the significant shareholders and their shareholdings in the notes to the balance sheet, where these are known or ought to be known.

2 Significant shareholders are defined as shareholders and groups of shareholders linked through voting rights who own more than 5 per cent of all voting rights. Where the articles of association provide for a lower percentage threshold for registered shares (Art. 685d para. 1), that threshold applies for purposes of the duty of disclosure.

3 Also to be indicated are the shareholdings in the company and the conversion and option rights held by each current member of the board of directors, executive board and board of advisors including those held by their close associates, specifying the name and function of the member concerned.”

2. On 3 March 2013 a new Art. 95 para 3 of the Federal Constitution of the Swiss Confederation was adopted by a popular vote (**Initiative Minder**), according to which:

“For the protection of the economy, private property and shareholders, and to guarantee sustainable corporate governance, the law shall regulate Swiss companies limited by shares listed on stock exchanges in Switzerland or abroad in accordance with the following principles:

a.

the general meeting votes on an annual basis on the total amount of all remuneration (money and the value of benefits in kind) given to the board of directors, the executive board and the board of advisors. It elects on an annual basis the president of the board of directors, the individual members of the board

of directors and the remuneration committee, and the independent representatives of voting rights. Pension funds vote in the interests of their insured members and disclose how they have voted. Shareholders may vote remotely online; they may not be represented by a governing officer of the company or by a custodian bank;

b.

the governing officers may not be given severance or similar payments, advance payments, bonuses for company purchases and sales, additional contracts as consultants to or employees of other companies in the group. The management of the company may not be delegated to a legal entity;

c.

the articles of association regulate the amount of credits, loans and pensions payable to governing officers, their profit-sharing and equity participation plans and the number of mandates they may accept outside the group, as well as the duration of employment contracts of members of the executive board;

d.

Persons violating the provisions under letters a-c are liable to a custodial sentence not exceeding three years and to a monetary penalty not exceeding six times their annual remuneration.”

As this article of the Swiss Constitution is broadly drafted and not directly applicable, and as the adoption of a formal statute by the Parliament will take some time, the Federal Council (Swiss government) has already adopted a transitional ordinance (Orab), which entered in force on 1 January 2014.

It is interesting to note that according to some recent searches, it appears that less than one year after the acceptance of the initiative, some companies have already found ways to legally replace the forbidden golden parachutes by other types of remuneration and to take advantage of loopholes in the legal system to reach a similar result.

5. Has it occurred in your jurisdiction that management decisions were revised after being challenged by stakeholders (e.g. consumers) ?

- [to the extent applicable] Can you give some examples?
- Was this protest spontaneous or organized by certain groups/institutions ?

6. Has your jurisdiction issued specific legislation on female presence in the board of directors ?

No, there is no specific legislation on female presence in the board of directors.

- If no, was this (n)ever a political topic ?

There have been some discussions on female presence in the board of directors of public or semi-public agencies.

- If yes, which obligations apply under these laws ?

7. Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board ?

- Does this depend on the type of company ?
- Does this depend on whether the company is listed or not ?

There is no requirement to have a minimum of independent and/or non-executive directors in the board.

However, according to Art. 12 para. 3 of the Swiss Code (recommendations for listed companies, see above N° 2), *“The majority of the Board should, as a rule, be composed of members who do not perform any line management function within the company (non-executive members).”*

8. Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics ?

- Composition of Board of Directors ?
- Compensation for Directors ?
- Obligation to have certain stakeholders represented in the Board ?

There are no specific requirements regarding the composition of the Board of Directors.

However, according to Art. 12 para. 1 of the Swiss Code (recommendations for listed companies, see above N° 2), *“The Board of Directors should be small enough in numbers for efficient decision-making and large enough for its members to contribute experience and knowledge from different fields and to allocate management and control functions (section 21 ff.) among themselves. The size of the Board should match the needs of the individual company.”*

9. Position of directors/ managing directors in the event of disposal and/or merger of the company ?

- Is it typical to have wording on the position of the management in transfer agreements ? If yes, which topics would usually be covered ?
- Is it common to have wording on discharge for the services performed prior to the disposal/merger ?
- Is it common to have contractual limitations of liability towards the acquirer ?
- Is it common for the sale agreement to provide restrictive covenants on the part of directors / managing directors ? If yes, what type of restrictive covenants ?

10. Are there in your jurisdiction minimum requirements to become a company director ?

- Does a director need to prove certain knowledge on company business ?
- Does he need to have certain degrees ?

There are no minimum requirements to become a company director.

However, according to Art. 12 para. 2 of the Swiss Code (recommendations for listed companies, see above N° 2), *“Members of the Board of Directors should be persons with the abilities necessary to ensure an independent decision-making process in a critical exchange of ideas with the Executive Management.”*

11. Does a company director has specific obligations with regard to:

- Non-compete obligations

The duty of loyalty (Art. 718b SCO) prohibits directors from competing with the company. In case of an infringement of such duty, the company can claim the profit unlawfully obtained by the director on the basis of Art 423 para. 1 SCO, according to which *“where agency activities were not carried out with the best*

interests of the principal in mind, he is nonetheless entitled to appropriate any resulting benefits”.

- The obligation to reveal so-called “corporate opportunities” towards the company

The prohibition on competition also includes the particular case of usurpation of corporate opportunities. By frustrating the opportunities of the company, the director breaches his duty of loyalty, which can also trigger his criminal liability (Criminal management).