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# **Introduction to Swiss Law: Commercial Law**

**Dr David Roth**

**Postdoctoral Research Fellow and Lecturer,  
Prof Dr Kern Alexander, Chair for Law & Finance**

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## Lecture topics

- Overview
  - Subject matter of commercial law
  - Characteristics
  - Sources
- Company law
  - Forms of Company
  - 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)



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# 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
- 17<sup>th</sup>/18<sup>th</sup> 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 codification : 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: Motion Français/Patent Act revision
- Cross-sectional nature of economic law → part of private *and* public law – *or tertium?*



## 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



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# Company Law



## Overview (1)

- Numerus clausus of permitted company types:  
partnerships (mainly member-oriented) *and* corporations (mainly capital-oriented)
- 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  
(Registration obligation if revenues above CHF 100'000)



## 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)
- Commercial Partnership (Kollektivgesellschaft)

### **Both personal and limited liability:**

- Limited Partnership (Kommanditgesellschaft)



## Simple Partnership (CO Art 530 ff)

### 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 as stipulated in the partnership agreement.





## Commercial Partnership (CO 552 ff)

### 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 entities 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)
- Standard/most common form is a **commercial enterprise** with a name registered in the commercial register



## **Commercial Partnership (CO 552 ff)**

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 (CO 594 ff)

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 (CO Art 620 ff)**

### **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 (CO Art 620 ff)

### 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) provided for in the articles of association (Art. 627 Nr. 12 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 (CO Art 620 ff)

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

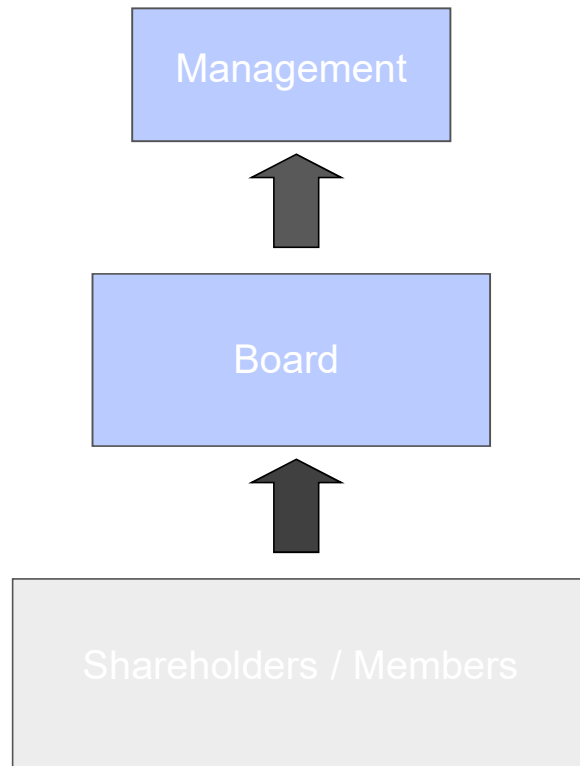
**“The board of directors has the following non-transferable and inalienable duties:**

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 (CO Art 620 ff)

### The Company's Organs





## The Articles of Association

- Function
  - Internal organisation
  - Division of power between the shareholders and the board
- Typical content – non-exhaustive  
(prescribed by law/flexible content, CO Art. 626 f.)
  - 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 (CO Art 620 ff)

### The Articles of Association (CO Art 626)

**“The articles of association must contain provisions concerning:**

1. The business name and seat of the company;
2. The objects of the company;
3. The total share capital and the extent to which it is paid up;
4. The number, nominal value and types of shares;
5. The procedure for convening general meetings and the voting rights of shareholders;
6. The governing bodies for management and auditing;
7. The form of the company's external communications.”



## Company limited by shares (CO Art 620 ff)

### The Articles of Association (CO Art 627)

**“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 – Consequences (non-exhaustive)

- Terminology: Public companies have stock-market listed shares
- Regarding the restriction of transferability of shares (Art. 685 ff CO)
  - Precondition: Provision in the articles of association (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 exceeds 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 revCO) and the Code of Penalties (Art. 154 revCP)  
→ 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 (CO Art 772 ff)**

### **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 (CO Art 772 ff)

### 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 (CO Art 772 ff)

### 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 commerce / 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 1.1.2022, gemäss SHAB-Datum / Etat au 1.1.2022, selon date FO5C / Situazione 1.1.2022, 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	166'658	12'809	298	1'125	17'802	5'061	3'921	6'705	10'508	758	4'337	1'763	6'023	3'148	685	601	10'560	1'642	4'750	3'355	5'580	7'090	453	16'749	6'927	3'679	30'329
Kollektivgesellschaft Société en nom collectif Società in nome collettivo	11292	689	13	52	1'170	305	306	421	978	43	285	89	321	293	42	24	614	112	290	205	303	642	59	955	781	166	2'134
Kommanditgesellschaft Société en commandite Società in accomandita	1'302	87	1	9	125	43	41	19	156	11	37		38	15	23	6	83	8	39	25	32	39	9	28	48	50	330
Aktiengesellschaft Société anonyme Società anonima	229736	12'186	372	2'245	17'957	5'107	4'678	7'401	18'563	1'255	6'516	1'769	11'242	3'311	2'553	1'927	12'483	1'720	4'638	8'361	6'522	16'482	719	16'404	9'360	19'663	35'702
GmbH Soc. à responsabilité limitée Soc. a responsabilità limitata	231'250	14'048	512	1'885	20'728	6'722	5'880	7'255	15'525	990	4'547	1'817	11'161	4'019	1'559	1'343	11'720	1'927	5'728	7'044	6'973	13'585	730	20'664	10'739	11'704	42'445
Genossenschaft Société coopérative Cooperativa	8323	503	22	53	1'424	232	236	460	364	59	309	116	574	150	58	60	448	93	223	124	241	178	89	731	343	113	1'120
Verein Association Associazione	10'590	412	13	42	864	230	494	284	1'631	42	261	40	263	194	18	25	407	37	127	117	189	824	33	1'000	441	301	2'301
Stiftung Fondation Fondazione	17745	762	46	143	1'809	462	1'151	484	1'567	157	638	145	784	364	132	95	702	149	401	442	344	881	73	1'624	705	528	3'157
Zweigniederlassung Succursale Succursale	13'546	616	52	113	1'098	354	389	492	777	48	639	143	651	310	120	91	952	117	365	245	430	639	89	1'581	991	401	1'843
Ausl. Zweigniederlassung Succursale étrangère Succursale estera	3327	123	6	14	93	57	90	71	512	3	58	11	58	29	15	7	187	63	32	54	63	377	5	271	64	307	757
Andere Rechtsformen Autres formes juridiques Altre forme giuridiche	542	18	2	5	42	11	20	39	103	10	43	3	25	5	7	6	24	5	16	4	11	20	8	45	10	5	55
Total 1.1.2022	694'311	42'253	1'937	5'686	63'112	18'584	17'206	23'631	50'684	3'376	17'670	5'896	31'140	11'838	5'212	4'185	38'180	5'873	16'609	19'976	20'688	40'757	2'267	60'052	30'409	36'917	120'173



## 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”



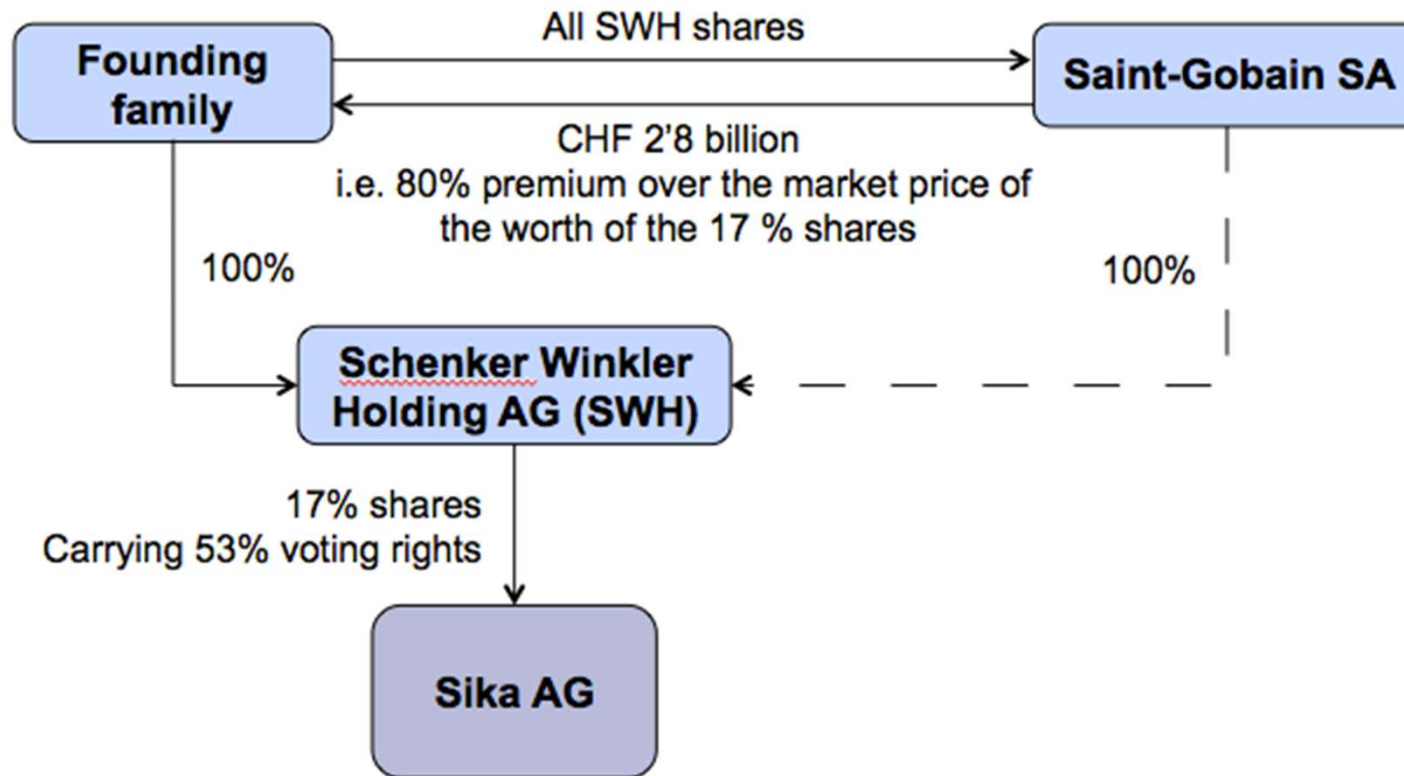
## 2 Objectives

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





## 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)
- Reputation → The *Halo Effect* of social responsibility and political activity
- Competitive edge (investor attraction)
- Large v small companies?



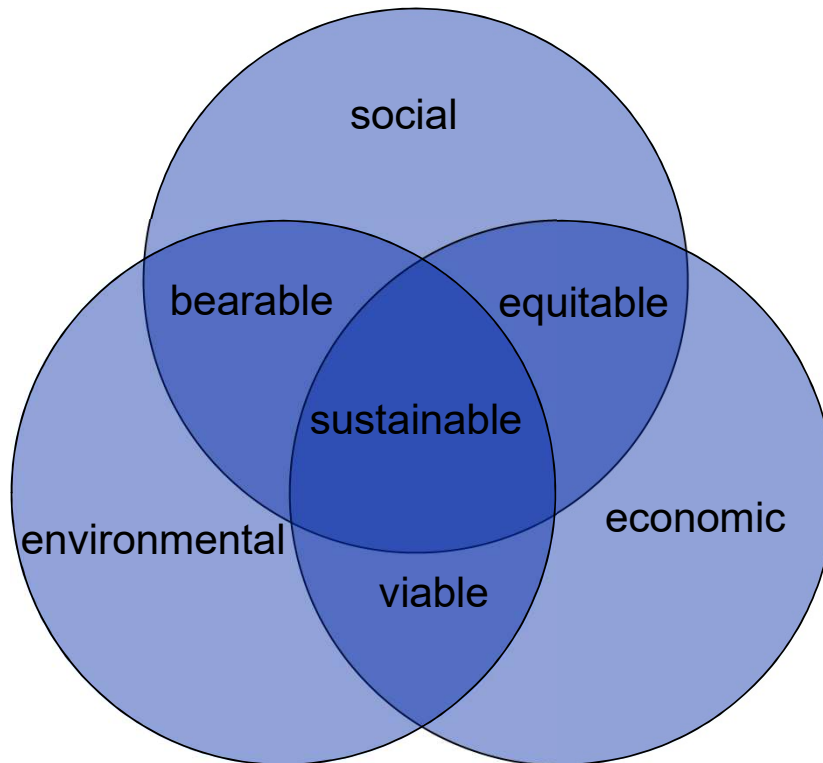


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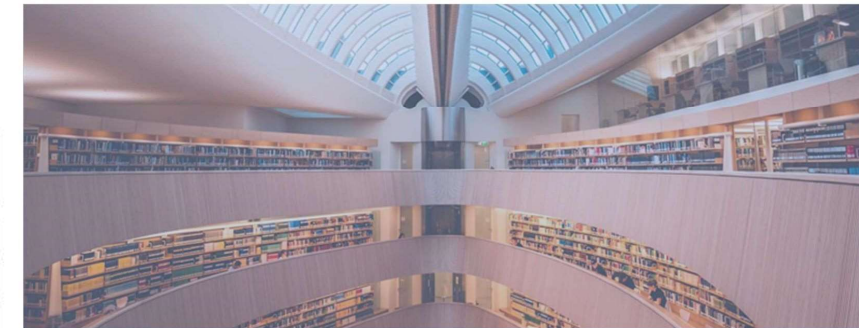


# Corporate Social Responsibility



[ema.uzh.ch/R796V](https://ema.uzh.ch/R796V)

Prof. Dr. Kern Alexander, Chair for Law & Finance



## Agenda

13:30	Reception and Registration
14:00 – 14:10	Welcome, Prof Kern Alexander, University of Zurich
14:10 – 14:40	Prof Katja Langenbacher, University of Frankfurt <i>A Question of Free Speech?</i> <i>Comparative Remarks on Sustainability Reporting</i>
14:40 – 14:55	Discussion
<b>Corporate Law and Sustainability</b>	
14:55 – 15:15	Prof Pierre-Henri Conac, University/MPI Luxembourg <i>Sustainable Corporate Governance in the EU: Reasonable Global Ambitions?</i>
15:15 – 15:35	Prof Marco dell'Erba, University of Zurich <i>ESG and Executive Compensation</i>
15:35 – 15:50	Discussion
15:50 – 16:05	Coffee/Tea Break
<b>Financial Regulation and Sustainability</b>	
16:05 – 16:25	Prof Aline Darbellay, University of Geneva <i>The Financial Materiality of Sustainability Information under Swiss Capital Markets Law</i>
16:25 – 16:45	Dr Dr Markus Winkler, Pestalozzi, <i>Integrating ESG into Suitability</i>
16:45 – 17:00	Discussion
<b>Commercial and Tax Liability for Sustainability Risks</b>	
17:00 – 17:20	Marie-Cristine Kaptan, Bär & Karrer <i>Liability for Climate Change Risks</i>
17:20 – 17:40	Dr Giedre L. Huber, University of Geneva <i>Tax Incentives in Relation to Climate Change in Switzerland</i>
17:40 – 17:55	Discussion
17:55 – 18:00	Final remarks, Oliver Widmer, Pestalozzi
18:00 – 18:30	Closing Reception

## SCFL22

2022 Conference on Sustainability  
in Commercial and Financial Law

November 9, 2022  
Aula Magna, KOL-G-201  
University of Zurich  
Raemistrasse 71, 8006 Zurich

The University of Zurich, Faculty of Law, and the Society of Commercial and Financial Law are hosting a special conference to analyze recent developments in commercial and financial law as it relates to environmental and social sustainability.

This is a hybrid conference; if you are interested in attending, either in person or on Zoom, please register here:

<https://bit.ly/2Zrf6XL>



## 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



### Proposal for a EU Directive on Corporate Sustainability Due Diligence («CSDD»; Feb. 23, 2022)

- **Corporate due diligence duty**
  - “to identify, prevent or mitigate, and ultimately terminate adverse impacts of their corporate activities on human rights and the environment”
  - EU standard for human rights and environmental due diligence
  - Further due diligent duties for banks, insurers etc. on clients and their subsidiaries
- **Duty of care for directors linked to sustainability matters; civil liability regime**
- **Personal scope of application**
  - EU companies with 500+/250+\* employees and EUR 150/40\* Mio worldwide turnover
  - Non-EU companies with corresponding EU-wide turnover (\* companies in high impact sectors)
- **Sanctions: «effective, proportionate and dissuasive» (to be imposed by member states)**





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# Bank Secrecy



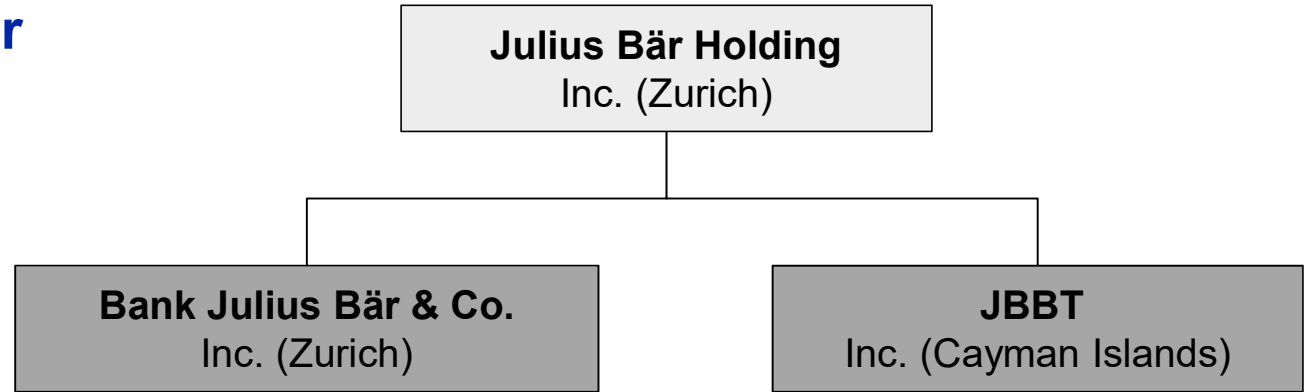


## Bank Secrecy: Overview

- 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. [...].
- (1<sup>bis</sup>) 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