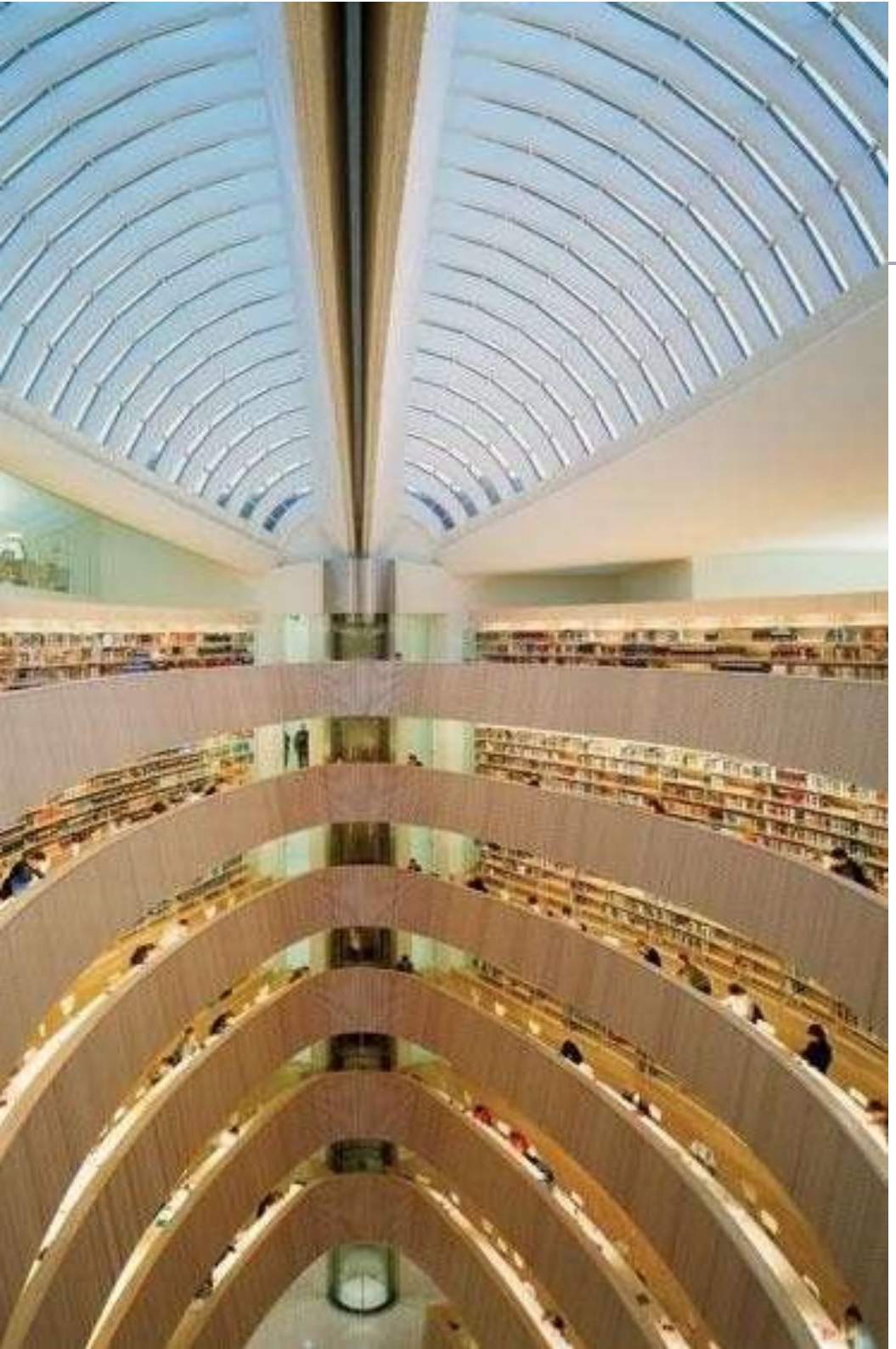


Universität Zürich[UZH]

Majority Control and Minority Protection

Dr David Roth

Principles of Corporate Law
Fall Semester 2025
Lecture 6

Addendum: Societas europaea

Twenty years later, there are – despite all initial prophecies of doom ('too expensive', 'too complicated', 'no need') – more than 3000 Societas Europaea (SEs) all over Europe. Many large and well-known European enterprises now operate as an SE – *Airbus SE, BASF SE, Porsche Holding SE, SAP SE, Schneider Electric SE, SCOR SE, Strabag SE* and *TotalEnergies SE* are just a few prominent examples. In fact, eight of the thirty DAX companies (26.6 %), eight of the CAC forty companies (20 %) and eight of the EURO STOXX fifty companies (16 %) are now SEs. But there are also many smaller European 'hidden champions' which have discovered the SE as an attractive legal form for themselves. Moreover, in the context of the

See further: Schmidt, Twenty years of societas europaea, EUCL 4 (2021), 116 ff.

Main Points

- Investor rights
- Control and control transactions
- Dual-class share structures
- Shareholder duties
- Equal treatment of shareholders
- Fair treatment of shareholders
- Corporate opportunity
- «Hybrid» investors

Investor rights

- Shareholders
  - Disclosure and accounting rules
  - Rights to participate in shareholders' meetings
  - Voting rights (e.g. decision and appointment rights)
  - Rights to receive dividends
  - Pre-emptive rights
  - Rights to sue directors or the majority for suspected freeze-out
  - Rights to call extraordinary shareholders' meetings
- Creditors
  - Rights to receive interest payments
  - Liquidation rights (measures that enable creditors to repossess collateral and protect their seniority)
  - Related: Doctrine of capital maintenance / Prohibition of financial assistance

Absolute and proportional shareholder rights (non-exhaustive)

- Absolute rights
  - Right to demand information
  - Right to participate in shareholders' meeting
- Proportional rights
  - Dividend rights
  - Voting rights
    - Decision rights
    - Appointment rights
  - Subcategory: threshold rights (see next slide)

Selected threshold rights (example: CH)

- Convocation and Agenda Item (Art. 699(3) CO): “A general meeting may also be convened by one or more shareholders together representing at least 10 per cent of the share capital.” (revCO: listed/non listed 5 %/10 % of share capital or votes)
- Art. 727(2) CO: An ordinary audit must be carried out if shareholders who represent at least 10 per cent of the share capital so request
- Right to instigate a Special Audit (Art. 697d CO; revCO: listed/non listed 5 %/10 % of share capital or votes)
- “Important resolutions require at least two-thirds of the voting rights represented and an absolute majority of the nominal value of shares represented.” (Art. 704(1) CO)

Election of BoD by general meeting (CO 698 II 2.) as «important resolution»?

Included?

Exhaustive?

Caveat!

– 2. Important resolutions

– Art. 704[555]

[1] A resolution by the general meeting requires at least two-thirds of the votes represented and a majority of the nominal value of shares represented for each of the following:

1. any amendment of the company's objects;
2. the consolidation of shares, unless the consent of all the shareholders concerned is required;
3. a capital increase from equity capital, in return for contributions in kind or by offset with a claim, and the granting of special privileges;
4. the restriction or cancellation of the subscription right;
5. the introduction of contingent capital, the introduction of a capital band or the creation of reserve capital in accordance with Article 12 of the Banking Act of 8 November 1934[556];
6. the conversion of participation certificates into shares;
7. any restriction on the transferability of registered shares;
8. the introduction of shares with preferential right to vote;
9. any change in the currency of the share capital;
10. the introduction of a casting vote for the person chairing the general meeting;
11. a provision of the articles of association on holding the general meeting abroad;
12. the delisting of the equity securities of the company;
13. the relocation of the seat of the company;
14. the introduction of an arbitration clause in the articles of association;
15. dispensing with the designation of an independent voting representative for conducting a virtual general meeting in the case of companies whose shares are not listed on a stock exchange;
16. the dissolution of the company.[557]

cf. Tanner, ZK Comm., 3rd ed., 704 N 2, 8

Voting rights

- Shareholders' options: «voice» and «exit» (Albert Hirschman, 1970)
  - «Political» vs «economic» solution
  - Inverse relationship
  - «Voice» may not only improve their corporation, but the entire market
  - Caveat: Rational apathy and free riding as threats to the exercise of «voice»
- Rationale for voting right as a proportional shareholder right: Proportionality of risk and influence
- Three theories of voting rights (see next slides)

Rights-based theory of voting rights

- Doctrinal, most traditional explanation for voting rights:
  - Shareholders are co-members/«owners» of the corporation
  - Vote as an inherent/constituent/essential characteristic of this position → exercise of a property right
- Effect
  - No transfer of voting right without the share itself (see § 405(3) DE-AktG: vote selling and buying are misdemeanors)
  - vs *Hewlett v Hewlett-Packard*, 2002 WL 549137, at 4 (Del. Ch.): «Shareholders are free to do whatever they want with their votes, including selling them to the highest bidder.»

THE WALL STREET JOURNAL.

6 months ago

Startup for Trading Shareholder Voting Rights Is Shutting Down

By Alexander Osipovich, Reporter

Shareholder Vote Exchange, a startup that sought to let investors sell their rights to vote in corporate shareholder meetings, said it was winding down operations.

"After much deliberation, we ultimately realized that scaling SVE to its full potential is not something that we can achieve," the startup said in a notice to customers on Sunday evening.

The notice did not elaborate on the reasons for the shutdown. It urged customers to withdraw any money in their accounts on the trading platform within the next 30 days.

Founded in 2021, the California-based startup created a website that ran auctions for the proxy voting rights in the shareholder meetings of companies such as Disney and Johnson & Johnson.

The startup's backers said it would benefit investors by letting them earn money by selling voting rights that they most likely wouldn't use anyway. Critics warned that the emergence of a market for trading shareholder voting rights could undermine corporate governance and increase the risk of manipulation in corporate proxy battles.

Economic theory of voting rights

- Voting right as a channel between
  - shareholders (risk-bearers), and
  - managers (persons with steering power);

  → Vote is a signal of please or pain to the management, «like a nerve running from a burned hand to the brain»
- System theory:
  - Vote allows incorporating unforeseen future, or adapting to changed circumstances
  - Correction of the flaw of understanding the corporation as a «nexus of contracts»
    → Completion of incomplete contracts and alteration of its terms by (majority) vote

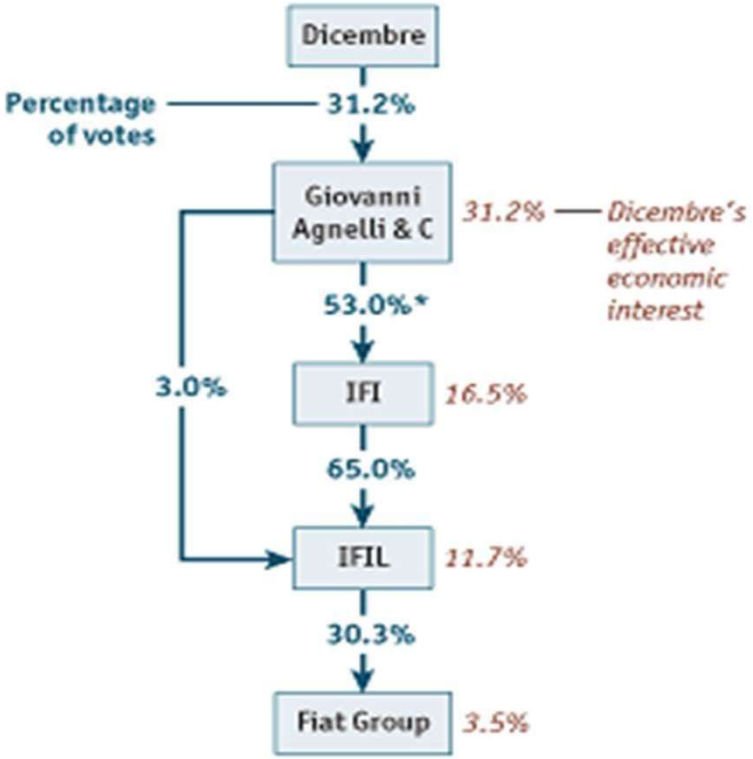
Shareholder democracy theory of voting rights

- Governance structure of corporations is analogous to representative democracies
  - Legislators of the U.S. securities laws in the 1930s saw «shareholders […] as voters, boards of directors as elected representatives, proxy solicitations as election campaigns, corporate charters and by-laws as constitutions and amendments» (according to Monks/Minow, 2004)
  - *Blasius Industries Inc. v Atlas Corp* (1988) 564 A 2d 651 (Del. Ch.): Voting rights are «critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.»
- What does this mean with regard to «one share, one vote» or even shares with excessive voting power?

Forms of Control

- Control through almost complete ownership
- Majority control
- Control through a legal device without majority ownership
  - Pyramiding
  - Non-voting stock
  - Class of stock having excessive voting power
  - Voting trust
- Minority control
- Management control

The Agnelli Family – Control of the Fiat Group (as of September 30, 2006)



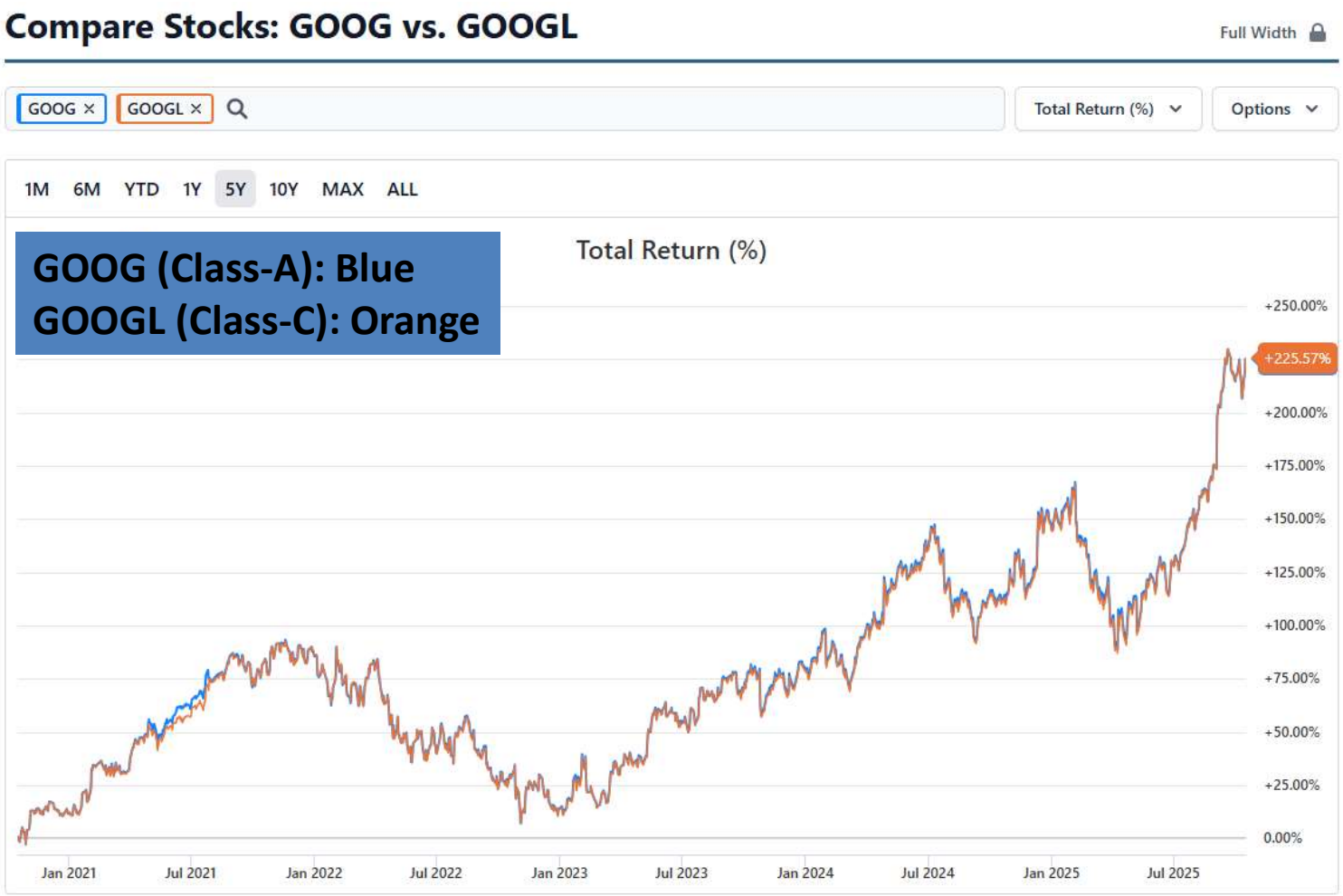
Alphabet's Multi-Class Share structure

- In August 2015, Google announced a restructuring: Google Inc. will become a subsidiary of the holding company Alphabet Inc.
- 2-for-1 stock split in April 2014

Class-A shares	→	"GOOG"; 1 vote per share
Class-B shares	→	10 votes per share (Founders only)
Class-C shares	→	"GOOGL"; no voting rights

- 2015: Sale of USD 4.4 billion of Class-B and Class-C shares by the founders Larry Page and Sergey Brin: After the sale, they would still own 11.9 % of the Class-A and Class-B shares, corresponding to 52 % of the voting power.

Alphabet – Trading of Class-A and Class-C Shares



Control facilitates «control transactions» – Examples (and minority shareholders' fears)

- Majority may elect who they want in the board.
- Overpaying directors, putting relatives in management.
- Managers may take corporate opportunities, with board approval / looting of corporate assets
- Selling controlling blocs *at a substantial "control premium"* since control is a valuable asset.
- Companies may make targeted repurchases of own shares, *paying a premium* to some investors but not to others.
- Shareholders of one company obtain little of the gain from a *merger*, while shareholders of the other company obtain more.

How should law deal with control/control transactions?

- Prohibition (of certain decisions)

  → «incomplete» catalogue by design
- Hence, from substance to procedure («how» rather than «what»):
  - Strict threshold rights («supermajority»)
  - Need for both total *and* minority consent
- Rules on equal treatment
  - Repurchase tender offers to all shareholders
  - Equal dividend rights
  - Court review with full scrutiny
- Excluding the controller from voting in case of self-interest

  e.g. «related party» transactions
- Minority exit right at fair price («appraisal right»)

Shareholder duties

- Provision of *pro rata* legal capital
- Loyalty duties: Shareholders as fiduciaries of
  - the corporation; and/or
  - other shareholders; and/or
  - other stakeholders?
- Reporting duties
  - Securities laws

    → Combating insider trading, unfair takeover techniques
  - AML Laws

    → Reduce terrorist financing, money laundering etc.
- Mandatory bid duty (see lecture on Takeovers & Mergers)

Reporting duties

- Reporting obligation about the financial beneficiary (see earlier class)
- Note: Registration with the corporation is (also) a prerequisite for exercising (voting) rights
- Reporting of significant holdings
  - See e.g. § 13(d) U.S. Securities Exchange Act 1968, Directive 88/627/EEC 1988, now Directive 2004/109/EC
  - Five basic aspects of such regulation
    - Fractional thresholds for disclosure
    - Number of shares
    - Percentages of capital, voting power, share class
    - Dimension of change that triggered (new) reporting duty
    - Details of the disclosure (date etc.)

Loyalty duties

- Duty bearer
  - Controllers
    e.g. *re Sears Hometown and Outlet Stores Inc. Stockholder Litigation* 2024 WL 262322 (Del. Ch.; «Sears»; see next slide)
  - All shareholders
    e.g. BGH, 20.03.1995 – ZR 205/94 *Girmes*
  - No shareholders
- Duty dimension
  - General fairness duty, although of «limited» nature compared to directors (Delaware)
  - *Ad hoc* determination of duty (UK «unfair prejudice» claim)

Sears (1) - Facts

- Eddie Lampert was a passive and largely supportive investor in Sears Hometown and Outlet Stores Inc.
- Shares fell from USD 55.62 to 2.30 during that time (USD 600 Mio loss)
- Sears had two separate business segments:
  - «Hometown» (unprofitable for years)
  - «Outlet» (profitable for the first time in the most recent year)
- BoD committee decided to liquidate «Hometown» («the bad business») and continue operate «Outlet» («the good business»)
- Lampert believed that this plan would be value destructive, the BoD disagreed
- Lampert offered to buy Sears for USD 2.25, BoD asked for 9.50, which Lampert viewed as totally unrealistic

Sears (2) – Facts and ruling

- Lampert effected «controller intervention»: He announced to amend the Sears' bylaws and remove two directors
- BoD was convinced that Lampert would block the liquidation plan, saw no sustainable path forward and negotiated with Lampert the sale of Sears at USD 3.21 per share
- Minority stockholders brought suit, claiming Lampert breached his fiduciary duties using voting power to block the liquidation plan
- Court held, that:
  - Lampert had limited fiduciary duties when using voting power, and had fulfilled them
  - Sale of Sears at USD 3.21 was not entirely fair to minority stockholders, ordered Lampert to pay another USD 1.78

Sears (3) - Takeaways

- Controllers have certain «limited» fiduciary duties when exercising their stockholder voting power to «alter the status quo»
- «Enhanced scrutiny» review, when controllers may have «subtle» conflicts and act in areas traditionally reserved for the BoD
  → Burden of proof is with the controller
- Hindering the BoD from acting (bylaws amendment, removal) amounts to «alteration of the status quo»
- In casu, different levels of fiduciary duty applied to blocking BoD plan («limited») and buying the company («entire fairness»)

Who is a «controller» (under Del. Law)?

- § 144 Delaware General Corporate Law (DGCL)
- Before 2025:
  - Majority shareholders
  - Minority shareholders if they exercise actual control, whether generally or specific to a particular transaction
- 2025 amendment

  Minority shareholders must either
  - Own at least 1/3 of the voting shares, or
  - Have the right, by contract or otherwise, to cause the election of a majority of directors

  → Safe harbour rule;
  criterion «transaction specific control» no more applicable

2025 amendment – an overreaction?

Art. 680 CO

- F. . Shareholder's duty to contribute
- I. Object
- Art. 680

[1] A shareholder may not be required, even under the articles of association, to contribute more than the amount fixed for subscription of a share on issue.

[2] A shareholder does not have the right to reclaim the amount paid-up.

Principle of Equal Treatment (CH)

- *Resolutions* of the general meeting: CO 706 II(3)
  - ➢ May be challenged if they give rise to unequal treatment of shareholders (see next slide)
- *Performance* of the duties of the members of the board of directors“: CO 717
  - ➢ Duty of Care and Loyalty

    “The members of the board of directors and third parties engaged in managing the company's business must *perform their duties with all due diligence and safeguard the interests of the company in good faith*.”

    “They must afford the *shareholders equal treatment in like circumstances*.”

Challenging Resolutions of the General Meeting (CH)

CO Art. 706

VII. Challenging resolutions of the general meeting

1. Right of action and grounds

1 **The board of directors and every shareholder may challenge resolutions of the general meeting which violate the law or the articles of association by bringing action against the company before the court**.

2 In particular, challenges may be brought against resolutions which

1. remove or restrict the rights of shareholders in breach of the law [e.g. art. 691 CO] or the articles of association;
2. remove or restrict the rights of shareholders in an improper manner;
3. *give rise to the unequal treatment or disadvantaging of the shareholders in a manner not justified by the company's objects*; …

Liability For Administration, Business Management and Liquidation (CH)

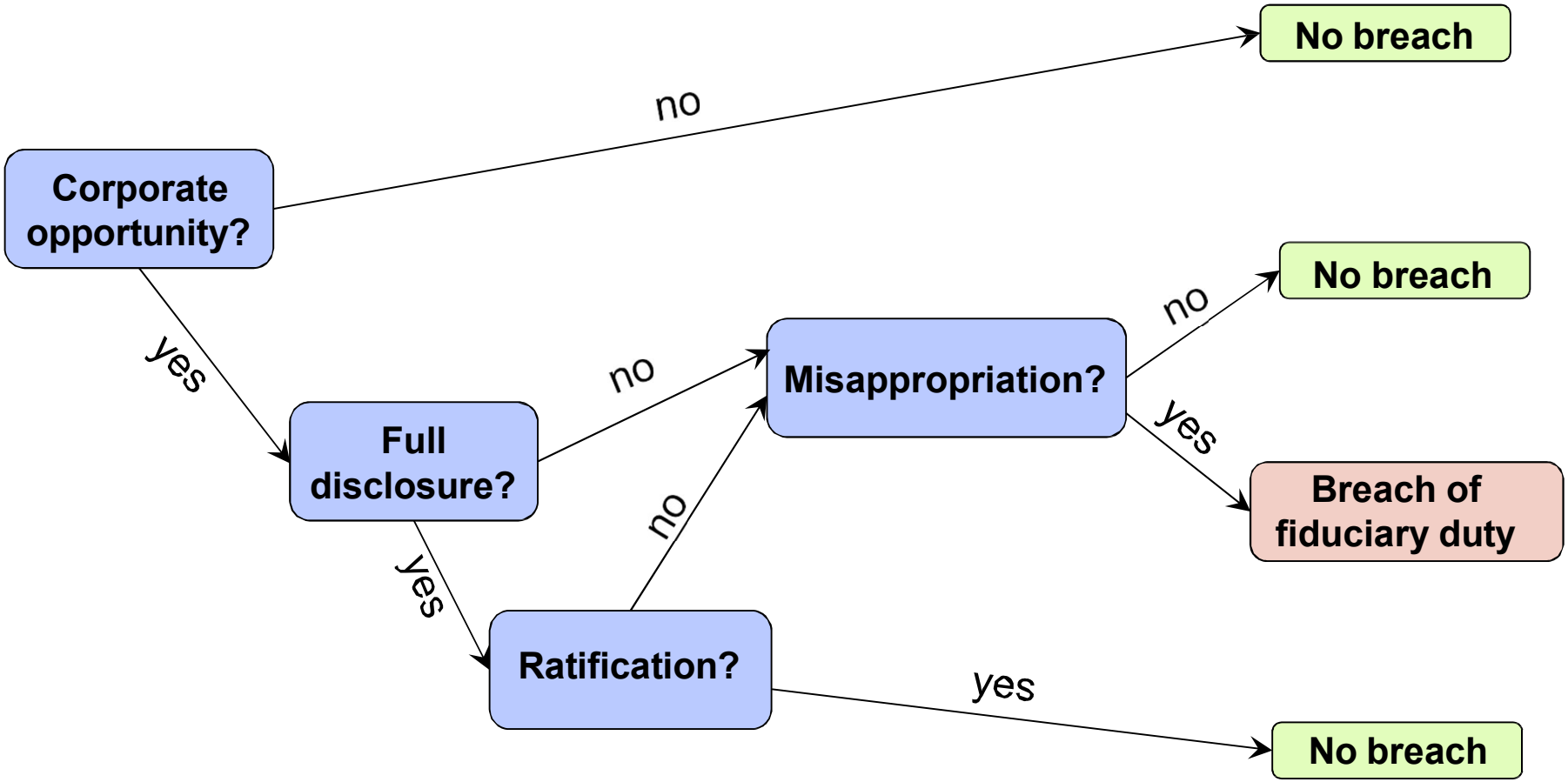
Art. 754 CH-CO

III. Liability for administration, business management and liquidation

[1] The *members of the board of directors and all persons engaged* in the business management or liquidation of the company *are liable both to the company and to the individual shareholders* and creditors for any losses or damage arising from any intentional or negligent breach of their duties.

- **Elements**: a) damage b) breach of duty c) causation d) culpability
- **Breach of Duty** e.g.:
  - Non-Transferable Duties (Art. 716a CH-CO)
  - Duty of Care and Loyalty (Art. 717 CH-CO)
  - General Duties (Art. 716 CH-CO)

Corporate Opportunity doctrine



Financial assistance by a company for the acquisition of its own shares (UK)

- Financial Assistance was first made a criminal offence by the Company Act 1929
- The current prohibition on the giving of financial assistance by public companies for the purchase of their own shares is set out in Company Act 2006, ss. 677-683
- Financial Assistance is **not applicable to private companies unless they belong to a group of a public company**

Financial assistance by a company for the acquisition of its own shares (UK)

Typical abuse examples:

- Director who wishes to exit the business but cannot find a purchaser with funds to acquire his shares uses the company's assets to assist an impecunious purchaser
- Acquisition of the public company by a bidder who *borrows money to fund the acquisition* and then uses the company's assets once control has been secured to *repay the funding*

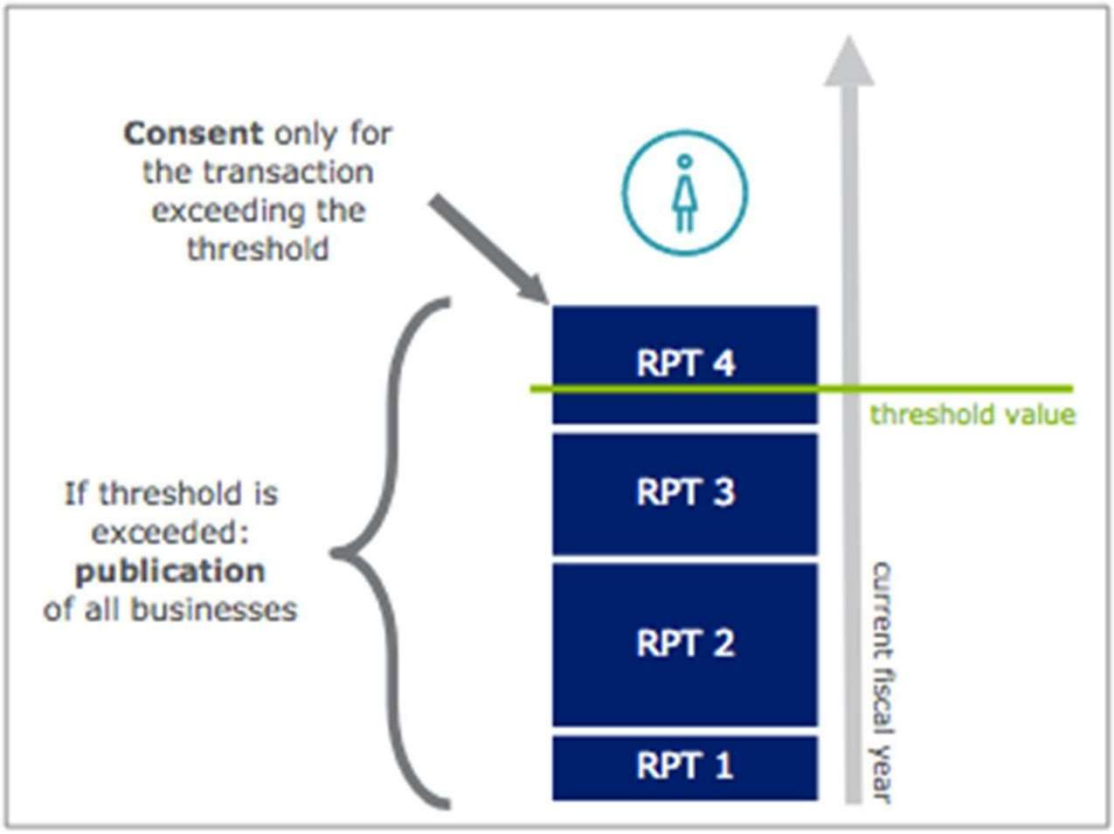
Financial assistance under a Swiss Law perspective (Art. 678 CO)

- A company may provide a loan to third persons or to its shareholders provided that the transaction is at arm's length (Art. 678 para. 2 [rev]CO e contrario).
- Shareholders and members of the board of directors, executives and their close associates who have unduly ~~and in bad faith~~ received dividends [and alike] (*or other benefits that are manifestly disproportionate to the performance rendered in return ~~and to the company's economic situation~~*) are obliged to return such profits (Art. 678 para 1 and *2* **rev**CO)
- BGE 140 III 602: *"manifestly disproportionate" means obvious for any righteous person because it is economically unsound; certain discretion for the BoD (≈ business judgment rule) ~~which is larger when company is in good economic situation~~ [?]*
- Director's liability for any losses or damage arising from any intentional or negligent breach of their duties (Artt. 754 and 717 CO)
- Applies to all corporations (listed and non-listed)

EU: Second Shareholder Rights Directive – Provisions regarding related party transactions (1)

- Art. 9c SRD II: „*Transparency* and *approval* of related party transactions“
- „Directive“ → National implementation; e.g. section 111a to 111c German AktG
- Section 111b para. 1 AktG:
  Prior *approval* of the supervisory board required for transactions of a listed party
  1. with **related parties**
  2. whose economic value alone or together with transactions with the same party within the current fiscal year exceeds the **threshold**.
- „Related parties“: enlarged scope; all persons according to international accounting standards
- „Threshold“: 1.5 % of the sum of fixed and current assets to the last financial statement.
- Section 111c para. 1 AktG:
  The listed company must *publish* details of such transactions with related parties that require approval in accordance with section 111b para. 1 AktG without delay. If the obligation is triggered by the aggregation of several transactions, all of these transactions must be published as well.
- See further SRD II provisions in Lecture „Compensation and Bonuses“.

EU: Second Shareholder Rights Directive – Provisions regarding related party transactions (2)



(c) Deloitte Legal (2020)

The doctrine of capital maintenance (UK)

- The doctrine of capital maintenance precludes the return of capital, directly or indirectly, to the shareholders before the winding up of the company.
- Rules, designed to ensure, first, that a company obtains the capital which it has purported to raise and, secondly, that that capital is maintained
- Purpose: *Protection of creditors, ensuring their liquidation rights*
- Landmark case: *Trevor v Whitworth* (1887). This case established the fundamental principle that there can be no return of capital to the members other than a proper reduction of capital.
- Company Act 2006: governs payment for share capital, the purchase of a company's own shares including financial assistance for such purchases, the reduction of capital and distributions to shareholders.

The doctrine of capital maintenance (UK) – Remedies

- Transactions that prove injurious to creditors may be **challenged on the ground** that the **transaction is at an undervalue** or is a **preference** (eg. Insolvency Act 1986, s. 238 et seq.)
- **Personal liability of directors** for wrongful trading if they allow the company to continue trading past a point when they know or ought reasonably to now that there is no reasonable prospect of avoiding insolvent liquidation (Insolvency Act 1986, s. 214)

The doctrine capital maintenance (CH)

- Art. 680 para. 2 CO. “A shareholder may not have the right to reclaim the amount paid-up.” (see above)
- Shareholders may not demand that capital contribution be paid back
- The company is not allowed using the protected company assets in order to provide benefits to shareholders; such benefits also include any transactions that indirectly produce such a repayment, such as:
  - Loans to shareholders that are not covered by the freely disposable resources
  - Acquisition of its (the company’s) own shares by the company if the payment is not covered by the company’s freely disposable resources
- Any direct or indirect obligation for repayment on the part of the company/Any GA or BoD resolution that enable the company to return not freely disposable equity capital to shareholders is void; shareholders are obliged to return the repayments received.

The fall of Credit Suisse (2023)

Ordinance
on Additional Liquidity Assistance Loans and the Granting of Federal Default Guarantees for Liquidity Assistance Loans from the Swiss National Bank to Systemically Important Banks

Amendment of 19 March 2023

The Swiss Federal Council
ordains:

[...]

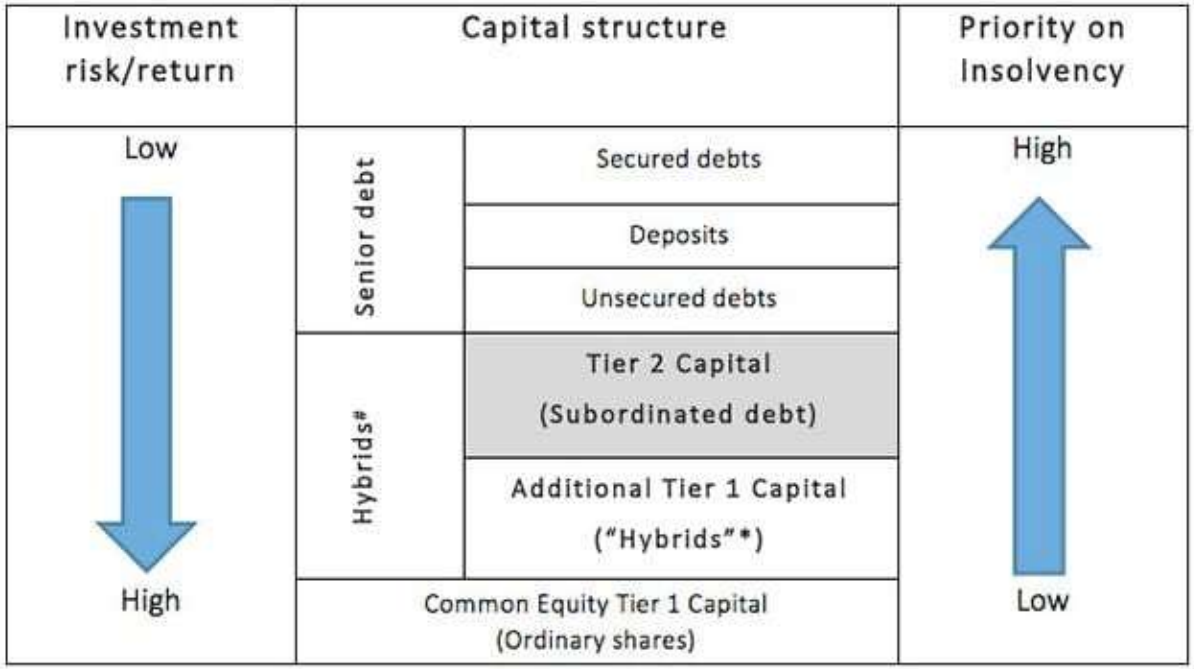
Art. 5a Additional Tier 1 capital

At the time of the credit approval in accordance with Article 5, FINMA may order the borrower and the financial group to write down additional Tier 1 capital.

«[…] In the currently possible scenario of a merger – with or without an additional liquidity commitment from the Swiss National Bank (SNB) and a guarantee from the Swiss Confederation – Credit Suisse does not believe that the contractual requirements are met for a write-down. The measures currently contemplated are designed to create confidence, lead to a merger and obtain/preserve liquidity – not capital. The measures taken are, in our view as set out below, also not required on a consolidated basis to remedy any over-indebtedness or insufficient capitalization of CSG.»

What is «additional Tier 1 capital»?

- Basel III: (Common) equity – AT1 – AT2 – (Senior) debt
- Additional Tier 1 capital
  - Bonds with conditional mandatory conversion or waiver («write-off»)
  - When (contractual or statury conditions [«trigger»]) are met: AT1 capital becomes equity capital



*Per ASIC Report 365. *Per market convention.

FAC partial decision B-2334/2023 of 1 October 2025

- Legitimacy (appellants' right to appeal as «third parties») affirmed
- (Contractual) requirements for write-off were not fulfilled:
  No viability event «A» or «B» according to AT1 prospectus, since no «extraordinary support» [had been given] / «customary measures [appeared] inadequate or unfeasible […] *to improve CSG's capital adequacy*» (liquidity help only)

  → FINMA's order was an instruction of breach of contract
- And this means? – … Instruction corresponds to a serious interference with bondholders' property rights

  → Which would need a clear and formal legal basis
  - Art. 26 BankA (–)
  - Art. 31 FINMASA (–)
  - Art. 5a Emergency Ordinance (–)
- Furthermore: Art. 5a Emergency Ordinance was deemed itself to be unconstitutional → FINMA's order had no valid legal basis

FAC partial decision B-2334/2023 of 1 October 2025

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Home › News › FINMA to appeal partial decision of the Federal Administrative Court concerning AT1

News

15 October 2025 News 2025

FINMA to appeal partial decision of the Federal Administrative Court concerning AT1

The Swiss Financial Market Supervisory Authority FINMA takes note of the Federal Administrative Court's partial decision concerning the write-down of AT1 capital instruments. FINMA will contest the judgment of 1 October 2025 and appeal to the Federal Supreme Court.