Universität Zürich[UZH]

University of Zurich: Faculty of Law

Introduction to Swiss Law: Commercial Law

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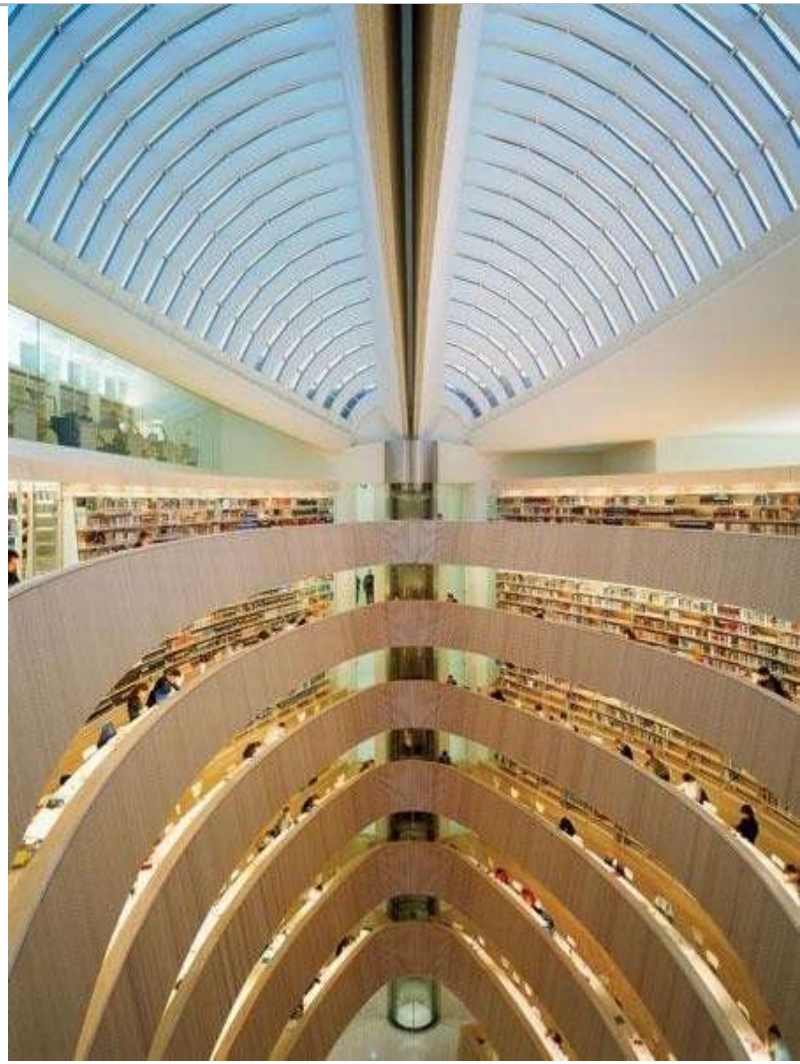


Lecture topics

- Overview
  - Subject matter of commercial law
  - Characteristics
  - Sources
- Company law
  - Company types
  - Selected issues regarding the Company limited by shares (Aktiengesellschaft)
  - Corporate Social Responsibility (CSR)
- Bank Secrecy
  - Then and now
  - Art. 47 Bank Act; Automatic Exchange of Information (AEOI)

Overview

What is commercial law?

- Body of law that regulates (nowadays: any) commercial activities
- Special rules can be traced back as far as to the Phoenician times

  → sea trade rules; later: Consolato del Mare (Mediterranean), Laws of Oleron (France and England, Laws of Wisby (Baltic/Hanseatic territories)
- *Lex mercatoria* (law merchant): No uniform medieval body of law – local special merchant rules
- 17th/18th century: emerging national codifications – replacement/integration
  - France: Ordonnances de commerce/de la marine (1673/81)
  - Germany/Preussen: Allgemeines Landrecht (1794)
- "New lex mercatoria" after WW2: Autonomous world trade law to avoid conflict of national laws

See further: Felix Dasser, Mouse or Monster? Some Facts and Figures on the lex mercatoria (2008)

Characteristics of Swiss Commercial Law (1)

- Necessity of preliminary decision:
  - (Centrally) planned/Command economy: commercial law is public law
  - Market economy: commercial law is private law
  - Switzerland: art. 94 ff/art. 27 Federal constitution – (social) market economy
- Differentiation between subjective and objective systems:
  - Subjective: “merchant”

    Germany/Austria: e.g. § 1 German Handelsgesetzbuch
  - Objective: “commercial activity”

    France (after French Revolution): art. L110, L121-1 French Code de Commerce
  - Switzerland: objective system

Characteristics of Swiss Commercial Law (2)

- Special codification vs. uniform codification:
  - Special codificaton : separate commercial law code

    Germany (Handelsgesetzbuch); France (Code de Commerce); Austria (Unternehmensgesetzbuch)
  - Uniform codification: commercial law norms are part of Civil law code

    Italy: Codice de commercio became part of Codice civile (1942)
  - Switzerland: uniform codification
    - Before 1881/83: Western Switzerland (French speaking part) applied French Code de Commerce; Eastern Switzerland (German speaking part) did not have separate Commercial law codes
    - Revision of Federal Constitution 1874: competence for Federal legislation
      → Swiss Code of Obligations (CO) 1881/1883
    - 1911: integration of CO into Civil Code “Part Five [of the Swiss Civil Code]: The Code of Obligations”
    - Since 1911: plethora of special legislation (partially with regard to Commercial law)
    - Consequence: commercial norms are scattered all around

Characteristics of Swiss Commercial Law (3)

- Subset of *economic law* – Common characteristics by the example of competition law
  - "Competition law": Cartel/Unfair competition law *and* IP laws
    - Ensuring competition by preventing "undercooling"/"overheating"
      vs [?] exclusivity rights → No: Complementarity from a dynamic perspective
    - No primacy of IP laws (despite art. 3 para. 2 CartA)
  - Switzerland: significance of European law and institutions
    - Cartel law:
      "Substantive treatment in line with [...]"/"Strong orientation towards EU competition law" (SSC);
      "les systèmes d'application des règles de la concurrence de la Suisse et de l'Union reposent sur les mêmes principes et prévoient des règles similaires" (EU-Swiss competition law cooperation treaty)
    - IP laws (by the example of patents):
      EPC membership → today: full patent examination (only) through EPO
    - Recent developments e.g. Cartel Act/Patent Act revision
- Cross-sectional nature of *economic law* → part of private *and* public law – *or* tertium?

The fall of Credit Suisse (2023)

«[…] 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.»

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.

[…]

Art. 10a Derogations from the Mergers Act

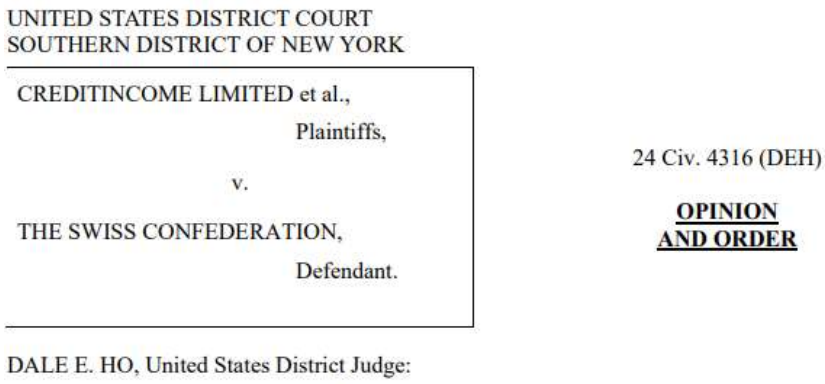
[1] Where necessary to protect the Swiss economy and the Swiss financial system, the following shall apply to transactions in accordance with the Mergers Act of 3 October 2003[3] (MergA) between banks supervised by FINMA which are systemically important or are part of a systemically important financial group in accordance with Article 7 of the BankA and which are internationally active:

a. the performance of such transactions does not require decisions by the general meetings of the entities concerned, where the transaction is performed in agreement with FINMA;

b. Articles 11, 14, 15 and 16 of the MergA shall not apply, where the transaction is performed in agreement with FINMA;

Civil and administrative litigation

- Switzerland
  - Commercial Court Zurich: “Swiss investor protection association” vs UBS
  - Federal Administrative Court: AT1 bondholders vs FINMA and UBS (Partial decision of 1 Oct 2025: Write-off decree revoked)
- Abroad
  - U.S.D.C. S.D.N.Y.: AT1 bondholders vs Switzerland (Decision of 30 Sept 2025: No jurisdiction)
  - Investor-state arbitration: e.g. Singapore: AT1 bondholders vs Switzerland etc.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CREDITINCOME LIMITED et al.,
Plaintiffs,
v.
THE SWISS CONFEDERATION,
Defendant.

24 Civ. 4316 (DEH)

OPINION AND ORDER

DALE E. HO, United States District Judge:

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

Important sources of Swiss Commercial law (non-exhaustive)

- Procedural Law (i.a. Civil Procedure Code [CPC], Cantonal Court Organisation Codes)
- Sales provisions (Art. 184 ff CO)
- Provisions on commercial enterprises and the cooperative (Art. 552 ff CO); simple partnership (Art. 530 ff CO), legal entities (Art. 52 ff Civil Code [CC])
- Federal Act on Collective Investment Schemes (CISA)
- Federal Act on Merger, Demerger, Transformation and Transfer of Assets (MerA)
- Provisions on the Commercial Register, Business Names, Commercial Accounting and Financial Reporting, and Negotiable Securities (Art. 927 ff CO; i.a. Commercial Register Ordinance [CRO] ...)
- Financial Market Regulation (i.a. Financial Services Act [FinSA]; Financial Institutions Act [FinIA]; Bank Act [BA]; Financial Market Infrastructure Act [FinMIA])

Examples of Procedural Commercial law provisions

- Art. 5 CPC – Court of sole cantonal instance

  (1) The cantonal law designates the court that has jurisdiction as sole cantonal instance for:

  a. disputes in connection with intellectual property rights (...);

  b. cartel law disputes;

  c. disputes on the use of a business name;

  d. disputes under the Unfair Competition Act (...)

  (...)

- Art. 6 CPC – Commercial Court

  (1) The cantons may designate a special court that has jurisdiction as sole cantonal instance for commercial disputes (Commercial Court).

  (4) The cantons may also assign to the Commercial Court:

  a. the disputes mentioned in Article 5 paragraph 1;

  b. the disputes relating to the law of commercial companies and cooperatives.

Cantons with Commercial Courts

- Bern
- Zurich
- St. Gall
- Argovia

Example: § 57 ff Zurich Court Organisation Code

- The Commercial Court consists of at least two members of the High Court and the Commercial judges; decisions are taken by a gremium of two members of the High Court and three Commercial judges
- Eligible as a Commercial judge are only owners or managers of companies or persons who had such positions for a minimum of ten years

Examples of Commercial Sales provisions in Swiss CO

- Art. 190 CO – Seller's obligations / Withdrawal from commercial transactions

  (1) Where in commercial transactions the contract specifies a time limit for delivery and the seller is in default, the presumption is that the buyer will forego delivery and claim damages for non-performance.

  (2) However, if the buyer prefers to demand delivery, he must inform the seller without delay on expiry of the time limit.

- Art. 215 CO – Obligations of the buyer – Liability for computation of damages

  (1) Where the buyer in a commercial transaction fails to discharge his payment obligation, the seller is entitled to compensation for the difference between the sale price and the price at which he has subsequently sold the object in good faith.

  (2) In the case of goods with a market or stock exchange price, the seller is entitled to claim as damages the difference between the contractual sale price and the market price at the time of performance without needing to sell the object on.

Excursus: What about application of "new lex mercatoria" in Switzerland?

- Dispute settlement through arbitration is quite common in (international) commerce.
- Reasons: (Non-national) judge of choice, confidentiality, limited contestability, enforceability
- Domestic arbitration (Art. 353 ff Civil Procedure Code [CPC]) and
  International arbitration (Art. 176 ff Code on Private international Law [CPIL])
- Applicability: Seat of arbitral tribunal in Switzerland; CPIL, if at least one party is domiciled or habitually resident outside Switzerland (Art. 177 CPIL)
- Arbitrability:
  - "Any claim over which parties may freely dispose" (Art. 354 CPC)
  - "All pecuniary claims" (Art. 177 CPIL)
- Applicable law: Decision according to
  - the *rules of* law chosen by the parties (Art. 381 (1) a CPC; Art. 187 (1) CPIL), or
  - equity (Art. 381 (1) a CPC; Art. 187 (2) CPIL); if no choice: Art. 381 (2) CPC; Art. 187 (1) CPIL

Company Law

Overview (1)

- Numerus clausus of permitted company types:
  partnerships (mainly member-oriented), corporations (mainly capital-oriented), hybrids
- Associations of persons (companies) vs. associations of funds (namely foundations)
- Registration in commercial register (declaratory or for acquisition of personality)
- Partnerships: cascade of applicable provisions (simple P → general P → limited P)
- Popular non-company form of business: sole proprietorship

Overview (2) – Liability

Liability:

1. Limited Liability
2. Personal Liability

Limited Liability:

- Company limited by shares (Aktiengesellschaft, AG)
- Limited liability Company (Gesellschaft mit beschränkter Haftung, GmbH)

Personal Liability:

- Simple partnership (Einfache Gesellschaft)
- General Partnership (Kollektivgesellschaft)

Both personal and limited liability:

- Limited Partnership (Kommanditgesellschaft)

Simple Partnership (Art. 530 ff CO)

1. ***Requirements:***

- **Contract**
- **Two or more Persons**
- **Combination of efforts or resources to achieve a common goal**
- **Default form of partnership** („[…] any partnership that does not fulfil the distinctive criteria of any of the other types of partnership codified herein." CO 530 II)

2. ***Characteristics***

- **Each partner** has an **equal share in profits and losses** (unless other agreement exists) (CO 533)
- partners are **jointly and severally liable** for obligations to third parties (CO 544 IV)
- **Objects, rights in rem and claims** transferred to or **acquired for the partnership** belong jointly to the partners *or* as stipulated in the partnership agreement.

General Partnership (Art. 552 ff CO) (1)

1. ***Requirements***:

- **Contract**
- **Two or more Persons**
- **Common goal (generally commercial/business-oriented goal)**
- **Registered in commercial register (for commercial enterprises obligatory and of a declaratory nature, for noncommercial entitites of a constitutive nature)**
- **Acting toward third parties as representative of the partnership (i.e. utilizing name of identifier of partnership)**

2. ***Characteristics***

- **Unlimited liability of partners:** The partners are jointly and severally liable with their entire assets for all obligations of the partnership. (CO Art 568 I)

General Partnership (Art. 552 ff CO) (2)

Though commercial partnership is not a separate legal personality, it acquires a quasi-legal personality, i.e. is treated as if it had a legal personality in certain cases, such as:

- **Can deal in its own name**
- **Can act as a party in legal proceedings and sue in its own name**
- **Can become a subject of debt collection procedures („Betreibung“)**
- **Liability as an entity for actions resulting from the partners‘ activities in the name of the company**
- **Assets are divided from the assets of partners and in their collective ownership (does not limit liability of partners, however)**

Limited Partnership (Art. 594 ff CO)

1. ***Derivative form*** **of Commercial Partnerships (and sharing many of its general characteristics)**

2. ***Characteristics***

- **Both limited and unlimited liability of partners:**
- **Certain partners with unlimited liability (identical to commercial partnership)**
- **Other partners only liable** only up to the amount of their specific contributions. (CO 594 I)
- Partners with unlimited liability must be **natural persons,** but **limited partners may also be legal entities and commercial enterprises.**
- Standard/most common form is a **commercial enterprise** with a name registered in the commercial register (CO 594 III and 595)

Company limited by shares (Art. 620 ff CO) (1)

1. ***Requirements***:

- **Founding through public deed by founding members**
- **Articles of Association**
- **Registration in commercial register**
- **Share capital of at least CHF 100‘000, of which at least CHF 50‘000 must be contributed**

Company limited by shares (Art. 620 ff CO) (2)

2. Characteristics

- **Limited liability of shareholders:** Shareholders are shielded from losses greater than their investment in the company
- **Name** can be chosen freely, but must indicate the legal form of the company (in one of the four languages, i.e. A.G. or S.A. in German or French)
- The company is governed by:

1. The **General meeting of shareholders** as the supreme governing body. In Switzerland, generally the principle of „one share one vote“ is followed

2. The **board of directors** that leads the company. The board can delegate the leadership to individual members of the board or to third parties (→ management; „Geschäftsleitung“) if
(1) not prohibited by the articles of association (Art. 716b CO); and
(2) the duty is transferable/alienable (Art. 716a CO *e contrario*, see next slide)

3. The **external auditor:** ensures and verifies the accuracy of the company‘s financial statements and act as safeguards against fraud and other discrepancies

Company limited by shares (Art. 620 ff CO) (3)

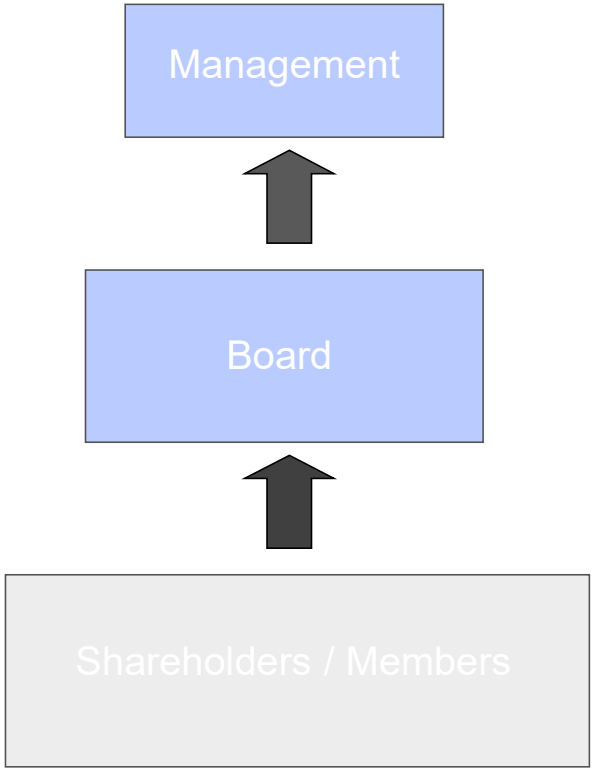
Non-transferable and inalienable duties of the BoD (Art. 716a para. 1 CO)

"**The board of directors has the following non-transferable and inalienable duties:**

1. the overall management of the company and the issuing of all necessary directives;
2. determination of the company's organisation;
3. the organisation of the accounting, financial control and financial planning systems as required for management of the company;
4. the appointment and dismissal of persons entrusted with managing and representing the company;
5. overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, articles of association, operational regulations and directives;
6. compilation of the annual report, preparation for the general meeting and implementation of its resolutions;
7. notification of the court in the event that the company is overindebted."

Company limited by shares (Art. 620 ff CO) (4)

The Company's Organs



Company limited by shares (Art. 620 ff CO) (5)

The Articles of Association

- Function
  - Internal organisation
  - Division of power between the shareholders and the board
- Typical content – non-exhaustive (as prescribed by law, art. 626 CO)
  - Procedures for convening and conducting shareholder and board meetings
  - Rules for appointing and removing directors
  - The regulation of share transfers (e.g. voting rights restrictions, see next)
  - The payment of dividends

Company limited by shares (Art. 620 ff CO) (6)

The Articles of Association (former Art. 627 CO) – repealed

"**In order to be binding, provisions on the following matters must be included in the articles of association:**

1. amendment of the articles of association, where different from the statutory provisions;
2. the payment of shares of profits paid to board members;
3. the interest paid to shareholders until commencement of the company's operations;
4. limitation of the company's duration;
5. contractual penalties for failure to pay up share capital on time;
6. capital increases from authorised capital and contingent capital increases;
7. [repealed]
8. restrictions on the transferability of registered shares;
9. the preferential rights of individual share classes, participation certificates, dividend rights certificates and the granting of special privileges;
10. restrictions on the voting rights of shareholders and their rights to appoint representatives;
11. cases not envisaged in law in which the general meeting may make resolutions only by qualified majority;
12. authority to delegate management responsibilities to individual members of the board of directors or to third parties;
13. the organisation and duties of the external auditors, where these go beyond those prescribed by law;
14. the possibility of converting shares issued in a specific form into another form, together with an allocation of resultant costs, where this derogates from the regulations in the Uncertificated Securities Act of 3 October 2008."

Private vs Public Companies limited by shares – (7) Consequences (non-exhaustive)

- Terminology here: Public companies have stock-market listed shares (vs only freely transferable)
- Regarding the restriction of transferability of shares (Art. 685 ff CO)
  - Precondition: Provision in the articles of association ([former Art. 627 Nr. 8 and] Art. 685a para. 1 CO, see before)
  - Private companies: Broad possibilities; necessity of „serious reasons“ (Art. 685b CO)
  - Public companies: *Only voting rights restriction if*
    (1) articles of association envisage a percentage limit on the registered shares (Art. 685d para. 1 CO)
    (2) acquirer fails to declare expressly that he acquired the shares in own name and for own account (para. 2)
    (3) other federal law provides for refusal of foreign acquirer (Art. 4 of the Final Provision on the 26th Title CO)
- Regarding the mandatory bid duty as a result of control transactions (Art. 125 ff FinMIA)
  - General provision: Whoever excedes the threshold of 33 1/3 % of the voting rights of a company is obligated to make an offer to acquire all listed equity securities of that company (Art. 135 para. 1 FinMIA)
  - Companies may raise this threshold to 49 % of voting rights in their articles of association (*opting up*; ibid), or if they state in their articles of association that there is no obligation to make a public takeover offer (restrictions apply; *opting out*; Art. 125 para. 3 f. FinMIA)

Executive Remuneration – *The Minder Initiative*

- Art. 95 para. 3 Federal Constitution (FC) – not self-executable
- «Ordinance against Excessive Compensation (OaEC)»

Major Amendments:

- Shareholders Say-on-Pay (binding)
- List of prohibited types of compensation
  - golden parachutes
  - golden hellos (but: compensation for “switching costs”)
- Criminal Sanctions for infringement (up to 3 years imprisonment)

Revision of the CO:

- Transfer of the OaEC provisions into the Code of Obligations (i.a. Art. 732 ff CO) and the Code of Penalties (Art. 154 CP)
  → certain increase of legal certainty

Executive Remuneration – Art. 95 para. 3 Federal Constitution

Say-on-Pay (Art. 95 para. 3 lit. a FC):

"The general meeting votes on an annual basis on the total amount of all remuneration (money and the value of benefits in any kind) given to the board of directors, the executive board and the board of advisors. […]"

Prohibited list (Art. 95 para 3 lit. b FC):

"The governing officers may not be given severance or similar payments, advance payments, bonuses for company purchases and sales, additional contracts as consultants to or employees of other companies in the group. […]"

Case study: Rejection of GAM‘s remuneration report

- Vote in April 2017
- Subject of vote: Definite remuneration report for 2016
- Maximum aggregate remuneration amount was approved of in the (binding) prospective vote already in April 2016
- Hence, vote on definite report was consultative
  (only single binding vote)
- 54.24 % against definite report, only 17.57 % in favor
- Consequence: „Downward adjustment“ by GAM, cut to fixed compensation of CEO and cap to bonus pool of BoD
- Consultative vote on definite report as an instrument to prevent shareholder revolt at the next prospective vote → results in less an effect than expected

The limited liability company (Art. 772 ff CO) (1)

1. ***Requirements*:**

- **Founding through public deed by founding members**
- **Articles of Association**
- **Registration in commercial register** (CO Art 779 I)
- **Share capital of at least CHF 20‘000** (CO Art 773)

The limited liability company (Art. 772 ff CO) (2)

2. Characteristics

- **Limited liability of members:** Members are shielded from losses greater than their investment in the company

- **Name** can be chosen freely, but must indicate the legal form of the company (in one of the four languages, i.e. GmbH or Sàrl in German and French)

- The company is governed by:

1. The **General meeting of members** as the supreme governing body.

2. The **management** that leads the company. Members are jointly responsible for managing the company unless the articles of association specify an alternative arrangement.

3. The **external auditor:** ensure and verify the accuracy of the company‘s financial statements and act as safeguards against fraud and other discrepancies.

The limited liability company (Art. 772 ff CO) (3)

3. Contrasting the limited liability company and the company limited by shares

- Conceptually similar to company limited by shares
- „Smaller“ version of company limited by shares
- Useful for setting up a regional or local companies with smaller overall footprint
- Limits liability of members
- Cheaper to set up as it requires less capital (CHF 20‘000 vs CHF 100‘000)

Handelsregister / registre du commere / Registro di commercio

Eingetragene Gesellschaften pro Rechtsform und Kanton / Sociétés inscrites par forme de droit et canton / Società iscritte per forma di diritto e cantone

Stand 1.1.2025, gemäss SHAB-Datum / Etat au 1.1.2025, selon date FOSC / Situazione 1.1.2025, secondo data FUSC

Rechtsform Forme juridique Forma giuridica	Total	AG	AI	AR	BE	BL	BS	FR	GE	GL	GR	JU	LU	NE	NW	OW	SG	SH	SO	SZ	TG	TI	UR	VD	VS	ZG	ZH
Einzelunternehmen Entreprise individuelle Ditta individuale	175'260	12'353	285	1'168	18'584	5'318	4'138	6'204	11'090	775	4'597	1'845	6'477	3'180	709	624	11'659	1'721	5'014	3'396	6'098	7'306	452	17'741	6'884	3'768	3'3874
Kollektivgesellschaft Société en nom collectif Società in nome collettivo	11'417	711	14	55	1'144	309	294	447	937	47	289	94	321	288	48	25	678	112	278	205	322	649	50	951	708	167	2'274
Kommanditgesellschaft Société en commandite Società in accomandita	1'115	69	1	8	108	38	32	17	142	9	30		28	13	12	5	76	5	30	28	31	36	8	21	42	46	280
Aktiengesellschaft Société anonyme Società anonima	243'658	12'897	1'034	2'274	18'831	5'278	5'008	7'899	19'731	1'281	6'940	1'859	12'074	3'534	2'661	1'965	13'152	1'805	4'971	9'209	7'008	16'536	733	17'620	10'348	21'756	37'254
GmbH Soc. à responsabilité limitée Soc. a responsabilità limitata	269'617	16'382	620	2'141	23'860	7'561	6'971	8'949	18'489	1'162	5'449	2'103	12'770	4'921	1'787	1'453	13'535	2'228	6'654	7'969	8'134	15'101	848	24'744	13'094	13'830	48'862
Genossenschaft Société coopérative Cooperativa	8'108	479	20	56	1'371	217	239	436	367	58	309	106	559	149	60	60	445	91	206	120	229	166	88	732	341	110	1'094
Verein Association Associazione	12'283	454	17	51	1'057	261	568	347	1'860	42	310	47	274	220	19	26	499	44	153	131	225	893	30	1'261	466	408	2'620
Stiftung Fondation Fondazione	17'842	745	47	146	1'824	466	1'130	493	1'627	156	669	145	785	367	133	109	717	155	388	432	345	909	77	1'576	701	610	3'090
Zweigniederlassung Succursale Succursale	14'605	678	47	114	1'186	390	386	561	873	57	726	148	681	336	107	95	1'002	131	365	269	444	702	94	1'657	1'105	412	2'039
Ausl. Zweigniederlassung Succursale étrangère Succursale estera	3'247	111	2	16	76	55	90	68	512	2	63	9	54	30	18	6	199	64	22	55	72	328	5	289	61	336	704
Andere Rechtsformen Autres formes juridiques Altre forme giuridiche	568	22	2	5	41	12	19	43	108	10	46	3	21	12	7	6	24	6	16	4	10	21	9	44	10	7	60
Total 1.1.2025	757'720	44'901	2'089	6'034	68'082	19'905	18'875	25'464	55'736	3'599	19'428	6'359	34'044	13'050	5'561	4'374	41'986	6'362	18'097	21'818	22'918	42'647	2'394	66'636	33'760	41'450	132'151

What about "FIFA Association"?

- Company form: Association (Art. 60 ff Civil Code)
- "Ideal", non-profit objective
- But: Commercial activity possible in support of the non-profit objective
- Further requirements: two persons, no capital, articles of association
- Is FIFA "non-profit"?
  - Balance sheet total: CHF 3 billion
  - Favourable Taxation
  - "Lex FIFA"

2 Objectives

The objectives of FIFA are:

(a) to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes;

(b) to organise its own international competitions;

(c) to draw up regulations and provisions governing the game of football and related matters and to ensure their enforcement;

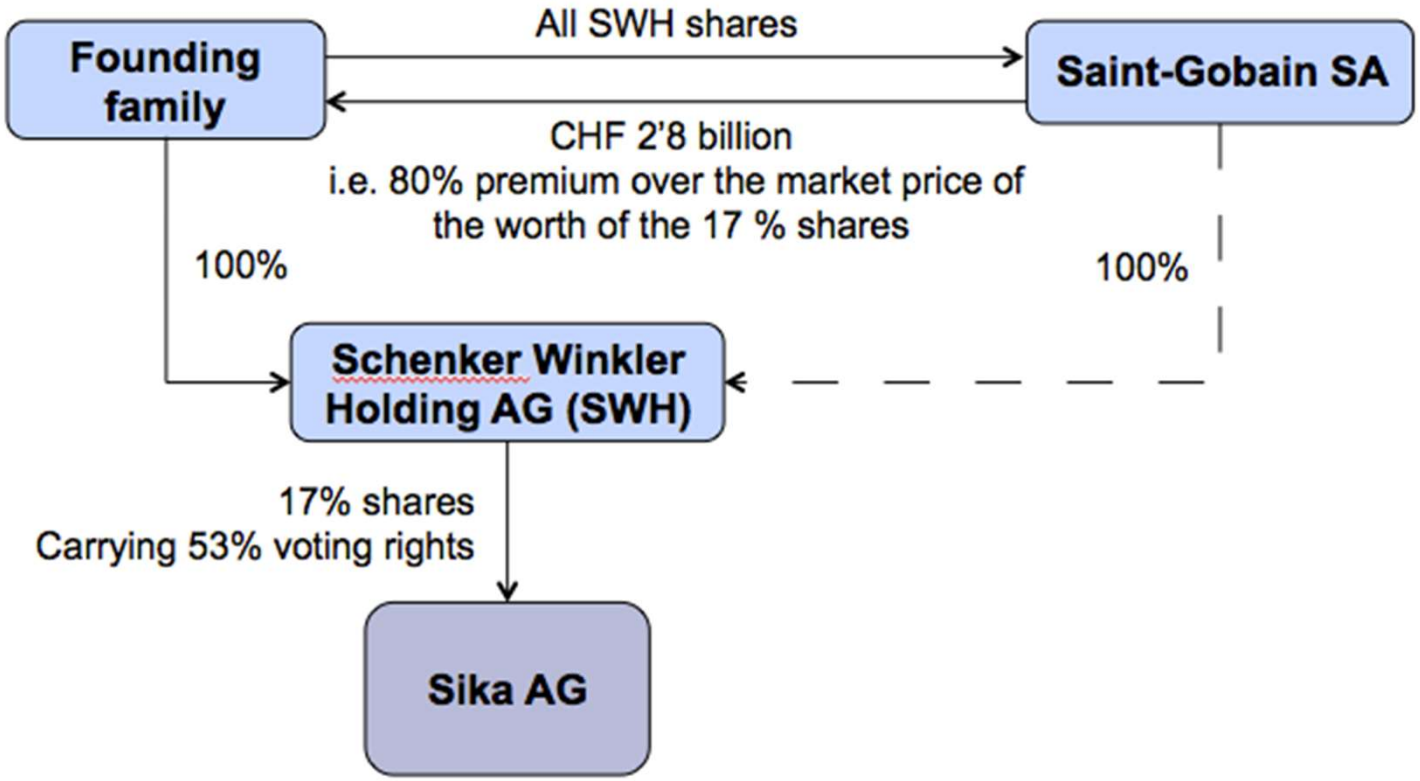
(d) to control every type of association football by taking appropriate steps to prevent infringements of the Statutes, regulations or decisions of FIFA or of the Laws of the Game;

(e) to use its efforts to ensure that the game of football is available to and resourced for all who wish to participate, regardless of gender or age;

(f) to promote the development of women's football and the full participation of women at all levels of football governance; and

(g) to promote integrity, ethics and fair play with a view to preventing all methods or practices, such as corruption, doping or match manipulation, which might jeopardise the integrity of matches, competitions, players, officials and member associations or give rise to abuse of association football.

Case study: Sika – Hostile takeover battle



Case study: Sika – Articles of Association

[4] Voting rights restriction for acquirer of shares with privileged voting rights
→ BoD *can* cap at 5 %.

Acting as a group to circumvent [4] also allows for voting rights restriction.

[5] Opt-out from mandatory bid rule

Case study: Sika – Hostile takeover battle

- Dec 2014 – Contractually intended course of action:
  - Step 1: SWH votes out non-compliant BoD members
  - Step 2: Saint-Gobain gains control over Sika indirectly by acquiring SWH
- Counteraction:
  Sika's BoD (opposing the control transaction) restricts SWH's voting rights to 5 %
- SWH filed a *civil suit* against Sika – Arguments and Outcome:
  - Indirect acquisition is not covered by [4]
  - SWH and Saint-Gobain did not act as a group in the sense of [4]
  - Court of First Instance Zug dismissed the action
- Bill and Melinda Gates Foundation sued on the *administrative track*
  - Foundation held 3 % of Sika; wanted to receive the 80 % premium over market price – mandatory bid duty?
  - Argument: [5] does not apply in the case of an indirect acquisition
  - Federal Administrative Court held that opt-out applies – no mandatory bid duty

Case study: Sika – Outcome

- Settlement outside of court
  - Time limit to contract (2018); Supreme Court decision only in 2019
  - Meanwhile, Sika stock price doubled – 80 % premium was below stock price
- Sale of all shares (17 %) by Founding family to Saint-Gobain
- Saint-Gobain subsequently sells 7 % to Sika, which “destroys” these shares through a capital reduction
- Result: Saint-Gobain holds 10 % of all shares
  (2nd largest shareholder is Blackrock with 9.3 % of all shares)
- One share, one vote → end to excessive voting powers
- Any draft decision of Appeals Court of Zug (‘Obergericht’) remains sealed; decision of first instance (‘Kantonsgericht Zug’) establishes precedent on shareholder voting rights restrictions
- May 2020: Saint-Gobain sold all (10 %) shares right after elapse of two-years stock lockup

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 before slide 27)

Social responsibility and political activity

- Traditionally, wealth maximisation is/was the proper goal of corporate governance
- “Beyond Friedman”: Should companies do “more” than increasing profits?
- Shareholder value v stakeholder value/holistic approach
- Corporate Social Responsibility (CSR) / Inter- and intragenerational Sustainability
- Reputation → The *Halo Effect* of social responsibility and political activity
- Competitive edge (investor attraction)
- Large v small companies?

Corporate Social Responsibility: *The Responsible Business Initiative*

Proposal of a new Art. 101a FC (Federal Constitution)

- Obligation to take comprehensive measures to respect internationally recognized human rights and international environmental standards
- Mandatory due diligence to identify the real and potential impact – identify risks and take measures; reporting obligations
- Applies to companies with registered office, central administration, or principal place of business in Switzerland
- Duty to ensure that also companies „under their control“ (economic control suffices) respect these rights and standards

Corporate Social Responsibility: *The Responsible Business Initiative*

Proposal of a new Art. 101a FC (Federal Constitution)

- **Liability provisions**
  - Swiss based companies will be liable for human rights abuses and environmental violations caused abroad by companies under their control in front of Swiss Courts.
  - **Exemption** from liability when the company credibly demonstrates to the Court that it carried out adequate due diligence and that it took all necessary measures to prevent the violations.
- Federal Council: appealing initiative; but: duty of care along the whole supply chain is overstretched; locational disadvantage, need for international standardization; often little relation to CH, taking of evidence difficult for Swiss courts

Corporate Social Responsibility: *The Responsible Business Initiative*

Chronology

- October 2016: the initiative was submitted with 120 418 valid signatures.
- January 2017: the Federal Council proposed to the Parliament that it should recommend to the voters to decline the initiative without any counterproposal
- Studies show high voter approval
- 2017 – 2020: Parliament in search of an (indirect) counterproposal
- Popular vote on Nov 29, 2020; narrow „no“
- Indirect counterproposal of Parliament
  - Reporting obligations and duties of care but no (further) liability
  - Initiators: „toothless tiger“

Corporate Social Responsibility: *Recent EU Developments*

EU Corporate Sustainability Due Diligence Directive («CSDDD»; 2024) – Oct 2025 amendments by JURI Committee report on Omnibus proposal

- **Corporate due diligence duty**
  - "to identify, prevent or mitigate, and ultimately terminate adverse impacts of their corporate activities on human rights and the environment" → "carry out a scoping based on reasonably available information […], and based on the result of the scoping, […] carry out a further assessment"
- **Personal scope of application**
  - EU companies with 5000+~~/3000+/1000+~~ employees and EUR 1500~~+/900+/450+~~ Mio w.w. turnover (starting from ~~2027/~~ mid 2028 ~~/2029~~)
  - Non-EU companies with corresponding EU-wide turnover
- **Sanctions: «not less than 5%» → «maximum of 5%» (to be imposed by member states)**

Bank Secrecy

Bank Secrecy: Overview

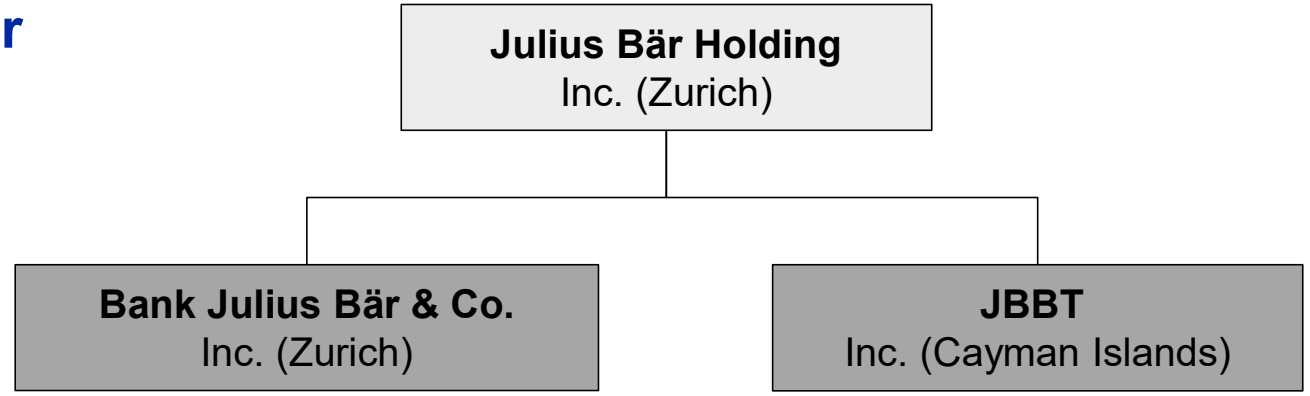
- Confidentiality on existence of customer relationship and all contextual information (account number, balance, postings/payments, guarantees etc.)
- Breach can be a criminal law offence: Art. 47 BA (see further on next slide)
- But why?
  - Safeguarding civil law obligations (contractual confidentiality duties and client's personality right)

    → Function of individual protection; *now prevailing view*
  - Interest in a well-functioning and competitive financial sector through protection of bank client data

    → Function of system protection; cf. BGE 141 IV 155 E. 4.2.5
- "Gradual erosion" of (foreign) bank secrecy:
  - (Foreign) political pressure, vulnerability of secrecy in today's world
  - Towards a global standard for automatic exchange of (financial account) information (AEOI)

    → AEOI with ca. 100 states (including all EU, EFTA, OECD and almost all G20 states); OECD: "largely compliant"
  - Domestic bank client confidentiality remains unaffected

Case study: Rudolf Elmer



- Facts: Elmer was employed by Julius Bär Bank & Trust Company (JBBT)
- JBBT is incorporated on the Cayman Islands and a subsidiary of the Swiss Julius Bär Holding
- Elmer got fired from JBBT. He subsequently leaked information about clients of JBBT to Swiss authorities, newspapers and WikiLeaks

Case study: Rudolf Elmer

Art. 47 BA:

(1) Whoever intentionally does the following shall be imprisoned up to three years or fined accordingly:

a. discloses confidential information entrusted to him in his capacity as a member of an executive or supervisory body, an employee, representative or liquidator of a bank, as member of a body or employee of an audit firm or that they have observed in this capacity;

b. […];

c. […].

(1bis) Whoever enriches himself or others with an action in accordance with (1)(a) or (c) shall be punished with imprisonment for up to five years or fined accordingly.

(2) Whoever acts in negligence shall be penalized with a fine of up to CHF 250,000.

(3) […].

(4) The violation of the professional confidentiality shall remain punishable even after a bank license has been revoked or a person has ceased his/her official responsibilities.

(5) […].

(6) […].

Case study: Rudolf Elmer

- Court of First Instance Zurich: guilty in two cases;
  overturned by Court of Appeals Zurich; state attorney appealed to the Swiss Supreme Court
- Decisions 6B_1314/2016 and 6B_1318/2016 of October 10, 2018:
  Verdict of not guilty
- Personal applicability of Art. 47 Banking Act (BA) (–)
  - „Bank“ means an institute in the sense of Art. 1(4) BA:
    Julius Bär Holding (–), Bank Julius Bär & Co. (+), JBBT (–)
  - „Employee“ requires an employment contract in the sense of Art. 319 ff. CO;
    contract between Bank Julius Bär & Co. and Elmer does not qualify as such
  - JBBT (and therefore Elmer, respectively) provided „stand-alone“ services for Bank Julius Bär & Co. → no outsourcing (hence services don‘t fall under Bank secrecy)
- No need to further examine geographical applicability