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REVISED SWISS CODE OF BEST PRACTICE FOR CORPORATE GOVERNANCE – WHAT IS NEW?

On 6 February 2023, the long-awaited revised version of the Swiss Code of Best Practice for Corporate Governance was published by *economiesuisse*. This briefing provides an overview of the key changes compared to the previous version of 2014. We also focus on a few selected topics of practical importance and analyse certain implications of the revision, providing recommendations for companies to consider as part of their governance regimes. These focus areas are: environmental sustainability, social sustainability, compensation and the duties of the board of directors (particularly with respect to conflicts of interest).

INTRODUCTION

The Swiss Code of Best Practice for Corporate Governance is an instrument of self-regulation issued by *economiesuisse* which was first published in 2002. The second edition of 2014 (SCBP 2014) was revised based on the Say-on-Pay rules introduced to Swiss law at that time, whereas the third and current edition (SCBP 2023) considers the Swiss corporate law reform that entered into force on 1 January 2023 and certain other changes to the Swiss Code of Obligations (CO), but also international developments in corporate governance and sustainability.

In this spirit, the introduction to the SCBP 2023 now explicitly states that: „business activities are sustainable when the interests of different stakeholders in the company are taken into account and economic, social and environmental goals are pursued holistically“. We will therefore set out an overview of how this guiding principle has been implemented in the SCBP 2023 and describe the key differences compared to the previous edition.

ENVIRONMENTAL SUSTAINABILITY

The notion that environmentally sustainable business activities create long-term value has been built into the SCBP 2023 in various instances. At the highest level, shareholders (having the final say within the company) determine in the articles of association the key parameters of the company's business activities – which is nothing new – and, where appropriate, comment on issues regarding sustainable corporate development, such as CO2 or other

environmental goals (art. 1 para. 2 SCBP 2023). Such provisions would most likely be implemented within the purpose article of a company's by-laws and on the one hand legitimise decisions by the board of directors (the board) and management to pursue certain environmental goals (potentially at the expense of short-term profits), but on the other hand also hold directors and senior management accountable for working towards or reaching such goals (which, in turn, can provide a basis for variable compensation targets).

Second, with respect to the board, the SCBP 2023 recommends that as part of its duty to be responsible for the overall management and supervision of the organisation, the board should also specify the sustainable interests of the company. In addition to the interests of shareholders, it should consider in its decisions, among other things, the interests of the environment – always following any requirements set out in the articles of association (art. 9 para. 1 SCBP 2023). Based on this recommendation, the board could interpret its ultimate responsibility for the running of the company to mean (and establish in the organisational regulations or in concrete decisions) that environmental goals should be taken into account, even if this is not explicitly mentioned in the articles of association. Relatedly, the SCBP 2023 states that the board may link variable compensation paid to management to specific sustainability goals. This is a trend that had already been suggested in (legal) literature and practised by some larger companies, but was so far not officially recognised as best practice. The SCBP 2023 also clarifies that the report on non-financial matters should be part of the internal controls and may be reinforced by an external audit (art. 34 para. 3 SCBP 2023).

SOCIAL SUSTAINABILITY

A new aspect of best practice introduced with the SCBP 2023 is social sustainability, by which we mean interaction with stakeholders, company culture, but also the promotion of diversity. An emphasis on gender diversity in particular was prominently implemented in the German version of the SCBP 2023, always mentioning the male and female forms of a person (e.g., „Aktionärinnen und Aktionäre“) – a change that does not have any impact in the English version, where gender neutral forms are used.

The SCBP 2023 includes (different from the previous versions) recommendations regarding interactions with stakeholders and related to company culture. It does so

along two dimensions: Externally, the board should seek a dialogue with the shareholders and other key stakeholders on important matters (including with respect to matters of compensation) and incorporate their key concerns in its planning and decision-making (art. 8 SCBP 2023). How can this be done? First, the board should ensure that shareholders receive sufficient information (potentially beyond the legal disclosure requirements) ahead of general meetings of shareholders, and should also appoint a body responsible for shareholder relations which can collect input from shareholders for consideration and response by the board or its chairperson. At general meetings of shareholders, the board can address any concerns so raised (even if not officially requested by shareholders to be included in the agenda) – always adhering to the principle of equal treatment.

Internally, the board shall „promote a culture that encourages people to act in an entrepreneurial way and that is characterized by integrity, long-term thinking and responsibility“. The climate should be one of inviting questions and addressing sensitive issues openly (art. 12 SCBP 2023). In more practical terms, there should be processes in place to ensure that employees can report any suspected irregularities – either to an independent internal or external body – without experiencing disadvantages or retaliation, followed by an appropriate investigation and response by the company. This not only requires setting up systematic internal processes at management level and throughout the organisation, but the drive and general guidance must also come from the top and the board should on a regular basis supervise the implementation of responsible corporate action.

Further, while the SCBP 2014 already recommended that boards should consist of male and female members, the 2023 edition applies a broadened understanding of diversity: Companies should aim to have a diverse board with members of different competences, experiences, ages, backgrounds, ethnicities, skills and qualities, ensuring a decision-making process influenced by a variety of perspectives in order to fulfill its management and supervision duties competently (art. 13 para. 2 SCBP 2023). In our view, competence should still be the key requirement for selecting (and electing) board members to ensure a corporate governance that is in line with the legal requirements, but not necessarily only on an individual level; rather, the totality (and balance) of competences – including how individuals complement and challenge each other – should be the ultimate criterion for the composition of the board.

COMPENSATION

As mentioned in the introduction, the SCBP 2014 already included recommendations on compensation matters (at that time in an annex), many of which were transferred to the main body of the SCBP 2023 (e.g., the recommendation that compensation for non-executive positions should generally only consist of fixed components, or that the compensation system should contain malus and claw back mechanisms).

Apart from some tweaks in language, the key changes in the SCBP 2023 regarding best practice recommendations on the compensation policy and compensation system include the following (art. 39 ff. SCBP 2023):

- > The SCBP 2023 emphasises that the compensation policy should ensure that the board, the executive committee and employees are compensated for performing, as well as motivated to perform, in a way that serves the goal of sustainable corporate development and the long-term growth of company value.
- > It further clarifies that the compensation should be comprehensible to third parties and be based on specific criteria which are geared towards a sustainable achievement of the company's goals, whereas variable compensation may be linked to compliance and other sustainability goals.
- > The SCBP now contains a clear recommendation for the board to provide for share-based compensation combined with holding periods, with the aim of aligning the interests of executives with the interests of long-term oriented shareholders as closely as possible; previously, share-based compensation was only highlighted as one option. This is a reaction to the observation that in some companies, the share price and compensation developments diverged, and aims to re-invigorate the 'pay-for-performance' principle (see FRICK DAVID, Der neue Swiss Code of Best Practice for Corporate Governance 2023, GesKR 1/2022, p. 1 ff.).

Against this background, especially listed companies should review their compensation systems and policies – taking into account effects that the previous or current compensation systems may have had – and ensure that the compensation payable is indeed a means to achieve the company's long-term goals.

CONFLICTS OF INTEREST AND DUTY OF COMMITMENT

The guidelines for members of the board and for the executive team to avoid conflicts of interest have been completely revised in the SCBP 2023. The section begins with the general statement that members of the board and executive committee should arrange their personal and business affairs to avoid, as far as possible, conflicts of interest with the company they act for. Investments or other transactions – having recently been identified and publicly discussed in criminal cases against former executives – should not be carried out if they could jeopardise the company's interests (art. 19 para. 1 SCBP).

Unlike the new art. 717a CO, but in line with prevailing doctrine, the SCBP 2023 distinguishes between conflicts of interests („*Interessenkonflikte*“) and proximities of interests („*Interessenberührungen*“). A proximity of interest exists if the interests of the company are affected or if interests of third parties should be safeguarded by a board member, but there is only a minor risk that the company's interest is disregarded. Nonetheless, according to art. 19 para. 2 of the SCBP 2023, members of the board as well as the top executives must inform the chairperson about proximities of interests and disclose all relevant information. In line with art. 717a CO, the SCBP 2023 demands that the board, after such information, decides on how to handle the conflict. As measures that might be considered, the SCBP 2023 mentions different forms of not being permitted to participate (in voting and/or in discussions), a double resolution, the prior assessment of the transaction by an independent third party or the approval of a transaction by a general meeting of shareholders. In case of ongoing conflicts that cannot be resolved, the board should ask the member to resign or decide not to nominate the member for re-election. We recommend that the organisational regulations of a company define how conflicts of interest are to be handled.

Furthermore, the rules of the SCBP concerning the time commitment of the members of the board were refined beyond the legal requirement to state the number of mandates they and members of the executive committee may hold in other companies (cf. art. 15 para. 4 SCBP 2023). Namely, in the event of accepting a new mandate, the person concerned should inform the competent body in advance. This goes further than the current practice at many companies, as so far it has been more common for companies to require that members of the board inform the chairperson if their circumstances change in a manner

that may affect their independence. The SCBP 2023 goes even further and demands that the board determines the information to be provided by a board member if it accepts a new role, and the process concerning the consent required to do so for members of the executive committee. This is typically one of the core responsibilities of a nomination committee.

OTHER CHANGES

Many of the changes that were made in the SCBP 2023 reflect the recent corporate law reform. This applies, e.g., to the use of electronic means in relation to shareholders. The SCBP supports hybrid and virtual general meetings of shareholders as long as these forms of meetings facilitate participation of shareholders and do not jeopardise the „orderly and safe conduct“ of the meeting (art. 3 para. 3 SCBP 2023). In our experience, it is precisely this responsibility for said orderly and safe conduct which makes companies hesitant to conduct general meetings of shareholders in these new forms, being concerned that shareholders attending virtually may make excessive use of their participation rights. Another major obstacle to the use of these new forms is the risk allocation in art. 701f CO in case of a system failure (requiring the company to

conduct the respective meeting again), which seems to ignore whether the technical problem could have led to a different outcome of a vote (which often will not be the case given that most shareholders nowadays choose to vote before the meeting) – hopefully, the courts will interpret this unfortunate rule in a company-friendly manner. As a result, some companies plan to give shareholders, apart from attendance on-site, the ability to watch the general meeting of shareholders virtually, e.g., via a streaming platform. This does not qualify as a hybrid meeting in the sense of art. 701c CO in case shareholders are only allowed to exercise their rights on-site.

There are some further changes to the SCBP not directly related to the corporate law reform. For example, the recommendations on board committees, in particular on the audit committee, were expanded significantly. Notably, the SCBP states that the audit committee should discuss the reporting on non-financial matters (art. 23 para. 5 SCBP). However, we believe that in case there is a dedicated sustainability or environmental, social, governance (ESG) committee, such a committee may be even better placed to review the non-financial and other ESG related reports than the audit committee. In addition, risk management, compliance and financial monitoring are now summarised under the internal control system (cf. art. 26 ff. SCBP 2023).

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