The Legal 500 Country Comparative Guides

Switzerland: Corporate Governance

This country-specific Q&A provides an overview to corporate governance laws and regulations that may occur in Switzerland.

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1. **What is the typical organizational structure of a company and does the structure typically differ if the company is public or private?**

   By law, both listed and non-listed companies are required to have three corporate bodies: the shareholders' meeting, the board of directors and the external auditors. Private companies may waive the requirement to perform an audit of their annual accounts (and, therefore, to appoint external auditors) if certain criteria are met.

   In listed companies as well as larger private companies, the day-to-day management is typically delegated by the board of directors to the executive management, often called "executive committee" or similar (see question 5).

   Further, listed companies are required to establish a compensation committee whose members are elected by the shareholders' meeting from among the board members. The board of directors typically establishes further committees (see question 9).

2. **Who are the key corporate actors (e.g., the governing body, management, shareholders and other key constituencies) and what are their primary roles? How are responsibilities divided between the governing body and management?**

   The key corporate actors are the board of directors, the executive management and the shareholders (acting at the general meeting of shareholders). The board of directors may pass resolutions on all matters not reserved to the shareholders' meeting by law or the articles of association. Subject to certain non-transferable duties pursuant to statutory law which include, among other things, determining the strategy of the company and supervising management, it may delegate all other duties, namely the management of the company, to the executive management based on an authorization in the articles of association and the adoption of organizational regulations. However, such organizational regulations in most cases reserve certain matters for approval by the board of directors, such as significant acquisitions or disposals.

   While the law states that the shareholders' meeting is the supreme governing body, its powers are generally confined by law and may be extended by the articles of association in very limited cases only. See question 20.

3. **What are the sources of corporate governance requirements?**

   Swiss company law is primarily set out in art. 620 ff. of the Swiss Code of Obligations ("CO"). The most relevant additional source for listed companies is the Ordinance against Excessive Compensation in Listed Companies ("OaEC"). The OaEC is applicable to Swiss companies listed on either a Swiss or foreign exchange. It provides for a mandatory "say on pay" by shareholders regarding executive compensation, the prohibition of severance and certain other forms of payments as well as the duty of the board of directors to produce an annual remuneration report, among further rules. Additionally, companies listed on the SIX Swiss

Exchange (“SIX”) are subject to SIX’s regulations, including the Directive on Information Relating to Corporate Governance (“DCG”) which requires companies to publish a Corporate Governance section in the annual report.

The Swiss Code of Best Practice for Corporate Governance (“SCBP”) issued by economiesuisse, a private association of Swiss business, contains guidelines regarding matters of Corporate Governance. The SCBP follows a comply-or-explain approach, allowing companies to deviate from the SCBP’s provisions if they provide a suitable explanation. Although compliance with the SCBP is not mandatory, its provisions are widely observed and it is thus an important part of the Swiss legal framework. Guidelines by proxy advisors (see question 26 below) have also gained importance in recent years and are taken into account by a growing number of companies.

4. **What is the purpose of a company?**

Swiss companies are by default profit-oriented. In following its corporate purpose as defined in a company’s articles of association, a company’s board of directors should pursue the long-term interest of shareholders. At the same time, the board of directors is, pursuant to existing case law, allowed to appropriately take into account the interests of other constituencies, including employees, customers and creditors.

5. **Is the typical governing body a single board or comprised of more than one board?**

The mandatory governing body of Swiss companies limited by shares is the board of directors. By default, the law provides for a one-tier board system, i.e. the board is responsible for the management of the company and represents the company in relation to third parties.

However, it is possible – and customary for listed or other larger companies – that the board delegates the daily business to the executive management / an executive committee (see question 2 above). This results in a two-tier governance structure in which the board of directors is mainly tasked with the ultimate direction and strategy of the company as well as the oversight over the executive management. The executive management may be personally fully separated from the board, or certain members of the executive management (such as the CEO) may also sit on the board (see question 15).

6. **How are members of the governing body appointed and removed from service?**

Members of the board are appointed and removed by the general meeting of shareholders, usually upon recommendation of the board of directors. For listed companies, the OaEC requires that board members be elected individually and on an annual basis. Board members of non-listed companies are elected for a term of three years unless otherwise provided in the articles of association (up to a maximum of six years). It is not possible for the board to fill vacancies by itself.

Members of the executive management are appointed and removed by the board of directors.

7. **Who typically serves on the governing body and are there requirements that govern board composition or impose qualifications for directors regarding independence, diversity, tenure or succession?**

   The board of directors of larger and in particular listed companies is typically mainly composed of non-executive, outside directors who have entrusted the executive committee with the operation of the company. The SCBP recommends that the majority of the board is independent, which it defines as non-executive members who have never or at least not for the previous three years been members of the executive committee and who have no or only minor business relations with the company.

   The number of board members is not specifically regulated by law, but minimum and maximum numbers may be imposed by the articles of association. Where there are different classes of shares, the articles of association must stipulate that the holders of each share class are entitled to elect at least one representative to the board.

   Swiss law does not require particular knowledge or qualifications (e.g., in strategic, financial or accounting matters) and there are no gender or diversity requirements. In respect to the latter, it is currently proposed to introduce a gender quota on a comply-or-explain basis for the board and executive management of listed companies. The SCBP recommends already today that the board of directors is comprised of male and female members with the necessary abilities to ensure an independent decision-making process in a critical exchange of ideas with the executive management. Also, companies are free to incorporate qualifications into their articles of association and/or the organizational regulations.

   By law, the term of office of board members is either three years (non-listed companies), unless otherwise provided in the articles of association, or one year (listed companies) (see question 6). However, the law does not impose any restrictions on the overall tenure as board members can be re-elected without limitation. The articles of association may provide for age restrictions or a maximum term of office.

   The SCBP recommends the board to plan the succession and to determine the criteria for selecting candidates.

8. **What are the common approaches to the leadership of the governing body?**

   Leadership of the board of directors is typically assumed by the chair of the board of directors who must assure that the board fulfills its duties according to the law and the internal regulations and that the relationship between the board and the executive management functions properly. The OaEC requires that the chair of Swiss companies listed on a Swiss or foreign exchange is annually elected by the shareholders' meeting.

Leadership of the executive management is typically assumed by the CEO.

There is an increasing tendency towards the review of the board's performance with external experts.

9. **What is the typical committee structure of the governing body?**

   The board of listed companies typically comprises several committees, in particular a compensation, a nomination, and an audit committee. The board may appoint further permanent (e.g., risk, corporate governance) or ad hoc committees. Several tasks may also be combined in a committee (such as nomination and compensation matters).

   The OaEC requires a mandatory and annual election by the shareholders of the members of the compensation committee and the articles of association must provide for principle-based rules regarding the powers and responsibilities of this committee. The SCBP recommends that an audit, compensation and nomination committee be established. Other than that, Swiss law does not explicitly provide for mandatory board committees.

10. **How are members of the governing body compensated?**

    A cash remuneration of board members is standard, whereby several companies offer (mandatory or optional) stock participation schemes. Such remuneration covers board meetings as well as committee work. No bonuses are paid at the level of the board. For the executive management, see question 13.

    Pursuant to the OaEC, listed companies are required to annually submit the board's proposal on the compensation of the board members, the senior management and the advisory board to the shareholders' meeting for a binding vote.

11. **Are fiduciary duties owed by members of the governing body and to whom are they owed?**

    The members of the board and all persons tasked with the company's management (i.e. members of the executive management) have a duty of care and loyalty that requires them to carry out their responsibilities with due care and to safeguard the interests of the company. These duties are owed to the company (see question 5 regarding relevant constituencies). In addition, the members of the board and executive management are required to treat shareholders under the same circumstances equally.

12. **Do members of the governing body have potential personal liability? If so, what are the key means for protecting against such potential liability?**

    Members of the board and executive management as well as other persons who have

significant influence on the company's decision making process, are jointly and severally liable for damages caused by intentional or negligent breach of their duties. Each member can be held liable with his or her entire assets. The plaintiff may be any individual shareholder, the company itself or, in the case of the company's bankruptcy, any creditor. In some instances, board members (and third persons who act as such) may also be held criminally liable, including in case of violation of certain requirements set forth in the OaEC (e.g. payments of prohibited severance benefits).

Key means for protection are the following: (i) Acting in compliance with the business judgment rule, which means that if directors take decisions in a flawless decision-making process, on the basis of appropriate information and free from conflicts of interests, then the courts only examine whether a business decision was reached in a sound manner; (ii) setting up D&O insurance, which today is standard in nearly all companies in Switzerland; (iii) entering into appropriate indemnity arrangements, although their enforceability is not fully settled in many respects, and (iv) the shareholders granting discharge to the members of the board of directors and the officers, meaning that they as well as the company are excluded (or at least limited) from bringing forward any action against the directors for facts that were known at the shareholders' meeting.

13. **How are managers typically compensated?**

Although the compensation systems of Swiss listed companies vary significantly, the compensation usually consists of fixed (base salary, normally paid in cash) as well as variable remuneration. The latter typically comprises a short-term and a long-term component. The short-term variable remuneration depends on past performance and is usually paid as an annual cash bonus or in blocked shares. The remuneration granted under long-term incentive plans in most cases consists of equity awards (such as performance share units) which are subject to multi-year vesting periods.

Members of executive management of listed companies are subject to the compensation rules of the OaEC, see question 10.

14. **How are members of management typically overseen and evaluated?**

In a normal two-tier structure under which management of the company is delegated to executive management, the board of directors remains responsible for the oversight of executive management (see question 5). By law, the board of directors has a duty to select, instruct and supervise executive management. Oversight is typically ensured by appropriate and regular reporting by management at board meetings and supported by oversight carried out by relevant board committees (e.g., the audit committee in respect to oversight on financial reporting).

Members of management are typically evaluated on the basis of achievement of the targets determined under the applicable short-term and long-term incentive plans. These may be

targets regarding the financial and/or share price performance of the company (absolute or relative to the market or industry) or personal performance criteria regarding the relevant member, or a combination of the two. A distinction is often made between different functions or levels of management and depending on whether a member holds a function at group level or for certain regions or business units only.

15. **Do members of management typically serve on the governing body?**

While both solutions are permissible and seen in practice (see question 5), it is nowadays more common that boards of directors are composed exclusively of non-executive directors. The SCBP recommends that the board chairmanship and CEO position not be entrusted to one and the same person (dual leadership). Where exceptionally one person performs both functions the board should implement adequate control mechanisms (such as the appointment of a non-executive lead director).

16. **What are the required corporate disclosures, and how are they communicated?**

Corporate disclosures are required under a variety of provisions under the CO, the OaEC, other statutes as well as stock exchange rules. A broad distinction can be made between periodic, recurring disclosures and disclosures required upon the occurrence of certain events.

Listed companies are required to prepare and publish an annual report comprising the annual (consolidated and stand-alone) financial statements and a management report. The compensation report required by the OaEC and the corporate governance report pursuant to the DCG are typically included as separate sections in the annual report. The publication of semi-annual (consolidated) interim financial statements is mandatory for companies listed on the SIX, while quarterly financial reporting is voluntary.

Companies listed on the SIX are further required to inform the market of price-sensitive facts (so-called ad hoc publicity) as soon as they occur through both a “pull” (publication on the company’s website) and a “push” (distribution by e-mail) system so as to ensure equal treatment of market participants. Companies may postpone the publication under ad hoc publicity rules in certain limited circumstances only.

SIX stock exchange regulations require that members of the board of directors and executive management report transactions in the company’s equity securities or financial instruments related thereto (including transactions by related parties if made under the significant influence of the relevant member) to the company. The company must submit information regarding such transactions through an electronic reporting platform. The information is publicly accessible on SIX’s website indicating the function of the reporting individual but not the name.

In addition to the above, SIX’s regulations also require companies to provide certain

information on their websites (such as a corporate calendar) and provide for a number of regular reporting obligations. Specific reporting obligations apply to issuers of certain instruments such as bonds and derivatives.

17. **How do the governing body and the equity holders of the company communicate or otherwise engage with one another?**

    The primary forum for communication and engagement between the board of directors and the shareholders of a company is the annually held ordinary shareholders' meeting, where shareholders are entitled to request information regarding the company's affairs to the extent required for the exercise of shareholder rights and subject to confidentiality requirements. Information is otherwise mainly provided by the means described under question 16 above. The board of directors may also engage with individual investors directly but may only do so within the boundaries of the law, particularly the principle of equal treatment of shareholders and where information is shared, restrictions under insider laws and stock exchange regulations relating to ad hoc publicity.

18. **Are dual or multi-class capital structures permitted and how common are they?**

    Swiss law is rather flexible when it comes to equity (and debt) capital structures and it is permitted to issue several classes of shares as well as debt instruments. It is, however, only allowed to create voting shares by attributing them different nominal values (meaning that all shares technically carry one vote but have different dividend rights). Moreover, it is also possible to issue participation certificates, which do not bear any voting rights. According to a study conducted by a Swiss proxy advisors for the year 2019, approximately 8 percent of the 172 reviewed listed companies have made use of these possibilities. This number has decreased over the last years, as the overall trend is towards the principle of 'one share one vote', i.e. capital structures in which the voting power is in proportion to the respective capital share. Only very few companies have issued participation certificates.

19. **What percentage of public equity is held by institutional investors versus retail investors?**

    It is difficult to make an accurate statement in this regard as there are no reliable and up-to-date statistics available. However, estimates and approximations indicate that more than half of public equity is held by institutional investors.

20. **What matters are subject to approval by the shareholders and what are the typical quorum requirements and approval standards? How do shareholders approve matters (e.g., voted at a meeting, written consent)?**

    According to the CO, the following matters are subject to the approval by the general meeting of shareholders:

- adoption and amendment of the articles of association;
- appointment or removal of the members of the board and the auditors;
- approval or rejection of the management report, including, if applicable, the consolidated financial statements;
- approval or rejection of the use of the balance sheet profits and, in particular, the declaration of dividends;
- discharge of the members of the board from liability; and
- matters that are by law (such as the OaEC or the Merger Act) or by the articles of association reserved to the shareholders' meeting.

Unless otherwise provided by law or the articles of association, the general meeting passes resolutions by an absolute majority of the voting rights represented. The CO sets out certain important matters, such as but not limited to the amendment of the purpose of the company, the restriction of the transferability of registered shares or the dissolution of the company, for which at least two-thirds of the voting rights represented and an absolute majority of the nominal value of shares represented are required. The articles of association quite often change the default majority, in particular by calculating the majority on the basis of votes cast (instead of votes represented) and/or by applying a relative majority (i.e. abstentions do not count as votes cast), and sometimes contain other deviations (e.g. additional supermajority requirements).

21. **Are shareholder proposals permitted and what requirements must be met for shareholders to make a proposal?**

Individual shareholders or group of shareholders representing shares with a total a par value of at least 1 million Swiss francs or, if lower, 10 per cent of the share capital, may request that an agenda item together with a proposal be included in the invitation. The articles of association may contain a lower threshold and the SCBP states that in case the general meeting of shareholder reduces the par value of shares through repayment, the board of directors should review whether it would be appropriate to adjust the required threshold. In addition, each shareholder may submit a proposal under an existing agenda item directly at the shareholders' meeting.

22. **May shareholders call special meetings or act by written consent?**

Individual shareholders or group of shareholders representing 10 per cent of the share capital, may request that an extraordinary shareholders' meeting be convened. The articles of association may contain a lower threshold.

Shareholders may only resolve on matters by voting on physical meetings. However, representation by proxy, in particular by instruction to the independent proxy, is generally permitted.

23. **Is shareholder activism common and what are the recent trends?**

With about 35 shareholder initiatives between 2010 and 2018, Switzerland is a key European target for activist shareholders. Since 2012, such initiatives in Switzerland have more than doubled.

24. **What is the role of shareholders in electing the governing body?**

The general meeting of shareholders is responsible for the election of the members of the board of directors, usually upon proposal of the board of directors (see question 6 above).

25. **Are shareholder meetings required to be held annually or otherwise, and what information needs to be presented?**

Swiss companies must hold an annual shareholders' meeting within six months after the close of the business year and may hold further (extraordinary) shareholders meetings, if necessary. Each shareholder has the right to receive each year a copy of the audited (consolidated and stand-alone) financial statements of the company, the management report, the compensation report, and the audit report (typically all included in the annual report). In addition, each shareholder has the right to ask questions to the board of directors and the auditor during the general meetings. Information requested by the shareholder has to be provided to the extent such information is necessary for the shareholder to exercise its rights. Disclosure of information can be refused if it jeopardizes the business secrets or other worthy interests of the company.

26. **Do any organizations provide voting recommendations or otherwise advise or counsel shareholders on whether to approve matters?**

Proxy advisors, including international players such as ISS and Glass Lewis as well as national players such as Ethos or SWIPRA, usually provide shareholders with voting recommendations for each agenda item on the agenda for the general meeting of listed companies. Some big institutional investors also issue their own advice and recommendations.

27. **What role do other stakeholders, including debt holders, employees, suppliers, customers, the government and communities, typically play in the corporate governance of a company?**

Other stakeholders are typically not formally involved in the corporate bodies of a company; in particular, Swiss law does not provide for formal employee representation on the board of directors. However, stakeholder interests may be taken into account in decisions of corporate bodies (see questions 4, 29). In addition, similar to other European jurisdictions, Swiss corporate law provides for specific protections for creditors, namely capital maintenance provisions, which the board of directors must observe in the interest of creditors.

28. **What consideration is given to ESG (environmental, social and governance) issues, including climate change, sustainability and product safety issues, and are there any legal disclosure obligations regarding the same?**

Swiss law currently does not contain specific legal disclosure regulations on such issues. Companies can, however, include certain information in their annual report on a voluntary basis. In particular, companies with a primary listing on the SIX Swiss Exchange can opt in a sustainability report according to an internationally recognized standard, which is published on the SIX website and binds the issuer.

Furthermore, several legal changes are currently proposed that deal with such issues. The most far-reaching is a popular initiative regarding corporate social responsibility, which, if adopted, would oblige companies to implement stricter standards regarding human rights and the environment in their worldwide activities. A vote on this initiative is expected to be held in fall 2020.

29. **How are the interests of shareholders and other stakeholders factored into decisions of the governing body?**

Swiss company law allows a board to take into account both the interests of shareholders as well as the interests of the company with all its stakeholders (see question 4). Accordingly and if consistent with the long-term interests of shareholders, a company's board of directors will typically appropriately consider all stakeholders within the framework of good corporate management.

30. **Do public companies typically provide earnings guidance on either a quarterly or annual basis?**

Earnings guidance is provided by several Swiss companies although it is not a general standard. Among companies who do publish guidance, the level of detail, metrics as to which guidance is given and intervals/timeframes vary. Some companies give guidance on an annual basis (i.e., for the next financial year) with quarterly or semi-annual updates, while others do so with respect to a different timeframe (typically medium term). While there is no legal obligation to provide guidance, listed companies who have issued guidance are required to inform the market of any significant deviations of expected results from the guidance under ad hoc publicity rules (profit warning).

31. **May public companies engage in share buybacks and under what circumstances?**

Listed companies may engage in share buybacks subject to certain limitations under corporate and financial markets laws. Unless shareholders authorize the cancellation of shares, treasury shares are limited to 10% of the issued share capital and freely available equity must be available in the amount of the acquisition price. In addition, the principle of equal treatment of shareholders must be observed (generally requiring to buy back shares

from individual shareholders at market price). Buybacks are also subject to the rules relating to insider trading and market manipulation of the Financial Market Infrastructure Act (FMIA). In this regard, certain safe harbors for repurchase programs apply, which in turn are subject to certain black-out periods including in case of a postponement of the publication of price-sensitive information.

32. **What do you believe will be the three most significant issues influencing corporate governance trends over the next two years?**

First, new developments are expected to arise from several legal proposals that are currently in parliament. This includes a general corporate law reform, which would fine-tune shareholder rights and the shareholders' meeting process in particular, as well as several proposals in the area of corporate social responsibility (see question 28). We currently anticipate that the corporate law reform will be adopted in mid 2020. Second, the manner how certain companies deal with voting secrecy at shareholders' meetings has come under pressure by media and lawmakers after a highly publicized, alleged incident last year, which might eventually lead to companies adjusting their voting procedures and reduce the foreseeability of the outcome of votes immediately prior to shareholders' meetings. Third, we expect that influence of proxy advisors and shareholders activism continues to further increase (see questions 23 and 26). Fourth, and partially as a response to such challenges, the trend towards non-executive, mostly independent boards and towards more sophisticated and formalized governance arrangements is going on (see questions 7 and 15). Finally, we see a certain political pressure to impose foreign investment controls on the horizon. Although such a change is far from being certain and while it would mainly impact the M&A market, it might also give rise to new, creative governance structures to mitigate its consequences.