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The Revised Swiss Code of Best Practice for Corporate Governance – Clamped between Corporate Law and Proxy Guidelines?

On 6 February 2023, economiesuisse published the revised Swiss Code of Best Practice for Corporate Governance. The revision is the first major overhaul since 2014 and follows the entry into force of the Swiss corporate law reform.

This edition of Advestra Insights looks into some of the changes and their implications for Swiss listed companies. Furthermore, it points towards broader corporate governance trends exemplified in the Code's new guidelines and makes some comparisons with recent proxy advisors' recommendations.

1 INTRODUCTION

On 6 February 2023, economiesuisse (www.economiesuisse.ch) published its revised Swiss Code of Best Practice for Corporate Governance (the "**2023 SCBP**"). It replaces the Swiss Code of Best Practice for Corporate Governance in its version following the last major overhaul in 2014 (the "**2014 SCBP**") in the wake of the "Say on Pay" amendment to the Federal Constitution.

First introduced in 2002, the SCBP sets corporate governance standards in the form of non-binding recommendations primarily addressing Swiss listed companies, but also serving as a guideline for non-listed Swiss companies and other organizations of economic significance. Within its non-binding framework, it follows a "comply or explain" approach: the SCBP allows companies to deviate or refrain from implementing the SCBP's recommendations provided that any deviations are disclosed in a transparent way

and an explanation is provided. Nevertheless, it is implied that absent a good justification listed companies should not depart from the principles set out in the SCBP.

The publication of the 2023 SCBP follows the entry into force of the Swiss corporate law reform on 1 January 2023 which brought about manifold changes to the law governing Swiss companies. The timing follows a similar pattern of the past: the 2014 SCBP was enacted in the wake of the Ordinance against Excessive Compensation in Listed Companies (whose provisions have now been transferred to the Swiss Code of Obligations ("CO") as part of the corporate law reform).

As a general observation, the 2023 SCBP also imposed itself a gender-neutral language; a trend followed by several listed companies when amending their Articles of Associations.¹

Below, we will take a look at key changes and examine whether the 2023 SCBP is more than just a summary of the current state of affairs in Swiss corporate law and practice.

2 GENERAL MEETINGS AND SHAREHOLDERS

2.1 Overview

On the one hand, the revision of the shareholders' right and general shareholders' meeting provisions evolved around the corporate law reform which is striving for, *inter alia*, an enhancement of shareholders' rights and modernization of shareholders' meetings (e.g., by allowing the use of digital technology). On the other hand, it also picked up more general trends such as ESG, regular dialogue between companies and their

shareholder base as well as enhanced transparency expectations for proxy advisors towards companies.

2.2 Shareholders' Meetings

In addition to mirroring the new corporate law provisions on powers of the shareholders' meeting, the 2023 SCBP emphasizes the shareholders' right to comment on issues regarding sustainable corporate development, including social and sociopolitical matters. A trend which has been observed recently with many listed companies proposing the addition of an ESG clause to its corporate purpose in the Articles of Associations.² As a side note, the topics of long-term value creation and corporate social responsibility had already been addressed during the last revision of the 2014 SCBP.³ The current incarnation of the SCBP goes one step further and places sustainability and sustainable growth at the heart of the corporate governance framework. The 2023 SCBP also suggests that the Articles of Associations may comment on issues regarding sustainable corporate development, including social and sociopolitical matters (such as CO₂ or other environmental goals, respecting human rights, etc.), as long as the inalienable powers of the Board are reserved.

However, in line with the 2014 SCBP, the 2023 SCBP still does not make any recommendations on transparency and disclosure with respect to ESG and/or sustainability aspects, which have become the focus of the latest amendments to the CO. This corresponds with the historical approach that the SCBP is generally reticent on disclosure issues, because these were

¹ See e.g. the 2023 AGM invitation of Novartis AG.

² See e.g. the 2023 AGM invitations of Schaffner Holding AG and Dätwyler Holding AG. Pioneers, like Nestlé S.A., however, already have similar ESG clauses as part of their corporate purpose for decades.

³ In an explanatory report to the 2014 revision, it had been noted that "the focus is always on the

long-term interests of the shareholders, represented and concretized by the sustainable interests of the company. However, the implementation of this standard leaves room for interpretation". The report is available under: <https://www.economiesuisse.ch/de/publikationen/swiss-code-best-practice-corporate-governance-2014>.

primarily the domain of stock exchange regulation, namely the SIX Corporate Governance Directive.

Separately, the 2023 SCBP not only includes duties and recommendations for (listed) companies, but also for its shareholders: "Institutional investors, including proxy advisors, should act transparently towards the company." In particular, this provision aims at increasing transparency by proxy advisors which have been the subject of ongoing criticism. However, the 2023 SCBP shies away from implementing additional substance, such as a right for Swiss listed companies to be heard by proxy advisors before they issue recommendations.

Many other reforms of the 2023 SCBP mirror the new Swiss corporate law requirements (for listed companies), such as:

- The requirement of the board of directors (the "**Board**") to include motions, together with a brief justification, in the notice convening the shareholders' meeting (art. 700(2)(3) CO);
- When determining the agenda items, the Board should observe the principle of unity of subject matters (*Einheit der Materie*; art. 700(3) CO);
- Interestingly, the 2023 SCBP permits purely electronic shareholders' meetings (virtual meetings) "if this makes participation easier for shareholders and the orderly and safe conduct of the meeting is not jeopardized". These requirements of easier participation and orderly/safe conduct go beyond the Swiss corporate law requirements (art. 701d CO), but are more liberal than the conservative stance certain proxy advisors take when it comes to virtual shareholders' meetings.⁴ Rightly, the 2023 SCBP emphasizes the individual

responsibility of each shareholder for the functioning of their electronic means when participating electronically;

- The independent proxy should treat voting instructions received from individual shareholders confidentially until the shareholders' meeting and may give the company general information on the instructions received no earlier than three working days before the shareholders' meeting (art. 689c(5) CO).

The 2023 SCBP also deleted any references and explanations for votes by "show of hands". The reason is that the new corporate law provisions require listed companies to disclose the exact distribution of votes in the meeting minutes (art. 702(5) CO) which factually makes votes by "show of hands" impossible for listed companies.

2.3 Dialogue with Shareholders and Investors

The 2023 SCBP promotes more interaction between companies and its investor base. In line with the general trend towards a more constructive engagement with shareholders and investors, the 2023 SCBP suggests that the Board seeks a dialogue with shareholders on important matters and ensures a dialogue with other key stakeholders of the company.

This is particularly true in the run-up to shareholders' meetings, when companies should use the resources available to facilitate the provision of information to and decision-making by shareholders. Following shareholders' meetings, in case "a significant proportion of the votes do not support the Board's motion", it should start a dialogue with the shareholders and address their concerns. The 2023 SCBP remains silent on the threshold for such "significant proportion" of non-supporting votes. This threshold may accordingly vary from one company to

⁴ ISS and Ethos will vote against an amendment of the Articles of Association if they allow for virtual meetings without a justified reason.

another. However, we would expect that any acceptance levels of agenda items below around 80% might be an indication for certain shareholders' dissatisfaction and merit a dialogue with the shareholders.

Stating the obvious, the 2023 SCBP provides that any shareholder (and, by extension, other key stakeholder) interaction finds its limit in applicable disclosure requirements and the statutory principle of equal treatment of shareholders. Furthermore, the 2023 SCBP confirms that the Board is not required to respond to all requests for information in the shareholders' meeting: It explicitly provides for the right to answer complex questions (or list of questions) before or after a meeting.

3 BOARD OF DIRECTORS AND COMMITTEES

3.1 Overview

As in earlier versions, the 2023 SCBP devotes the bulk of its provisions to the Board as governing body being responsible for the "overall management and supervision" of a company. While a body "managing" and "supervising" at the same time may seem contradictory at first glance, such dual role is a result of Swiss corporate law, which foresees the Board as supreme managerial body, but allows for delegation of tasks to certain executive members or an executive management team, subject to retention of certain "inalienable" duties relating to the "overall management". Such a delegation is the norm for virtually all listed Swiss companies. The 2023 SCBP reiterates the non-transferrable Board duties which have remained largely unchanged under the revised Swiss corporate law apart from setting up a report on non-financial matters dealing largely with ESG related considerations, activities and goals.

Not surprisingly and in line with the *Zeitgeist*, the topics of ESG and corporate culture also figure prominently in the revised section on Board matters of the 2023 SCBP. For example, the 2023 SCBP wants Boards to promote a

culture that "encourages people to act in an entrepreneurial way and that is characterized by integrity, long-term thinking and responsibility". As a more practical matter to support this goal, the 2023 SCBP now recommends implementing a "whistleblowing" procedure, whereby employees can report suspected irregularities without "expecting" disadvantages. However, this cultural goal is not mirrored or supported in the section on compensation principles (see section 5 below).

3.2 Composition

In terms of substance, not much has changed in the section on composition of the Board. As one would expect, a particular focus is on diversity of Board members. The 2023 SCBP restates that the Board should aim for "suitable diversity" and that diversity does not only encompass gender, but also competencies, experience, age, background and origin. The 2023 SCBP does not impose any quantitative requirements as to diversity but defers to Swiss corporate law, which mandates for certain listed companies, subject to a modified comply-or-explain regime, a female representation of at least 30% on the Board as of 2026 and 20% as of 2031 on the executive committee. Against the backdrop of this statutory requirement, it is somewhat surprising that the SCBP feels compelled to express truisms such as "The board of directors should strive to ensure that the statutory guidelines for balanced representation of the genders is achieved".

Notably, the 2023 SCBP mandates that there are "enough members who are familiar with Swiss conditions". Again, this home bias is only a soft requirement that may be taken as an expression of unease of a Swiss working group with the current lack of Swiss resident members in certain very large and international Swiss corporates and the risk of a potential disconnect between international Swiss corporates and the Swiss population resulting in a more hostile corporate environment.

3.3 Independence and Over-boarding

The 2023 SCBP mandates a majority of independent members for the Board. While this was already the case in its previous version, the language has gotten rid of the usual "should" to a hardened "The majority of the board of directors are independent members". However, the non-binding nature of the SCBP and the definition of "independent" put this seemingly hard requirement into a soft perspective. Apart from certain very special cases, a member is deemed independent if he or she is a non-executive member who has never been a member of the executive board (or was a member only more than three years ago) and who has no or comparatively minor business relations with the company. Thus, unlike major proxy advisors such as ISS or Glass Lewis or the corporate governance rules applicable to banks and insurance companies, representatives of major shareholders are not *per se* non-independent under the 2023 SCBP as independence is benchmarked against the executive management rather than the shareholder base.

The 2023 SCBP calls upon Board members to manage their time in a way "that they can carry out their mandate correctly and consciously" but remains silent on when a director is deemed over-boarded. Again, it reiterates the corporate law position pursuant to which the Articles of Associations must specify the maximum number of Board or similar roles in other companies, but shies away from prescribing any thresholds itself, an overture to proxy advisors who tend to be vocal on this topic.

3.4 Working Methods and Chairperson

Little has changed in this section compared to the 2014 SCBP. As to the frequency of Board meetings, the 2023 SCBP still defers to the requirements of the company and continues to uphold the minimum number of four meetings per year. As a rather obvious concession to the digital age in which we are

living, the 2023 SCBP now expressly confirms the use of electronic means for Board meetings.

Again, there has been little substantive change in the provisions on the role of the chairperson. The 2023 SCBP reiterates the important role of the chairperson in preparing and conducting meetings and acting as interface to the executive management. It also highlights the chairperson's key role in the provision of information to the Board.

The 2023 SCBP continues to advocate a dual leadership role in which the chairperson of the Board and the CEO are two different people. As in its previous version, the 2023 SCBP acknowledges that there may be company specific and exceptional circumstances in which it may be justified that a single person assumes both the role of CEO and chairperson of the Board (or if the former CEO becomes chairperson without any cooling-off period). If that is the case, the 2023 SCBP continues to demand that appropriate controls are in place and that a lead independent director should be appointed to counter the preponderance of the executive chairperson.

3.5 Conflicts of Interest

Echoing the codification of the rules on conflicts of interest in art. 717a CO, the 2023 SCBP significantly expands on its recommended procedures and rules to address potential conflicts of interest of members of the Board or the executive board.

It stipulates that each member should arrange their personal and business affairs so as to avoid any conflicts between the interests of the company on whose Board or executive board they sit, including refraining from making any investments that could result in such a conflict.

As under the 2014 SCBP, in case of a conflict of interest the member must inform the chairperson. However, the 2023 SCBP expands this obligation to cases where there is a proximity of interests, *i.e.*, where the personal

interests of a member merely affect (rather than outright conflict with) the interests of the company. It is now also specified that the disclosure by the relevant member must include all relevant circumstances required for the chairperson to assess the interests of that member, and thus the magnitude of the conflict (or proximity) of interest.⁵ This is of particular importance – not least from a liability perspective – especially where the member is subsequently excluded not only from the decision-making but also from the discussion among the Board. The Board can only make an informed decision and comply with the business judgment rule if all relevant information is available to it.

Whereas the 2014 SCBP commanded that a member subject to a conflict of interest should not participate in the decision-making, the 2023 SCBP now provides for a more differentiated approach, echoing the legislative process that led to the adoption of art. 717a CO. Rather than simply excluding the relevant member in any and all cases, the Board should take such measures as are most appropriate to address the situation and safeguard the company's interests. The 2023 SCBP lists the following potential measures:

- Exclusion of the member from the resolution, the deliberations or both;
- Double resolution, *i.e.*, resolving on the matter with and without the affected member, whereby a valid resolution is only adopted if in both votes the requisite quorum is reached;
- Commissioning a third party for a prior assessment (the 2014 SCBP provided for this for assessments in connection with related party transactions);
- Submitting the matter to the shareholders' meeting for approval.

These measures may also be combined if deemed appropriate. Boards are not precluded from using other safeguards

available or that may form in the future. The above list of measures only tracks what has already been discussed and proposed in legal doctrine and applied in practice.

Finally, where the 2014 SCBP stated that a member who is subject to an ongoing conflict of interest cannot be a member of the Board or executive board without assigning specific responsibilities, the 2023 SCBP is now very specific that the Board should decide whether to ask the member to step down or refrain from nominating the member for re-election. Of course, any member who is unfit for their role due to a permanent conflict of interest is also likely to infringe upon their fiduciary duties under applicable law and should themselves resign on their own initiative.

3.6 Committees

3.6.1 General

The 2023 SCBP does not prescribe any Board committees, but merely states that the Board should form committees to perform defined tasks. In light of this and given that the compensation committee is the only Board committee that is mandatory under Swiss corporate law for listed companies, such companies have a large degree of freedom as to what specific committees they would like to create. The 2023 SCBP names the audit and nomination committee (in addition to the mandatory compensation committee) as "usual suspects" but could envisage special committees also in the areas of corporate governance, sustainability, digitalization and technology, innovation, risk and investments and also ad hoc committees "to assess specific transactions".

Although the revised section on Board committees is significantly more detailed, it contains mainly provisions that seem rather obvious in the context of best practice for corporate governance such as the right of

⁵ The concept of disclosure of cases where there is a proximity of interests has most recently also been advocated in Swiss legal literature (see *e.g.*

Rolf Watter, *Interessenkonflikte im neuen Aktienrecht*, GesKR 2/2022, S. 252).

committees to obtain independent advice from external experts or to hold meetings with or without other members of the Board or the management. A further rather obvious statement is that committees should inform the entire Board about their activities.

3.6.2 Audit Committee

The audit committee figures prominently in the 2023 SCBP. As in the previous version, Boards are advised to set up an audit committee that should be composed of independent members of the Board (see above for the definition of "independent") and a majority should have practical experience in finance, accounting or auditing. The revised wording now clarifies that the chairperson of the Board should not also be the chairperson of the audit committee.

Again, the revised section of the 2023 SCBP is much wordier than its predecessor and sets out soft requirements that mostly seem inherent in the establishment of an audit committee such as assessing the external and internal auditor and their independence, discussing the financial statements with the CFO and head of the internal and the external audit function. As a welcome clarification, the 2023 SCBP expressly states the audit committee should have access to the head of the external audit and hold a session without participation of management at least once a year. The revised wording also clarifies that the new report on non-financial (*i.e.*, primarily ESG) matters required by Swiss corporate law as of 2024 should also be discussed in the audit committee. However, in case there is a specific ESG or sustainability committee, such a committee may – in our view – be better placed to critically review this report.

3.6.3 Other Committees

As mentioned, the compensation committee is mandated by Swiss corporate law for a listed company and hence the 2023 SCBP now merely states that the Board should be supported in the fulfillment of its tasks in the

field of compensation by a compensation committee and otherwise defers to the section on determination of the compensation for the Board and executive management (see section 5 below).

The nomination committee is also briefly addressed in the 2023 SCBP, but other than a new reference to succession planning as a potential task of such committee, there was little substantive change. The 2023 SCBP reiterates that the Board should set up a nomination committee and that such committee should be composed predominantly of independent members (see above for the definition of "independence").

4 DEALING WITH RISKS, COMPLIANCE AND FINANCIAL MONITORING

The 2023 SCBP also expands its recommendations on risk management, compliance and financial monitoring. It now mandates the Board to (i) have an appropriate risk management system in place (which also considers reputational risks), (ii) conduct an annual risk assessment and (iii) monitor the company's solvency (in line with the newly emphasized corporate law requirement of art. 725(1) CO). The executive management must implement measures (including allocation of resources) to ensure compliance and integrity in day-to-day operations.

Interestingly, the 2023 SCBP puts a particular emphasis on the governance of data handling and requires rules to (i) enable the use of data not only for the benefit of the company but of the wider community and (ii) ensure compliance with data protection laws. Although data protection compliance is not the only big threat for (listed) companies, this special emphasis is in our view warranted by the increased regulatory focus in this area under the revised Data Protection Act and the substantial fines for infringements of data protection laws (such as GDPR) which may even threaten the corporate existence.

At the same time, the internal audit should not only report to the Board and/or the audit

committee, but also to the executive management. Nevertheless, the internal audit must be autonomous and independent and have unrestricted access to information within the company. These measures have mostly already been applied in practice.

5 COMPENSATION

While executive compensation remains a focus of the 2023 SCBP and investors at large, it is less of a trending topic now than it was at the time of the SCBP's last revision in 2014, which followed on the heels of the "Say on Pay" popular initiative which sought to control executive pay of listed companies. Nevertheless, there have been some notable amendments of the recommendations regarding compensation in the 2023 SCBP.

The overarching principle for listed companies remains that compensation should be competitive but also commensurate with market conditions, that it should reward performance and align executives' interests with those of (long-term) shareholders, particularly as regards share-based compensation. This is also reflected in the 2023 SCBP's addition that compensation paid to executives should be commensurate with payments made to shareholders as well as investments and provisions needed to sustainably develop the company.

In line with the general trend to sustainability, the 2023 SCBP states that variable compensation may be linked to specific compliance and other sustainability objectives. Notably, the 2023 SCBP now explicitly recommends that compensation systems provide for *malus* provisions, *i.e.*, provisions ensuring that compensation is reduced if certain objectives are not met. As before under the 2014 SCBP, claw-back provisions should continue to be considered allowing for companies to claim back compensation already paid in case certain events occur. In practice, the triggering of

claw-back provisions is often tied to (i) the restatement of financial figures that served as a basis for the calculation of variable compensation in past periods or (ii) cases of fraud or other wrongdoings of an employee.

6 CONCLUSION

By almost doubling in length, the 2023 SCBP is much more detailed and to some extent convoluted (even including digressions into data protection). It satisfies the *Zeitgeist* by addressing topics like ESG, corporate culture, independence and handling of conflicts of interests. In particular ESG and sustainability are at its «front and center», albeit leaving disclosure to the new rules on non-financial reporting and to stock exchange regulation.

However, the history of the SCBP seems to repeat itself: Similar to the overhaul in 2014, instead of leading the discussion on corporate governance topics and setting own standards, the 2023 SCBP rather follows the developments and reflects the status quo as provided by the new Swiss corporate law and proxy guidelines. Innovative or controversial topics were mostly avoided, probably with the exception of (i) disclosure requirements in cases of proximity of interests (though such concept has most recently been advocated by legal scholars) and (ii) *malus* / claw-back provisions with respect to variable compensation elements. The 2023 revision of the SCBP was in our view a missed opportunity to move into more uncharted territory in the Swiss corporate governance landscape, *e.g.*, in providing more guidance for conduct by proxy advisors or addressing pressing issues such as greenwashing or other compensation elements. Against this background, it is not surprising that its reception in media and the corporate community seems to have been rather muted.

Overall, it remains to be seen whether the 2023 SCBP may attain a relevant position in the niche between Swiss corporate law and the increasingly important guidelines issued by proxy advisors.

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