

International Financial Law Review

March 2006 -

More transparency in board compensation

Swiss company law does not address the transparency of management and board of directors' remuneration. For companies listed on the SWX Swiss Exchange, the SWX Directive on Information Relating to Corporate Governance (the SWX Directive) requires that management and board of directors' remuneration be disclosed. However, the SWX Directive only requires the total amount of compensation paid to the board of directors and the management board to be indicated. The Swiss Code of Best Practice for Corporate Governance also addresses the disclosure of corporate governance issues. However, the Swiss Code does not provide binding corporate governance standards. It just aims to give recommendations for listed companies.

In Autumn 2005, the Swiss parliament adopted a revision of the company law that improves the rules of corporate governance in Switzerland. The new provisions (article 663b *bis* and article 663c(3) of the Swiss Code of Obligations) complete the rules regarding the mandatory content of the attachment to the balance sheet and aim to foster the transparency of Swiss companies whose shares are listed on a Swiss or foreign stock exchange.

According to the new article 663b *bis* of the Code, listed companies are required to disclose the compensation paid to present and former members of the board of directors and the management board in the attachment to their balance sheet. The disclosure must include the total of all compensation paid to the board of directors and the management board, the amounts each of the individual members of the board of directors have drawn, the highest amount paid to a member of the management board and the names of these recipients. In addition, compensation paid to persons who are close to present or former members of the board of directors or the management board must also be disclosed, unless they were made at arm's length.

The new article 663c(3) of the Code also provides that any shares in the company held by each member of the board or of the management board or by related parties must be disclosed in the attachment to the balance sheet.

The new provisions are expected to enter into force on July 1 2006. If this is the case, listed companies will have to include the additional disclosures regarding the compensation and shareholdings in their 2006 balance sheets.

Arlette Pfister and Daniel Stoll

All material subject to strictly enforced copyright laws. © 2006 Euromoney Institutional Investor PLC.

International Financial Law Review

December 2005 -

Further amendments to the Federal Penal Code

In October 2003 Switzerland amended the Federal Penal Code (FPC) and enacted provisions exposing corporations to penal prosecution. With this step Switzerland took up the pace set by Anglo-Saxon and some European countries years ago.

A new article in the FPC, article 100 quarter (i), outlines a secondary penal responsibility of corporations, in those cases when a crime is committed within the corporation's scope of business, but the crime cannot be tied to an employee because of the corporation's lack of sufficient internal organization. In a *numerus clausus* of criminal activity such as organized crime, money laundering, bribery of authorities, or the financing of terrorism, the corporation also becomes primarily and cumulatively subject to penal prosecution if it fails to take the necessary and reasonable organizational measures to prevent the crime. This is outlined in article 100 quarter (ii).

In both cases the corporation's culpability is tied to organizational deficiencies. In cases of secondary culpability the deficiency is such that the perpetrator cannot be identified. In cases of primary culpability, although the crime is attributable to an individual, the corporation is at fault for failing to take appropriate and reasonable steps to prevent the crime.

Over the past decade, the Swiss government and the monitoring bodies of the financial markets put a tight framework of legislation in place aimed at preventing money laundering and the abuse of the financial markets for organizational crime or bribery. There is widespread consensus that financial institutions which comply fully with the rules of the Federal Banking Commission and of the self-regulatory bodies of professional organizations, as well as the present legislation, run little risk of violating article 100 quarter (i).

Were they to violate the article, they could face fines of up to CHF 5 million (\$3.8 million).

But practitioners will be more concerned about what is meant by "the necessary and reasonable organizational measures to prevent wrongdoings" stated in article 100 quinquies (ii).

Although until today no investigation or court decision dealing with article 100 quinquies in the FPC has become public, it is expected that the new legislation will be of high practical importance. In particular, persons who suspect that they have suffered financial losses due to wrongdoings within a company have an interest in beginning a criminal investigation into the corporation. This would allow them to shortcut or even avoid civil procedures.

Corporations involved in a criminal investigation will be forced to make provisions in their financial statements for the commencement of the investigation. Depending on the importance of the matter and the exposure involved, and whether the company is listed or not, there may even be grounds for ad hoc publication.

The financial consequences for a corporation subjected to a criminal investigation should not be underestimated. Corporations doing business in Switzerland have a further reason to ensure that they are in full compliance with local laws and regulations.

Daniel Stoll

All material subject to strictly enforced copyright laws. © 2006 Euromoney Institutional Investor PLC.

International Financial Law Review

October 2005 -

Company law revisions considered

The Swiss parliament is considering two bills that will update Swiss corporation law: one revises the Swiss Code of Obligations (the CO) regarding audits and one introduces the Swiss Federal Act on Admission and Supervision of Auditors. These two bills reflect recent international developments in the field of corporate governance.

Regarding the CO, the requirements of nationality and domicile of members of the board of directors in stockholding companies were also reviewed. The existing rules provide that the majority of the members of the board of directors must have Swiss citizenship and be domiciled in Switzerland.

Subsequent to the enforcement of Bilateral Agreements with the EU, the requirement of nationality was adapted because it was regarded as discrimination. The adaptation was made by way of an interim Circular of the Swiss Federal Commercial Registry in July 2003. It provides that citizens of the EU must be treated as Swiss citizens when assessing the requirement of nationality of the members of the board of directors, provided that they are domiciled in Switzerland.

The current revision goes even further: both chambers of the Swiss parliament (National Council and Council of State) decided to drop the requirement of nationality for members of the board of directors of stockholding companies completely. However, to sufficiently consider the interests of the Swiss tax authorities and potential creditors, the draft bill requires that at least one member of the board or one director authorized to represent the company is domiciled in Switzerland. All other requirements are waived, which facilitates the management of foreign controlled stockholding companies in Switzerland greatly. It will no longer be necessary to nominate (and pay) Swiss trustees in the board of stockholding companies to meet the present requirement of nationality. This new rule will enter into force together with the revised provisions regarding the audit and the Act on Supervision of Auditors, which will be on January 1 2007 at the earliest.

Arlette Pfister

All material subject to strictly enforced copyright laws. © 2006 Euromoney Institutional Investor PLC.