



NICG

Network for Innovative
Corporate Governance

Board Dynamics

Coping with Uncertainty.

Actions for the Now and the Future.

we are curious, free spirits,
and non-profit

Innovative Corporate Governance

brave. unexpected. adaptive.

2020 was unexpected for most of us. What is valid today will be altered tomorrow. All of us, be it in private or in business life, had to rearrange while making provisions with the given resources. All these manifold experiences we made throughout this year, along with unplanned obstacles, enabled us to advance and to learn – not only in the very moment we are in but also for tomorrow or even for the future to come:

We will remain brave, we will encourage our people, and we will constantly reflect upon underlying assumptions. According to the principle:

«If your ship doesn't come in, swim out to meet it.» – Jonathan Winters

With our initiative on Board Dynamics we are setting sail by addressing tomorrow's issues: Where is the potential for board development? What is tomorrow's governance scheme? How must the board of directors be set up to meet strategic demands? Which erupting digital technologies support decision making? How can companies collaboratively work with and not against shareholders and stakeholders? Once we are swimming in the cold sea, there is no point in returning to shore, but instead, our goal must be to «swim and win». Waiting at the shore was never an option for true adventurers; yes, we are leaving the comfort zone to try out new paths.

In this phase, the board of directors assumes the role of the captain and supports the crew in setting the sails and steering in the right direction for the short and the long distance. In doing so, the board is nowadays supported by disruptive technologies. Tomorrow is today; this is how the future is shaped by the board of directors.

Once again, our booklet 2021/1 covers a multitude of topics. It offers academic and practical insights from senior executives and young talents. We, the Network for Innovative Corporate Governance (NICG), wish you a pleasant reading. And please remember: we are curious, free spirits, and non-profit, and happy to exchange thoughts with you – also during the cold winter time.

Wishing you a healthy, joyful and successful 2021.

Warm regards,



Michèle Sutter-Rüdisser



Felix Horber

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COVID-19

Krisenmanagement aus Sicht des Chief Legal Officers



Hermann Geiger

Attorney-at-law, Dr. iur., Dr. rer. pol., LL.M.,
Group Chief Legal Officer, Mitglied der
Geschäftsleitung von Swiss Re

«Coronavirus Disease 2019» oder kurz COVID-19, umgangssprachlich auch Corona oder Covid genannt, ist eine Infektionskrankheit, zu der es infolge einer Infektion mit dem neuartigen Coronavirus SARS-CoV-2 kommen kann. COVID-19 wurde erstmals im Dezember 2019 in Wuhan beschrieben und breitete sich in der Folge rasant zu einer Pandemie aus, auf die Regierungen weltweit wiederholt mit radikalen Lockdown- und Quarantänemaßnahmen reagiert haben. Durch das weitgehende Erliegen wirtschaftlicher Aktivitäten ist enormer ökonomischer Schaden entstanden, auf die Regierungen, Aufsichtsbehörden, Verbände und andere Interessengruppen mit weiteren Massnahmen entgegensteuern. Daneben wurden global Klagen eingereicht, von Einzelklägern, im Wege von Sammelklagen, oder auch sogenannter Musterverfahren in regulierten Wirtschaftssektoren. Viele dieser Massnahmen verfolgen das Ziel, die ökonomischen Lasten als Folge der Pandemie beziehungsweise der wirtschaftslenkenden Massnahmen auf andere Parteien zu verlagern. Die Instrumente hierfür sind insbesondere Gesetze, regulatorische Massnahmen, sowie die Gerichte. Insofern kann die COVID-19 Krise durchaus als «rechtliche Krise» bezeichnet werden. Jedoch greifen sowohl die COVID-19 Krise als auch die getroffenen Massnahmen deutlich weiter, und praktisch niemand, weder Einzelpersonen noch Unternehmen, können sich dieser Krise entziehen. COVID-19 wirft insofern Fragen des allgemeinen Krisenmanagements auf, denen ich aus der Sicht des «Chief Legal Officers (CLO)» eines Grossunternehmens im Folgenden nachgehe. Dabei möchte ich praxisrelevante Informationen geben, die von allgemeiner Natur sind und nicht auf eine spezifische Situation im Unternehmen Bezug nehmen.

1. Makro-juristischer Kontext

Unternehmen unterliegen einem immensen Anpassungs- und Veränderungsdruck. Dazu trägt die höchst dynamische Rechtsentwicklung der letzten Jahre bei, die tief auf die Unternehmenssteuerung und -aufsicht einwirkt sowie komplexe Fragen der Corporate Governance, Compliance und Unternehmensethik aufwirft. Das Volumen und die Komplexität neuer Regelwerke und Bestimmungen schreitet mit einer besorgniserregenden Geschwindigkeit voran. Alle diese Änderungen müssen zudem im Lichte einer ebenfalls neuen Realität in der Rechtsdurchsetzung gesehen werden. In der Praxis sind mehr Untersuchungs- und Vollstreckungsverfahren, striktere Strafen und höhere Geldbussen zu beobachten.

Abgerundet wird dieses Bild durch eine sich ändernde Teilhabe der Aktionäre – Stichwort «shareholder activism» – und eine Medienlandschaft, welche bestehende oder behauptete Unzulänglichkeiten weltumspannend und plötzlich zu einem Dauerthema macht und ein Unternehmen deutlich einfacher ins Zentrum der öffentlichen Aufmerksamkeit rücken kann. An diesem Befund hat die COVID-19 Krise nichts geändert, im Gegenteil verschärft sich der Anpassungs- und Veränderungsdruck von Unternehmen weiter. Die zunehmende Digitalisierung von Geschäftstätigkeit und Geschäftsprozessen erfährt in der COVID-19 Krise zudem einen unheimlichen Vorschub, welche ihrerseits neue Chancen und Risiken aufwirft.

Vor diesem Hintergrund gehören Rechtsrisiken heute zu den bedeutsamsten Risiken vor allem international tätiger Unternehmen. Zahlreiche Unternehmensskandale und Geldbussen im Milliardenbereich unterstreichen die Notwendigkeit für ein wirksames Risikomanagement gerade auch im Rechtsbereich. In den Jahren nach dem Enron-Skandal und später nach dem Zusammenbruch von Lehman Brothers und der Finanzkrise 2008 hat sich die Rolle des Unternehmensjuristen bei einer Vielzahl von Unternehmen erheblich verändert. Im modernen Verständnis kommt im Rahmen des Managements von Rechtsrisiken regelmässig sowohl eine geschäftsunterstützende («enabling function») als auch eine kontrollierende Funktion («governance» oder «gatekeeper function») zum Tragen. Dieses Verständnis gilt für den CLO und die Rechtsabteilung allgemein. Immer häufiger umfasst die Rolle des CLO dabei nicht mehr nur rein juristische Aufgaben. Regelmässig agiert der CLO als strategischer Geschäftspartner, dessen Blick weit über Rechtsrisiken hinaus geht und weitere Themen des allgemeinen Risikomanagements sowie der strategischen Unternehmensberatung einschliesst und auch etwa Fragen ethischer Geschäftsführung und des Reputationsmanagements umfasst. Häufig findet sich die Rolle des CLO heute deshalb auf der Ebene der Geschäftsleitung von Unternehmen angesiedelt und bedingt einen Einbezug des CLO in den gesamten unternehmerischen Entscheidungsprozess. Es liegt auf der Hand, dass im dynamischen Wirtschaftsleben der Dualismus des Rollenverständnisses als Geschäftspartner einerseits und Gatekeeper andererseits geeignet ist, Spannungen und Interessenkonflikte auszulösen, zumal bei komplexen Fragen des Managements von Rechtsrisiken sowie anderer operationaler Risiken.

Nicht zuletzt deshalb hat Norman Veasey, der frühere Chief Justice des Delaware Supreme Court, ausgeführt: «The CLOs role is frequently interesting, always multifaceted, sometimes lonely, and potentially perilous». Dieser makro-juristische Kontext ist wichtig, um die Rolle des CLO im Management der COVID-19 Krise richtig zu verorten.

2. Epidemien, Pandemien und Risikomodelle

Der Ausbruch von COVID-19 zeigt wie gross die Bedrohungen durch Epidemien und Pandemien sind und wie rasch sich Infektionskrankheiten ausbreiten können. Definitionsgemäss treten Epidemien und Pandemien in Intervallen auf und können Millionen an Todesopfern fordern, an der schwarzen Pest schätzungsweise 50 Millionen Menschen in den Jahren 1347 bis 1352, was grosse Veränderungen in der Wirtschaft, der Geopolitik und sogar der Religion ausgelöst hat. Zwischen 1918 und 1920 waren ebenfalls 50 Millionen Tote an der Spanischen Grippe zu verzeichnen. Auch an der bislang letzten Cholera-Pandemie, die 1961 begann, sind mehrere Millionen Menschen gestorben. Seit 1980 infizieren sich Menschen mit HIV, bislang sind rund 40 Millionen Menschen an dem Virus gestorben. Nachdem im 20. Jahrhundert von einem Rückgang vieler hochinfektiöser Krankheiten ausgegangen wurde, kommt es seit dem Beginn des 21. Jahrhunderts wieder vermehrt zum Auftreten von Infektionskrankheiten, wie etwa SARS als erste Pandemie im 21. Jahrhundert, die Schweinegrippe, MERS und Ebola, die viele Tausende an Todesopfern gefordert haben. Gründe hierfür liegen in der wachsenden Resistenz von Mikroben gegen viele Antibiotika, sowie das heutige Ausmass der Vernetzung und Globalisierung, welche die Ausbreitungsgeschwindigkeit von Infektionskrankheiten auf mehrere hundert Kilometer pro Tag erhöht hat. Nicht zuletzt deshalb hat die Weltgesundheitsorganisation bereits 2004 im Rahmen ihres «Pandemic Preparedness Project» zur globalen Pandemie-Vorsorge aufgerufen. Es ist daher nicht überraschend, dass Pandemierisiken Berücksichtigung in den Risikomodellen von Unternehmen verschiedenster Wirtschaftsbereiche gefunden haben. Die Ausbreitung von COVID-19 hat herkömmliche Risikomodelle dennoch häufig überfordert, und das interne Risiko- und Krisenmanagement vor grosse Herausforderungen gestellt.

Zwar wurden die Risikomodelle im Zuge der Finanzkrise 2008 wesentlich ausgefeilter, sie bildeten die beispiellosen Auswirkungen der COVID-19-Pandemie aber nicht hinreichend ab. Die weltweite Ausbreitung von COVID-19 wurde am 11. März 2020 von der Weltgesundheitsorganisation zu einer Pandemie erklärt, mit einhergehenden Quarantänemassnahmen von Regierungen weltweit, die zur Schliessung von Staatsgrenzen, dem Erliegen des Personenflugverkehrs, der Unterbrechung globaler Lieferketten, und dem wiederholten Lockdown von Städten geführt haben. Ehemals zuverlässige Korrelationen von statischen und dynamischen Faktoren in Risikomodellen haben sich in der COVID-19 Krise nicht bewährt. Als Störfaktor wirkt COVID-19 über verschiedene Phasen unterschiedlich und dynamisch, wie sich in der jüngst in England auftretenden Mutation deutlich zeigt, und lässt sich deshalb in Risikomodellen nur schwer erfassen und abbilden.

3. COVID-19 Krisenmanagement

Nach dem Vorgesagten überrascht es nicht, dass die COVID-19 Krise praktisch jeden Unternehmensbereich betrifft und die dynamische Entwicklung ihrer Ausbreitung das interne Krisenmanagement stark fordert. Wengleich die Sicherheit und Gesundheit der Menschen und Mitarbeitenden im operationalen Krisenmanagement im Mittelpunkt stehen, befasst sich das COVID-19 Krisenmanagement im Unternehmen typischerweise auch mit den Kernbereichen des Geschäfts (Kunden, Lieferanten, Produkte), der Solvenz (Kapital- und Liquiditätsmanagement), der Kapitalanlage sowie des Geschäftsbetriebes allgemein. Häufig sind die auftretenden Fragestellungen und Probleme rechtlich determiniert, weshalb der Rolle des Unternehmensjuristen generell als auch der des CLOs grosse Bedeutung im Management der COVID-19 Krise zukommt. Es geht darum, nicht nur den anwendbaren Rechtsrahmen zu verstehen, sondern die Interaktion und Dynamik zwischen Regeln und dem Geschäft laufend zu erfassen und zu kommunizieren sowie im Krisenmanagement adäquat abzubilden. Die Beratung des Unternehmens umfasst dabei nicht nur die Analyse der eigentlichen Rechtsproblematik. Gefragt sind neben der technischen und analytischen Kompetenz ferner ein sicherer Blick für Fragen, die weit über das Recht hinausgehen, wie etwa bezüglich der Medien, der öffentlichen Meinung sowie allgemein des richtigen Verhaltens («Business Ethics») in komplexen Situationen.

Nachfolgend sollen beispielhaft einige bedeutsame und regelmässig wiederkehrende Themen im COVID-19 Krisenmanagement aus der Sicht des CLOs skizziert werden. Entsprechend herkömmlichen Risikomanagement-Grundsätzen ist allen diesen Massnahmen gemein, dass sie einen präventiven, reaktiven, sowie einen wiederherstellenden Charakter («Prevent – Respond – Recover») haben. Die Schwerpunktsetzung im Einzelfall wird sich immer nach den Besonderheiten des jeweiligen Unternehmens, seines «Crisis Management Frameworks», und seiner Situation orientieren.

4. Rechtsfragen

COVID-19 wirft die vielfältigsten Rechtsfragen auf, die Unternehmen betreffen können. Sprichwörtlich spannen sich die Themen von A wie Arbeitsrecht bis Z wie Zwangsvollstreckung, praktisch kein Rechtsbereich bleibt ausgespart. In den Verträgen mit Zulieferern und Kunden können sich gleichermassen komplexe Rechtsfragen stellen wie im anwendbaren Recht, regulatorischen Massnahmen und anderen verwaltungsrechtlichen Verfügungen. Es geht um Themen wie «Act of God», Force Majeure- bzw. Höhere Gewalt-Klauseln in Lieferverträgen, Deckungsausschlüssen in Versicherungen, über Bewertungsfragen in Unternehmenskaufverträgen bis hin zu arbeitsvertraglichen Ansprüchen bei Betriebsschliessungen. Auch die Rechtsentwicklung zu COVID-19 scheint so dynamisch wie das Virus selbst. Kaum ein Tag vergeht, an dem nicht Neuregelungen zu COVID-19 bekannt gemacht werden, welche die Unternehmenstätigkeit beeinflussen. In regulierten Sektoren wie der Finanzdienstleistungsindustrie greifen Aufsichtsbehörden einzelner Länder tief in unternehmerische Freiheiten ein und erlegen den Unternehmen bestimmte Verbote auf wie etwa die Ausschüttung von Dividenden, der Kündigung von Verträgen oder auch der Erhöhung von Preisen. Die COVID-19 bezogenen Regelwerke können pro Land mehrere hundert Seiten umfassen. Sämtliche dieser Regelungen, ob vertraglich, rechtlich oder regulatorisch, müssen im Rahmen eines rechtlichen Krisenmanagements erfasst und katalogisiert sowie im Sinne eines «Legal Monitoring» laufend überwacht werden.

5. Unternehmenskommunikation

Es ist zu erwarten, dass die Verteilung der Lasten der COVID-19 Krise in eine Fülle von Rechtsstreitigkeiten münden wird. Eine Vielzahl von Klagen sind bereits anhängig, in regulierten Industrien haben Aufsichtsbehörden einiger Länder bereits sogenannte Musterklagen gegen Unternehmen eingereicht. Insbesondere in USA hat COVID-19 zu einer regelrechten Explosion von «Class Actions» geführt. Ein effektives und strategisches Management drohender und aktueller Rechtsstreitigkeiten ist mithin unumgänglich. Besonderes Augenmerk ist dem «Legal Privilege» und verwandten Rechtskonzepten des Anwaltsgeheimnisses zu widmen. Diese schützen die Kommunikation zwischen Rechtsanwälten und dem Mandanten, nicht aber die Kommunikation anderer Mitarbeiter innerhalb desselben Unternehmens. Gerade in Grossunternehmen mit vielschichtigen Informationsbedürfnissen und einer Vielzahl möglicherweise anwendbarer Rechtsordnungen ist die Aufrechterhaltung des Anwaltsgeheimnisses keine leichte Aufgabe. In einer Krisensituation mit einer Vielzahl zu erwartenden Klagen ist dies jedoch unverzichtbar und muss über entsprechende Schulungen und Instruktionen sichergestellt werden.

In börsennotierten Unternehmen können gerade in Krisensituationen ferner kapitalmarktrechtliche Informationspflichten relevant werden, welche gegebenenfalls auch Aspekte des Insiderrechts berühren. Wie die interne kann auch die externe Kommunikation ergebniskritisch sein, was das Management von Rechtsrisiken und anderer Risiken anbelangt. Aus diesem Grund muss der CLO die Krisenkommunikation strategisch und inhaltlich mitgestalten. Dies erfordert die Beherrschung aller Fakten zu einem Zeitpunkt, in dem die Informationen noch weit verstreut und unsicher sein können. Es bedeutet auch, die interne und externe Kommunikation zu koordinieren und dabei die potenziellen nachgelagerten Risiken jeder Kommunikation zu berücksichtigen. Krisen erodieren typischerweise Vertrauen, weshalb der Wiederherstellung von Vertrauen in der strategischen Kommunikation zentrales Augenmerk zu geben ist.

6. Corporate Governance

Der Kommunikation des CLO mit dem Verwaltungsrat («Board of Directors») kommt gleichermaßen entscheidende Bedeutung zu. COVID-19 betreffende Aspekte des Krisenmanagements werden häufig die Katalogaufgaben der persönlichen, nicht übertragbaren Pflichten und Verantwortlichkeiten von Verwaltungsratsmitgliedern in einer Vielzahl von Unternehmen betreffen. Zu den Schlüsselbereichen der Unternehmensaufsicht im Rahmen der COVID-19 Krise gehören sicher Fragen der Geschäftskontinuität einschliesslich der Kommunikationsplanung, der IT-Infrastruktur, etwaiger Störungen von Kundenbeziehungen und Lieferketten, sowie der Nachfolgeplanung hinsichtlich kritischer Positionen im Unternehmen. Zu nennen sind ferner Fragen des Humankapitals einschliesslich der Gesundheit und Sicherheit von Mitarbeitenden, der Vergütung und spezifischer Anreizsysteme, sowie allgemein der Bindung von Mitarbeitenden an das Unternehmen. Wie bereits erwähnt haben auch Fragen der Liquidität, des Kapitalmanagements, der Offenlegung sowie des Anlagenmanagements neben anderen Bereichen des Risikomanagements zentrale Bedeutung für das Board. Grenzschiessungen, Quarantänebestimmungen sowie Abstandsregelungen haben schliesslich eine neue Situation für die Durchführung von Sitzungen als auch von Generalversammlungen geschaffen, die überwiegend nur virtuell abgehalten werden können.

Beinahe alle der vorerwähnten Sachverhalte werfen komplexe Rechtsfragen auf. Manche dieser Rechtsfragen haben sich in dieser Form noch nie gestellt. Die umfassende Einbindung des CLO in alle Belange des Verwaltungsrats stellt sicher, dass die relevanten Rechtsrisiken in allen Entscheidungsvorlagen Berücksichtigung finden. Dies geschieht im besten Interesse des Boards, welches als Aufsichtsorgan haftungsrechtlich besonders exponiert ist. Haftungsrechtlich exponierte Einzelfallentscheidungen bedürfen einer guten Vorbereitung, der schriftlichen Dokumentation aller der Entscheidung zugrundeliegenden Risiken einschliesslich der rechtlichen Angemessenheit des Abwägungs- und Entscheidungsprozesses an sich. Wo die Entscheidungsfindung aufgrund fehlender rechtlicher Parameter mit Unsicherheiten behaftet ist, ist der Dialog zwischen dem Board und CLO besonders wichtig, um risikobasierte Lösungen angemessen zu kalibrieren und die Risikotoleranz adäquat zu bestimmen.

Da Recht eine Querschnittsaufgabe ist, die über das gesamte Unternehmen und seine Produkte und Geschäftsprozesse reicht, können sich Boards das detaillierte Verständnis und Wissen des CLO über die Gesellschaft und seine Geschäftstätigkeit in vielfacher Hinsicht zu Nutzen machen.

Schliesslich sind in Krisenzeiten der «tone at the top» von immenser Bedeutung für die Moral und den Zusammenhalt von Mitarbeitenden sowie der Compliance im Unternehmen allgemein. Der CLO kann selbst über seine Kommunikation und Reaktion auf bestimmte Themen demonstrieren, dass das Board neben dem Management den «tone at the top» sehr ernst nimmt. Der CLO ist Teil der «C Suite», mithin trifft ihn eine besondere Verantwortung für integriertes und rechtskonformes Verhalten. Er nimmt häufig eine Schlüsselrolle ein, was das Integritätsmanagement und die Einbindung der formell-rechtlichen und ethischen Anforderungen in die Geschäftsprozesse anbelangt. Es ist gerade das Verhalten der Geschäftsleitung und des CLO, die das Bekenntnis des Boards zu Compliance und ethisch einwandfreiem Verhalten in das Unternehmen hinein transportieren, einer in COVID-19 Zeiten immens wichtigen Aufgabe.

7. «Well-Being» in der Rechtsabteilung

All die vorerwähnten Aufgaben kann ein CLO nur zusammen mit einem starken Team bewältigen. CLOs sind Manager grosser Rechtsabteilungen, die in international tätigen Konzernen mehrere hundert Mitarbeitende umfassen können. Vor allem in Krisen ist die Belastung von Rechtsabteilungen besonders hoch, weil Krisen wie aufgezeigt regelmässig stark rechtlich determiniert sind. COVID-19 verschärft die Situation insofern, als Mitarbeitende global wegen der verhängten Lockdown-Massnahmen nicht mehr in der gewohnten betrieblichen Infrastruktur, sondern nur noch hiervon isoliert von zu Hause arbeiten können. Die Bedeutung von Wohlbefinden, Belastbarkeit, guter Kommunikation und Transparenz kann in ihrer Wichtigkeit für eine effektive Führung in einer Krise wie COVID-19 gar nicht hoch genug eingeschätzt werden. Hinzu kommt, dass die Verhaltenspsychologie Juristen nachsagt, sie hätten ein vergleichsweise höheres Grundbedürfnis nach Vorhersehbarkeit, Autonomie, und Kontrolle.

Es ist offensichtlich, dass COVID-19 sämtliche dieser Grundbedürfnisse negativ beeinflusst und COVID-19 in der Leitung von Rechtsabteilungen potenziell schwieriger zu navigieren macht. Gerade wo Rechtsabteilungen in juristisch unbekanntes Terrain und Ungewissheit vorstossen, wie das in der COVID-19 Krise häufig der Fall ist, wächst der Bedarf an einer starken Führung und der Fürsorge für die Mitarbeitenden.

8. Schlussbemerkungen

Bei Fertigstellung dieses Artikels im Dezember 2020 stellt sich die Krise um COVID-19 weiterhin schwierig dar. Eine Mutation des Virus aus England sowie die Verfügbarkeit von Impfstoffen beschäftigt die Menschen. Auch aus juristischer Sicht wird die Fülle an Rechtsfragen auf absehbare Zeit nicht abreißen. Man denke etwa an Themen wie eine Impfpflicht im Arbeitsverhältnis. Die Rolle des CLO wird deshalb auch und gerade in Zeiten von COVID-19 weiterhin «frequently interesting, always multifaceted, sometimes lonely, and potentially perilous» sein. Sie bietet faszinierende Einblicke nicht nur in die juristische Welt, global und über unterschiedlichste Bereiche hinweg, sondern auch in die komplexe Welt der Führung und Steuerung von Unternehmen, die in Zeiten von COVID-19 anspruchsvoll wie beinahe nie zuvor ist. Die Entwicklungen sowohl im Geschäftsumfeld als auch im Recht aufgrund von COVID-19 schaffen neue Realitäten, welche die ohnehin grossen Herausforderungen des CLO weiter erhöhen. Dennoch gilt: Jegliche unternehmerische und juristische Komplexität ist mit der richtigen Herangehensweise zu bewältigen, und die «richtige» Einstellung bei der Bewältigung dieser Aufgabe wird häufig sein, auf das Beste zu hoffen, und auf das Schlimmste vorbereitet zu sein.



Covid-19: Long-term Planning in Times of Environmental Uncertainty



Erik Linden

PhD student at the University of St. Gallen and Founder of the Advisory Boutique Orbit Management Services GmbH. His work focuses on long-term planning with a special focus on Top Management Teams, Strategic Issue Management, Strategy as Practice, Strategy Processes, Business Models, Future Research as well as Aviation, Transportation, and Systemic Management.

**The tools and frameworks discussed in this article are based on a previously published article by the same author: Linden, E. (2020). Pandemics and environmental shocks: What aviation managers should learn from Covid-19 for long-term planning. *Journal of Air Transport Management*, 101944.

Covid-19 is disrupting whole industries: Every year, the World Economic Forum (WEF) asks many decision makers, prior to the annual meeting in Davos, what they consider to be the greatest risks for the world. For 2020, environmental issues such as climate change as well as cyber-attacks and data breaches were named as the most probable global risks. Several months later, the world looks different: the disease Covid-19 is spreading across the globe, causing significant changes to society but also to organizations. Obviously, the business world was surprised by Covid-19 and its impact. Some industries are even undergoing an unprecedented, historical change.¹ How is it possible that so many decision makers seem to be surprised and overwhelmed by Covid-19?

1. Covid-19 is not a Black Swan but an increase in uncertainty in the external environment.

There is no doubt that globally spread infectious diseases are relatively rare events. The high damage potential is usually assigned a very low probability. This also means that pandemics are assigned a subordinate role compared to other risks. That is why some organizations might not have dedicated action plans for globally spread infectious diseases. They were simply not able to quantify the impact of such an event. BoDs of such organizations are asking themselves: how should I predict, calculate, or even make plans for such events? Therefore, the outbreak of Covid-19 is often described as 'Black Swan' in press articles or consulting reports.²

- 1 For example, the aviation industry with a 95% decrease in air traffic in April 2020 and a projected decrease in demand of at least 75% in 2020, impacting not only airlines but also airports, service providers, and everyone involved in the system of aviation.
- 2 The term originates from the author Nassim Nicholas Taleb: Taleb (2007). *The black swan: The impact of the highly improbable* (Vol. 2). Random house. He uses the term to describe the extreme impact of rare and unpredictable outlier events and the human tendency to find simplistic explanations for these events, retrospectively - such as financial crises.

To be called a black-swan event, the event must first of all be a surprise to the observer. Second, it has to have a major effect. Third, after the first recorded instance of the event, it must be rationalized in hindsight, as if it could have been expected. These criteria are all true for the pandemic Covid-19. Nevertheless, Covid-19 obviously did not arise in a vacuum. Pandemic plans and precautions have already been made by many countries, politicians, and organizations. Even the WEF decision makers rated 'infectious diseases' as their number 10 risk over the next 10 years. This is why Nassim Nicholas Taleb would not call Covid-19 a Black Swan.

But calling Covid-19 a Black Swan or not does not help any manager per se to make better plans for such events or cope with Covid-19. The answer to the above-mentioned problems may be found in the management of uncertainty. It seems obvious that Covid-19 is an event in the external environment of an organization that creates high levels of uncertainty.³ Thus, tools and frameworks that help managers cope with uncertainty of the external environment are seen to be very useful. These frameworks will help to answer the following questions: How should BoDs cope with uncertainty of the external environment? Is making long-term plans possible in an environment with high levels of uncertainty?

2. Introduce uncertainty as standard factor for long-term planning and manage it proactively.

Answers to the above-mentioned questions may be provided by proactively managing uncertainty in the long run. It may not be possible to predict Covid-19 or Black Swans in the form of occurrence nor can they be measured, or the organizational impact quantified in detail. In times of Black Swan events such as Covid-19,

it is tempting firefight and otherwise be paralyzed by high levels of uncertainty, but it is crucial to consider the future and thus long-term assumptions and changes to the strategy and the organization overall as well. Being open to change and uncertainty and learning as individuals but also as an organization as a whole might help to do so. Thus, embracing uncertainty in the short- but also in the long-run will support top managers in making more effective decisions about the future of their organization.

Although embracing uncertainty of the external environment being a vital factor for long-term planning, uncertainty does not only arise via external environments. Strategizing itself is concerned with the future of an organization and this future is per se uncertain. Every action, practice, or decision-making creates new uncertainties. Thus, uncertainty also develops internally through decision-makers taking decisions about future directions and plans of their organization. Therefore, especially for strategic decisions about the future of an organization, uncertainty should be a standard factor since it will be regardless. BoDs need to cope with uncertainty and make it their daily routine and habit to work with uncertainty – not solely for the sake of reacting to the environment, such as in the case of Covid-19, but also for their own decision-making praxis and practices. Consequently, a culture of uncertainty should be built in combination with a «Just Culture»⁴ that allows honest errors or deviating assumptions to occur. From these honest errors, individuals and organizations should learn and derive future actions and plans and we should learn from them – again as an individual but also as an organization.

3 In 1921, Frank Knight distinguished uncertainty from risk with uncertainty being the lack of knowledge which is immeasurable and impossible to calculate. This definition of uncertainty is now referred to as Knightian uncertainty: Knight Frank, H. (1921). Risk, uncertainty and profit.

4 Just Culture refers to an aviation-related term that describes the reporting and 'no-blame' culture when dealing with mistakes or issues. A Just Culture in aviation describes an atmosphere of trust in which people are encouraged, even rewarded, for providing essential safety-related information, but in which they are also clear about where the line must be drawn between acceptable and unacceptable behavior. Hence, a Just Culture supports learning from unsafe acts in order to improve the level of safety awareness through the improved recognition of safety situations and helps to develop conscious articulation and sharing of safety information.

3. Develop a three-step process to embrace uncertainty in the organization.

Those who have existing long-term plans should regularly check their assumptions for validity – nothing new at all for experienced managers and BoD members. In times of high levels of uncertainty, such as in times of environmental shocks, climate change or digitalization, agile and more flexible management and long-term plans are vital for the success of an organization. To embrace uncertainty, it is important to demonstrate determination to sense what is happening in the environment, seize the opportunities arising from the environmental change, and transform the organization accordingly. This means managing the associated uncertainties proactively and more often and regularly in times of environmental change. The following three-step process of sensing, seizing, and transforming might enable an organization to better manage uncertainty of the external environment and to develop into a learning organization that is more resistant to change.⁵

3.1 Sensing

First of all, in a situation of uncertainty, it is important to grasp and describe the problem. It is essential to learn quickly and build strategic assets. This requires routines of interaction in coordinated search and learning procedures. What was certain historically might be uncertain in a new situation. Therefore, one should define the most important key performance indicators for the uncertain situation – both for the short and long term.⁶ What are the most critical factors of the event and for the organization? It is crucial to distinguish between the short- and the long-term impact, for example on the strategy, the business model, the supply chain or the workforce of the organization. It is very useful to work with scenarios to embrace uncertainty.

One should also be aware of other techniques for creating alternative futures such as the delphi method, time series methods, artificial intelligence methods, simulations, visioning or backcasting. In any case, it is necessary to work with extreme alternatives, e.g., for the impact on liquidity, other financial measures, and operational metrics. BoDs should try to design dashboards or other virtual tools to cope with the high levels of complexity. Most organizations today have at least some sensing practices in place but are missing an institutionalized and routinized approach to gather and share relevant information. The better uncertainty is understood on various levels of the organization, the more likely it is that trade-offs can be made between different outcomes for the organization and decisions to be taken more objectively. Please see the section on «fostering an internal and external dialogue» for more input on the activity of ‘sensing’.

3.2. Seizing

Once important parameters have been identified in a larger context, the next step is to analyze causal relationships for the organization. It is vital that BoDs are able to link, e.g., customer experiences with their business model, thus with e.g., engineering design choices. The long-term competitive advantage might be fostered through the integration of external activities and technologies by selecting the boundaries of the organization and therefore looking for possible alliances, networks, and partnerships. The effective and efficient internal coordination or integration of strategic assets is key in this phase. If possible, the big environmental change is broken down into smaller, more manageable steps for which a solution may already exist or which are easier to calculate. These smaller shares then need to be adjusted to the internal context and the structure of the organization. This discrete and manageable set of options should be made clear and definite to build loyalty and commitment.

5 The terms sense, seize and transform are important terms for the long-term planning of organizations and refer to the theory of dynamic capabilities by Teece et al. to integrate, build, and reconfigure internal and external competences to address rapidly changing environments: Teece, D. J., Pisano, G., & Shuen, A. (1997). Dynamic capabilities and strategic management. *Strategic management journal*, 18(7), 509-533.

6 A performance indicator or key performance indicator (KPI) is a type of performance measurement to evaluate the success of an organization or of a particular activity (such as projects, programs, products, events, and other initiatives) in which it engages.

3.3. Transforming

Thirdly, environmental change requires the ability of an organization to transform its asset structure and accomplish the necessary internal and external transformation. In this phase, managers should maintain competitiveness through enhancing, combining, protecting, and, when necessary, reconfiguring the organization's assets. One should develop an action plan for the management of internal and external strategic assets. In the case of Covid-19, this means that new strategic assumptions might foster a change in the structure, processes, designs, and incentives of the organization. It is helpful to think of decentralization, local autonomy and strategic alliances or networks to transform the organization. Therefore, BoDs should think of possible turnaround or exit strategies and their communication of such strategies. Roles and responsibilities should be clearly defined in this phase and transformation, if needed, should be communicated transparently to accomplish an effective and efficient transformation process in times of environmental uncertainty.

Despite this three-step process being vital for aligning the organization to the environment, one should always reflect on whether the transformation is really necessary and possible in the long run. BoDs need a high sense of prudence to not overexaggerate short-term developments and overreact to pressure from, e.g. stakeholders or the owner(s). BoDs should therefore also remain patient in times of environmental change. One should not overreact to environmental change or act to soon and align strategic assets based on short-term thinking. This might counteract established and successful long-term plans. Thus, one should not be an actionist in times of high levels of uncertainty in the external environment.



4. Foster an internal and external dialogue on environmental uncertainty.

In times of environmental change, a critical and open dialogue on internal and external environmental changes should be fostered between the main stakeholders of the organization. The dialogue between the management and the BoD is especially relevant. One should reduce the natural information asymmetry between the two most important strategic teams as far as possible and needed for effective advice and control by the BoD. This internal and external dialogue might have cognitive and reflexive functions which are vital for strategizing. A focus should be placed on the interactions of the chairman and the CEO. They are the most influential and important actors for the long-term success of an organization. Strategy dynamics should be fostered, and a more agile strategic planning process should be implemented with more frequent and intense strategy discussions. This might include more formal as well as informal strategy interactions for exchanging ideas and thoughts on recent changes of the environment and developing strategic initiatives or programs that are based on solving the most pressing strategic issues. This should be done on different levels as well as with the main stakeholders of the organization to become accustomed with uncertainty.⁷ These interactions should be establish fast and interactive iterations of thinking and acting more rapidly, resulting, in the best in higher levels of commitment, motivation and strategic change in- and outside of the organization. It might be useful to integrate the results of these interactions into a centralized «Governance, Risk and Compliance Management (GRC)» tool. Despite such a GRC tool, one should be aware of and constantly challenge the strategic tools in use. They might have an effect on the success of the long-term planning process as well as the firm's performance. Tools, such as GRC, might help to reduce uncertainty, but only if addressed correctly and for the right reasons. A BoD should therefore always be able to answer the following questions: Which information, planning, controlling and risk tools are we using? Will e.g., scenarios and strategic alternatives, initiatives or programs be developed in response to uncertainty?

5. Make the BoD a co-creator, especially in times of environmental uncertainty.

Many organizations have problems and struggle with the question who shall be responsible for the strategy in times of uncertain environments. In Switzerland, for example, the BoD is the vital strategizing actor.⁸ Among other duties, the BoD is responsible for the development of strategic objectives, the determination of the means necessary to achieve the objectives, for issuing the necessary instructions to the executing bodies, and for controlling the implementing bodies with regard to the achievement of objectives. To do this, the BoD needs to be in a cooperative strategic dialogue with the executive management and steer the company through strategic guidelines indirectly or by orders directly. Despite strategy being a non-delegable duty, the role is not self-determined in organizations today. Hence, and especially in times of environmental uncertainty, it is essential to define the role, function, responsibilities, and involvement of the BoD in terms of strategizing. This might diverge from a sole supervision to a coaching or even a co-creating role⁹, depending on the environment of the organization and the situation the organization is in. In times of highly uncertain environments, such as in times of Covid-19, it might be advisable for BoDs to be co-creators and to not just take on a controlling, supervising or coaching function.¹⁰ Especially in terms of accountability, not playing this active role might even lead to accountability charges for BoD members.¹¹ Thus, in this so-to-say chaotic environment of Covid-19, the BoD needs to spend equal time on co-creating as on supervision, making the most of the capabilities and, in the best case, the experience of its members. If the BoD does not have these capabilities and experiences, compose and structure the team differently. The BoD team and its processes and functioning are crucial for the success of the organization – even independent of the environment and the level of uncertainty.

7 According to the stakeholder management approach for strategic management, among others by Freeman, R. E., & McVea, J. (2001). A stakeholder approach to strategic management. *The Blackwell handbook of strategic management*, 189-207 and Buysse, K., & Verbeke, A. (2003). Proactive environmental strategies: A stakeholder management perspective. *Strategic management journal*, 24(5), 453-470. This is especially important in industries which are highly dependent on main actors and are very dynamic.

8 Long-term planning is one of the major tasks the Board of Directors in accordance with OR 716a of the Swiss Code of Obligations (OR). See more details on the role and duties of Swiss BoDs in: Müller, R., Lipp, L., & Plüss, A. (2014). *Der Verwaltungsrat: Ein Handbuch für Theorie und Praxis* (Vol. 4). Schulthess.

9 See Cossin, D., & Metayer, E. (2014). How strategic is your board? MIT. with their article on «How Strategic Is Your Board?» in the MIT Sloan Management Review. See also Figure 1 which has been designed according to their article.

10 Roles for communication are delegable. But it is important to define who communicates, how and to whom.

11 In Switzerland and according to the so-called «Business Judgment Rule». Find a comprehensive overview in Gauch, S. (2018). *Grundlage und Bedeutung der Business Judgment Rule in der Schweiz*. Dike.

Covid-19 is having an undeniable effect on every organization and is increasing the level of uncertainty of the external environment. Thus, the management of uncertainty is vital for the long-term success of an organization. The key strategy actors, among others, BoD members need to embrace uncertainty proactively and make long-term plans accordingly to address the following questions: Who is responsible for strategizing (roles, responsibilities and involvement)? When, how regularly, for how long, with whom, and with what tools should strategy actors meet? Covid-19 is a strong call for action in terms of strategizing – not only for strategic managers but also for Board of Directors. BoDs need to be aware that they are responsible for shaping the long-term success of their organization in better advising and controlling the Executive Management.

Checklist for Long-term Planning in Times of Environmental Change

Managers may use this checklist to test whether and how they should implement long-term planning in times of environmental uncertainty:

- Introduce uncertainty as standard factor for long-term planning and make long-term plans accordingly.
 - Introduce a three-step process to embrace uncertainty in the organization by sensing changes, seizing opportunities, and transforming the organization accordingly.
 - Do not overexaggerate the current short-term developments and do not be an actionist!
 - Foster a dialogue (formal & informal) on environmental change. Be aware of the tools being used – they might be vital for the success of long-term planning and the company's performance.
 - Make the BoD a co-creating team in times of high levels of uncertainty.
 - If the BoD team does not have the necessary capabilities and experience, compose and structure it differently to be efficient and effective as literal strategizing team.
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Digital Transformation and Corporate Governance: Transparency, Traction and Talent as Key Ingredients



Anette Bronder

Group Chief Operating Officer, Member of the Group Executive Committee, Swiss Re

Digitalization requires clear governance to take root and flourish. While at first glance, agile principles and corporate governance seem to contradict each other, the reality is different. Boards of directors should take note.

Digitalization within large corporations started decades ago. For many, it began even before the 1970s, when microprocessors and microcomputers were invented. While back then, digitalization was largely about so-called rationalization, today, it is about creating new business models, improving process efficiency and strategic transformation.

Where new technologies meet tradition, we must reengineer the way we manage business to effectively reap the benefits of digital transformation – leaders and employees require different roles than in the past, strategy and organizational culture must go hand in hand, and technology must be used as an enabler for transformation. Swiss Re, a global reinsurance company with more than 155 years of history, is a case in point.

Our business has always been about creating knowledge from data – and that was long before anyone spoke about artificial intelligence or digitalization. Over the years, we have moved from a rather simple dataset – for example, using age as a single data element for life insurance policies in the 1940's – to an environment where historical data on paper is replaced with real-time or even predictive data. At Swiss Re, we are evolving from a 'risk knowledge company' to a 'tech- and data-led risk knowledge company'. Through our transformation, we can further create concrete customer benefits and increase society's resilience.

But making this transition is easier said than done. Over the years at Swiss Re – as in many other companies – various departments took to solving problems in isolation and finding unique solutions with the help of technology or data. In many cases, this led to duplications, inefficiencies or a lack of coordination across the company. Based on our experience, we have learned that – in order to get real value out of data and to effectively master digital transformation – three key requisites are required:

- I. Transparency on strategic goals and decisions,
- II. Traction when it comes to implementation and execution, and
- III. Talent as the basis for the required cultural shift.

1. The Three Key Requisites for Effective Digital Transformation

1.1 Transparency – a clear vision and governance structure

Creating an environment where digitalization can flourish starts at the board level and requires a shift in focus and reorientation. Academia takes this shift very far. Some scholars even suggested that the fast-paced environment of digital transformation is calling for a new era of corporate governance with flexible boards and flexible agendas: «Boards in the future consist of virtual networks of people where needs to monitor management diminish and shared leadership approaches are emphasized [...], we suggest that boards work according to a dynamic board agenda based on organizational threats and opportunities. The agenda is built around learning and knowledge management and is reflected in the committee structure.»¹

While this is an interesting concept, in Switzerland it would not be possible as board members are an elected group of individuals following a strict agenda with a strong focus on control and legally binding procedures. The board of directors is tasked with oversight. It creates the framework for decisions, appoints senior management, evaluates performance, approves the business strategy (the long-term view), and oversees committees such as the investment, risk management or audit committees. In addition, over the last few years, the importance of corporate governance has been increasing due to a stronger call for transparency and risk control from all stakeholders, but especially from larger institutional shareholders.

This mandate, however, does not hinder boards from refocusing: «In an era of constant change, boards must reduce uncertainty for stakeholders by making sure that the company has a crystal-clear vision of its future and an actionable plan to achieve it. Certainly, the vision and the plan will evolve, but the board must have the courage and wisdom to be proactive instead of reactive.»²

While continuing to provide proper oversight and challenging the strategy, the board must create space for discussions and encourage business model innovation in the interest of the long-term success of the company. A 'crystal-clear vision' is fundamental for the entire company to then complement it with a strategy of the same clarity. What must follow is an open and agile culture, where there is room for experimentation, allowing for innovation, failure, iterations, and pronounced opinions.

A study by the Massachusetts Institute of Technology found that if at least three board members are digitally savvy – meaning that they have a background in this field – the company outperforms on growth and valuation.³ Digitally savvy directors can overcome a certain information asymmetry with senior management and «change the risk conversation from evaluating projects to the business model risk of not doing something new»⁴, the authors write. At Swiss Re, it has been our experience that certain information asymmetries can be solved by calling in external or internal experts to engage in fruitful discussions on opportunities and threats. Our board is not only relying on internal knowhow and expertise, we also formed a Strategic Council with renowned experts from very different fields, ranging from former secret service officials to medical experts.⁵

1 <http://www.sciencedirect.com/journal/index.php/bmr>.

2 <https://knowledge.insead.edu/blog/insead-blog/agile-boards-of-directors-a-fad-or-the-future-9961>.

3 https://cisr.mit.edu/publication/2019_0901_PrincipalDigitalBoard_VeillScholtenWoerner.

4 <https://www.forbes.com/sites/peterhigh/2020/09/30/mit-research-suggests-companies-with-digitally-savvy-leaders-and-boards-far-outperform-their-peers/>.

5 <https://www.swissre.com/institute/about-us/Advisors.html>.

1.2 Traction – an integrated tech and data strategy comprising a Group-wide view

Beyond transparency, a Group-wide view on technology, data, transformation, and security is – in our view – critical to making the best use of technology as a valuable enabler across the company. An integrated tech and data strategy standardizes platforms and infrastructure and protects them. It also helps overcome silos, ensures speed, and improves access to high-quality data. It also facilitates the integration and analysis of data to enable superior insights and analytics, thus reducing complexity of system architecture and informing business decisions. The end result is a moment of unification and a joint movement.

To ensure a smooth implementation of our tech and data strategy, a clear governance structure is also needed on the executive level. On a strategic level, this implies the establishment of a tech-steering board comprising the CEO. On the execution level, it is key that – in an integrated team – all tech leaders throughout the company are aligned and drive the innovation process.

Group-wide roles which cut across functions, departments, and business units ensure this alignment. At Swiss Re, we recently appointed Chief Officers for Data, Technology and Transformation, respectively. Each of these leaders has a clear mandate such as ensuring high data quality and seamless access to data, further developing technology platforms, and setting the Group-wide digital transformation agenda, including tech steering and innovation management.

Security continues to have a seat at the table just as data, transformation, and technology do. This is as important as ever, and security must also be seen from a Group-wide perspective. Over the last few years, but especially during the COVID-19 pandemic, the physical and digital workplaces converged. While in the past, IT was a house with doors, today the house no longer has walls. Consequently, in a digital environment, companies are much more exposed to cyber threats than in the past.

While data security has always been a key priority for us, our clients' continued confidence in us depends on our ability to protect our data and information. This trust is also contingent on how we use the data in the first place.

1.3 Talent – recognition of the importance of culture

A clear vision and governance structure, combined with an integrated tech and data strategy, sets the basis for digitalization. But these two requisites alone will not suffice to truly enable digital transformation. The right talent with the right mindset embedded in the right culture is fundamental to transformation.

There is a saying «culture eats strategy for breakfast».⁶ This is not to say that strategy is not important. But what it does is place emphasis on culture as a powerful tool for innovation and organizational success. This is especially true for an agile approach where decisions are delegated to the lowest possible level.⁷ Culture must facilitate collaboration beyond silos, innovation, and joint movement. But it also has to go beyond that. It calls for a different leadership style that empowers employees.

The role of a leader shifts from being a process owner with project plans and Project Steering Boards to becoming a product owner with a clear focus on execution. What does this mean? Once the strategy is set, the senior management determines the commercial objectives and value drivers and derives the initiatives and induces the needed change by defining the problem that needs to be solved. Once that is clear, decision making is delegated to the lowest level possible to empower the team. The leader no longer controls and leads. His or her job is to make sure that the team succeeds by offering hands-on support, regular check-ins and – maybe most importantly – the removal of any roadblocks. The team moves fast, works with an iterative approach and learns from mistakes. This leadership style – often also called servant leadership – is more intense, more collaborative, but also more rewarding for the leader and the team.

⁶ The quote is attributed to US management consultant Peter Drucker.

⁷ <https://agilemanifesto.org/principles.html>.

In such a setup, the composition of teams is important. It needs the right talent with the right skills. Usually, there is no shortage of great ideas. Consequently, the focus has to be on execution. Having business, legal and security professionals at the table helps things move more quickly. It ensures that their considerations and concerns are taken into account before the final products are presented – in other words, they are part of the solution-finding process from the get-go. Everyone works towards the same goal with common values such as team spirit, client centricity, and a passion to perform. This also includes moving at speed and knowing that not everything works out. Therefore, iterations, learning from mistakes, communication, and understanding are key ingredients.

2. Proof of Concept – Transparency, Traction and Talent in Action: iptiQ

Are we, at Swiss Re, successful in implementing the right governance and culture for the digital age? Time will tell. But our progress towards this goal is very encouraging. Take our white-label digital insurance platform, iptiQ, for example. Created in 2016, this B2B2C business is growing strongly. It currently has 40 distribution partners, more than 500,000 customers and USD 300 million in gross premiums written. Based on the current growth trajectory and peer valuation, iptiQ's market-implied valuation has grown to approximately USD 2 billion.

How did we achieve this? Once iptiQ's business strategy was approved, the team was selected, starting with the CEO. We based the entire business on an agile approach and put together cross-functional teams. Risk and compliance have had a seat at the table from day one. We always had a clear focus on clients – what benefits we wanted to bring to them and how we could solve problems for them. Technology is an enabler that helps us get the transparency we need to be fast, innovative, and successful. The board provides direction and support. And thanks to the right mindset, they accept that not everything works out the way it was planned.

It was not easy from a cultural perspective. If you isolate a new start-up company within a traditional company too much, you get an 'us versus them' dynamic. If you bring it too close, it gets assimilated, and the idea is gone. To balance this, we created a layer in-between the business and the rest of the company. This shields it, allowing for the freedom to test and learn. But it is not a carte blanche. Certain values and setups have to be respected such as such as ethical behavior and protection from cyber risk.

We are proud of the fact that Swiss Re incubated iptiQ within its own four walls by embracing the very principles described above.⁸

3. The Takeaway

We made the first successful steps in our digital transformation and can unequivocally say that governance does not get in the way of an agile, digital environment. It is only through transparent governance and a clear vision and strategy, paired with a setup that creates traction and the right people and culture, that innovation can really flourish. These ingredients define the playground in which new ideas can grow and perform at their best. What is needed is a fresh definition of leadership at all corporate levels right up to the board. Leaders should stop focusing on processes and shift to a product-focused view. They need to accept that failure and mistakes are part of the game and that their function is to make sure the teams succeed in the end. This can be a stressful experience but is ultimately more satisfying and worthwhile for all concerned.

8 <https://www.swissre.com/risk-knowledge/driving-digital-insurance-solutions/christian-mumenthaler-discusses-insurtech-at-itc-global-2020.html>.



Teeter-totter in Discretionary Disclosure:

Why Firms Should Extend Board Succession and Composition Reporting



Cornel Germann

PhD student at the University of St. Gallen. His research focuses on behavioural aspects of board of Directors with a special emphasis on board committees, director selection, and strategic leadership.

Dear reader,

the following article is based on a current dissertation project at the University of St. Gallen (HSG). The dissertation's primary emphasis is on board chair succession planning: competencies, requirements, stakeholder influence and perception, and (s)election and board composition reporting. Feedback on my initial thoughts is warmly welcomed. For any remarks, requests, or support, please feel free to get in touch: cornel.germann@unisg.ch.

Board succession reporting is like a teeter-totter – a long, flat board supported by a single pivot point. It requires two coordinating parties to keep the game going: as one end goes up, the other goes down. Yet, if one party jumps off, the other may fall off or – in the case of an organization – have to explain its action (ex-post). For this reason, adequate succession and board composition reporting parallels the soft surface teeter-totter playgrounds are equipped with.

An organization's willingness for confidence-building succession and board composition reporting is crucial.¹ The decisive factor when it comes to consciously supporting transparency in (voluntary) reporting is less a question of eloquence and rhetorical brilliance but rather one of inner attitude. Institutional investors, proxy advisors, the media, and NGOs are increasingly demanding legitimacy and information. One reason why share- and stakeholders are calling for succession reporting is the fact that, in most cases, there is but one single board nominee per vacancy up for AGM election, and shareholders are only left with the choice of voting for or against the one nominee. In that sense, simply revealing the name and the biographical history of the proposed candidate rises concerns to whether an intact strategic succession planning is in place.

¹ Werder, A. & Wieczorek, B. J. (2007): Anforderungen an Aufsichtsratsmitglieder und ihre Nominierung. *Der Betrieb*, 60(6), 297-303.

The lack of succession reporting also makes it difficult for external parties to comprehend why the proposed individual is supposed to be the *best fit* for the position. Consequently, boards are facing increasing pressure to implement succession reporting. Two examples: First, BlackRock requires boards to disclose their view on the mix of qualities and competencies needed to effectively oversee and guide the management with regard to the company's long-term strategy. Second, ISS's voting recommendations and Vanguard's investment decisions build upon their board's present and planned age, tenure, diversity, and leadership composition.

How do firms perceive succession and board composition reporting? To date, the majority of Swiss organizations has been skeptical about in-depth succession reporting. It seems that they are not prone to transparency and disclosure, and they reason against it with potential stock market manipulation threats or agency and disclosure costs such as proprietary costs, political costs, confidentiality costs, and litigation risk.² The low level of board succession and composition reporting probably stems from the lightly regulated Swiss governance environment (compared to other countries, e.g., SEC Form 20-F filing). Articles dealing with succession are rather generic and leave great discretion to a firm's disclosure policy. The effect is that succession reports (often part of the governance reporting section) only meet the minimum requirements – some put in a greater effort than others – without providing information on strategy, structure, or process. A lot of information remains superficial, is provided narratively, and generates few insights. Four practical examples:

- It might be beneficial to specify whether succession planning follows a particular (long-term) strategy:

«[...] the Nomination Committee is formed on an ad-hoc basis for the purpose of preparing the groundwork for electing new members to the Board of Directors and the Group Executive Board when needed [...]» (Swisscom annual report 2019)

- It might be beneficial to specify how the process with its individual steps is organized:

«[...] the Board has a succession planning process in place to identify potential candidates for the Board at an early stage. With this process, we are well prepared [...]» (Credit Suisse annual report 2019)

- It might be beneficial to specify what business and environmental factors influence board work:

«[...] the profile of individual appointments may vary from time to time. Such variations take account of the Board's evolving requirements in terms of experience and diversity [...]» (Richemont annual report 2019)

- It might be beneficial to specify the current requirement for the board of directors:

«[...] the recruiting process for BoD and GEB members takes into account a broad spectrum of factors, such as skills, backgrounds, experience and expertise [...]» (UBS annual report 2019)

2 Ghio, A. & Verona, R. (2020): Voluntary Corporate Disclosure. In A. Ghio & R. Verona (Eds.), Contributions to management science. Evolution of corporate disclosure: Insights on traditional and modern corporate communication (pp. 55-100). Springer.

In this regard, the current reporting on board succession and board composition tends to be imprecise and is virtually identical to previous disclosure practices. So, the question is: *how to improve board succession and composition reporting?* The willingness for succession transparency and more specific descriptions (e.g., also by providing examples) is the starting point for a more profound and advantageous reporting practice where all parties benefit. Overall, this would support a «the enemy of my enemy is my friend» attitude.³ Just as much, providing more insights would also indicate that the board is willing to think critically and approach succession professionally. In more depth, concise succession and board composition reporting – beyond «boilerplate language» – is likely to yield two major benefits. Firstly, concise reporting facilitates communication between the firm and its share- and stakeholders. In that sense, external parties benefit from a higher level of information disclosure which helps them acquire more knowledge for their decision-making process. Secondly, it adds credibility to existing best governance practices. Empirical evidence shows that organizations eager to extend their governance and ESG scope are seen in a positive light and thus more likely to attract investors.⁴

The review of SMI 2019 annual reports showed that there is a need for improved reporting schemes. One «must have maps of the world to traverse».⁵ The article thus proposes a framework – or at least supporting guidance – providing initial thoughts that assist (and not dictate!) organizations in the way they can disclose board succession and composition planning:⁶

- What is the right planning horizon?
- How will the search be performed?
- How are the selection and the appointment organized?
- What are the necessary requirements in terms of skills, experience, and expertise?

Yet, to perform succession and board composition reporting in best practice manner, it is of utmost importance – besides the highlighted contents in the guidance framework – to keep disclosure fundamentals in mind:

- **Create necessity:** It is essential to stick to «the eyes of the beholder, i.e., the receiver and not the sender.»⁷ Organisations face a broad range of share- and stakeholders. However, it is crucial to define the primary share- and stakeholder base and clearly address them in the report (what to whom).
- **Retain adaptability and link actions to process:** Decisions made relate to business processes and environmental influences. Keep the reports flexible and link them to examples and actions. That will increase the quality and the understanding of the comments.
- **Use visualisation:** Lengthy texts make it difficult to capture key points. For example, visuals help to illustrate the process graphically and link areas, actions, decisions, and individuals with each other in a more concise manner.
- **Chose adequate channel(s):** Choose the channels and the content wisely and strategically. Keep time considerations (episodic vs. occasional and regular vs. irregular) in mind and adapt the quantity and quality to the chosen channel. Also, use qualified external advisors (e.g., auditor) to increase the trustworthiness.
- **Consistency, clarity, and comparability:** Before starting, define a clear and concise reporting strategy. In addition, benchmark what competitors in similar business/economic situations are reporting. Once decided, stay on the path and adjust your format and content continuously but in a well-considered manner. Be a first-mover: sooner or later, other boards will recognise the signs of the times and respond to higher stakeholder demands.

3 Campbell et al. (2012): Shareholder influence over director nomination via proxy access. Implications for agency conflict and stakeholder value. *Strategic Management Journal*, 33(12), 1431-1351.

4 Bushee, B. J. & Noe, C. F. (2000): Corporate Disclosure Practices, Institutional Investors, and Stock Return Volatility. *Journal of Accounting Research*, 38, 171-202

5 McCombs et al. (1995): Issues in the news and the public agenda. The agenda-setting tradition, in Glasser, T.L. and Salmon, C.T. (Eds), *Public Opinion and the Communication of Consent*, Guilford Press, New York, NY, pp. 281-300.

6 Financial Reporting Council (FRC) (2016): Feedback Statement. UK Board Succession Planning.

7 Nielsen, C. & Madsen, M. T. (2009): Discourses of transparency in the intellectual capital reporting debate. Moving from generic reporting models to management defined information. *Critical Perspectives on Accounting*, 20(7), 847-854.

Board Succession and Composition Reporting: Some Food for Thought

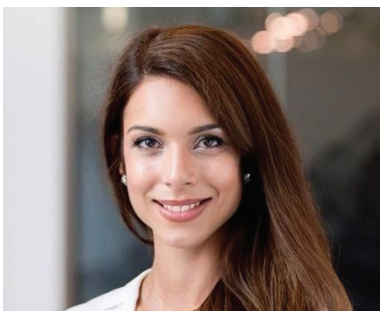
Policy, Performance, and Guidelines	Board Responsibility	<ul style="list-style-type: none"> Describe the board's / committee's / individuals' responsibilities and tasks List topics to be discussed in the board / committee (general titles) Identify the ultimate decision-making process and decision-making individuals (and provide reasons why the process is considered adequate and / or the individual is suitable for leading the process) Formulate policies on formal communication and information exchange
	Board Composition	<ul style="list-style-type: none"> Assess existing competencies, skills, and experience of each individual board member (incl. method / technique assessed) Go beyond biographies; provide more meaning (e.g., individual's contribution, emphasis on diversity) State the added value of the full board of directors as a group (e.g., board work, chemistry) Describe current business and environmental factors and show what competencies, skills, and experience are needed / must be developed to meet them
	Board Performance	<ul style="list-style-type: none"> Describe the performance assessment technique / method Report the individual's performance according to the assessed criteria State the board's development and learning process, incl. / excl. external consultancy Outline how strategy and board performance are linked to board succession planning

Planning, Process, and Procedures	Board Succession Strategy	<ul style="list-style-type: none"> Describe the strategy to be followed and strategic areas to be emphasized State the purpose and goal of succession planning at board, senior management, and upper management level Outline how the organization promotes talents / career paths (internal pipeline) Summarize how succession is integrated in the board's agenda (qualitative and quantitative criteria)
	Board Succession Process	<ul style="list-style-type: none"> Describe succession stages (pooling, identification, assessment, and evaluation) and outline how the process is organized List internal and external parties involved and their contribution attributable State how planned vs. emergent succession process unfolds and differs
	Board Succession Planning and Candidate Nomination	<ul style="list-style-type: none"> Prioritise the position and planning of new successors («open positions») Provide information on the nominated board and senior management members as well as substantial arguments for why the nominees' personality, skill set, experience, etc., qualifies them for the position («best fit», requirement profile vs. proposed candidate profile) Discuss the reasons for the change (e.g., diversity, culture, geography, experience)

To sum it up, rethinking board succession and composition reporting is a first step in the right direction. Organizations should get in the driver seat and proactively intensify their scheme: **launch tailored disclosure and iteratively drive the disclosure continuum towards successful value creation.** A teeter-totter reduplicates two swinging seats; it

describes (ex-post) an effect based on action. There is not one, but several ways to do so – also in succession. Each participant can choose the height, speed, and its counterpart. However, the game only works in a collaborative and cooperative manner, and not if there is only one party involved.

Decision Making in the Boardroom: Towards a new Understanding of Corporate Governance in the Age of Artificial Intelligence



Yasmine Bensultana

PhD student at the University of St. Gallen. Her research focuses on corporate governance and artificial intelligence with a special emphasis on decision making, human and machine interactions, and augmentation strategies at the level of the board of directors.

1. Introduction

The potential of big data and artificial intelligence (AI) to fundamentally disrupt the practices of corporate governance and the decision making processes of the board of directors (BoD) has recently attracted considerable attention.¹ Some experts argue that, in today's increasingly complex and dynamic business environment, the BoD should no longer make critical decisions without the support of intelligent systems.² In the past, board decisions were often made with limited data availability and an emphasis on gut feeling. But with the emergence of big data and AI, board decisions can be based on the analysis of underlying patterns and anticipated trends. Just as AI is helping doctors improve their diagnoses, it is also able to generate valuable insights for the BoD. This potential motivates an analysis of how humans and AI can work together in the boardroom and, in particular, what role AI can play in the decision making of the BoD.

2. Human and Artificial Intelligence

In order to understand the AI's potential contribution to decision making at board level, we must first deconstruct the broad meaning of the term «artificial intelligence» and understand how it compares to human intelligence.³

Human intelligence describes the mental quality that consists of the ability to learn from experience, adapt to new situations, understand abstract concepts, and use knowledge to manipulate the environment.⁴ Over time, researchers have emphasized different aspects of intelligence in their definitions such as the ability to think abstractly or the ability to learn and give good responses.

- 1 E.g., Evans, G. (2017). Disruptive technology and the board: The tip of the iceberg. *Economics and Business Review*, 3(1), 205-223; Merendino, A., et al. (2018). Big data, big decisions: The impact of big data on board level decision making. *Journal of Business Research*, 93(1), 67-78.
- 2 Libert, B., Beck, M. & Bonchek, M. (2017). AI in the boardroom: The next realm of corporate governance. *MIT Sloan Management Review*. Retrieved on 02 May 2020 from: <https://sloanreview.mit.edu/article/ai-in-the-boardroom-the-next-realm-of-corporate-governance/>
- 3 For a more detailed analysis, see: Hilb, M. (2020). Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance. *Journal of Management and Governance*, 24(4), 851-870.
- 4 Sternberg, R. (1998). Human Intelligence. In *Encyclopedia Britannica Online*. Retrieved from <https://www.britannica.com/science/human-intelligence-psychology>.

More recently, however, psychologists have agreed that adaption to the environment is key to understanding what intelligence is and what it does. Effective adaption draws upon several cognitive processes such as perception, learning, memory, reasoning, and problem solving. Thus, the main emphasis in a definition of intelligence is that it is not a cognitive process per se but rather a «selective combination of these processes that is purposively directed toward effective adaption».⁵

Artificial intelligence, on the other hand, is an umbrella term for both AI terminology, such as «machine intelligence», «computer intelligence» or «intelligent behavior», as well as for AI technologies, such as machine or deep learning,

which are used to develop AI applications.⁶ For this article, I employ Poole & Mackworth's definition of AI as «computational agents that act intelligently»⁷ and perceive their environments in order to take actions that maximize the chances of success. This understanding of AI is a notable departure from previous views that emphasized AI displaying humanlike intelligence, and it may alleviate some of the concerns regarding the replacement of humans through AI.

To discuss the potential and limitations of the two approaches with regard to board decision making, I rely on Hilb's decision process model, as illustrated in Figure 1:

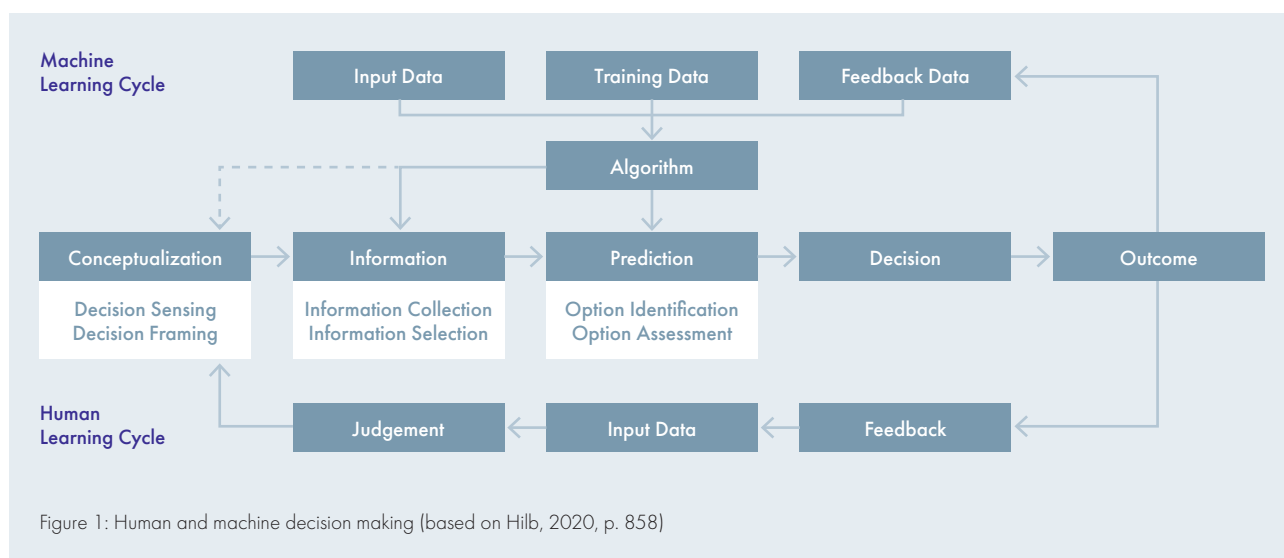


Figure 1: Human and machine decision making (based on Hilb, 2020, p. 858)

Figure 1 illustrates that both approaches – human and machine – to decision making assume that decisions are based on predictions of possible outcomes. In both approaches, predictions are based on some sort of input data which are then further processed to generate an output, i.e., the final decision outcome.

With regard to the machine decision process, Figure 1 shows that AI (or more specifically, machine learning, ML) assumes three types of data: (i) input data, i.e., the direct input to the algorithm leading to predictions, (ii) training data, used primarily to generate the algorithm, and (iii) feedback

data, used to improve the algorithm over time. Technically speaking, these three types of data play a different role for different ML applications such as supervised learning, reinforcement learning and unsupervised learning. Hence, it is crucial to discuss which learning approach is best suited for the specific type of decision in order to judge its effectiveness. Additional complications from AI-based decision making arise from the lack of transparency or transferability, referred to as «the black box» character of AI, the inherent inability to distinguish between causality and correlation, as well as the inefficiency in terms of the data required for valid predictions of possible outcomes.⁸

5 Idem.

6 Alsheibani, S., Cheung, Y. & Messom, C. (2019). Towards an artificial intelligence maturity model: From science fiction to business facts. Pacific Asia Conference on Information Systems (PACIS) 2019 Proceedings. 46.

7 Poole, D. L. & Mackworth, A. K. (2010). Artificial Intelligence: Foundations of Computational Agents. Cambridge, UK: Cambridge University Press, p. 3.

8 For a more detailed discussion of the different approaches and their limitations, see Hilb, M. (2020). Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance. Journal of Management and Governance, 24(4), p. 858.

With regard to the human decision process, I note that the decision process is based not only on input data and feedback from previous outcomes but also on human judgement. The role of human judgement in decision making has been extensively studied and is often considered as one of the key concerns when it comes to automating decision making. For the purpose of this article, judgement is understood in a more encompassing view of the term than intuition or gut feeling. It describes the synthesis of data, facts, and processes that go into decisions from which we have learned in the past. Human judgement thus seems particularly relevant in situations in which information is lacking, ambiguous, or even conflicting, as it is often the case in the real-world settings that the BoD is dealing with.

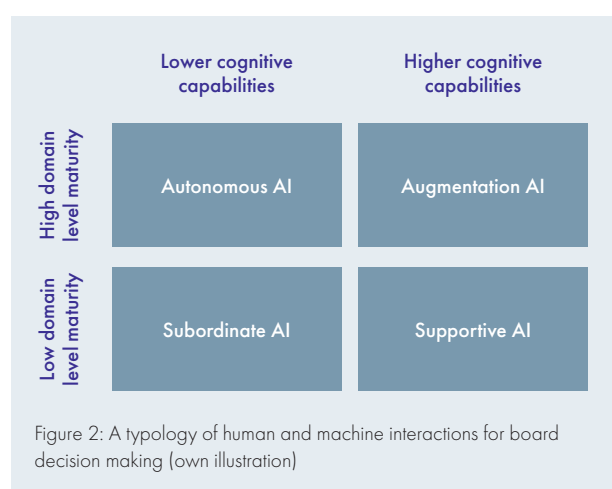
3. Delineating the Typology

In what follows, I develop a typology that provides insights into different types of human and machine interaction forms available for boardroom decision making. My main argument is that, by combining human and artificial intelligence, boards can enhance overall board intelligence and exploit different forms of decision making that contribute to a more effective and efficient corporate governance. The scope of this article is limited to decision making by the BoD and focuses primarily on decisions derived from the non-transferable statutory duties of the board as stated in article 716a of the Swiss Code of Obligations. To determine which types of decisions benefit most from being supported by AI, it is key to recognize the main features of decision making. I therefore present different approaches to decision making, as proposed by Hilb, in order to illustrate how the processes of human and machine decision making are compared (Figure 1). Based on this model, I derive two dimensions that serve to characterize human and machine interactions in boardroom decision making: (I.) domain-level maturity, and (II.) cognitive capabilities.

Domain-level maturity refers to the maturity level of AI in the respective area in which it is employed. The dimension refers to the machine-learning life cycle in Hilb's model and focuses on the technical feasibility of the AI-based systems for decision making in the respective domain. Domains with high AI maturity levels include corporate finance, controlling, and the legal practice. In other domains, such as human resource management, the application of AI remains at the «potential» level as of today and is therefore generally met with skepticism.⁹

Cognitive capabilities are brain-based skills that are needed for acquiring knowledge, processing information, and for reasoning. In general, they relate to mechanisms of how humans learn, remember, and solve problems, thus encompassing the domains of perception, attention, memory, learning, and decision making.¹⁰ The dimension refers to the human learning cycle in Hilb's model and draws upon the cognitive capabilities that are involved in human judgement and high-level strategic decision making. For the purpose of this article, I thus define board decisions that involve ethical dilemmas, value judgements, trade-off considerations and/or paradoxical thinking as decisions that require high cognitive capabilities.

Combining these two dimensions in a 2 x 2 matrix, a typology emerges in which each of the four categories designates a particular interaction form between humans and machines in the context of boardroom decision making, as illustrated in Figure 2:



9 Duan, Y., Edwards, J. S. & Dwivedi, Y. K. (2019). Artificial intelligence for decision making in the era of Big Data – evolution, challenges and research agenda. *International Journal of Information Management*, 48(1), 63-71.

10 Kiely, K. (2014). «Cognitive function». In Michalos, Kim M. (Ed.). *Encyclopedia of Quality of Life and Well-Being Research* (pp. 974-978). Dodrecht: Springer.

4. The four Interaction Forms

As the typology proposes different interaction forms between humans and machines in board decision making, my intention is to clarify the role of AI related to each interaction form. Based on this idea, I label the four categories as follows: autonomous AI, augmentation AI, supportive AI, and subordinate AI. Figure 2 depicts the typology with the four interaction forms.

Subordinate AI: In the case of subordinate AI, it exhibits low domain-level maturity in the field that it is supposed to be applied to. The low maturity is either because the ML approach is not well suited for the context of the decision or because AI systems have not yet been developed for or proven to be successful in the respective domains. In addition, the decision requires a lower level of cognitive capabilities in the sense that there is available information and little uncertainty, complexity, and ambiguity. In this setting, humans are the decision makers who may or may not use AI to provide additional insights to certain aspects of their decision process.

Supportive AI: In the case of supportive AI, the AI still exhibits a low domain-level maturity, while the board decision requires higher cognitive capabilities due to increased uncertainty, complexity, and/or ambiguity. In this setting, humans clearly are still the clear decision makers who rely on selective decision support systems. Examples in the context of boardroom decision making include supporting the BoD by gathering and analyzing information, identifying and diagnosing problems, proposing possible courses of action, and evaluating such proposed actions.

Augmentation AI: In this setting, AI exhibits a high domain-level maturity, and its usage and application are generally accepted and usually well-regulated in the respective field. While humans remain the clear decision makers, the AI-based solutions are more sophisticated and allow the decision maker to use the technology in a way that surpasses human intelligence, e.g., by identifying outliers in large amounts of data or automated reporting.¹¹ The aim of using intelligent systems is thus to enable such tasks to be performed by a computer while emulating human capabilities as closely as possible. It is important to note, however, that in this setting, AI is not meant to replace board members or to automate governance. It serves to augment overall board intelligence by combining the learning cycles of humans and AI, as shown in Figure 1.

Autonomous AI: With autonomous intelligence, AI is theoretically able to make decisions independently and to operate within a predefined range without human decision input. These are settings in which AI exhibits a high domain-level maturity and in which its machine-learning approaches are well suited for the decision context. In addition, these decision types typically require lower cognitive capabilities, given that data is readily available, the decision context is less uncertain and ambiguous, and the decision does not require complex considerations or moral judgements. However, even though the AI is theoretically able to decide autonomously in these situations, it is important to note that current accountability and liability standards still require the BoD to hold formal decision authority over the final decision outcome.

11 For a more detailed discussion: Hilb, M. (2020). Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance. *Journal of Management and Governance*, 24(4), p. 861.

5. Empirical Examples

Having developed a conceptual typology, I now focus on adding empirical examples of board decisions to my framework. In order to better understand the potential contribution of AI to the decision making of the BoD, I follow Hilb's taxonomy of board decisions and identify three generic key roles of BoD that are acknowledged across jurisdictions:¹²

- **Control:** As a supervisory body, one of the key responsibilities of the BoD is to control the top management team (TMT) and to ensure full compliance with the law, accounting standards, and the company's statutory rules, particularly with regard to the firm's finances and risk management. The key decision types in this category thus involve decisions on target achievements, meeting accounting standards, and legal compliance.
- **Co-direction:** The BoD is also responsible for strategic leadership, for developing the corporate strategy

with the TMT, and for ensuring its implementation by setting objectives and monitoring its achievements. Key decisions thus involve decisions on innovation, optimization, transformation, diversification or concentration, and internationalization.

- **Coaching:** The BoD is also responsible for appointing and coaching the TMT to ensure effective leadership. By adding the role of a supporter and coach to the BoD, we extend the traditional dualistic perspective of direction and control and include decisions on executive and board appointments, development, and compensation.

Based on the typology presented in Figure 2 and Hilb's taxonomy of board decisions described above, I draw on typical board decisions as derived from the non-transferable statutory duties of the board stated in article 716a of the Swiss Code of Obligations and assign them to the four types of human and machine interactions in board decision making:

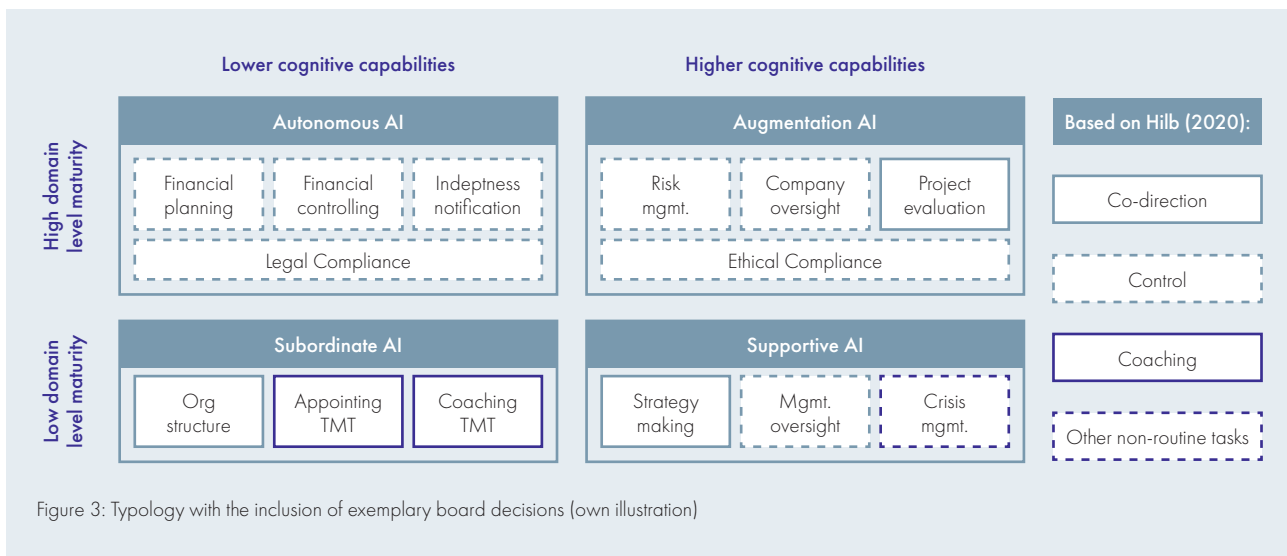


Figure 3 systematizes different forms of human-machine interactions in decision making and assigns specific examples of board decisions to each interaction type. Even though these decisions are to be understood as generic examples, the aim is to help the BoD decide

whether and how to incorporate AI-based systems to support and guide their decision making. It can be noted that AI is predominantly suitable for control and command functions of the BoD such as financial planning and controlling or risk oversight and compliance.

12 Hilb, M. (2020). Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance. *Journal of Management and Governance*, 24(4), p. 852 – 853.

In addition, AI is also quite advanced in the field of project evaluations, given that data availability is guaranteed. In other areas such as strategy making, management oversight, or non-routine tasks, such as crisis management, AI can play a supportive role in board decision making. These are typically areas in which AI is not yet capable of automating decisions due to limited data availability or the complex and conflicting nature of the decision. Finally, in some areas, such as drafting organizational structures or appointing and coaching the TMT, AI only plays a subordinate role as of today. These are areas in which, even though the context may not be overly complex or ambiguous, AI is still at an early stage, and there are many other factors apart from quantifiable data that play an important role in supporting the BoD fulfil its direction and support roles.

6. Conclusions

This article contributes to the theoretical underpinnings of human and machine interactions in decision making at the board level. In terms of practical implications, this article argues that AI systems can introduce profound and pervasive changes to the board's decision making and thus fundamentally alter existing corporate governance structures. However, board members should also take into account the technical limitations of AI-supported decision systems.¹³ First, in addition to the considerable time and cost required for AI implementation, decision makers need to consider its interoperability with other existing information systems and platforms. Second, they need to carefully examine the quality of data used as input to train AI systems. Moreover, there are also important legal considerations for the board's decision to incorporate AI into its decision making processes, in particular with regard to the accountability and liability rules related to the BoD. Legally, the business judgement rule states that any key decision taken at the level of the board must be based on the best available information and must be documented accordingly. This rule may lead to conflicting interpretations though: it could either mean that companies could be forced to resort to AI

for certain decisions where AI-based decision support systems promise better results than human predictions or that it could lead to its rejection due to the fear of legal disputes that may arise from the usage of such systems.¹⁴


Notwithstanding these limitations, AI can be used as a powerful decision support system that can help the BoD make faster, more accurate, and unbiased decisions. However, boards eager to benefit from the potential that AI offers in this realm first need to understand the different interaction forms between humans and machines in decision making. Unfortunately, AI adoption is still often equated with automation, whereby humans are thought to be replaced by machines in decision making. In practice, however, AI is much more commonly used to augment human activity.¹⁵ This augmentation view is particularly true for the strategic decision making of the BoD. This generally involves considerations that are difficult to digitize or where prior knowledge and experience is important for anticipating outcomes in novel or unusual circumstances. In this context, the human and machine relationship should therefore no longer be considered dichotomous but evolving into a «machine augmentation» of human capabilities.

Overall, I believe that the question is not whether AI will play an increasingly important role in decision making and corporate governance but how well we are able to use and adapt such systems in order to complement and enhance the existing capabilities of the board. This is why I believe that it is paramount to understand the underlying features of the technology and how it can affect reasoning and decision making. Only when we truly grasp the fundamentals of these processes, we can reap the full potential of what AI has to offer in these areas. The result could be a whole range of new governance mechanisms and systems that are powered by the advantages of both human and machine learning cycles. Today's boards of directors can play a central role in this process if they are willing and open to engage in the social dialogue that is necessary for taking a step forward in human and AI governance.

13 For a more elaborate discussion of limitations, see: Paschen, U., Pitt, C. & Kietzmann, J. (2020). Artificial intelligence: Building blocks and an innovation typology. *Business Horizons*, 63(2), 147-155.

14 Hilb, M. (2020). Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance. *Journal of Management and Governance*, 24(4), p. 859.

15 See also: Athey, S., Bryan, K. & Gans, J. (2020). The allocation of decision authority to human and artificial intelligence. *AEA Papers and Proceedings*, 110(1), 80-84; Raisch, S. & Krakowski, S. (2020). Artificial intelligence and management: The automation-augmentation paradox. *Academy of Management Review*, forthcoming (pre-print version).

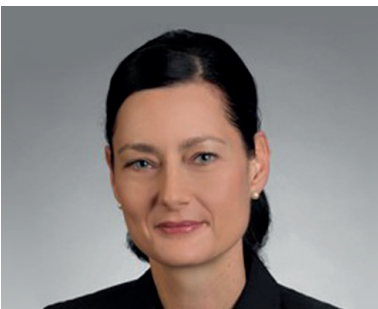


The group as a guiding model for the governance of an ecosystem?



Dr. Felix Horber

Attorney-at-law, Executive M.B.L.-HSG, VR-CAS HSG, Lecturer in Law at the University of St. Gallen, Group Company Secretary, Swiss Re



Christina Lusti

Attorney-at-law, Executive M.B.L.-HSG, Head Corporate Governance Group, Swiss Re

1. Executive Summary

With the rise of business ecosystems, research into the appropriate governance framework for these ecosystems is still in the early stages. In this paper we posit that the framework and principles of a group's corporate governance may in many ways serve as a model for establishing an ecosystem's governance. Proper governance should reduce risks, ensure compliance, define roles and responsibilities and support the flow of information. The right governance principles support the ecosystem's business success and value creation as well as ensuring that the ecosystem is poised to face competition and regulatory challenges.

2. Introduction

Business ecosystems are increasingly important. One of the principal reasons behind the growing significance of ecosystems is digitalisation. Rapid changes in technology have underpinned the increasing importance of ecosystems and provided businesses with new opportunities for cooperation and information exchange. New technology also changes how companies can serve their customers.¹ The dependence on mobile devices combined with the influence of the internet give rise to new opportunities for linking goods and services.²

While ecosystems develop very rapidly, not much is known about the governance structures they have established. The purpose of this paper is to discuss whether the governance framework of an internationally active group of companies (a publicly listed corporation with multiple subsidiaries, «group») could be a guiding model for the governance of an ecosystem. Furthermore, the value of an ecosystem applying governance principles that have been set out by a group is evaluated.

1 Jacobides, M.G. (September-October 2019). In the Ecosystem Economy, What's Your Strategy? The five questions you need to answer. *Harvard Business Review*, 6 («Jacobides, M.G., Harvard Business Review»).

2 Jacobides, M.G., *Harvard Business Review*, 6.

The type of ecosystem referred to in this paper is described by Avramakis et al. as follows: «Ecosystems are networks of businesses and consumers (online and offline) that support each other with their respective capabilities to deliver greater economic value than would be possible through autonomous operation.»³ Ecosystems offer a one-stop shop solution for services in one area or several different areas.⁴ Business ecosystems («ecosystem») are referred to in the sense of a managing company («sponsor») offering products and services provided by several «partners» or «participants», which generally cover several fields for customers («user»). Jacobides found that «in an increasing number of contexts, the firm is no longer an independent strategic actor. Its success depends on collaboration with other firms in an ecosystem spanning multiple sectors.»⁵ The value that an ecosystem can create depends on the partners participating in it. Partners frequently provide their services on a shared platform based on shared principles in order to ensure product and service cross-compatibility.

The first step of this analysis explores the different natures of ecosystems and groups. In the second step, the challenges and unique features of an ecosystem are listed. This assessment assists us in defining what an appropriate governance framework for an ecosystem might look like. The purpose and cornerstones of a group's model governance framework and the related governance principles will be outlined. Lastly, how a group's governance set-up and principles fit into the ecosystem's purpose is analysed.

3. Characteristics of an ecosystem versus a group

To identify the nature of an ecosystem, several questions are asked and answered. For example, what does it take for an ecosystem to be able to take off in the first place? What does it take to avoid losing market share after a successful start and what does it take for an ecosystem to secure a sustainable position after a successful start? Research has identified three critical stages that define an ecosystem's lifecycle.⁶ An ecosystem must first seize the opportunity to gain a large share of the target market. To be successful, it must gain this share quickly. For the ecosystem to acquire a large segment of the market, it needs to simultaneously attract partners, users and more participants who may in turn offer additional products and services to attract more customers. In its early stages an ecosystem needs to invest in its growth, processes and platform. It must therefore be well capitalised and defer profitability to a later phase of its development. In order to survive an ecosystem in its second stage is forced to evolve and to face competition. It needs to broaden its scope, growing either by responding to further customer demands or by moving into additional markets. Lastly, in the third stage, a successful and sustainable ecosystem must become a leader in its respective market. It needs to flexibly adapt its strategy to its cycles and developments accordingly. Compared to the evolving and highly dynamic nature of an ecosystem, the group, as defined herein, is traditionally settled and has become a successful market player. It adapts its strategy only if required by market or economic developments.

3 Avramakis, E., Anchen, J., Raverkar, A.K. (January 2019). Digital ecosystems: extending the boundaries of value creation in insurance. Swiss Re Institute, 1 («Avramakis, E., Anchen, J., Raverkar, A.K., Digital ecosystems»).

4 Avramakis, E., Anchen, J., Raverkar, A.K., Digital ecosystems, 2.

5 Jacobides, M.G., Harvard Business Review, 6.

6 Reeves, M., Lotan, H., Legrand, J., Jacobides, M.G. (2019). How Business Ecosystems Rise (and Often Fall). MIT Sloan Management Review. <https://sloanreview.mit.edu/article/how-business-ecosystems-rise-and-often-fall/>

4. Challenges of an ecosystem

According to Avramakis et al., an ecosystem fails if it does not successfully engage partners, offer them attractive incentives or if it underestimates the importance of gaining a critical number of participants that foster profitability.⁷ Participants are connected to the ecosystem through the sharing of resources and data. They have governance challenges such as the allocation of resources or dealing with conflicts of interest related to the distribution of costs and gains.⁸ As outlined by Avramakis et al., an ecosystem may also fail due to an imbalance between openness and control.⁹ The ecosystem must not be too tight nor too open. Jacobides sees two key governance choices for ecosystems;¹⁰ in the first, the sponsor must decide early during the creation whether the ecosystem will be open, managed or closed. Depending on the level of openness, partners can participate in the ecosystem based on general standards or specific rules, or their participation may require approval and be tightly controlled. The more open an ecosystem is, the easier it is to attract partners. There is a balance between having many partners providing services and products while ensuring high-quality standards and profitable value creation for participants. The second option offers the sponsor a choice between an ecosystem that grants easy access for partners and one in which partners are tightly bound. The latter aims for greater exclusivity of products and services and higher quality standards. A well-known, attractive sponsor and a closed ecosystem are able to pull in many interested partners. For a smaller sponsor, the number of potential partners that can be attracted depends on what alternatives partners have. Schmeiss et al. identified access, control and incentives as the three overarching governance mechanisms for ecosystems that operate through a platform.¹¹ Access criteria and rights enable the participation of the relevant partners. Control defines the standards that form the basis for partners to participate and incentives serve to attract partners.

5. Group corporate governance

How can the described choices be embedded in the governance of an ecosystem? Could the governance framework of a group serve as a guiding model? In line with the characteristics of a group being solid, well-positioned, profitable and successful, the main purpose of its governance is to minimise risk, adhere to regulatory requirements, define roles and responsibilities and ensure the flow of information. A group governance framework provides organisational structure, oversight and management principles as well as reporting procedures. It clearly allocates roles, responsibilities and authorities in addition to line-management reporting within the group. Several documents govern such types of governance frameworks and their principles. At the uppermost level of hierarchy, a code of conduct or similar document sets out key principles that guide the group's companies in making responsible decisions and achieving results using the highest ethical standards. Articles of Association define the legal and organisational framework of the group parent company. Similarly, corresponding bylaws define the governance framework and cover the responsibilities of both the oversight body and those delegated to the management body, including the authorities of their members. Group-wide standards allow steering of the group companies in an efficient and harmonized manner. Such standards may cover: strategy; capital allocation decisions on group-wide steering and control; allocation of capital and resources to opportunities; asset and liability management; treasury; funding and capital management; financial and risk management; governance, compliance, legal and regulatory affairs; and functional matters including human resources, talent management, reputation and brand. The group's governance principles and standards ensure a consistent, harmonized and tailored approach across the group. Its corporate governance complies with local rules and regulations that apply where it does business. Overall, a group's governance framework ensures sustainability, fosters transparency and facilitates a quality assessment of the group's organisation and business.

7 Avramakis, E., Anchen, J., Raverkar, A.K., Digital ecosystems, 5.

8 Cunningham, J.A., Menter, M., Wirsching, K. (27 November 2017). Entrepreneurial ecosystem governance: a principal investigator-centered governance framework. *Small Business Economics*, 545-562 («Cunningham, J.A., Menter, M., Wirsching, K., *Small Business Economics*»).

9 Avramakis, E., Anchen, J., Raverkar, A.K., Digital ecosystems, 5.

10 Jacobides, M.G., *Harvard Business Review*, 8.

11 Schmeiss, J., Hoelzle, K., Tech, R.P.G. (2019). Designing Governance Mechanisms in Platform Ecosystems: Addressing the Paradox of Openness Through Blockchain Technology. *California Management Review* 2019, Vol. 62(1) 121-143, in particular 123.

6. Ecosystem governance

Can the group governance framework outlined and the related principles be used as a guiding model for an ecosystem? Which aspects should an ecosystem consider implementing in its governance? In light of the above considerations on the nature and challenges of an ecosystem, it seems advisable that the governance of an ecosystem should aim to have the same purpose as that of a group. In other words, the ecosystem's governance should help mitigate risks, ensure compliance with regulatory requirements, define roles and responsibilities and make sure that information flows between sponsors and partners. According to M.G. Colombo et al., the governance of ecosystems is about governing relationships to achieve competitive advantages, coordinating, motivating and governing the business network.¹² J.A. Cunningham et al. found that an efficient and functioning governance of an ecosystem should ensure that all participants who contribute to the ecosystem's value creation should receive a return on the value that they create together.¹³ To this end, and similar to a group, an ecosystem needs to implement not only an organisational structure as well as oversight and management controls, but also policies that govern partner cooperation and participation. This being said, the appropriate documentation relating to the governance framework and corresponding principles are just as important for an ecosystem as they are for a group. The documents support the implementation of the ecosystem's governance structure and standards, while fostering an understanding of the ecosystem's governance among partners. Taking into account the sponsor's chosen level of ecosystem openness, the documents ensure a consistent governance approach across the ecosystem. To sum up the above considerations, the governance structure and principles for an ecosystem need to be adapted to the dynamic nature of an ecosystem as well as to the requirements set by each lifecycle. The governance framework needs to be robust enough to protect the sponsor, yet flexible and adaptable enough to allow the ecosystem to continuously evolve. It is essential that the governance of an ecosystem leaves room for flexibility, so that it may be continuously aligned with the adapted strategy. An appropriate governance framework supports the sponsor in attracting partners. An open and healthy culture also plays an important role. Sponsor and partner culture and governance should fit well with each other.

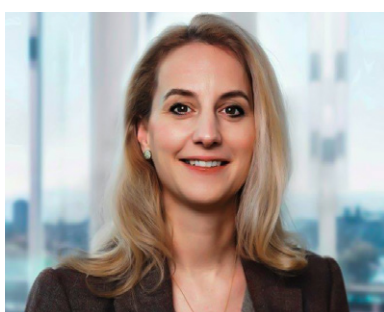
7. Conclusion

Good governance is very much in the interest of stakeholders, including investors, shareholders, clients and employees. In general, corporate governance continues to progress towards increased transparency and accountability of companies to stakeholders. Investor expectations can shift with one example being the increased demands for more meaningful and more frequent engagement with boards and management. Ecosystems face similar demands and challenges. Lately, there have been concerns raised regarding competition and data protection law matters relating to ecosystems. The corresponding laws and the understanding of what is permissible vary greatly from one country to another. A meaningful and comprehensive dialogue with stakeholders – including regulators – seems important, not only for groups but also for ecosystems. Appropriate governance frameworks may vary considerably between ecosystems, depending on specific setups and decisions. One governance structure might be suitable for one ecosystem but not for another. However, it is safe to acknowledge that for all types of ecosystems the governance framework and related principles must support business opportunities and value creation, while ensuring the desired level of standards and control in order to remain competitive and respond to regulatory challenges.

12 Colombo, M.G., Dagnino, G.B., Lehmann, E.E., Salmador, M.P. (28 November 2017). The governance of entrepreneurial ecosystems. *Small Business Economics*, 419-428, in particular 423.

13 Cunningham, J.A., Menter, M., Wirsching, K., *Small Business Economics*, 545-562, in particular 553.

Redefinition of the Corporate Purpose and the Increased Importance of «E» and «S» within ESG



Dr. iur. Katja Roth Pellanda

Attorney-at-law, LL.M, Group General Counsel,
Zurich Insurance Company Ltd

Since some time, a shift in public expectations and increased regulatory focus has amplified the importance of ESG for companies.

While traditional (corporate) governance topics (the «G» within ESG) – mainly board composition, shareholder rights and executive compensation – remain a focus area, the environmental and social aspects of ESG (the «E» and «S») have gained importance. Companies are expected to commit to a purposeful business, integrate societal goals in their strategy and disclose ESG information. Today, there is a growing consensus that companies (have to) play an increasingly important role in solving the challenges of our society and the planet.

These pre-existing trends are being accelerated by the current global economic and health crisis resulting from COVID-19.

From Business to Purposeful Business

The shift from a shareholder primacy to a more holistic stakeholder view was promoted by Blackrock's «Dear CEO Letter of 2018 – A Sense of Purpose», which stated that society is increasingly turning to the private sector to respond to broader societal challenges and serve a social purpose.¹ This shift has been confirmed by the U.S. Business Roundtable statement on «Redefining the Purpose» in August 2019² as well as the 2020 WEF manifesto towards a universal company purpose.³ Nowadays, there is broad consensus that companies should (also) focus on their social impact. ESG cannot be outsourced to governments and politicians alone.

1 <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

2 <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

3 <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

In the past, a corporate purpose was the «simple» description of what a company is doing to generate profit. Today, companies are increasingly taking into account the challenges of our society and the planet when describing their corporate purpose and define how they want to profitably solve these challenges through their business in the long term.⁴ The corporate purpose is the reason why a company exists and the basis on how a company will build trust with its customers, employees and society at large.⁵ It creates the foundation for the corporate culture and for the values the company stands for. In addition, the corporate purpose often plays an important role in a company's communication strategy.

Some countries have already reacted to this newer development and France introduced a new type of company, the «entreprise à mission» in 2019, which is defined as a company that adopts social and environmental objectives, which are aligned with its (business) purpose and set out in its Articles of Association.⁶ Danone was the first listed company in France who adopted this concept.⁷ There are companies also in Switzerland that have already included a broader purpose in their Articles of Association by mentioning that the company is striving to create sustainable value.⁸

«E» and «S» in Action

Social pressure, the continuing rise of long-term investment stewardship and corporate scandals are serving as drivers for the increased importance of «E» and «S» within ESG.

As a result, the focus has more generally shifted from the question of whether the interest of other stakeholders besides shareholders must be considered by companies when developing their business strategy to how companies best take the interest of their stakeholders into account.

Switzerland always defined the Board of Director's duties as safeguarding the best interests of the company and assuring its long-term profitability; such duties, however, are being understood to also include ESG considerations. While the operational execution of ESG will be delegated to management, the Board of Directors remains responsible to oversee the integration of ESG in the company's long-term strategy. In some cases, it might even be appropriate to create a new board committee or change the mandate of existing committees to be able to address ESG topics more specifically.

Companies will implement different ESG strategies as there will not be a one-size-fits-all approach. Yet, there are some key trends, which are currently shaping the ESG landscape and which are expected to continue to remain, such as:

- Adoption of a corporate purpose, which includes ESG goals
- Integration of ESG in the business strategy: examples are environmental (e.g., limiting global temperature rise⁹) or societal-related pledges (e.g., expanding access to medicine¹⁰)
- Focus on human capital management (e.g., diversity & inclusion; employee satisfaction and engagement; succession and talent management; attrition and retention; workforce culture as well as employee (mental) health, safety and wellbeing)
- Linking variable compensation to ESG-related targets

4 For an illustration of a «purposeful business» <https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/>.

5 For a framework on how companies can translate a corporate purpose into practice, <https://www.enactingpurpose.org/assets/enacting-purpose-initiative---eu-report-august-2020.pdf>.

6 <https://link.springer.com/article/10.1007/s10551-020-04439-y>.

7 <https://www.danone.com/about-danone/sustainable-value-creation/danone-entreprise-a-mission.html>.

8 Among those are: ABB Ltd., Nestlé SA, Novartis AG and Alcon Ltd.

9 Zurich Insurance Group AG has committed in June 2019, as the first insurance company, to set targets in the framework of the UN Global Compact Business Ambition Pledge that aims at limiting global temperature rise to 1.5° C above pre-industrial levels (<https://www.zurich.com/en/sustainability/our-role-in-society/climate-change/minimizing-our-environmental-footprint>).

10 Novartis AG launched in September 2020 the first sustainability-linked bond incorporating social targets, which entitles bondholders to receive a higher interest if Novartis fails to meet its targets for expanding access to its innovative medicines and addressing key global health challenges (<https://www.novartis.com/news/media-releases/novartis-reinforces-commitment-patient-access-pricing-eur-185-billion-sustainability-linked-bond>).

In addition, companies are increasingly changing their organizational set-up regarding ESG to enhance the «Head of ESG/Sustainability» role from middle management to senior management and provide this function with a global responsibility for the sustainability efforts of the company (i.e., moving away from fragmented responsibilities dispersed within different functions within the company).

The establishment of an effective corporate governance for «E» and «S» will become increasingly important and ESG data and key performance indicators (i.e., non-financial data) will need to be established, tracked, reviewed and disclosed. So far, there is no standardized disclosure for ESG available and a huge variety of voluntary disclosure frameworks¹¹ exist. However, in certain jurisdictions mandatory ESG disclosure requirements have already entered into force or will soon be enacted.¹² Moreover, early signs of standardization initiatives are becoming visible and it is to be hoped that consensus on a global level is going to take place within the near future.

Public-private Partnerships (PPPs)

Demonstrating leadership in ESG is a differentiating factor and companies that are not getting engaged on this topic have to expect tougher conversations with shareholders and stakeholders, and will face an increased willingness of shareholders to vote against director-related proposals (mainly re-elections, compensation related resolutions and discharge) and to vote for shareholder proposals.¹³ Such companies might also have an increased exposure to shareholder activism. Finally, there will be an increased likelihood of legislation and regulation if companies do not undertake effective voluntary actions.

ESG is clearly not only a key trend but a topic to remain and will continue to shape the corporate landscape. As the global social and environmental challenges are becoming more acute, it is apparent that responding to these challenges will require coordination amongst multiple actors within the private and public sector. It is therefore to be expected that public-private partnerships (PPPs) are going to gain importance in the near future.¹⁴

11 Such as e.g., the Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB), the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD), etc.

12 The SEC adapted the Rule Regarding Human Capital Disclosures in August 2020, under which an issuer has to provide a description of the registrant's human capital resources to the extent such disclosures would be material to an understanding of the registrant's business (<https://www.sec.gov/news/press-release/2020-192>). In the EU, the Sustainability-Related Disclosures Regulation (SDRD), which regulates the disclosure of sustainability considerations in investment decisions and pre-contractual provision of sustainability-related information in financial products, will become effective as of March 2021 (https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/sustainability-related-disclosure-financial-services-sector_en). In Switzerland, mandatory non-financial reporting obligations will be introduced with the Corporate Law Reform since the Responsible Business Initiative has been rejected and the provisions of the indirect counterproposal will come into force (<https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/verantwortungsvolle-unternehmen.html>). The Swiss Supervisor for Financial Markets (FINMA) has communicated in May 2020 that it has identified a need for targeted regulatory action regarding disclosure of climate related financial risks of regulated companies and started a public consultation process (<https://www.finma.ch/en/news/2020/11/20201110-mm-transparenzpflichten-klimarisiken/>).

13 See as an example page 4 f. of the 2021 Stewardship Expectations of BlackRock (<https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf>).

14 See in this regard page 37 ff. of the G30 publication on «Reviving and Restructuring the Corporate Sector Post-Covid» (<https://www.zurich.com/en/sustainability/our-role-in-society/climate-change/minimizing-our-environmental-footprint>).



Von der Corporate Governance zur Foundation Governance



Dario Sutter

Doktorand an der Universität St.Gallen. Im Rahmen seiner Dissertation befasst er sich mit der Regulierung des Trusts im Kontext von Family Offices, wobei insbesondere eine mögliche Einführung des Trustinstituts im materiellen Schweizer Recht und allfällige Alternativen hierzu einen Forschungsgegenstand darstellen.

1. Stiftungslandschaft der Schweiz und rechtliche Rahmenbedingungen

1.1. Von den alten Griechen und den Römern zum «Stiftungsparadies Schweiz»

Das Institut der Stiftung geht auf die Griechen und Römer zurück und leistet infolgedessen seit langer Zeit Gutes für die Gesellschaft, indem auf diesem Wege Vermögen für wohltätige Zwecke gestiftet werden kann. Während im Mittelalter Stiftungen vor allem zur Unterstützung Kranker errichtet wurden und sich insbesondere die christliche Kirche diesem Institut bediente, ist das liberale Schweizer Stiftungsrecht heute Grundlage für das «Stiftungsparadies Schweiz». Besonders wichtig ist die sogenannte Stifterfreiheit, welche Ausfluss der Privatautonomie des Privatrechts ist. Die Stifterfreiheit führt dazu, dass sich eine Stiftung grundsätzlich jedem legalen Zweck widmen darf. So sind denn auch die Ziele von Stiftungen in der Schweiz ganz unterschiedlich: Das Institut findet Verwendung für karitative, erzieherische, medizinische, religiöse und viele weitere Zwecke. Nicht nur die Förderung des Gemeinwohls ist häufig als Motiv auszumachen, sondern auch die Optimierung und Strukturierung des (Familien-)Vermögens. Ein Paradebeispiel ist hier wohl die Familienstiftung, welche nicht der Allgemeinheit Gutes tut, sondern nur für einen kleinen Destinatärkreis – wie der Name schon erahnen lässt, die Familie – geöffnet ist.¹

1.2. Überblick über die rechtlichen Rahmenbedingungen des Stiftungsprivatrechts der Schweiz

Unter dem Begriff der Stiftung ist ein Zweck- oder Sondervermögen zu verstehen, das personifiziert und rechtlich verselbständigt ist. Je nach Zweck kann es sich um eine klassische Stiftung oder eine Sonderform handeln. Als Sonderformen in Frage kommen kirchliche Stiftungen, Familien- und Personalfürsorgestiftungen.

¹ SCHÖBEL SARAH KATHARINA, Corporate Governance im Stiftungsrecht, Diss., Zürich 2012, S. 42 ff.; SPRECHER THOMAS/VON SALIS-LÜTOLF ULYSSES, Die schweizerische Stiftung, in: NKF Schriftenreihe Band 9, S. 9; SPRECHER THOMAS/VON SALIS-LÜTOLF ULYSSES, Die schweizerische Stiftung – Ein Leitfaden, Zürich 1999, S. 31.

Die Errichtung der Stiftung stellt den Stiftungsakt dar und ist ein einseitiges, nicht empfangsbedürftiges Rechtsgeschäft.² Die Organisation der Stiftung wird in Art. 83 ff. ZGB konkretisiert. Aufgrund der Stifter- und Organisationsfreiheit definiert die Stiftungsurkunde die Organe der Stiftung und die Art der Verwaltung. Der Stiftungsrat ist das oberste Stiftungsorgan; er verwaltet die Stiftung und hat sich an den Stifterwillen zu halten, um den Stiftungszweck zu erfüllen.³ Grössere Stiftungen sind häufig zweistufig organisiert; sie haben einerseits eine Geschäftsführung, andererseits aber auch einen Stiftungsrat. An der Willensbildung der Stiftung können und dürfen die Stiftungsräte nicht teilnehmen. Sie haben die Pflicht, die Gesetze und die Stiftungsstatuten zu befolgen. Wo ein Ermessensspielraum besteht, ist dieser sorgfältig auszuüben.⁴ Das oberste Stiftungsorgan hat gemäss Art. 83a ZGB die Pflicht, die Geschäftsbücher der Stiftung zu führen und dabei die Vorschriften des Obligationenrechts über die kaufmännische Buchführung und Rechnungslegung sinngemäss anzuwenden.⁵ Seit der am 1. Januar 2006 in Kraft getretenen Stiftungsrechtsrevision gelten für Stiftungen ebenfalls die Regelungen des Obligationenrechts betreffend der ordentlichen und eingeschränkten Revision. Einige Stiftungen sind von der Revisionspflicht ganz ausgenommen, beispielsweise die vorhin erwähnten Familienstiftungen.⁶ Für die Aufsichtsbehörde besteht gemäss Art. 83b Abs. 4 ZGB zudem nach Möglichkeit, eine Stiftung, die grundsätzlich nur eine eingeschränkte Revision durchführen müsste, zu einer ordentlichen Revision zu verpflichten, wenn dies für die zuverlässige Beurteilung der Vermögens- und Ertragslage notwendig ist.⁷

2. Von der Corporate Governance...

Unternehmensskandale sorgen nicht nur für negatives Aufsehen, sondern verdeutlichen, dass bei grossen Aktiengesellschaften mit zerstreutem Aktionariat Führungsprobleme auftreten können. Ausgangspunkt der Problematik ist die Delegation von Eigentumsrechten der Aktionäre an die Geschäftsführung. Zwischen dem Aktionariat und der Geschäftsführung bestehen Informationsasymmetrien, welche es der Geschäftsführung ermöglichen, andere Interessen als jene des Aktionariats zu verfolgen (Principal-Agent-Problematik). So können Entscheidungen gefällt werden, die den (Eigen-)Interessen der Geschäftsführung entsprechen, aber nicht mit jenen des Aktionariats übereinstimmen.⁸ An dieser Stelle setzt die Corporate Governance an. Unter den Begriff der Corporate Governance fallen alle rechtlichen und faktischen Rahmenbedingungen im Zusammenhang mit der Leitung und Überwachung eines Unternehmens. Erwähnt wurde der Begriff bereits in den 70-er Jahren im angelsächsischen Sprachraum, fand aber erst im letzten Jahrzehnt des 20. Jahrhunderts zunehmend Verbreitung. Die Corporate Governance umfasst Regeln zur (guten) Führung eines Unternehmens und bietet Instrumente zum Ausgleich von Informationsasymmetrien und zur Verhinderung von Interessenkonflikten durch Implementierung verschiedener organisatorischer Massnahmen.⁹

2 GRÜNINGER HAROLD, in: BSK Zivilgesetzbuch I, Art. 1-456 ZGB, THOMAS GEISER/CHRISTIANA FONTOULAKIS (Hrsg.), Basel 2018, Art. 80 N 1 ff.

3 GRÜNINGER (FN 2), Art. 83 N 1 ff.

4 GRÜNINGER (FN 2), Art. 83 N 3; SPRECHER/VON SALIS-LÜTOLF (FN 1), Die schweizerische Stiftung, S. 9; SCHÖBEL (FN 1), S. 42 ff.

5 GRÜNINGER (FN 2), Art. 83a N 1 f.; ist eine Stiftung nicht verpflichtet, sich im Handelsregister einzutragen oder eine Revisionsstelle zu benennen, ist sie nur verpflichtet, eine sog. Milchbüchlein-Rechnung über die Einnahmen, die Ausgaben und die Vermögenslage zu führen.

6 Vgl. Art. 87 Abs. 1 bis ZGB.

7 GRÜNINGER (FN 2), Art. 83b N 3 ff.

8 HOFSTETTER KARL, Corporate Governance – Herausforderungen für Stiftungen, in: Stiftungsparadies Schweiz, PHILIPP EGGGER (Hrsg.), S. 44.

9 BRÄNDLI BEAT, Internationale Standards, in: St.Galler Handbuch zum Schweizer Finanzmarktrecht – Finanzmarktaufsicht und Finanzmarktinfrastrukturen (SGHB Band I), PETER SESTER/BEAT BRÄNDLI/OLIVER BARTHOLET/RETO SCHILTKNECHT (Hrsg.), S. 40; SCHÖBEL (FN 1), S. 1 f.; SPRECHER THOMAS, Was ist und was leistet Foundation Governance?, in: Jusletter vom 26. April 2010, o.S.

So finden sich auch in jeder Gesellschaftsrechtsordnung Bestimmungen zur Corporate Governance. Wesentlich ist hier vor allem die klare Kompetenzabgrenzung zwischen Generalversammlung – dem Aktionariat als Eigentümerschaft – und dem Verwaltungsrat. Mit der Revision als Judikative bildet die Generalversammlung als Legislative und dem Verwaltungsrat als Exekutivorgan die Gewaltenteilung auf drei Säulen in einem Unternehmen ab. Parallel zum nationalen Recht bildeten sich auf internationaler Ebene insbesondere durch die OECD Principles of Corporate Governance weitere (Internationale) Standards heraus, welche über diese positivrechtlichen Bestimmungen hinausgehen; so findet man heute international auch Vorgaben zur Nachhaltigkeit und zu Vergütungsfragen. Der Soft Law-Charakter dieser Standards im Bereich Corporate Governance ist aber dahingehend zu relativieren, als dass insbesondere das Börsengesellschaftsrecht diese Vorgaben teils verbindlich eingeführt hat; so kennt bspw. die Schweizer Börse SIX eine Richtlinie zur Corporate Governance. Obgleich diese Vorgaben nur für Publikumsgesellschaften verbindlich sind, ist zu erwarten, dass in Zukunft solche Standards vermehrt auch Eingang in das Gesellschafts- und Handelsrecht finden und so Verbindlichkeit für alle Unternehmen erlangen.¹⁰

3. ... zur Foundation Governance

3.1. Ausgangslage

Nicht nur Unternehmen sind von Skandalen betroffen, sondern auch Stiftungen. Aufgrund dessen, dass sie aber deutlich weniger im Fokus der Öffentlichkeit stehen als grosse Publikumsgesellschaften, sind diese in der öffentlichen Wahrnehmung weniger präsent und verschwinden schnell wieder aus dem Bewusstsein.¹¹ Obwohl die Governance-Bestrebungen den nicht-profitorientierten Sektor zunächst nicht erreichten, gab es in den USA nach 1980 erste Vorschläge für Regelungen bezüglich Corporate Governance im Non Profit-Bereich. Diese mündeten 2002 letztendlich in den Principles and Practices for Effective Grantmaking, die vom Council of Foundations veröffentlicht wurden.¹² Obwohl die Standards, welche für börsennotierte Unternehmen erarbeitet wurden, teils auch für den Stiftungssektor Geltung erlangen können, war man sich von Anfang an bewusst, dass eine 1:1 Übernahme aus verschiedenen Gründen nicht zielführend ist: Stiftungen und Aktiengesellschaften differieren nicht nur hinsichtlich der Rechtsform und den damit unterschiedlichen rechtlichen Vorgaben, sondern auch in Bezug auf den Zweck, die Anspruchsgruppen, die Eigentumsverhältnisse und die Messbarkeit der erbrachten Leistungen. Nichtsdestotrotz gibt es eine gemeinsame Schnittmenge und das Ziel von Governance-Vorgaben ist in beiden Anwendungsbereichen dahingehend identisch, als dass damit Leistungen nachhaltig verbessert werden sollen. Eine Anpassung von Corporate Governance-Standards an den Stiftungssektor ist vor allem aus dem Grund zwingend notwendig, um unerwünschte Folgen von unpassenden und/ oder unnützen Vorgaben zu verhindern.¹³

10 BRÄNDLI (FN 9), S. 40 ff.

11 GRÜNINGER (FN 2), Art. 83b N 3 ff.

12 HOFSTETTER KARL, Corporate Governance – Herausforderungen für Stiftungen, in: Stiftungsparadies Schweiz, PHILIPP EGGGER (Hrsg.), S. 44.

13 SPRECHER (FN 9), o.S.

3.2. Governance Probleme in Stiftungen

Das liberale Schweizer Stiftungsrecht umfasst deutlich weniger rechtliche Rahmenvorgaben als das Aktienrecht, obgleich die grossen Schweizer Stiftungen als Akteure der Wirtschaft nicht zu unterschätzen sind und deren Tätigkeit beachtlichen Einfluss auf die Wirtschaft haben. Nur schon aus diesem Grund kann es sich eine Stiftung aus Reputationsgründen nicht leisten, sich Corporate Governance-Standards komplett zu verschliessen, denn die Agency-Problematik tritt eben nicht nur in Aktiengesellschaften, sondern auch in Stiftungen auf – einzig die Akteure unterscheiden sich. Stiftungen sind verselbständigte Vermögen ohne Eigentümerschaft. Während in Aktiengesellschaften das Aktionariat als Eigentümer fungiert und diesbezügliche Interessen hat, fehlt diese Eigentümerschaft bei Stiftungen. An deren Stelle tritt der Stiftungszweck beziehungsweise der Stifter, der zwar keinen Anspruch auf Auszahlungen hat, trotzdem aber erwartet, dass das gestiftete Geld im Sinne des Stiftungszwecks eingesetzt wird. Doch auch dieser kann von den Stiftungsorganen in einer Art und Weise verfolgt werden, die dem Stifter widerstrebt. Ein weiterer Unterschied hinsichtlich der Agency-Problematik ist, dass es bei Stiftungen keine Marktkontrolle gibt: Während Publikumsgesellschaften unter Übernahmepressur geraten könnten, fehlt dies bei Stiftungen gänzlich. Einzige Aufsicht bei Stiftungen ist die Stiftungsaufsicht, welche aber nur grundlegende Kontrollaufgaben wahrnimmt, was nicht im Geringsten mit der Eigentümer- und Marktkontrolle bei Aktiengesellschaften verglichen werden kann. Weiter verschärft wird diese Problematik dadurch, dass der Stifter bei vielen Stiftungen bereits verstorben ist und daher nicht mehr als Quasi-Eigentümer eine gewisse Kontrolle ausüben kann. So kümmern sich bei den meisten Stiftungen die Stiftungsorgane als Dritte um das gestiftete Vermögen, was zu einem Governance-Problem führen kann.¹⁴ Nachfolgend werden drei Problembereiche, welche durch die Foundation Governance eingedämmt werden sollten, kurz beleuchtet:

3.2.1. Problematische Verhaltensweisen

Hier bestehen drei mögliche Problematiken: Erstens können Stiftungsmittel für eigene Zwecke verwendet werden. Zweitens besteht die Gefahr, dass sich die Stiftungsorgane überhöhte Entschädigungen auszahlen lassen. Und drittens besteht die Gefahr der Selbstbeauftragung von Stiftungsorganen als Rechtsanwälte, Steuerberater etc. Derzeit ist im Stiftungsbereich Ehrenamtlichkeit zwar weit verbreitet, weshalb die Gefahr der überhöhten Entschädigungszahlungen auf den ersten Blick aktuell als eher gering einzuschätzen ist. In Zukunft kann aber von einer erhöhten Professionalisierung ausgegangen werden, was dazu führen wird, dass die Verbreitung der ehrenamtlichen Tätigkeit abnimmt und sich die Gefahr der Auszahlung überhöhter Entschädigungen akzentuieren könnte.¹⁵

3.2.2. Problematische Personenkonstellationen

In Stiftungen gibt es keine Eigentümerschaft, welche die Stiftungsorgane wählen kann. So besteht die Gefahr, dass sich der Stiftungsrat immer wieder selbst zusammensetzt, obgleich diese Zusammensetzung möglicherweise nicht unbedingt förderlich ist für den Stiftungszweck. Auch ist zu beobachten, dass die Funktionentrennung und die Gewaltenteilung in Stiftungen gegenüber gewinnorientierten Unternehmen zurückbleibt. So ist es problematisch, wenn eine Personalunion besteht und dem Stiftungsrat Personen angehören, die auch in der Geschäftsführung der Stiftung die operativen Entscheidungen treffen. Dies verhindert eine eigentliche Kontrolle, welche dem Stiftungsrat in Stiftungen anstelle des Verwaltungsrats in Aktiengesellschaften als eine Hauptaufgabe zukommt.¹⁶

14 HOFSTETTER (FN 8), S. 45 f.; SPRECHER (FN 9), o.S.; VON SCHNURBEIN GEORG/FRITZ TIZIAN, Foundation Governance im Kontext von Reputation und Legitimation, in: ZögU – Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen, 35(1), S. 63.

15 HOFSTETTER (FN 8), S. 47 f.; SCHÖBEL (FN 1), S. 18.

16 HOFSTETTER (FN 8), S. 47; SCHÖBEL (FN 1), S. 19.

3.2.3. Problematische Anlage- und Ausschüttungsstrategien

Bei dieser Problematik werden die Geldmittel entweder schlecht und / oder zu riskant – beispielsweise zu wenig diversifiziert – angelegt oder ein grosser Teil des Stiftungsertrags versickert im Verwaltungsaufwand und kommt nicht dem Stiftungszweck zugute. Auch besteht die Gefahr einer passiven Stiftung: Diese zeichnet sich dadurch aus, dass die Erträge des Stiftungsvermögens ungenügend ausgeschüttet werden und Vermögen angehäuft wird, anstatt den Stiftungszweck ausreichend zu befriedigen.¹⁷

3.3. Foundation Governance in der Schweiz

Die Foundation Governance liegt bei der Geburt einer Stiftung sehr stark in der Hand des Stiftungerrichters. So kann er im Voraus bereits viele Vorkehrungen treffen, um eine geeignete Foundation Governance zu etablieren und so die Gefahr von zukünftiger Misswirtschaft minimieren. Nach der Gründung der Stiftung ist das strategische Gremium für die Foundation Governance der Stiftungsrat. Er muss gegenüber einer allfälligen Geschäftsführung unabhängig sein und genügend Kompetenz zur Umsetzung einer wirkungsvollen Foundation Governance mitbringen.¹⁸ Das Stiftungsprivatrecht der Schweiz ist – wie bereits erwähnt – sehr liberal ausgestaltet und setzt nur wenige (zwingende) Leitlinien in Bezug auf die Foundation Governance. Dies macht die Selbstregulierung umso notwendiger und deren Beachtung muss ein grösseres Gewicht beigemessen werden.

3.3.1. Zwingendes Recht: Stiftungsrechtsrevision 2006 und derzeit laufende Revision

Zum 1. Januar 2006 trat das teilrevidierte Schweizer Stiftungsrecht in Kraft, welches unter anderem Veränderungen des Privatstiftungsrechts hinsichtlich der Foundation Governance vorsah. So ergaben sich mit der Revision neue Anforderungen betreffend die Buchführungspflicht und die Revision. Ausserdem ergaben sich damit neue Pflichten des Stiftungsrats im Falle einer Überschuldung und Zahlungsunfähigkeit, oder wenn der ursprünglich vorgesehene Zweck der Stiftung aufgrund (gesellschaftlicher) Veränderungen eine andere Bedeutung erhalten hat. Die Transparenz wurde durch neue Eintragungspflichten im Handelsregister erhöht.¹⁹

Derzeit läuft eine weitere Revision des Stiftungsrechts, welche auf die Parlamentarische Initiative des ehemaligen Ständerats Werner Luginbühl (BDP) «Schweizer Stiftungsstandort. Stärkung»²⁰ zurückgeht. Der Vorentwurf zeigt, dass die Transparenz hinsichtlich der steuerbefreiten Stiftungen erhöht werden soll und Haftungsbeschränkungen in Fällen von leichter Fahrlässigkeit bei unentgeltlicher Tätigkeit für eine Stiftung vorgesehen sind. Letzteres dürfte die Rekrutierung Freiwilliger erleichtern. Auch soll die Stiftungsaufsichtsbeschwerde klarer geregelt werden, so dass Personen mit berechtigten Interessen klagen können. Des Weiteren betrifft die geplante Revision die Stiftungszweckänderung, was die Schweizer Stiftung anpassungsfähiger machen soll.²¹

3.3.2. Selbstregulierung: Swiss Foundation Code

Im Rahmen der Selbstregulierung schaffen Organisationen der Wirtschaft Regeln für sich selbst, was insbesondere deshalb vorteilhaft ist, weil somit jene Akteure Regeln schaffen, welche über das notwendige Know-How verfügen. Durch Selbstregulierung kann eine Branche dem Gesetzgeber zuvorkommen und dessen Eingriffe und Restriktionen mittels zwingenden Rechts verhindern.

17 HOFSTETTER (FN 8), S. 47 f.; SCHÖBEL (FN 1), S. 23 f.

18 HOFSTETTER (FN 8), S. 49.

19 SPRECHER (FN 9), o.S.

20 Parlamentarische Initiative 14.470.

21 RONCORONI GIACOMO, Das Neue Stiftungsrecht – Überblick und Ausblick, in: Der Schweizer Treuhänder, 10/06, S. 736 ff.; SPRECHER (FN 9), o.S.; SCHUBIGER BENNO, Braucht die Schweiz eine Reform ihres Stiftungsrechts?, abgerufen von <blog.stiftungschweiz.ch/braucht-die-schweiz-eine-reform-ihres-stiftungsrechts/> am 8. Dezember 2020.

Dies ermöglicht grössere Autonomie in der Ausgestaltung der Führung und Organisation einer Stiftung und bildet die Grundlage für massgeschneiderte Lösungen im jeweiligen Einzelfall.²²

In der Schweiz gibt es seit Oktober 2005 den Swiss Foundation Code, der von Swiss Foundations herausgegeben wird. Es handelt sich dabei um den ersten Code für eine Good Governance für Förderstiftungen, womit ihm eine gewisse Vorbildfunktion für andere Kodizes im europäischen Raum zukommt. Der Swiss Foundation Code ist der Selbstregulierung zuzurechnen und beinhaltet Empfehlungen, die sich an Förderstiftungen unterschiedlicher Grösse wenden. Er soll der Umsetzung des Stifterwillens dienen und bei verschiedenen Anspruchsgruppen der Stiftung Vertrauen schaffen.²³ Der Swiss Foundation Code folgt den Grundsätzen wirksame Umsetzung des Stiftungszwecks (Grundsatz 1), Checks and Balances (Grundsatz 2) und Transparenz (Grundsatz 3).²⁴

Neben diesen Grundsätzen definiert der Code konkrete Empfehlungen, mit welchen den weiter oben erörterten Problematiken begegnet werden kann. Durch die fehlende Eigentümer- und Marktkontrolle kommt dem Stiftungsrat die volle Entscheidungsbefugnis zu. Dies in Kombination mit der Erneuerung im Sinne des Kooptationsprinzips und der Selbstbeaufsichtigung stellt hohe ethische Anforderungen an die Stiftungsratsmitglieder: Ihnen muss bewusst sein, dass sie immer im Sinne des Stiftungsinteresses handeln und Eigeninteressen in einer Stiftung nichts zu suchen haben.²⁵

Die Trennung von Geschäftsführung und dem Stiftungsrat als Aufsichtsorgan ist zu präferieren, allerdings – insbesondere bei kleineren Stiftungen – nicht immer möglich. Im Falle der Nicht-Trennung der beiden Ebenen wäre es wünschenswert, zumindest einige Personen in den Stiftungsrat zu wählen, welche von aussen kommen und somit eine gewisse Unabhängigkeit haben.²⁶ Um dem Problem des Personenfilzes zu begegnen, empfiehlt der Swiss Foundation Code, dass gewisse Zwangsrochaden oder gar Amtszeitbeschränkungen vorgesehen werden.²⁷ Es besteht auch die Möglichkeit, dass der Stiftungsrat nicht (nur) mittels des Kooptationsprinzips erneuert wird, sondern dass ein unabhängiges Gremium – z.B. die Stifterfamilie, der Stifter oder Dritte – den Stiftungsrat jeweils (zumindest teilweise) wählen.²⁸

Um eine gewisse Transparenz in Bezug auf die Arbeit des Stiftungsrats zu gewährleisten, empfiehlt der Swiss Foundation Code regelmässige Sitzungstermine des Stiftungsrats und vorgängig eine geeignete Informationspolitik. Während die Versorgung mit Informationen in Aktiengesellschaften durch den Verwaltungsratspräsidenten geschieht, ist dies bei Stiftungen die Aufgabe des Stiftungsratspräsidenten. Es muss transparent hinsichtlich Strukturen, Stiftungspolitik und Entschädigungen kommuniziert werden. Transparenz wird umso wichtiger, wenn der Stifter nicht mehr in das Stiftungsgeschehen eingreifen kann und die Stiftung auf Zuwendungen in Form von Spenden angewiesen ist. Auch wichtig ist die Selbstevaluation: Der Stiftungsrat sollte sich im Minimum einmal im Jahr treffen, um die Stiftungsarbeit, den Aufbau und die Struktur der Stiftung sowie die Stiftungspolitik kritisch zu hinterfragen.²⁹

22 WINZELER CHRISTOPH, Selbstregulierung: Grenzen und Möglichkeiten, in: St.Galler Handbuch zum Schweizer Finanzmarktrecht – Finanzmarktaufsicht und Finanzmarktinfrastrukturen (SGHB Band I), PETER SESTER/BEAT BRÄNDLI/OLIVER BARTHOLET/RETO SCHILTKNECHT (Hrsg.), S. 166 ff.; SPRECHER (FN 9), o.S.; s.a. MANUEL STUTZ, Anlegerschutz und FinTech – unter besonderer Berücksichtigung von Zahlungssystemen, Crowdfunding, Tokens und Robo Advice, Diss., St.Gallen 2019, S. 403 ff. mit weiteren Ausführungen zu den Vor-, aber auch den Nachteilen der Selbstregulierung im Finanzmarkt.

23 SCHÖBEL (FN 1), S. 95 f.

24 VON SCHNURBEIN/FRITZ (FN 14), S. 64.

25 SPRECHER THOMAS/EGGER PHILIPP/VON SCHNURBEIN GEORG, Swiss Foundation Code 2015 – Grundsätze und Empfehlungen zur Gründung und Führung von Förderstiftungen, in: Schriftenreihe Foundation Governance, Band 11, PHILIPP EGGER/GEORG VON SCHNURBEIN (Hrsg.), S. 37.

26 HOFSTETTER (FN 8), S. 49; SPRECHER/EGGER/VON SCHNURBEIN (FN 25), S. 37, 70 f.

27 HOFSTETTER (FN 8), S. 49.

28 SPRECHER/EGGER/VON SCHNURBEIN (FN 25), S. 45.

29 HOFSTETTER (FN 8), S. 55 ff.

Neben den Empfehlungen, welche auf die Verhaltensweisen und personellen Verflechtungen abzielen, befasst sich der Swiss Foundation Code auch mit dem Einsatz von Stiftungsmitteln. So soll der Stiftungsrat nach unternehmerischen Grundsätzen handeln und verfügbare Mittel zeitnah einsetzen, was die Problematik einer passiven Stiftung vermindert. Auch soll ein Augenmerk darauf gerichtet werden, dass die eingesetzten Verwaltungskosten in einem sinnvollen Verhältnis zur Wirkung der Unterstützungsgelder stehen.³⁰ Um das gestiftete Vermögen optimal anzulegen und zu bewirtschaften, sieht der Swiss Foundation Code ebenfalls Empfehlungen hinsichtlich der Wahl von Investitionen und der Unabhängigkeit der Vermögensverwaltung beziehungsweise des Vermögensverwalters vor.³¹

4. Fazit

Ein Grundpfeiler des «Stiftungsparadies Schweiz» ist das liberal ausgestaltete Stiftungsprivatrecht. Es beinhaltet deutlich weniger (zwingende) Regelungen als das Aktienrecht. Umso mehr kommt der Foundation Governance im Rahmen der Selbstregulierung eine erhöhte Bedeutung zu. Der Swiss Foundation Code gibt Stiftungserrichtern und Stiftungsräten ein Hilfsmittel in die Hand, um geeignete Instrumente für den Einzelfall zu identifizieren und zu implementieren. Ob die Foundation Governance in Zukunft – ähnlich der Corporate Governance – vermehrt Eingang ins materielle Recht oder in die gesteuerte Selbstregulierung findet, wird die Zukunft zeigen. Hier sind aber insbesondere auch die Stiftungen in der Pflicht: Solange die Selbstregulierung funktioniert und sich nicht ein Skandal an den anderen reiht, wird der Gesetzgeber keinen Handlungsbedarf erkennen und die Stiftungen vor (zu viel) Regulierung bewahren, was das «Stiftungsparadies Schweiz» in Zukunft noch paradiesischer machen dürfte.

30 SPRECHER/EGGER/VON SCHNURBEIN (FN 25), S. 80 f.

31 SPRECHER/EGGER/VON SCHNURBEIN (FN 25), S. 92 f.







Die Nachhaltigkeit als neues Standbein der Corporate Governance



Prof. Dr. Michèle Sutter-Rüdisser

Titularprofessorin für Organizational Control und Corporate Governance Universität St. Gallen, ständige Gastprofessorin für Banking and Insurance an der School of Management der Università Commerciale Luigi Bocconi in Mailand, unabhängiges und nicht-exekutives Mitglied verschiedener Verwaltungsräte



Dr. Felix Horber

Executive M.B.L.-HSG, Generalsekretär der Swiss Re, nebenamtlicher Oberrichter in Zug und Lehrbeauftragter an der Universität St. Gallen

Der Terminus «Corporate Governance» ist kein präziser juristischer Begriff, sondern eine Leitidee, die Fragen der Organisation und Unternehmensführung im Kontext regulatorischer Auflagen zu umschreiben versucht. Die Corporate Governance hat sich ständig weiterentwickelt und ist nicht mehr nur auf die Aktionärsinteressen fokussiert, sondern ist im Dienst von allen unternehmensrelevanten Anspruchsgruppen zu verstehen. Die Unternehmen sind Teil der öffentlichen Diskussion geworden und haben sich Fragen zu stellen, die weit über den Unternehmenszweck hinausgehen. Gesellschaftspolitische Themen werden zu Traktandenpunkten in Sitzungen des Verwaltungsrates und des Managements. Die Unternehmen werden dadurch gezwungen, sich mehr denn je vertieft mit Fragen zu befassen, die sonst Gegenstand parlamentarischer Debatten bilden oder in den Social Media zirkulieren. In diesem Zusammenhang kommt namentlich dem Aspekt der Nachhaltigkeit ein zentraler Stellenwert zu. Nachhaltigkeit impliziert Langfristigkeit und zeigt damit auf, wie ein Unternehmen auf der Zeitachse gegenüber den Stakeholdern seine soziale Verantwortung wahrnehmen will. Der Umgang mit der Nachhaltigkeit wird zu einem differenzierenden Beurteilungskriterium bei der Performancebewertung eines Unternehmens.

Diese Entwicklung ist erst der Anfang einer Denkweise, welche die Diskussion über die zukünftige Corporate Governance prägt. Bei Lichte besehen sind die Leitplanken für ein erweitertes Verständnis einer modernen Corporate Governance bereits heute gelegt:

- Die Unternehmen haben nicht nur ein generisches Mission Statement vorzuweisen, sondern den «Corporate Purpose», d.h. den gesellschaftlichen Unternehmenszweck, konkret und verständlich darzulegen.
- Die Unternehmen werden aufgefordert aufzuzeigen, wie der Übergang vom Shareholder-Value-Ansatz zum «Shared-Value-Konzept» vollzogen und so Mehrwert für alle Anspruchsgruppen generiert werden kann.
- Die Unternehmen werden darlegen müssen, wie sie die ESG-Kriterien (Ethical, Social and Governance) intern umsetzen und wie diese nach aussen hin zu messbaren Kriterien werden.
- Die Unternehmen werden darüber berichten müssen, wie das Thema Nachhaltigkeit in die Unternehmensstrategie integriert wird und wie die Nachhaltigkeitsüberlegungen den Entscheidungsprozess auf Stufe Management beeinflussen.
- Die Unternehmen werden – im Zuge der Implementierung des indirekten Gegenvorschlags zur Konzernhaftungsinitiative – den Aktionären Rechenschaft darüber abzulegen haben, wie die Corporate Social Responsibility wahrgenommen wird und welche konkreten Massnahmen getroffen werden, um dieser spezifischen Verpflichtung nachzukommen.

Diese wenigen Beispiele zeigen, dass bei der zukünftigen Beurteilung und Bewertung eines Unternehmens neben den klassischen «Financial Figures» die «Non-Financials» zunehmend in den Fokus geraten und zu einer Abrundung und Komplettierung des Erscheinungsbildes eines Unternehmens führen. In diesen Kontext passt auch der Ruf nach einer Taxonomie, also eines Bewertungsrahmens, innerhalb dessen die Unternehmen anhand einheitlicher Definitionen und Methoden risikorelevante Entwicklungen beurteilen und ihre Risk Exposures darlegen (bspw. klimabezogene Finanzrisiken). Die daraus resultierende Zusammenführung von Finanz- und Nachhaltigkeitsberichterstattung ist ein bedeutender Schritt für den Übergang zu einem integrierten Reporting.

Im Zuge dieser Entwicklung haben Proxy Advisors, institutionelle Investoren und Regulatoren begonnen, ihre Policies anzupassen und so ihre Vorstellungen zu kommunizieren, wie das Thema Nachhaltigkeit aus Unternehmenssicht inskünftig zu adressieren und wie dieser Entwicklungsschritt in der Unternehmensberichterstattung zu reflektieren ist. Auch hier zeigt sich klar die Tendenz, Unternehmen nicht mehr nur an ihren Finanzziele zu messen, sondern auch die Story Line zu erfahren, die letztlich zur Performance geführt hat.

Diese Akzentverschiebungen in der Corporate Governance World werden die Unternehmen vor neue Herausforderungen stellen. Verwaltungsrat und Management sind gut beraten, sich frühzeitig diesen Themen anzunehmen, damit im Unternehmen zeitnah die geforderten Weichenstellungen vorgenommen werden können. Dies ist auch eine gute Gelegenheit zu prüfen, ob im Verwaltungsrat und auf Stufe Management nach wie vor die nötigen «Skills und Competencies» vertreten sind, um auf diese neuen Strömungen der Corporate Governance adäquat, d.h. dem Zeitgeist und Interesse der involvierten Stakeholder entsprechend, reagieren zu können.

Die aufgezeigten Weiterentwicklungen der Corporate Governance werden die Unternehmen ganzheitlich erfassen und zu einer Dynamisierung des Beziehungsnetzes zu den Stakeholdern führen. Die Unternehmen werden im Schnittstellenbereich zur Öffentlichkeit noch stärker wahrgenommen werden, womit die Corporate Social Responsibility inklusiv Nachhaltigkeit automatisch ins Zentrum rückt.

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Universität St. Gallen

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Website: www.nicg.net
E-Mail: info@nicg.net
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