

NEWSLETTER

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Corporate Governance New Directive of SWX Swiss Exchange Swiss Code of Best Practice of *economiesuisse*

On 1 July 2002, the *Directive on Information Relating to Corporate Governance* of SWX Swiss Exchange entered into force. It covers the disclosure of Corporate Governance issues, does however not set any Corporate Governance standards. The Directive applies to all Swiss issuers having their securities listed on the SWX and also to issuers not incorporated in Switzerland but having their securities listed only on the SWX and not in their home country. These issuers shall provide the information required by the Directive for the first time in their financial report for the business year 2002.

Already on 25 March 2002 *economiesuisse* had issued the *Swiss Code of Best Practice*. This Code does include Corporate Governance standards, which are to be understood as recommendations and therefore are not binding. The Code addresses primarily Swiss listed companies, however, it is also recommended as a guideline for non-listed companies and organisations of "economic significance".

One can expect that on the basis of the principles contained in the SWX Directive and the Code of Best Practice there shall be a levelling of Corporate Governance standards among Swiss public companies. If a company needs to adapt its standards, it is advisable to implement the necessary measures in due time before the date of the balance sheet in order to present the adapted corporate governance standards already in the business report 2002.

This Newsletter outlines the contents of the SWX Directive and the Swiss Code of Best Practice.

Corporate Governance – Directive of SWX Swiss Exchange

General comment

Corporate Governance means all principles in the interest of the shareholders, which aim to institute transparency and a balanced interaction between management and control at the executive level of a company. The SWX Directive on information relating to Corporate Governance has entered into force on 1 July 2002 and aims to inform the market on important corporate governance issues with respect to listed companies.

The SWX Directive does not set any minimum standards, which it rather leaves to the concerned companies themselves, respectively to the expectations of the market.

The Directive applies to all Swiss issuers having their securities listed on the SWX. It does also apply to issuers not incorporated in Switzerland but having their securities listed only on the SWX and not in their home country.

According to the Directive, it is *mandatory* to provide information with respect to the remuneration and the shareholdings of members of the board of directors and members of the management as well as indications with respect to loans granted to these members. The disclosure of any other information may be dealt with in accordance with the principle "comply or explain", which provides that the issuer may decide not to disclose certain information provided that an explanation is given why this information is not being disclosed.



The information relating to Corporate Governance shall be included as a separate chapter of the business report, starting from the business year 2002.

The information shall be given as per the date of the balance sheet. However, any important changes occurring between the date of the balance sheet and the finalisation of the business report shall be adequately covered in the report.

Below please find a summary of the most important aspects of the above-mentioned information.

1 Information with respect to the structure of the group and the shareholders as well as the capital structure

The Directive requires information with respect to the structure of the group, the shareholders as well as the capital structure. In most cases, the provision of this information should not be problematic.

It is however worthwhile mentioning that key elements of any existing shareholders' agreements (to the extent that these have been disclosed in compliance with the Stock Exchange Act) as well as cross shareholdings exceeding 5 % are to be communicated.

2 Information with respect to the board of directors and the management

The personal information on the members of the board and the management should not pose problems.

In addition, any other activities and functions such as positions in governing and supervisory bodies of important Swiss or foreign corporations or public entities, consultancy functions on behalf of Swiss or foreign lobbies as well as any official or political positions shall be mentioned. Furthermore, any so-called cross involvement of members of the board of directors shall be indicated, i.e. any reciprocal representation in the boards of directors of listed companies.

Required information also comprises an outline of the principles applicable to the splitting of responsibilities between the board of directors and the management as well as a description of the information and control mechanisms which are at the disposal of the board of directors with respect to the management.

3 Information on remuneration, holdings and loans

According to the Directive, information on the remuneration and the shareholdings of members of the board of directors and members of the management as well as information on

loans granted to these members are compulsory. Any other information may be dealt with in accordance with the principle "comply or explain", provided that a specific and substantial explanation be given with respect to the choice of non-disclosure.

In the chapter "Remuneration, holdings and loans", indications, to be issued in general as a total amount, are required with respect to:

- I the principles and contents of the remuneration and stock option plans of the board of directors and the management;
- I the remuneration of the members of the governing bodies including the remuneration of former members (any termination indemnities shall be indicated separately, which may facilitate an identification of the beneficiary in the event of a reduced number of terminations);
- I shares and options allotted during the business year as well as shares and options held by the members of the board of directors and the management and any party having a close link to such members;
- I additional fees in favour of a member of the board of directors or a member of the management or in favour of a party having a close link to such members if the amount of such fees exceeds half of the usual remuneration of the concerned member;
- I total amount and conditions of security and loans granted by the issuer or one of the companies belonging to the group of the issuer to members of the board of directors or the management or any party having a close link to such members; and
- I contents of change of control clauses in agreements and plans in favour of members of the board of directors and/or the management (for example golden parachutes).

In addition to previous versions of the Directive, the final version of the Directive now provides that for the member of the board of directors with the highest total amount of all types of remuneration, there shall be a separate mention of the amounts paid and the shares and options allotted with his or her identity withheld.

4 Information on the participation rights of the shareholders and measures of defence

This information relates to restrictions to voting rights, to the representation of voting rights, to quorums provided for in the articles of incorporation and similar issues, as well as to any

possible opting-out or opting-up clauses (regarding mandatory tender offers) and should not be problematic.

5 Information on the auditors

Concerning the auditors, their fees shall be indicated as well as any additional fees charged by them or any associated parties for additional services. (e.g. consulting)

Corporate Governance - Swiss Code of Best Practice

General comment

The Swiss Code of Best Practice issued by *economiesuisse* on 25 March 2002 has been drafted by a group of experts comprised of representatives of all fields of the Swiss economy. The many foreign projects and rules were taken as a basis for the Code, notably the rules emanating from the United Kingdom.

The Swiss Code of Best Practice tailor-made for Switzerland does include corporate governance standards, which are to be understood as recommendations and are therefore not binding. The Code is primarily intended for Swiss listed companies, it is however also considered to be a guideline for companies and organisations which are not listed but which have an economic weight. The authors of the Code stress that the Code has to be adapted to the specificities of the concerned companies, in particular with respect to their size.

The core issue of the Code are the "checks & balances", that is the balanced relationship of management and control in the corporate governance triangle formed by the shareholders, the board of directors and the management. The capital structure of a company is however not an issue addressed in the Code, notably the "one share - one vote" principle required by investors.

The Code is to be read within the frame of Swiss legislation and its provisions dealing with corporate governance aspects. This does notably include, besides business law and corporate law, the provisions of the Swiss legislation on stock exchanges and takeovers with respect to the duty to disclose qualified shareholdings, public offers for takeovers, ad-hoc publicity and financial reporting and accounting standards.

1 Standards with respect to the position of the shareholders

In many cases, the Code does include principles which might be regarded as given in the Swiss legal practice, for example regarding the competencies of the shareholders, the convening and holding of general shareholders meetings, the voting procedure during general shareholders meetings, etc.

The laying down of these principles is to be understood in the light of comparable foreign rules and aims to present corporate governance aspects in a comprehensive manner to readers not acquainted with Swiss corporate law.

It is worth noting that the Code generally aims to facilitate the exercise of the shareholders' rights. In particular, the Code suggests reducing the share capital quota entitling shareholders to convene an extraordinary general meeting or to include an item on the agenda, as set forth in the articles of association; this is of special importance after a reduction of the par value of the share capital.

2 Standards with respect to the board of directors

2.1 Organisational regulations

The respective duties of the board of directors and of the management shall be clearly defined and delimited in the formal organisational regulations.

2.2 Establishing the board of directors

With respect to the size of the board of directors, the Code states that it must be as small as possible and as big as necessary, depending on the characteristics of each company.

The majority of the members should be non-executive members, that is members without any operational management tasks.

The Code provides that the board of directors shall plan its replacement and set selection criteria for candidates.

The board of directors shall also adequately introduce its new members to their task and hold task oriented training sessions. The board of directors should annually assess its performance as well as the performance of its members.

The question of one or two persons holding the positions of president of the board of directors and of chief executive officer has been widely discussed. The Code does favour a separation between these positions, although this is not clearly expressed.

It is however specified that in case one person holds both positions simultaneously, the board of directors shall implement adequate control mechanisms, notably by the appointment of a non-executive and experienced member (a so-called lead director) who shall be authorised, if necessary, to convene and conduct meetings of the board of directors.

2.3 Ad hoc publicity and insider information

It is recommended to issue specific principles with respect to ad hoc publicity as well as to take measures to avoid insider



trading, for example by setting guidelines and determining closed periods for the sale or purchase of shares of the company.

2.4 Internal audit, risk management and compliance

The Code recommends the establishment of an internal audit system which shall, depending on the risk profile of the company, also cover the risk management.

Furthermore, the board of directors shall take measures to ensure compliance with all applicable rules (Compliance). Compliance may be allocated to and performed by the internal audit.

2.5 Committees of the board of directors

Concerning the structure of the board of directors, the Code proposes to establish an audit committee, a compensation committee and a nomination committee. Depending on their tasks, the committees are subject to specific criteria with respect to independence and shall be established accordingly. The Code provides that small and medium-size companies may, instead of instituting committees, appoint individuals.

The audit committee shall namely form its own judgement on the external audit, the internal audit and the annual accounts, in addition to having an overview of compliance in the company.

The competencies of the compensation committee include the issuing of the remuneration policy, namely at the highest level of the company. It is worth noting that with respect to stock-option plans, a re-pricing shall not be allowed and that in the event of an early dismissal of a manager, indemnities paid by the company to such manager shall remain within certain limits.

The nomination committee shall be responsible for laying down the principles governing the selection of candidates for the board of directors, respectively the renewal of the mandates of the current members of the board of directors and for preparing the selection or re-election of these persons in conformance with the principles laid down. The nomination committee may also be responsible for the selection of candidates for top management positions.

3 Standards for external auditors

In this respect, the Code does refer to the legal rules of independence and to the cooperation with the internal audit.

4 Publicity

With reference to the Corporate Governance-Directive of the SWX Swiss Exchange, the Code proposes that the

company includes in its annual report information on its corporate governance.

Our lawyers in Zurich and Geneva shall of course remain at your disposal for any further information you may require.

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