

Swiss Corporate and Banking Law

Professor Dr. Kern Alexander

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Codes

Civil Code

The Swiss Civil Code of 10 December 1907 (SR 210; CC) contains important provisions relating to legal entities in general (Articles 52–59 CC), associations (Articles 60–79 CC), and foundations (Articles 80–89c CC).

Code of Obligations

Articles on Swiss Company Law are found in the following divisions of the Swiss Code of Obligations of 30 March 1911 (SR 220; CO): i) in the last part of division two, which is concerned with the simple partnership (Articles 530–551 CO); ii) in division three, which covers commercial enterprises and the cooperative company (Articles 552–926 CO); iii) in division four on commercial register, business names and commercial accounting (Articles 927–964fCO); and (iv) division five regarding negotiable securities (Articles 965–1186 CO).

The Corporate Law Reform of 2020 revises the articles concerning companies limited by shares (Articles 620–763 CO). It aims to incorporate into federal law the Ordinance Against Excessive Remuneration in Listed Companies Limited by Shares (20 November 2013, SR 221.331) and to improve corporate governance at listed and non-listed companies. Generally, the Corporate Law Reform introduced more flexible rules on company foundation and capital. Additionally, the rules on companies limited by shares were brought in line with new accounting standards.¹ Most provisions of the Corporate Law Reform were implemented by 2023.²

The Act introduces, among other things, gender quotas (Article 734fCO) for listed companies in Switzerland which meet at least two of the following thresholds, as set out in Article 727 I number 2 CO:

have total assets which exceed CHF 20 million;

have a sales revenue which exceeds CHF 40 million;

employ on average more than 250 staff full-time, annually.

Listed companies which meet at least two of the above conditions must ensure that women make up at least 30% of their board of directors and 20% of their executive committee. The quotas are not binding but companies who fail to meet them must provide an explanation for this.

¹ See Federal Office of Justice, Revision of Company Law (perma.cc/76B8-LY44).

² See for an overview Severin Roelli et al., New Provisions in Swiss Corporate Law and Changes to the Commercial Register Ordinance, Pestalozzi 2021 (perma.cc/V8UU-RTG5).

To address the problem of Swiss companies involved in the extraction of natural resources bribing or providing other illicit benefits to foreign governments, new transparency requirements for companies in the commodities sector require the disclosure of any payments made to government entities of CHF 100,000 or more per fiscal year (Article 964*d-i* CO). The new transparency requirements only apply to listed Swiss companies or companies that both exceed the thresholds of Article 727 I CO as set out above and that are involved the extraction of minerals, oil, natural gas or in the harvesting of timber in primary forests (Article 964*d* I CO).

Financial market regulation

In relation to companies that raise capital on public markets, such as the Swiss Stock Exchange, or which act as financial institutions or provide financial services, further relevant provisions can be found in the acts set out in the following paragraphs.

The Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (Financial Market Infrastructure Act, SR 958.1; FinMIA) governs the organisation and operation of financial market infrastructures, and the conduct of financial market participants in securities and derivatives trading (Article 1 FinMIA). The Federal Act on Financial Services (Financial Services Act, of 15 June 2018, SR 950.1; FinSA) establishes requirements for honesty, diligence, and transparency in the provision of financial services and offering of financial instruments, which are intended to protect the clients of financial services providers (Article 1 FinSA). The Federal Act on Financial Institutions of 15 June 2018 (Financial Institutions Act, SR 954.1; FinIA) aims to protect investors and clients of financial institutions and ensure the proper functioning of the financial market (Article 1 FinIA).³

The Federal Act on Banks and Saving Banks of 8 November 1934 (Banking Act, 952.0) regulates banks to ensure depositor protection and reduce risks to the financial system. The Banking Act was amended to include a bank resolution regime (section XI: measures in case of impending insolvency and section XII: liquidation of insolvent banks), deposits protection scheme (Article 37*a* Banking Act), requirements for systemically important (“too big to fail”) banks (section V: systemically important banks), capital requirements (section VI: capital requirements), and provisions on dormant assets (section XIII*a*: dormant assets).

The Federal Act on Collective Investment Schemes of 23 June 2006 (Collective Investment Schemes Act, SR 951.31; CISA) sets out further rules for collective investment schemes, or simply funds, to ensure investor protection, transparency, and the proper functioning of the market (Article 1 CISA).

³ See for a concretisation of these Acts: Financial Services Ordinance (6 November 2019, SR 950.11; perma.cc/3W73-2LDJ); Financial Market Infrastructure Ordinance (25 November 2015, SR 958.11; perma.cc/E5XA-V7EP); Financial Institutions Ordinance (6 November 2019, SR 954.11; perma.cc/YS9Z-ZRME).

The act on the Swiss Financial Market Authority of 22 June 2007 (Financial Market Supervision Act, SR 956.1; FINMAG) is the legal basis for the establishment and mandate of the Swiss Financial Market Authority (FINMA). It contains organisational provisions for FINMA (Article 5 et seqq.) and prescribes the supervisory instruments available to the body (Article 24 et seqq.). It also defines the persons and entities who can be subject to supervision (Article 3). The Act defines the rules for cooperation with other domestic and foreign authorities (Article 38 et seqq.). In Article 44 et seqq., the provisions which deal with the violation of certain provisions of financial law (i.e. insider dealing) are set forth.

Miscellaneous

The Merger Act of 3 October 2003 (SR 221.301) also contains rules relevant to Swiss companies engaging in merger and acquisition activities. On March 19, 2023, Credit Suisse Group AG was acquired by UBS Group AG. As part of a share exchange under the Merger Act (one UBS share for 22.48 Credit Suisse shares), a transaction was completed to acquire 100% of the shares of Credit Suisse. However, the actual legal basis was an emergency ordinance issued by the Federal Council (Ordinance on Additional Liquidity Assistance Loans and the Granting of Federal Default Guarantees for Liquidity Assistance Loans Provided by the Swiss National Bank to Systemically Important Banks, SR 952.3). This emergency measure circumvented the usual provisions of the Swiss Code of Obligations and the Merger Act, and it deprived shareholders of their statutory right to vote at the general meeting on the merger agreement worth 3 billion Swiss francs.⁴

The Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (Anti-Money Laundering Act; SR 955.0) regulates the prohibition of offences defined in the Swiss Criminal Code: money laundering (Article 305^{bis}) and terrorist financing (Article 260^{quinquies} Swiss Criminal Code). The Act also requires financial institutions and businesses carrying out financial transactions to carry out certain due diligence (Article 1). It applies broadly to financial intermediaries, natural persons and legal entities that deal in goods commercially and which, in doing so, accept cash (dealers) (Article 2). The act specifies the duties and due diligence financial intermediaries are required to carry out, including verification of the identity of customers and counterparties and the duty to keep records (Article 3 et seqq.). If an institution suspects money laundering, there is a duty to report this to the appropriate authorities (Article 9). Individuals suspected of money laundering may have their assets frozen by the authorities (Article 10). In addition, Article 12 et seqq. set forth the provisions on the supervision and licencing of financial institutions and the verification of financial transactions by institutions and other businesses.

⁴ See discussion in David Roth, 'Competition and Commercial Law', in M. Thommen, *Introduction to Swiss Law*, pp. 19-20.

Principles

Company Forms

Swiss law does not allow parties to establish companies in any form. Rather, there are fixed types of company forms (*numerus clauses*) that can be utilised.⁵ First, the *simple partnership* (Articles 530–551 CO) is a contractual relationship between two or more natural persons who agree to combine their efforts or resources in order to achieve a common goal (Article 530 I CO). A simple partnership has no distinct legal entity from its members. Thus, it cannot be represented under a company name. Furthermore, the members of a simple partnership are jointly liable without limitation for obligations incurred by the simple partnership (Article 537 I CO). The simple partnership can be established by written or oral contract, but the simple partnership cannot be registered in the commercial register. The flexibility and simple founding procedures for the simple partnership make it a popular and common form of entity for both economic and non-economic ventures. An example of a simple partnership is attorneys within a single practice who are sharing an office space. Often, the formation of a simple partnership goes unnoticed by its members, as the partnership contract is not subject to any formal requirements. For example, people living together in a shared apartment can form a simple partnership.

The *general partnership* (Articles 552–593 CO) refers to a partnership in which two or more natural persons join together, without limiting their liability towards creditors of the partnership, in order to operate a trading, manufacturing or other form of commercial business (Article 552 I CO). A general partnership has no legal personality but can be represented under its own name (Article 552 I CO) and acquire rights, obligations, represent parties, bring proceedings, or be sued in its own name (Article 562 CO). It can be established by written or oral contract, but, if used for non-commercial purposes, the general partnership is only established after it has been placed on the commercial register (Article 553 CO). General partnerships are popular with small businesses run by several people, such as restaurants, tradespeople and small law firms. An example of a general partnership is the Restaurant Reithalle, Bloch + Salzmann domiciled in Zurich.⁶

A *limited partnership* (Articles 594–619 CO) is a partnership in which two or more persons join together in order to operate a trading, manufacturing or other form of commercial business in such a manner that at least one person has unlimited liability (general partner) but one or more persons have liability which is limited to the amount of their specific contribution (limited partner) (Article 594 I CO). The limited partnership is established by contract, but if used for non-commercial purposes, legal personality is only acquired after registration with the commercial register (Article 595 CO). Family businesses often opt for

⁵ See chapter on Competition and Commercial Law, p. 363.

⁶ See Central Business Name Index, Restaurant Reithalle, Bloch + Salzmann (perma.cc/77GT-STQP).

the company form of limited partnership. To illustrate, the limited partnership Udo Jürgens Bockelmann & CO comes to mind, which manages the rights of the famous German singer Udo Jürgens.⁷

The *company limited by shares* (Articles 620–763 CO)⁸ is a company with its own business name whose pre-determined capital (share capital) as set out in the articles of associations is divided into shares and whose liabilities are payable only from the company assets (Article 620 I CO). Furthermore, shareholders cannot be required to contribute more than the amount fixed for a subscription of shares (Article 680 CO), unless otherwise stipulated in a separate shareholders' agreement.

To form a company limited by shares, the founding members must declare by public deed that they wish to form a company limited by shares and draft the articles of association (thereby constituting the governing bodies) (Article 629 CO). Legal personality is acquired at the point of registration with the commercial register (Article 640 CO). The company is governed by the general meeting of members (Articles 698–706b CO) which acts as the supreme governing body, elects the board of directors (Articles 707–726 CO), manages the company, undertakes other delegated tasks and appoints the external auditors (Articles 727–731b CO).

Along with the limited liability company, the company limited by shares is the most common legal company form used in Switzerland.⁹ This popularity derives from the unique attributes of this particular entity, including limiting the liability of individual shareholders to the extent of their capital investment, the transferability of shareholder membership interests, and the proportionate sharing of profits by shareholders based on their respective capital investments. Companies limited by shares are often used for large commercial enterprises as the company structure allows the involvement of a large number of shareholders providing capital while allowing for operational governance by non-shareholders. Many world-renowned Swiss companies such as Credit Suisse, Nestlé, Novartis and UBS are companies limited by shares.

The *partnership limited by shares* (Articles 764–771 CO) is a partnership whose capital is divided into shares and in which one or more partners have unlimited joint liability in the same way general partners have (Article 764 I CO). This company form plays only a secondary role in Swiss commercial activities. In the past, some Swiss private banks were formed as partnerships limited by shares. Currently, the private bank Reichmuth & Co is one of the few private banks still registered as a partnership limited by shares.

⁷ See Central Business Name Index, Udo Jürgens Bockelmann & CO (perma.cc/5XFU--E47T).

⁸ See chapter on Competition and Commercial Law, p. 363 .

⁹ See SME Portal for small and medium-sized enterprises, Limited company: One of the most common legal forms (perma.cc/EX2M-S3MB).

The *limited liability company* (Articles 772–827 CO) is an incorporated company with separate legal personality and a nominal capital specified in the articles of association, in which one or more persons or commercial enterprises participate (Article 772 I CO).¹⁰ The limited liability company has recently increased in popularity because the rules governing the formation of limited liability companies have been relaxed. Unilever Schweiz GmbH, belonging to the multinational consumer goods company Unilever, is an example of a limited liability company.¹¹

The *cooperative company* (Article 828–926 CO) is a legal entity formed by an unlimited number of persons or commercial enterprises, which has the primary aim of promoting or safeguarding the economic interests of its members by way of collective self-help or which is established for charitable purposes (Article 828 I CO). The cooperative company is formed after the articles of association have been approved by the constituting assembly and after registration with the commercial register (Article 830 CO). It is governed by the general meeting (Articles 879–893a CO), the board (Articles 894–905 CO) and the statutory auditor (Article 906 CO). A famous example of a cooperative company is the Swiss retail and supermarket giant Migros.¹²

Associations (Articles 60–79 CC) are legal entities with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose. They are established and acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association (Article 60 CC). Associations cannot pursue a commercial purpose but they can conduct commercial operations in pursuit of their non-commercial purpose (Article 61 CC). They are governed by the general meeting of their members (Articles 64–68 CC), the committee (Article 69 CC) and their auditors (Article 69b CC). Due to their flexibility, associations are suited and widely used in Switzerland to pursue non-commercial purposes. Additionally, associations are often used for professional or industry associations such as the Federation of the International Football Association (FIFA).

The *investment company with variable capital (SICAV)* (Articles 36–97 CISA) and the *investment company with fixed capital (SICAF)* (Articles 110–118 CISA) are both companies limited by shares with the purpose of investing collective capital. However, the SICAV differs from a traditional company limited by shares as its capital is, by definition, not fixed in advance (Article 36 I lit. a CISA). The *limited partnership for collective investment* (Articles 98–109 CISA) is a partnership in which at least one member has unlimited liability (general partner), with other members having liability up to a specified amount (Article 98 I CISA). Its sole objective is to invest collectively. Avobis Real Estate SICAV is—despite the

¹⁰ See chapter on Competition and Commercial Law, p. 377 et seqq., discussing details of LLC structure.

¹¹ See Central Business Name Index, Unilever Schweiz GmbH (perma.cc/P9HR-QZWD).

¹² See Migros, report 2020, Organisation & Structure (perma.cc/YQ2T-Z3U5).

misleading addition of SICAV in its name—an investment company with fixed capital.¹³ Dufour SICAV, on the other hand, is an investment company with variable capital.¹⁴ Finally, the UBS Clean Energy Infrastructure Switzerland, Kommanditgesellschaft für kollektive Kapitalanlagen is an example of a limited partnership for collective investment.¹⁵

Swiss law offers a flexible legal framework for the Limited Qualified Investor Fund (LQIF). The LQIF is a collective investment fund (defined under the Collective Investment Scheme Act (CISA), but it incorporates many of the advantages and flexibilities associated with individual asset management. As a legal innovation for qualified investors, the LQIF aims to reduce licensing and regulatory requirements. However, the legal implementation has proven to be inconsistent, as key protective mechanisms of the Federal Act on Collective Investment Schemes, such as the liability of LQIF intermediaries under the Act (Article 145 et seq. CISA) and the mandatory fungibility of units (Articles 40(3) and 82 CISA), have been retained. At the same time, investor participation rights have been curtailed, which, given the passive role of these investors, increases the risk of abuse of control by the fund manager. Since the LQIF serves as a one-size-fits-all solution for specific use cases, ranging from large institutional clients to managed private clients, the conflicting needs of these customers raise interpretative questions regarding investor protection.

Partnerships and legal entities

If a partnership is formed, no separate legal entity is created. However, even if general and limited partnerships do not form a separate legal entity, Articles 562 and 602 CO prescribe that general and limited partnerships can, under their company name, acquire and assert rights and incur liabilities.

Corporations (i.e. the company limited by shares, the limited liability company, cooperative company, SICAV and SICAF and the association) have legal entity status separate from their members. Therefore, they acquire rights and incur liabilities and are subject to the same rights and obligations as natural persons, so far as these rights and obligations are not, due to their nature, limited to natural persons.

Liability

A distinction must be made between the liability of the company and the liability of the individual members who own shares in the company. In general and limited partnerships, a general partner is liable individually for the debts and other claims against the partnership. However, in a limited partnership, limited partners (Article 594 I CO) are only liable to the

¹³ See Central Business Name Index, Avobis Real Estate Funds SICAV (perma.cc/H7KA-2J5C).

¹⁴ See Central Business Name Index, DUFOR SICAV (perma.cc/TR3D-K3PT).

¹⁵ See Central Business Name Index, UBS Clean Energy Infrastructure Switzerland, Kommanditgesellschaft für kollektive Kapitalanlagen (perma.cc/3LJY-76UX).

extent of their investment in the partnership. The partnership itself is not liable because it lacks legal personality.

Corporations (e.g. companies limited by shares, limited liability companies, cooperative companies and associations) have a separate legal personality to their members and thus incur separate liabilities. Thus, members of corporation are generally not personally liable for the liabilities incurred under the name of the corporation. However, persons that take part in the management of a company and certain members with a special role in the company, such as founders, are liable where they have intentionally or negligently violated of their duties (Article 753 et seq. CO).

Corporate social responsibility has become an important area of concern for the Swiss public.¹⁶ On 29 November 2020, the Swiss electorate narrowly rejected the popular initiative “For responsible businesses—protecting human rights and the environment” (Responsible Business Initiative). Following the rejection of the initiative, the Swiss Parliament’s indirect counter-proposal was approved in 2021 and entered into force on January 1, 2022 under section eight of the Swiss Code of Obligations, titled *Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour* (Article 964j et seq. CO). The key elements of the Parliament’s counter-proposal include: 1) non-financial reporting obligations for companies of public interest that exceed certain thresholds (Article 964j et seq. CO); and 2) due diligence obligations for Swiss companies that import or process minerals or metals from conflict or high-risk areas or offer products and services where there are reasonable grounds to suspect that child labour was involved. (Article 964k CO). Violations of these new obligations can result in fines up to CHF 100,000 where the company has acted with intention and up to CHF 50,000 in case of negligence (Article 325^{ter} Criminal Code).

Corporate Governance

Corporate governance addresses the need to balance the role of shareholders (as the company’s owners) with the role of the board of directors and other corporate agents. Rules on corporate governance are flexible in Switzerland and mostly based on a soft law approach. For example, *economiesuisse*, the federation of Swiss businesses, has issued a Swiss code of best practice for corporate governance.¹⁷

Soft law corporate governance guidelines and recommendations are supplemented, however, by the legal requirements of the Code of Obligations and other applicable provisions of Swiss law. In the Code of Obligations there are general requirements which govern the organisational structure of companies and prescribe certain duties, such as the

¹⁶ See discussion in David Roth, ‘Competition and Commercial Law’, in M. Thommen, *Introduction to Swiss Law*, pp. 17-18.

¹⁷ *Economiesuisse*, Swiss code of best practice for corporate governance, 2016 (perma.cc/J7HT--X84N).

duty of care imposed on the board of directors and on individual directors when acting for the company.

Further, corporate governance provisions can be found in the Ordinance Against Excessive Remuneration in Listed Companies Limited by Shares of 20 November 2013 (with the Corporate Law Reform these provisions will be moved to the CO) and the FINMA Circular 2017/1. The latter sets out rules for FINMA regulated companies regarding corporate governance, risk management, internal control system, and internal audit.¹⁸ Also, the Federal Council issued a draft Sustainable Corporate Governance Act in 2026, under which the Swiss due diligence and reporting obligations for company directors will be aligned with the amended CSDDD and the Corporate Sustainability Reporting Directive (CSRD).

Voting rights and restrictions on transfer of shares

In partnerships, resolutions by the partners generally require the consent of all partners before they can be adopted, unless the partnership agreement provides for a resolution to be passed by majority vote (Article 534 CO). In absence of a different understanding in the partnership agreement, the majority is defined as the numerical majority of the partners (Article 534 II CO). Regarding changes to membership, partnerships do not allow new members to be freely admitted. Generally, this requires the consent of the other members. If a partner resigns his membership then the partnership is dissolved, unless otherwise stipulated in the partnership agreement (Article 576 CO).¹⁹

In companies limited by shares, voting rights are attached to shares. The shareholders exercise their voting rights at the general meetings of shareholders in proportion to the total nominal value of the shares belonging to them (Article 692 I CO). However, the articles of association can stipulate that voting rights are determined by the number of shares belonging to each shareholder such that each share confers one vote, regardless of nominal value (Article 693 I CO). In such a case, shares with a lower nominal value have the same voting rights as shares with a higher nominal value. This confers more voting power to the holder of shares with lower nominal value. It should be noted that the allocation of voting rights according to the number of shares is not possible for votes on certain resolutions (e.g. election of external auditors or resolution concerning the initiation of a liability action; Article 693 III CO).

Shares of companies limited by shares are generally freely transferable. For registered shares, transfer can only be restricted in limited circumstances. Registered shares which have not been fully paid-up, for instance, may only be transferred with the consent of the company (Article 685 CO). Otherwise, the company may refuse to give consent to the

¹⁸ See Daniel Raun and Annette Weber, Changes for listed Companies under the Corporate Law reform: Gender Quotas and Say-on-Pay, CAPLAW–Swiss Capital Market Law, 5/2020, p. 15 et seq., (perma.cc/6KKJ-BD6C).

¹⁹ Lukas Handschin, Swiss Company Law, Zurich / St. Gallen 2008, p. 106 et seq.

transfer of unlisted registered shares for any valid reasons expressly set out in the articles of association or where the acquirer fails to expressly declare that he has acquired the shares in his own name and for his own account (Article 685b CO). Alternatively, the company can refuse to consent to the transfer of unlisted registered shares if it offers to acquire and take over the seller's shares at the real value (Article 685b I CO). In case of listed registered shares, the company may refuse to accept an acquirer of shares as a shareholder only where the articles of association set out a percentage limit on the registered shares for which an acquirer must be recognized as shareholder and the acquirer exceeds this percentage limit (Article 685d CO).

Transfer restrictions are a tool often used by shareholders to keep control over a company. If the abovementioned transfer restrictions apply, acquirers of shares cannot exert their voting right. In case of unlisted registered shares, this is because without the consent of the company the ownership of the shares (and all associated rights) remains with the seller (Article 685c CO). In relation to listed registered shares, the associated rights pass to the acquirer (Article 685f CO). However, the acquirer cannot exert his voting rights for shares that are not registered in the share ledger.

Transfer restrictions on registered shares are often the subject of legal disputes. Famously, such restrictions were at the center of a long takeover--battle between the Burkard family and the board of directors of Sika AG. The legal question at issue was whether the transfer restrictions contained in the articles of association of Sika AG would also apply if control over Sika AG was acquired indirectly, by a body acquiring shares of a holding company with a controlling stake in Sika AG. This legal question was decided by a court of first instance. It ruled that the transfer restrictions also apply where control is transferred indirectly. The decision was appealed, but the parties subsequently settled the dispute before the appeal court could rule on the issue. Thus, no final judgment settling this question was obtained. It is submitted that the applicability of transfer restrictions to indirect acquisitions of control will depend on the wording of the transfer restriction clause in the relevant articles of association. If the clause can be construed to have a broad meaning, it is reasonable to assume that it should also apply in cases of indirect acquisition of control. Thus, special attention should be given when drafting such clauses if a company wishes to avoid this effect.

In limited liability companies, the voting rights of company members are also determined by the nominal value of their capital contribution (Article 806 I CO). This will be the case unless the articles of association specify otherwise, in which case each member, regardless of the amount of their capital contribution, will be accorded one vote. Where the nominal value of a member's contribution is determinative, capital contributions with the lowest nominal value must be accorded a worth of at least one tenth of the nominal value of the other capital contributions (Article 806 II CO). Regarding limited liability companies, the assignment of capital contributions is restricted. An assignment requires consent of the members of the general meeting (Article 786 I CO). However, the articles of association can,

inter alia, waive the requirement of consent or stipulate grounds which will justify the refusal of consent (Article 786 II CO).

Corporate Reorganizations (stock splits and reverse stock splits)

Article 623 of the Swiss Code of Obligations concerns the splitting and consolidation of shares without changing the share capital.²⁰ It applies to changes to the nominal value through either capital increases or decreases.²¹ The change in the number of shares with the share capital remaining the same requires an amendment to the articles of association that falls within the competence of the general meeting based on a majority vote of those shareholders present at the general or special meeting of shareholders.²² The resolution of the general meeting may be subject to conditions, such as the condition precedent that a certain capital increase be carried out. The amended articles of association then come into force when the conditions are met. This procedure is particularly common in initial public offerings (IPOs), in view of which a stock split is carried out. It is also permissible to provide in the articles of association for changes in the par value in the event of certain circumstances and to delegate the execution to the board of directors.²³

A reclassification is also possible in relation to a portion of the shares. If the articles of association do not provide for voting rights based on par value (Art. 692 para. 1), but rather voting rights based on the number of shares (Art. 693 para. 1), the redenomination of a portion of the shares means, depending on the circumstances, the creation or cancellation of *voting shares* or a change in their voting power. In this case, the provisions regarding the introduction of an increase or decrease in voting shares, or the increase in voting power, must be observed.²⁴

If the share capital remains unchanged, shares can be split into shares with a lower nominal value (a 'stock split').²⁵ The split also covers the outstanding payment amounts.²⁶ As the nominal value only has to be greater than zero (Art. 622 para. 4),

²⁰ See the meaning of capital share and membership, Art. 622 N 1.

²¹ See Art. 622 N 115.

²² Art. 626 para. 4, Art. 698 para. 2 para.

²³ ZK-SIEGWART, N 5 [1945]; 5th ed., N 4; CR CO II-LOMBARDINI/CLEMETSON, N 7.

²⁴ cf. Art. 693 and 704 para. 1 no. 8; see also the 5th edition, N 8; BÖCKLI, Aktienrecht, § 3 N 22; ZK-JUNG, N 9 and 16.

²⁵ For the economic background, see KUNZ/WÄLCHLI, ST 2001, *passim*; KUNZ/MAJHENSEK, ST 2003, *passim*).

²⁶ (5th ed., N 6; ZK-SIEGWART, N 14 [1945]).

existing shares can be split into any number of shares regardless of the amount of share capital.

Similarly, several shares may be consolidated into fewer shares with a higher nominal value per share, provided the share capital remains unchanged (a 'reverse stock split'). A reverse split is only possible for shares of the same type and class,²⁷ unless each shareholder holds shares of different types or classes in the same ratio. The *ratio of the consolidation* can be any number greater than one and is usually expressed as a fraction (e.g., 5 :2, i.e., 5 existing shares correspond to 2 new shares).

Company-groups

Company-groups refer to several companies connected by a common economic interest. Swiss company law addresses company-groups in a range of fragmented provisions (e.g. consolidated accounts, Article 963 et seq. CO; acquisition by subsidiaries, Article 659b CO; approval of accounts and allocation of profit, Article 731 III CO; notification duty, Article 120 FinMIA; financial groups, Article 3c Banking Act).

Swiss company law follows the "principle of separation" for company-groups. Companies belonging to a company-group are considered, both internally and externally, as distinct legal entities. This clashes with the objective of company-groups to operate in economic unity with common management.

From this underlying principle, it follows that the management of each company that forms part of a company-group must act in the interest of the individual company and not the interest of the company-group. Thus, when two companies of a company-group enter into business transactions, management must ensure that the business transaction is carried out "at arms-length". Otherwise, it risks the voidability of the transaction, with the potential for personal liability being incurred by the members.

Regarding liability within company-groups, a parent company is not liable for the action of its subsidiaries. However, Swiss company law recognizes certain exceptions to this principle. Parent company liability can arise based on an agreement with the subsidiary, a comfort letter, trust in groups or tortious conduct. Furthermore, the parent company and its management may be liable for the actions of its subsidiary if it acts as the *de facto* governing body of the subsidiary (see Article 754 CO). Finally, if the parent company abuses the law by claiming legal independence of the subsidiary in bad faith, the corporate veil can be pierced, i.e. the parent company will be held liable for the conduct of the subsidiary.

Bank secrecy

Historical background

The concept of Swiss bank secrecy is based on Article 47 of the 1934 Banking Act. Switzerland adopted Article 47 as a way to attract foreign liquid capital and bank deposits

²⁷ ZK-JUNG, N 15.

to support the Swiss economy, During the 1930s and 1940s, Swiss banks attracted deposits from thousands of persecuted Jews and other ethnic groups from Germany and other Fascist-controlled countries in Europe. These persecuted groups transferred hundreds of millions in cash, liquid capital (i.e., securities), commodities and gold into accounts at Swiss banks and insurance policies at other Swiss institutions, often using numbered accounts and other indicia of anonymity.

The Independent Commission of Eminent Persons (ICEP)²⁸ issued a report in 1997 on the role of Swiss banks in receiving hundreds of millions of Swiss franc deposits from Jewish and other persecuted groups²⁹ and identified in 1999 around 53,000 accounts that had an estimated value of over CHF 500 million. The ICEP and the Swiss Federal Banking Commission jointly established an Independent Claims Tribunal with the mandate of identifying accounts in Swiss banks that had belonged to victims of Nazi persecution and that were dormant since May 1945.

The ICEP 1997 report concluded that some Swiss banks had engaged in questionable and deceitful conduct in handling and closing the accounts of victims.^{30,31}

During this time, the absence of a Swiss escheat law dealing with unclaimed property in banks allowed dormant accounts and other assets to remain indefinitely with the banks. ³² In most other countries, escheat laws require unclaimed banks assets to be transferred to

²⁸ The so-called Volcker Commission was established in 1996 to investigate dormant Swiss bank accounts that had been in existence since World War II. The Commission was based on a memorandum of understanding between the World Jewish Restitution Organization, the World Jewish Congress and the Swiss Bankers Association with the objective to both identify Swiss bank accounts opened by victims of Nazi persecution and assess the treatment of accounts of victims of Nazi persecution by Swiss banks.

²⁹ Independent Committee of Eminent Persons (ICEP), Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks (the “Volcker Report”), Bern 1999, p. 10 et seqq.

³⁰ ICEP, p. 13, and Annex 5, paras 5–11.

³¹ ICEP, p. 13, citing Annex 5, paras 37–41.

³² See Federal Council Decree of 20 December 1962 on Dormant Assets/accounts (BBl 1963 I 23). See also Banking Ombudsman (perma.cc/7M3Y-Z22S) and Swiss Banking Association (perma.cc/HA5Y-Q3PL). In 1962 the Federal Council approved a Decree that created a new escheat law that allowed assets of dormant accounts to revert to state ownership. It also introduced rules requiring banks to monitor and keep records on dormant accounts and assets; appoint legal representatives and find beneficiaries of or legal successors to such account holders; and, where necessary, to declare beneficiaries missing to allow inheritance proceedings; and transfer unallocated assets to a separate fund that would be allocated later in a claims resolution process.

the state after a given time period. Swiss banks, however, were able to use their original account contract terms to impose charges on dormant accounts over time until the account surplus was exhausted and the account could be closed. In addition, Swiss banks were not required to keep records on dormant accounts, which also undermined any efforts they did make to respond to claims regarding them. Where banks did keep records, they largely made them inaccessible, particularly to claimants including the heirs of Holocaust victims. The lack of transparency in bank practices and the inadequate legal framework for protecting the assets of dormant accounts meant that banks were not held to rigorous standards in terms of properly accounting for the funds they held in a fiduciary capacity.

In 1995, the SBA introduced guidelines regarding

In 1995, the SBA adopted guidelines (revised in 2000) that require banks to report certain information regarding dormant assets and applicable to all accounts where there had been no contact with a beneficiary for at least ten years, and to report all assets and deposit boxes held with a value over CHF 500. The information must be reported to a database which only the banking ombudsman has access to. If no client contact has been made for 60 years and the dormant assets amount to over CHF 500 (or an unknown value) then the bank must publish the dormant assets on the internet. If no client contact is made within one year from the date of publication, the assets are transferred to the Swiss Confederation. Assets worth less than CHF 500 should be transferred to the Swiss Confederation without any need for prior publication after 60 years.³³ Subsequent banking legislation today creates a time-unlimited obligation to repay deposits and to keep detailed records containing information on the current status of accounts and their owners.

As part of its takeover of Credit Suisse in 2023, UBS Group AG assumed significant historical liabilities related to Credit Suisse's conduct during World War II. A US congressional investigation in 2025 discovered historical data that Credit Suisse still held 890 potentially tainted accounts. UBS argued that the 1990s accord, in which the company and other Swiss banks settled the claims of Nazi victims by paying a total of \$1.25 billion to Holocaust survivors and their families, released the institutions from all known and unknown claims related to the Nazi regime and thereby blocking any potential further liability. However, U.S. District Judge Edward Korman rejected this attempt to limit the bank's liability in connection with new revelations, explaining that UBS was seeking a judicial ruling on hypothetical lawsuits and that, in the absence of a specific dispute, there was no basis for a judicial interpretation. This leaves the debate over potential new Holocaust lawsuits in the US against UBS AG and other Swiss banks unresolved.

Current regulation

Article 47 Banking Act sets out the sanctions for violating the principle of bank secrecy. This provision applies to all companies that fall under the definition of a bank as defined by Swiss banking law. The Banking Act defines a *bank* as an institution primarily active in the

³³ See Articles 371 and 37m Banking Act, introduced 1 January 2015.

financial sector that at a minimum: (i) accepts deposits from the public in excess of CHF 100 million on a professional basis or that publicly advertises as doing so; (ii) accepts deposits from the public up to CHF 100 million on a professional basis or that publicly advertises as doing so, and which invests or gives interest on deposits received from the public; or (iii) refinances itself on a large scale via loans from other banks (that do not own any significant holdings in it) in order to provide credit for its own account and in any manner possible for any number of persons or companies with which it does not form an economic unit (Article 1a Banking Act).

The provisions of the Banking Act also apply to persons primarily active in the financial sector, and who: (i) accept deposits from the public up to CHF 100 million on a professional basis or cryptobased assets designated by the Federal Council or who publicly advertise as doing so; and (ii) neither invest or give interest on these deposits from the public (Article 1b Banking Act). Finally, branches of foreign banks established in Switzerland and representatives of foreign banks in Switzerland are also covered by the provisions of Swiss banking law (Article 2 Banking Act).

Under Article 47, it is a criminal offence (which carries a potential sentence of up to three years in prison) to intentionally disclose confidential information, for anyone who has had such information entrusted to them or observed by them in their capacity as:

a member of an executive or supervisory body, employee, representative, or liquidator of a bank, or;

a person that is primarily active in the financial sector and who accepts deposits from the public up to CHF 100 million on a professional basis (or who publicly advertises as doing so) and who neither invests or gives interest on these deposits from the public; or

as a member of a body or employee of an audit firm

Similarly, a person who attempts to induce a violation of this secrecy requirement, who discloses confidential information to third parties, or who uses this information for his own benefit or the benefit of others will also be committing the offence outlined above, and could on conviction be sentenced to a custodial sentence of up to three years or to a monetary penalty.

In addition to Article 47 Banking Act, contractual obligations as well as the stipulations in Article 28 CC (concerned with the protection of privacy) can provide a legal basis for a bank's obligation regarding the non-disclosure of any information regarding their customers' bank accounts.

The obligation of the bank to maintain bank secrecy, however, is not absolute. There are several exemptions which may allow confidential information to be passed to third parties without the risk of incurring criminal (or civil) liability in a particular circumstance: for instance, requests for information as part of criminal proceedings or account information disclosed to legal representatives of the account holders and their heirs if the bank first

obtains the consent of the account holder. Bank account information can also be disclosed to the Swiss social security agency and to Swiss courts and tribunals as part of administrative and civil proceedings and in bankruptcy cases; based on requests for mutual legal and administrative assistance from foreign governments and courts involving alleged criminal offences; as part of disclosure obligations in securities and derivatives transactions and where the bank holds any suspicion of money laundering and/or terrorist financing.

In the circumstance of tax investigations and enforcement actions, banks are only required to disclose account information regarding tax code violations where this is required in ongoing criminal proceedings; the same obligation does not apply where only administrative proceedings are in issue. Regarding foreign tax investigations, Switzerland has adopted a number of double taxation treaties as part of the Automatic Exchange of Information standard as discussed below, obliging Switzerland to render administrative assistance in civil and criminal tax investigations and enforcement proceedings.

Automatic Exchange of Information

Switzerland has agreed to the *Automatic Exchange of Information (AEOI)*:³⁴ an international standard which governs how tax authorities exchange information regarding taxpayers. The instrument aims to increase transparency and prevent cross-border tax evasion. Based on the AEOI, financial institutions are required to report information to the relevant tax authority of their jurisdiction regarding the contents and account holders of designated bank accounts. The Swiss tax authority then sends the information received to the tax authority in the state where the client has residency.

AEOI becomes operative when a state enters a bilateral agreement with another state providing for the mutual and automatic exchange of information between the states, provided certain safeguards and procedures are met. To create the legal basis for the AEOI in Switzerland, the Swiss authorities introduced the Convention on Mutual Administrative Assistance in Tax Matters, the Multilateral Competent Authority Agreement and the Federal Act on the International Automatic Exchange of Information in Tax Matters.

AEOI partner states of Switzerland include Argentina, Brazil, Canada, the European Union, Russia, and the United Kingdom. For example, on 1 January 2017, the agreement between the EU and Switzerland on the automatic exchange of information on financial accounts entered into force. This agreement was a protocol to the agreement between the EU and Switzerland regarding measures equivalent to the EU Savings Tax Directive (2003/48/EG).

³⁴ Developed by the OECD in response to a G20 request and approved by the OECD council on 15 July 2014.

Landmark Cases

Insider Trading—Hans Ziegler³⁵

In a case involving the concept of “insider trading”, the Swiss Federal Criminal Court found Hans Ziegler guilty of the offences of breach of manufacturing or trade secrecy (Article 162 Swiss Criminal Code), industrial espionage (Article 273 Swiss Criminal Code) and exploitation of insider information (Article 154 FinMIA). The Swiss Federal Criminal Court held that Ziegler, while serving as a director of a listed Swiss company, had traded on the basis of inside information to enrich himself. Furthermore, the Court saw it as proven that Ziegler passed on confidential information to third parties. He was sentenced to a suspended prison sentence of 24 months and a probationary period of 2 years as well as a fine of CHF 10,000, although the prosecution had sought a prison sentence of five years. This case is of relevance as it adds to the limited case law on criminal provisions regarding insider trading which were introduced in 1998 and further tightened in 2013.

Geneva bank disclosure³⁶

In April 2012, a bank domiciled in Geneva transferred data to the US Department of Justice (DOJ) without notifying the data subject, a former employee of the bank. The data concerning the former employee was not anonymised. The former employee together with another person, also a former employee, requested access to copies of all data that had been transferred to the DOJ. This request was granted by the court of first instance and the appellate court. The appellate court ordered the disclosure of the relevant data but allowed the bank to redact information relating to other clients of the bank.

The bank appealed the decision of the appellate court to the Federal Supreme Court. On appeal, the bank argued that it should not be obliged to disclose that data because the disclosure violates the principle of bank secrecy under Article 47 Banking Act. The bank argued that disclosure of the requested data, even if information concerning other clients was redacted, would allow the former employee concerned to identify other clients. Part of the bank’s argument here was that the former employee had prior knowledge of the relevant data due to his prior employment. Thus, he would be able to identify other clients referred to in the disclosed data.

The Federal Supreme Court rejected this argument. They found that it was the fact that the employee had prior knowledge of other clients contained in the requested data that would potentially enable him to identify such clients. It was not the disclosure of data in and of itself, and therefore the disclosure of data would not violate Article 47 Banking Act.

The Federal Supreme Court also held that Article 9 of the Data Protection Law was not violated because the request for copies of the relevant data was not made in an abusive

³⁵ Judgement of the Federal Criminal Court SK.2020.36 of 22 June 2021.

³⁶ Judgement of the Federal Supreme Court 4A_406/2014 and 4A_408/2014 of 12 January 2015.

manner. Furthermore, the Court could identify no overriding interest of the bank to justify preventing the disclosure. In contrast, the employee had a justifiable interest in obtaining the data to prepare his defence, as the data had already been transferred to the DOJ.

Finally, Article 8 V Data Protection Law did not justify the refusal of the request because the fact that the Federal Council had authorised the transfer of data to the US did not release the bank from its duties under private law towards its former employees.

UBS data transfer 37

In a case which also involved the principle of bank secrecy, the Federal Supreme Court held that FINMA did not have the legal authority under either Article 26 Banking Act or Article 31 FINMAG to authorise UBS AG to transfer client data to the US tax authorities. However, FINMA could use emergency powers to authorise the transfer of data. The use of emergency powers requires an immediate and serious danger to public interest. The Federal Supreme Court argued that the potential actions of the US, in case of failure to transfer the client data, posed an immediate and serious danger to the Swiss economy justifying the use of emergency powers.

Biber 38

In the Biber Ruling, the Federal Supreme Court defined who has the capacity to sue members of the board or other responsible parties for damages caused by the breach of their duties. The background of the case is as follows: Biber Holding AG was in financial difficulties. As part of its restructuring efforts, it offered an exchange of old bonds for new shares and conversion options. However, the restructuring efforts later proved insufficient and Biber Holding AG was declared insolvent. A claimant who had acquired shares during the restructuring period claimed damages from board members of Biber. The courts of first and second instance dismissed the claimant's claim due to lack of capacity to sue.

The Federal Supreme Court held that the shareholders' or creditors' capacity to sue members of the board of a company going through insolvency proceedings depends on whether the damages claimed are direct or indirect. Direct damages are damages a company, shareholders or creditors incur individually. Indirect damages are damages shareholders or creditors incur because the company suffers a financial loss (i.e. the direct damage of a company results in an indirect damage for a shareholder or a creditor). A company can only incur direct damages, whereas shareholder or creditors can incur direct and indirect damages. Circumstances exist where both a company and shareholders or creditors incur direct damages.

37 Judgement of the Federal Supreme Court 2C_127/2010 of 15 July 2011.

38 DFC 131 III 306 (Judgment of the Federal Supreme Court 4C.111/2004 of 9 November 2004).

In the case that only shareholders or creditors incur direct damages, shareholders or creditors have an individual capacity to sue. For example, if a shareholder does not receive his dividends he incurs a direct damage and has capacity to sue. In the case that shareholders or creditors incur indirect damages, shareholders and creditors only have a derivative capacity to sue if the insolvency administrator waives the right to assert claims. Furthermore, if both the company and the shareholders or creditors can assert direct damages, the shareholders and creditors only have capacity to sue where they can base their claim on either obligations in tort, *culpa in contrahendo* or a provision that explicitly protects shareholder or creditor interests.

Selected Bibliography

Committee of Eminent Persons (ICEP), Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks, Bern 1999

Daniel Lengauer / Martin Schaad / Therese Amstutz (eds.), Company Law in Switzerland, Zurich 2009

Daniel Raun / Annette Weber, Changes for listed Companies under the Corporate Law Reform: Gender Quotas and Say-on-Pay, Swiss Capital Market Law 5/2020, pp. 13–17

Lukas Handschin, Swiss Company Law, 2nd edition, Zürich / St. Gallen 2015

Severin Roelli et al., New Provisions in Swiss Corporate Law and Changes to the Commercial Register Ordinance, Pestalozzi 2021