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Herbstsemester 2020

Gesellschaftsrecht II / Comparative Corporate Law Exam (2)

08 / 09 January 2021

Duration: 24-hour Take-Home Examination Essay Questions

Start: **Friday, 08 January 2021, 17:00 CET** (local time in Switzerland).

End: **Saturday, 09 January 2021, 17:00 CET** (local time in Switzerland). Submit the Exam Answer Sheet and the Examination Honor Code RWF Form to lst.alexander@rwi.uzh.ch by this deadline. Please ensure an adequate internet connection ahead of time. Late submissions are not accepted.

- Please check at receipt of the exam the number of question sheets. The **Exam** contains 3 pages containing 4 questions.
- The **Exam Answer Sheet** template is a separate document and contains 1 page – use this template for your answers, and send it to us at lst.alexander@rwi.uzh.ch
- The **Examination Honor Code RWF Form** is a separate document and contains 1 page – date and sign this and send the scan to us in the same email as the Exam Answer Sheet.
- The **Fact Sheet on Online Exams** is a separate document and contains 2 pages – for informational purposes only.

Notes on solving the questions

- Answer all four (4) questions.
- There is a 4000-word limit (for the whole exam). If you exceed it, points will *not* be deducted; however, be aware that if you exceed it markedly, you run the risk that the examiners do not read the excess words. *Your answer must contain a discussion and analysis of the main legal (and related policy issues) based on information from lectures and readings. Exam points will be awarded for identifying the main issues and providing the relevant analysis. Note: you will not receive full points simply for copying information off the lecture slides. Please make an effort of analysis, comparison and criticism to achieve full marks.*

Notes on marking

- When marking the exam, each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	20 points	20 %
Question 2	35 points	35 %
Question 3	25 points	25 %
Question 4	20 points	20 %

Total	100 points	100 %
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We wish you a lot of success!



Note: Please use the Exam Answer Sheet template we provide in a separate attachment. Date, sign, and scan the Examination Honor Code RWF Form and send it and the Exam Answer Sheet in one email to lst.alexander@rwi.uzh.ch by the submission deadline.

Question 1 (20%)

Discuss the role of shareholders and the role of the board of directors. How do their interests align, and how do their interests diverge? What role can corporate law play in aligning their interests?

Question 2 (35%)

The AIRTRAN corporation was incorporated in the United Kingdom with offices in London, Switzerland and United States; the company's shares were listed on the London Stock Exchange. The corporation's founder and controlling shareholder was Kenneth Layfield who served as President and Chairman of the Board of Directors. AIRTRAN'S directors also included chief executive officer Donald Bruno and chief financial officer Jeffrey Ohlan. AIRTRAN'S main line of business was producing operational software for pilots to operate commercial aircraft. Under Layfield's leadership, AIRTRAN's revenues grew substantially beginning in 2016 when AIRFLY - one of the world's largest airlines - began to buy AIRTRAN's operating software to be used in all of its aircraft. AIRFLY was incorporated in Switzerland. In 2017, as AIRTRAN's business grew with AIRFLY, AIRFLY's board of directors recommended, and its shareholders voted to elect, Layfield and Bruno to AIRFLY's board of directors. Layfield, Bruno, and Ohlan acquired large shareholdings in AIRTRAN and AIRFLY.

In March 2018, the pilots of several AIRFLY planes experienced serious difficulties in utilizing the operating software. After an investigation, AIRTRAN and AIRFLY engineers concluded in January 2019 that the operating software installed in most of AIRFLY's planes was seriously defective and recommended that all of AIRFLY's planes should be grounded immediately until the operational defects could be repaired. The engineers' recommendations were not publicly disclosed at the time they were made in January 2019. AIRFLY, however, continued to operate its planes throughout 2019. In July 2019, several more AIRFLY planes were diverted to make emergency landings just after takeoff because of the defective operating software.

While serving on the boards of both AIRTRAN and AIRFLY, Layfield and Bruno influenced the AIRFLY board to continue purchasing AIRTRAN's operational software in 2019 even after they had learned of the defects in AIRTRAN's operating software. They also voted as members of the AIRFLY board to continue flying AIRFLY planes even though they were aware of the planes' defective operating software purchased from AIRTRAN.

In February 2019, after being informed of the engineers' recommendations that AIRFLY planes should be grounded, Layfield, Bruno, and Ohlan sold most of their shareholdings in AIRTRAN and AIRFLY. The AIRFLY board did not release to the public the engineers' report until January 2020. Moreover, even while they knew of AIRTRAN's defective operating software, they voted in 2019 for AIRFLY to purchase the operating software for a new aircraft model that would be built in 2021.

Following the public release of the engineers' report in January 2020, the share price of both AIRTRAN and AIRFLY dropped substantially, resulting in huge losses for investors in both

corporations. By late 2019 (before the engineers' report was publicly released), Layfield, Bruno, and Ohlan had sold most of their shares in AIRTRAN, pocketing more than £6 million each. At about the same time, they sold most of their shares in AIRFLY pocketing profits of £5 million each. Layfield, as President and controlling shareholder in AIRTRAN, secretly diverted AIRTRAN's capital and pension fund reserves to another company which he controlled leaving AIRTRAN with very little capital to cover corporate liabilities including pension fund liabilities to its employees. In January 2021, AIRTRAN filed for bankruptcy (insolvency) with shareholders losing all of their investment capital and company creditors suffering huge losses on defaulted AIRTRAN loans.

- a) What legal rights do shareholders and creditors (including employees) of AIRTRAN have to recover their losses against Layfield, Bruno and, Ohlan?
- b) What potential liability if any do Layfield and Bruno have to AIRFLY and/or to shareholders of AIRFLY?
- c) Government regulators and enforcement authorities are also investigating Layfield, Bruno, and Ohlan. What type of potential regulatory or criminal liability do Layfield, Bruno, and Ohlan have?

Question 3 (25%)

Corporation A intends to take over corporation B. The Board of Directors (BoD) of A offers a 50 % premium over B's current market price if more than $66 \frac{2}{3}$ % of B's shares (with equal voting rights) are tendered to A. However, B's BoD has sought to frustrate the takeover by implementing severance payment provisions for members of B's BoD.

Advise B's BoD.

After the elapse of the offer period, A nonetheless managed to acquire 90 % of B's shares. B's remaining shareholders are disillusioned and wish to tender their shares under the same conditions. But A is now unwilling to acquire any further shares at the premium price. Media reports have since made public that B systematically profiled its unaware clients in order to assess automatically if contracts should be cancelled. The competent authority is investigating. Furthermore, due to diminished consumer trust, B becomes much less profitable. Evidently, A's BoD overpaid for B's shares.

Discuss.

Question 4 (20%)

Please highlight the main changes that "stakeholderism" as opposed to "shareholderism" could bring in corporate governance, and clarify the way technologies could contribute to re-design the main functions within corporate governance. Furthermore, please advance some regulatory proposals that in your opinion could contribute to the adoption of more sustainable corporate practices and to the implementation of new technologies for strengthening corporate governance.