

**NICG** Network for Innovative  
Corporate Governance

# Board Dynamics

## Tackling Emerging Strategies

we are curious, free spirits,  
and non-profit

# NICG – Network for Innovative Corporate Governance

Adaptivity. Flexibility. Endurance

*«There is in life a power, a consciousness, a dynamism that is greater than human control. When we acknowledge that we are navigating the skies, sailing the high seas, and not controlling life, we make far more profitable, ethical, and sustainable decisions.»*

Lisa Miller, professor at Teachers College, Columbia University

## **Dynamism – likely the word of the hour.**

For many companies, current market events are characterized by dynamics, be it social (COVID19), political (territorial conflicts), environmental (climate crisis), or economic (inflation and supply chain bottlenecks). As a strategic management and control instrument, the board of directors and the senior management are jointly required to derive suitable action measures to ensure the continuing success of the organization.

Being able to develop measures with foresight and precision (adaptivity), to integrate them with almost no reaction time (flexibility), and to have the courage even in the long run to take decisions that are sometimes unfamiliar or its outcome not fully known (endurance), are key attributes that the organization must deal with. It has become even more difficult to make these decisions because of the limited information available. In addition, the information that is available is difficult to interpret and requires courage to implement. For once looking at the individual- and thus beyond the organizational-level, it is central to focus on those factors that can be controlled (navigating the skies and sailing the high seas) and to accept those that are out of reach (to control life).

The 2022/2 edition of our Board Dynamics proves how diverse corporate governance is. As evidenced by the multi-faceted articles written by our authors, the NICG – as a curious, non-profit, academic network full of free spirits – contributes to advancing topics with both experienced experts and young, talented researchers. We are at the pulse of the time. Are you too? Let us tackle new projects together and drive corporate governance forward.

Kind regards



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# A Multi-stakeholder Approach: Is the Role of the Modern Stakeholder Changing to one with Corporate Influence?



## Cornel Germann

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«Understand stakeholder symmetry: Find the appropriate balance of competing claims by various groups of stakeholders»

Warren G. Bennis

## 1. Introduction

Early in the 1980, Milton Freedman and David Reed for the first time emphasized the need for stakeholder inclusions by the hypothesis that the primacy of shareholder interests at one point in time becomes completely outdated.<sup>1</sup> By introducing the notion of «the wide sense of stakeholder», group or individuals crucial for the achievement of objectives, and «the narrow sense of stakeholder», group or individuals crucial for the continued survival, the corporate actions shall be directed towards all groups and individuals having a stake of interest involved. In that sense, their theory was the antithesis of the at this time leading Milton-doctrine campaigning for «The Social Responsibility of Business is to Increase its Profits».<sup>2</sup>

As of today, beyond the pure interest of generating profit, the board of directors is strongly required to involve the multistakeholder-community. The positive aspect of its inclusion is that it will have an enormous impact to drive future-oriented actions forward. ESG, political risk, and resource-saving actions are just three examples. The negative aspect is that engaging with multifaceted stakeholders is also a balancing act in-between conflicting interest. Finding an adequate sense of balance between the commercial and the non-commercial interest of the various stakeholder views and the resulting requests/demands increases the complexity of the board's work.<sup>3</sup> In addition to the economic-social-political environment that has already highly challenged the board in recent years, the stakeholder-inclusion trend is expected to intensify.

1 Freeman, R. & Reed, D. (1983). Stockholders and Stakeholders: A New Perspective on Corporate Governance. California Management Review, 25(3), 88–106.

2 Friedman, Milton (1970, September 13). The Social Responsibility of Business is to Increase its Profits. The New York Times.

3 Ingenbleek, P. T. M. and Immink, V. M. (2010). Managing Conflicting Stakeholder Interests: An Exploratory Case Analysis of the Formulation of Corporate Social Responsibility Standards in the Netherlands. Journal of Policy & Marketing, 29(1), 52–65.

However, the higher complexity the board faces is not the crucial point this article wants to emphasize. On the contrary, it is desirable to achieve the best for the organisation, the society, and the environment from a dialogue based on partnership.<sup>4</sup> From the author's perspective, yet it is rather the increased (over-)influence on the board's area of responsibility by some stakeholders that this article views with skepticism. In practice, it is increasingly seen that the board is 'bound by instructions' to follow third-party recommendations to avoid criticism/potential breach of regulations. This particularly intends the forthcoming article to highlight by accentuating it with practical examples.

## 2. The Key Stakeholders Perspective

In principle, defining key stakeholders is company-specific and should be determined strategically by the board and the senior management. This is not a one-time but should be a constantly repeating process. Despite the company-specific individuality addressed, for the board four stakeholders have become increasingly important over the course of time that in the following it is briefly touched upon:

### 2.1 Institutional investors set the pace with the small shareholder becoming inventive

Since the dot-com crisis, institutional investors have greatly outnumbered private individuals and family shareholders (see figure 1). Although at the AGM the exercise of the voting right is decisive, with prerequisite to prior share register entry (30–40% of shareholders forego the entry as they invest only for dividend-purpose reasons), the trend towards over-proportionate (institutional shareholders) or under-proportionate (family or small shareholders) voting power will continue to increase.<sup>5</sup> For the board/management of the companies concerned, this will cause additional work. The most obvious example is the form of influence, which can range from shareholder-friendly corporate governance structures («adapt»), the sale of shares in the event of dissatisfaction («exit»), the activist exercise of shareholder rights («voice»), or a board seat request («enter»). On the other hand, with the loss of share votes, small shareholders lack the power to effectively defend their interests, which is reflected in the formation of advisory pools («infomedaries») or protective voting associations («vote pooling»).

Figure 1: Shareholder Structure of SMI Expanded Organisation<sup>6</sup>

SMI Expanded (2017)	SIX notification (weighted market cap.)	SIX notification (unweighted)
<b>By investor category:</b>		
Institutional*	57,8	69,4
Public / state fund	4,6	5,5
Private	27,9	12,3
Non-categorizable	9,7	12,8
<b>By institutional*:</b>		
Investment company	29,1	51,7
Ownership / participation**	15,9	1,4
Companies	7,7	5,4

\* Institutional includes: Investment companies, banks, proprietary / shareholdings, hedge funds, pension funds / funds, foundations, corporations, insurance companies.

\*\* Companies with own-equity shares and, if applicable, in other companies.

4 Silverstein, K. (2019, 26. July). Institutional Investors Have More Power than Governments to Shape Climate Future. Forbes.

5 Horber, F. (2022, Juni). Wenn eine Minderheit eine AG kontrolliert. The Reporting Times.

6 Seiler Zimmermann, Y. & Zimmermann, H. (2019, 18. Juni). Wem gehören die schweizerischen börsenkotierten Gesellschaften? Die Volkswirtschaft.

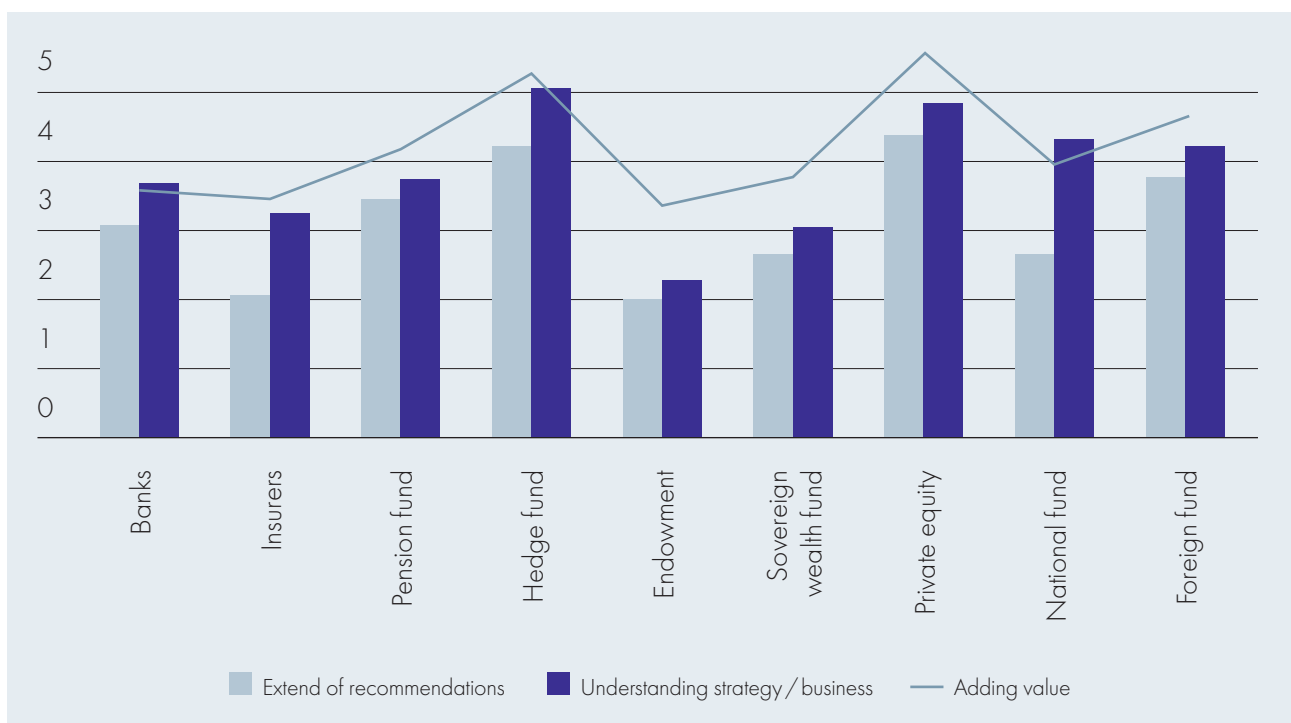
The handling of the two shareholder groups should follow the principle of equal treatment, which in practice yet increasingly ends in a patchwork problematic. Larger institutional investors often can question the strategy and provide input at the specific organized roadshows, leading to a greater proximity to board and management members and a higher information base. Having the opportunity to give company-specific feedback allows, on the one hand, to exert pressure on the board/management and, on the other hand, to align the corporate strategy with the investor-specific investment targets developed. The latter, in turn, can put the board/management in a quandary, as they have the difficult task of constantly distinguishing between goal-oriented from non-goal-oriented inputs. Consequently, there are three important questions that companies need to ask:

- What kind of institutional investors are influencing («investment style and horizon»)?

- How well do they understand the business («expertise»)?
- How strong is their added value in the feedback process («engagement»)?

In principle, all three factors are a question of (human) resources. A study that reviewed the role of the institutional investor in Germany identified that especially profit-driven investors exert high influence/pressure (see figure 2). The most prominent players among them are hedge funds, private equity, pension/national funds, and banks. Following those insights, company representatives who are in touch with institutional investors should collect the information they receive and «store» it in a central system point. This makes it possible to bundle the information and, after a strategic discussion by the board/management, to implement or discard the input accordingly.<sup>7</sup>

Figure 2: Institutional Investor Activity and Value-Add in a Company Perspective<sup>7</sup>



Note: Figure 2 shows the survey response-mean of a 6 Likert-scale (0 = none at all, 5 = very strong; N = 20)

<sup>7</sup> Nix, P. (2012). The Role of the Institutional Investor in Corporate Governance: Evidence from German Corporations [Dissertation, University of Surrey].

## 2.2 Regulator and politics intervene in entrepreneurial decision-making

Since the financial crisis 2008/2009, the influence of the regulatory (financial services) and political (parliament, initiative) side has increased and, in some cases, has (over)crossed the board's area of responsibility. The reasons for this are manifold but can be traced back to operational limitations, the handling of capital flows, and the perception of social interests. Companies are required to implement these measures, even if they are referred to as «voluntary», because they can result in potential legal and enforcement proceedings. Well-known examples of this in recent years include (list not exhaustive):

- Business operations: In the wake of several money laundering deficiencies, FINMA for certain banks enforced the adjustment of recruitment and remuneration/sanctions policy, the prohibition for M&A transactions, and the review of independent third-party auditors;<sup>8</sup>
- Dividends: To restrict the decision-making power, the Cantonal parliaments submitted a motion to disempower the board of their Cantonal Banks in determining the appropriation of profits (dividend amount) and use (dividend purpose);<sup>9</sup>
- Board candidacy assessment: To ensure the board of director has the necessary competences as supervisory and control body, FINMA assesses every potential new board member prior to election proposal to the Annual General Meeting or the Cantonal Parliaments;<sup>10</sup>
- Board appointment: In financial services alleged to have been part of investor fraud, FINMA took control of the business management and appointed an investigative lawyer as board member;<sup>11</sup>

- Capital flow: In the wake of the COVID crisis, FINMA and the ECB demanded the temporary suspension of dividend and share buyback programs to support the economy, despite already existing capital buffers;<sup>12</sup>
- Human resources allocation: Due to Brexit and the exodus of investment/trading activities to other European cities such as Paris or Frankfurt, the ECB requires banks to increase their human resources and lower the passporting-exposure (cross-border transaction support from UK-based to EU-based banks and/or service providers).<sup>13</sup>

From the perspectives of business and industry representatives, such measures are not target-oriented. As a consequence, beyond Switzerland, the regulators work is not without criticism. Some journalists, for example, are speaking of a loss of reality on the part of the ECBs inflation policy.<sup>14</sup> ECB policies yet have had already been criticized years before (e.g. John Cryan Ex-CEO Deutsche Bank). Another specific instance many times mentioned is the requirement to waive minus interest, penalizing safety-oriented banks with a high capital buffer.<sup>15</sup> Also, Deutsche Industriebank (IKB) critically reflected in a blog the ECB for abusing its operational independence, which is partly due to the packages of measures that have exceeded their effectiveness (especially with regard to its influence on the real economy).<sup>16</sup> Therefore, especially in view of the examples provided above, one has to ask: How much power can the regulator exert on entrepreneurial decisions if they miss/not fully achieve their target?

8 FINMA (2020, 20. Februar). Schwere Mängel in der Geldwäschereibekämpfung bei Julius Bär [Medienmitteilung].

9 finews (2022, 25. April). Kanton will mehr Macht über die Dividende der ZKB. finews.ch.

10 Städli, M. (2012, 23. Dezember). Finma greift bei ZKB ein. Neue Zürcher Zeitung.

11 Gilb, C. (2019, 13. Januar). Zug: Finma greift bei mutmasslicher Betrügerfirma ein. Luzerner Zeitung.

12 Finma. (2020, 25. März). FINMA unterstützt das Liquiditätspaket des Bundesrats und rollt weitere Massnahmen aus [Medienmitteilung].

13 Enria, A. (2022, 19. May). The desk mapping review – integrating Brexit banks into European banking supervision [blog]. Arnold, M. (2022, 19. May). ECB orders banks to beef up 'empty shell' operations set up after Brexit. Financial Times.

14 Rasch, M. (2022, 14. April). Die EZB verliert den Kontakt zur Realität. Neue Zürcher Zeitung.

15 Handelsblatt. (2016, 23. August). Cryan kontra Draghi. Der Deutsche-Bank-Chef hat den Glauben an die Heilungskräfte der EZB-Politik verloren. Cryan warnt, dass die lockere Geldpolitik von Notenbankpräsident Draghi inzwischen mehr Schaden anrichtet als nutzt. Handelsblatt.

16 IKB Deutsche Industriebank (2020, 3. Juli). Unabhängigkeit der EZB: In guten wie in schlechten Zeiten [Blog]?

We think it is time to critically reflect on the regulatory and political influence in corporate governance and to define a stronger dividing line between control/supervision vs. entrepreneurship/responsibility. Especially regarding the revision of Swiss Company Law with effect 1 January 2023, the responsibility of the board of directors has been confirmed and thus also applies to regulator representatives and their organisations. As it is a question often discussed with the external auditor, one has also to reflect critically whether it is time to come up with a supervisory authority that regulates the regulators.<sup>17</sup>

### 2.3 Proxy advisors' power in voting rights and its never-ending discussion of conflict of interests

With the change in the shareholder structure and the associated introduction of proxy voting for institutional investors in the US (2003), France (2005), and Switzerland (2014), proxy advisors have gained enormous influence. Studies have shown that their influence accounts for 10 – 20% of votes, with ISS and Glass Lewis wielding the most power with about 97% of worldwide market share.<sup>18</sup>

Despite the strong support for institutional investor in voting decisions, there is a strong voice of criticism against proxy advisors (list not exhaustive):<sup>19</sup>

- Fiduciary duty: There are no standards requiring them to demonstrate that recommendations are in the best interest of the company;
- Transparency: Ownership structures are opaque and there is no controlling authority over their actions. There is also a lack of clear criteria on how reporting is done;
- Risks of outcome: Proxy advisor are not elected by shareholders and therefore bear no reputational nor financial risks;
- Conflicts of interest: Conflicting interest occur while simultaneously advising and assessing governance structures;

17 Roy, A. (2012, 2. May). Who Regulates the Regulators? Forbes.

18 Zuckerschwerdt, A-S. (2016, 22. September). Stimmrechtsberater gewinnen an Einfluss. Die Volkswirtschaft. Chai, S., Fisch, J. & Kahan, M. (2010) The Power of Proxy Advisors: Myth or Reality? Emory Law Journal, 59(4), 869-918.

19 Larcker, D. F., Tayan, B. & Copland, J. R. (2018). The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry. Harvard Law School Forum on Corporate Governance.

- Resource constraints: Reporting is often unspecific, developed with underqualified resources, and a tick-the-box design.

Although proxy advisors are not completely resistant to criticism, as evidenced by the fact that companies are now increasingly able comment against a critical proxy vote and/or proxies supporting transparency claims in who funds their activities, conflict of interest issues remain.<sup>20</sup> One such example is the intransparent and questionable ownership structure of proxies itself (see figure 3).

Figure 3: Proxy Ownership Structure

Proxy Advisor	Ownership
ISS	Deutsche Börse, Genstar Capital
Glas Lewis	Peleton Capital Management, Stephan Smith
Ethos	Fondation Ethos, Pensionskasse Post, Retraite Populaires, Caisse de Prévoyance de l'Etat de Genève CPEG, Pensionskasse Bühler Uzwil (>2%)
Inrate	Infras AG, NEST Sammelstiftung, SG Analytics, Members of Executive Management

Therefore, there are increasing calls to regulate proxy advisors. With the Minder motion (19.4122, 23.09.2019), there has been a first impulse at the level of the Swiss parliament. However, despite approval of the motion in the Council of States (Ständerat, 16.12.2019) and National Council (Nationalrat, 03.06.2020), for example, Swissholding has spoken out against its adoption. According to them, there should be no specific regulation but rather quality and transparency standards improvement in the voting criteria, in the financing source, and in sending preliminary draft reports.<sup>21</sup>

20 Ethos. (2017, 14. Juli). Ja zu Mehr Transparenz bei den Beratungsmandaten der Proxy Advisors (Stimmrechtsberater) [Medienmitteilung].

21 SwissHoldings (2020, 29. Mai). Empfehlungen SwissHoldings Motion Minder (19.4122) Betreffend Stimmrechtsberater [Report].



In practice, it can be recognized that more and more companies want to follow proxy recommendations because they fear additional negative consequences that could be reflected in a lower voting rate at the AGM. However, studies have shown that companies that follow voting recommendations blindly do not gain any added value.<sup>22</sup> On the contrary, most of them had weaker operational performance and higher executive turnover. There, particularly foreign investors tend to follow proxy recommendations more closely in comparison to their national counterparts.<sup>23</sup> The recommendations often lack individual-specificity, clear insights on the variables taken into consideration, and weight specific favors differently (e.g. ISS focuses on governance-related variables, while Glass Lewis focuses on audit/disclosure-related variables). We thus urge companies as well as investor to cautiously decide what recommendations to implement in their voting decision.<sup>24</sup> Also, for the voting shareholders it is important to check rather twice and argue against than to blindly follow all recommendations (keyword comply or explain).

## 2.4 NGOs vehemently push into the boards' action

The voice of NGOs is rising. They are increasingly using social and societal pressure to vehemently insist on compliance with climate, social, and other environmental goals.<sup>25</sup> Measures to do so are in the corporate world often unusual and strongly based on guerrilla tactics. «Wir sind hier, wir sind laut, weil ihr uns die Zukunft klaut», speeches like that of Friday for Future activist Clara Mayer at the Volkswagen AGM 2019 will thus become more frequent and more difficult to handle for the chairperson steering the AGM.<sup>26</sup>

In order to limit reputational risks, companies are thus often forced to seek/foster an active dialogue. This results in new forms of influence and integration features. Two of them, to counteract actionism and make a drastic outside statement, is offering board positions or collaborative partnerships.<sup>27</sup>

However, a partnership should not be entered into blindly. The morals/ethics of such a partnership should be in strong agreement to set up a co-creation of engagement, for the company and the NGO.<sup>28</sup> It is also critical of offering a board position to an activist for the sole purpose of sending a sign to the outside that the company/the board takes the matter seriously. From this perspective, within board actionism will disrupt the company/board culture.<sup>29</sup> The board, which is not consensus-oriented per se but strives to present itself unified to the outside, would increasingly struggle with internal conflicts. Such conflicts would make the strategic and administrative board work more difficult and more complicated, which would further complicate the circumstance of handling the flood of information to which the board is exposed to.<sup>30</sup> As a result, in the long run, offering board positions to activists would rather harm than benefit the initial purposeful intention. From this perspective, it would thus be recommendable to compose the board with NGO/CSR expertise to proactively address the wider stakeholder community demands. There studies have shown that third-parties will start to positively acknowledge the impact post three years the expert joined the board.<sup>31</sup>

22 Larcker, D. F., McCall, A. L. & Ormazabal, G. (2013). Proxy advisory firms and stock option repricing. *Journal of Accounting and Economics*, 56(2-3), 149-169.

23 Balp, G. (2017). Regulating Proxy Advisors Through Transparency: Pros and Cons of the EU approach. *European Company and Financial Law Review*, 14(1), 1-36.

24 Mooney, A. (2019, 21 October). Proxy advisers under regulators' glare over transparency concerns. *Financial Times*. Doyle, M. (2018). The Conflicted Role of Proxy Advisors. *Harvard Law School Forum on Corporate Governance*. Choi, S. J., Jill, E. F. & Kahan, M. (2009). Director Elections and the Role of Proxy Advisors. *Southern California Law Review*, 82, 649-702.

25 Bruner, R. F. & Warburg, G. F. (2018). Governing NGOs: A Challenge in Four Acts. *Stanford Social Innovation Review*.

26 Welt.de. (2019, 15. Mai). 18-jährige Aktivistin greift VW scharf auf der Hauptversammlung an. *Welt*.

27 Ceesay, L. B. (2020). Exploring the influence of NGOs in Corporate Sustainability Adoption: Institutional-Legitimacy Perspective. *Journal of Business Research*, 9(2), 135-147.

28 Baur, D. & Palazzo, G. (2011). The Moral Legitimacy of NGOs as Partner of Corporations. *Business Ethics Quarterly*, 21(4), 579-604. Nahi, T. (2018). Co-creation for sustainable development: The bounds of NGO contributions to inclusive business. *Business Strategy and Development*, 2(1), 88-102. Hoepner, A. G. F. (2021). The Impact of NGO activism. In: Mayer, C. & Roche, B., *Putting Purpose Into Practice: The Economics of Mutuality*. Oxford University Press.

29 Bebchuk, L. A., Brav, A. Jian, W. & Keusch, T. (2020). Dancing with activists. *Journal of Financial Economics*, 137, 1-41.

30 van Ees, H., Gabriëlsson, J. & Huse, M. (2009). Toward a Behavioral theory of Boards and Corporate Governance. *Corporate Governance: An International Review*, 17(3), 307-319.

31 Chen, S. & Hermes, N. (2022). Corporate Social Responsibility and NGO Directors on Boards. *Journal of Business Ethics*, 175, 625-649.

### 3. Conclusion

As have Milton Freedman and David Reed be hesitant to suggest specific strategies on how to approach the multi-faceted stakeholders, this article also foregoes to provide a best practice approach. Yet despite not having the one solution ready, the author is convinced that for addressing the emerging demands stakeholders have, to return to Warren G. Bennis's quote at the beginning, it requires an adequate balance to deal with that symmetry. As in mathematics, symmetry can be observed in time, as a spatial relationship, through geometric transformations, and through other types of functional transformations. It is therefore also important in business to adopt to different perspectives to unite the symmetrical relationships.<sup>32</sup> This means, from a board-perspective, to find compromises to fulfil the duties and make beneficial entrepreneurial decisions and, from a stakeholder-perspective, to drive initiatives forward and establish business-environmental-friendly conditions.

32 Mainzer, K. (2005). *Symmetry and Complexity: The Spirit and Beauty of Nonlinear Science*. World Scientific.



# Bank Boards, Risk Culture and Sustainability



## Prof. Dr. Kern Alexander

Kern Alexander is Professor of International Financial Regulation and holds the Chair in Law and Finance at the University of Zurich. His research focus is on bank corporate governance and systemic risk in financial markets. He has advised bank boards and senior management on corporate governance, risk management and environmental sustainability and has taught executive education courses for many global banks and financial institutions. He is the author of many research articles and books, including *Principles of Banking Regulation* (Cambridge University Press, 2019) and *Brexit and Financial Service* (co-authored, Bloomsbury, 2018). He has also authored commissioned reports for the G20, the United Nations, the European Parliament and the European Commission on financial regulation and environmental sustainability. His 2014 report, 'Stability and Sustainability in Banking Reform: Are Environmental Risks Missing in Basel III?', is widely cited and has influenced the bank risk governance debate.

## 1. Abstract

The article analyses bank governance in the context sustainability risks and related business challenges. It addresses the issue of why it is important for bank boards to address environmental sustainability challenges and related financial risks. It suggests that effective bank corporate governance, including risk culture defined as the standards, incentives, and values within institutions, is vital for determining whether banks and other financial institutions will be able to support the economy's transition to more sustainable growth and development. Environmental sustainability challenges that require banks to be resilient against the financial risks associated with environmental change and to reorient credit and capital to more sustainable economic sectors have brought banks and other financial institutions to the fore in the sustainable finance debate.

## 2. Introduction

The paper considers some of the important issues which bank boards should consider in developing and supporting business strategies that support environmental sustainability objectives. Sustainable business and financial strategies have become an important focus for the boards of banks and other financial institutions as they address growing shareholder and regulatory concerns with climate change and other sustainability objectives. Although sustainability is a relatively new concept, it has, nonetheless, quickly been embraced as mainstream by many governments, regulators and market participants. Most of the literature accepts the 17 United Nations Sustainable Development Goals as an appropriate reference point for the policy objectives, but sustainability has many aspects.<sup>1</sup> This article takes an environmental focus, because that is already generating significant risks for the financial sector. However, many of the arguments apply equally to other social sustainability (so-called ESG) challenges as well.

<sup>1</sup> See United Nations (2015), *About the Sustainable Development Goals*, available at: [www.un.org/sustainabledevelopment/sustainable-development-goals](http://www.un.org/sustainabledevelopment/sustainable-development-goals).

The main relevance of sustainability to banks as businesses is that they depend in large part on sustained economic growth to create new assets. Sustained growth is also the objective of most governments and central banks. However, the new sustainability agenda sets the horizon for growth objectives at decades rather than, as has been the case over most of the past century, the short-term business or credit cycle. Taking a long-term approach to business development represents a challenge for any firm, especially banks, that needs to demonstrate on-going returns to investors.

As banking is central to the economy, this article will discuss how bank governance can address sustainable finance challenges. Part 1 discusses the banking business and the role it can play in addressing sustainability risks and challenges and supporting the transition to a more sustainable economy.<sup>2</sup> Part 2 suggests that «collective» agency problems that exist in large complex organisations, such as banks and other financial institutions, pose the main challenge for bank boards in addressing risk culture, particularly in the context of sustainable finance risks. It suggests that human agency theory offers an alternative theory that emphasises the importance of organisational culture in determining standards, norms and values that influence agent behaviour within many financial institutions. Part 3 discusses how bank regulators can interact with bank management and boards to address sustainability challenges. It also suggests that bank boards should consider the importance of 'risk culture' in addressing organisational failings and confronting new business challenges, such as climate change and other sustainability concerns. Although bank boards have the primary responsibility in setting the tone at the top of the organisation, regulatory intervention may be necessary to ensure that bank governance practices are adequately managing agency problems regarding sustainability concerns. Part 4 concludes with some recommendations for how bank governance and business practices could be improved to support society's sustainability objectives.

## 2.1 Banking and Sustainability

Banks are often referred to as 'special'. This is, in part, because they create money via deposits on their own balance sheets when they lend. That means they can use leverage to create credit in a way that non-deposit financial institutions cannot. The business model of a bank involves providing services for deposit taking (including term savings), credit creation, risk management (e.g., through derivatives) and payments. But the liquidity mis-match between taking sight deposits and term credit-creation makes it ideal for some types of finance and not others. This is an important issue in considering how bank finance can support sustainable development goals. Commercial banks are particularly good at assessing credit risk, especially for large numbers of smaller borrowers. Hence banks dominate in providing retail mortgages and credit for small and medium enterprises. Non-bank specialist lenders, in contrast, without cheap funding from a deposit base, typically compete by taking on niche credit risks (e.g., large mortgages, borrowers with irregular incomes, auto finance). Investment banks, or the affiliates of deposit-taking banks, play a complementary role by, for example, arranging / syndicating very large corporate loans or helping companies to issue bonds or equities, or facilitating government debt markets.

Banks deserve special attention because, in many economies, they are the dominant providers of credit. That includes providing initial development finance for new projects that can enable the economy to grow and to become more resilient to sustainability challenges. But, of course, they also provide finance for existing, unsustainable activities, which generates financial risk for themselves and systemic risks for the economy as a whole. European policymakers have already made clear that they consider banking to be important for supporting the transition to a more sustainable economy. Regulators have also focused on regulating bank governance following the great financial crisis of 2007–08 primarily to control bank risk-taking. In light of the Paris Climate Change Treaty and the growing recognition by policymakers and regulators of the economic risks associated with climate change and sustainability challenges, bank corporate governance has become a key focus for oversight to ensure that bank business practices are resilient to sustainability risks and facilitating the transition to a net zero carbon economy.

2 See European Commission (2018), Final report of the High-Level Expert Group on Sustainable Finance. Available at: [//ec.europa.eu/info/publications/180131-sustainable-finance-report\\_en](https://ec.europa.eu/info/publications/180131-sustainable-finance-report_en)

A few banks are public utilities, but most are not and, like other commercial firms, banks would not normally see it as their role to choose credits based on political or social factors. But bank behaviour has positive and negative externalities for society as a whole, just as individual behaviour does. One bank's loan to an unsustainable activity may be profitable for the bank – at least for a while – but such lending by banks collectively could seriously damage the economy over the longer term. So how can society influence banks to take account of these and other externalities and to direct more credit and investment towards sustainable economic activity and not just towards assets that generate only short-term rewards?

Part of the answer is to make banks internalise the externalities. This should be possible since these same systemic risks will ultimately undermine the banks' own business models. It is suggested that regulators and other stakeholders, including shareholders, can help to change bank risk culture so that the externalities associated with the banking business are identified and managed more effectively. The role of the bank's board is vital for ensuring that this task is fulfilled and that sustainability concerns are integrated into risk management practices and wider business models. That would drive the development of more lending to, and investment in, sustainable sectors of the economy.

## 2.2 Collective Agency Problems in Banks

The 'tragedy of the commons' is a metaphor to show how moral hazard arises from the over-use and degradation of the public 'commons' by rational, utility-maximizing individuals. In the context of climate change and environmental sustainability risks, today's generation does not have adequate incentives to take collective action to conserve and limit degradation of natural resources for the benefit of future generations. This collectivisation of losses passed on to future generations reflects the problems associated with negative externalities and social costs.<sup>3</sup>

The collectivisation of losses that can arise from the tragedy of the commons can also occur within the institutional structure of large organisations or financial institutions in which the behaviour of many individual agents across the organisation can lead to a collective form of moral hazard, an incentive problem at the collective action level.<sup>4</sup> This would involve individual managers having inadequate incentives to monitor and solve agency problems because organisational norms and institutional structures are such that they constrain or limit behaviour that may 'rock the boat'. Also, organisational incentives might be structured in a unilinear or univocal way, running directly from firm owners to managers, which does not take account of the firm's organisational norms and institutional structure that can influence decision-making and strategy and which may lead to a collective form of moral hazard across the organisation. Similarly, the very personality traits that fulfil traditional corporate governance objectives, such as shareholder wealth maximisation, can result in disadvantaging the interests of other principals such as bondholders or other creditors or stakeholders such as customers and employees.<sup>5</sup>

### A. Collective agency problems and Human Agency Theory

As commercial banking organisations are complex organisations, they can only achieve their economic objective of maximising shareholder returns through the collective efforts of many individuals – individuals who in theory share the same objectives and beliefs and who can coordinate their activities effectively. However, the size and complex structure of large, systemically important banks gives rise to a wide range of potential agency problems that involve several major stakeholder groups, including but not limited to shareholders, creditors, depositors and other customers, employees, management and supervisory bodies.

3 E Ostrom, 2008. 'Tragedy of the Commons'. The New Palgrave Dictionary of Economics, 3573, Basingstoke: Palgrave Macmillan.

4 James Dow, 2000. 'What is Systemic Risk?: Moral hazard, initial shocks, and propagation', 15, Institute for Monetary and Economic Studies, Bank of Japan.

5 See generally Mahmedier and Geoffrey (2009); See also A. Tversky, and K. Daniel, 1974. Judgment Under Uncertainty: Heuristics and Biases. Science, New Series, 185(4157), pp. 1124-1131.

Agency problems can arise because decision-making is directly or indirectly delegated from one stakeholder group to another in situations where stakeholder groups have different objectives and preferences, and where complete information that would allow stakeholders to control decisions made on their behalf is not readily available. The most studied agency problems in the case of banks involve i) depositors and shareholders and ii) supervisors and shareholders, and these problems have underpinned major design features of regulatory structures (eg, deposit insurance and capital adequacy) that attempt to align the incentives of principal and agent and to limit the incentive of both principals and agents to take excessive risks at society's expense. However, incentive conflicts between different groups of stakeholders, such as employees, customers, suppliers and other societal groups, based on different understandings of ethics and norms of behaviour by a variety of stakeholder groups can also undermine the firm's pursuit of its strategic objectives. These collective agency problems have become the focus of a growing literature on organisational and risk culture.<sup>6</sup>

Human agency theory provides a conceptual framework through which to analyse collective agency problems within complex organisations, such as banks.<sup>7</sup> It holds that – as is the case in other complex organisations – bank workers do not pursue their objectives in a vacuum, based on the design of a contract.

Instead, they are subject to societal norms and institutional values that constitute its organisational or risk culture, which influence how they coordinate their activities to achieve both their own individual objectives and the collective objectives of the institution. Successful institutional outcomes are the product of a particular organisational or risk culture that drives an effective coordination model. This type of collective agency outcome – driven by the collective pursuits of individuals throughout an organization – is influenced substantially by the norms, standards and ethical values fostered by the institution's leaders in the pursuit of the formal objective of shareholder wealth maximization (or other strategic objectives).

## B. Regulating Governance and Risk Culture

Most large banks in developed countries and many in developing countries approach environmental sustainability risks from a corporate and social responsibility perspective. Often banks have established board-level committees, such as risk committees, which generally take a short-term approach to financial risks (ie., credit risk at the transaction level or at the counterparty level) arising from climate and other environmental sustainability challenges.<sup>8</sup> Some banks instruct risk committees to report to the board on climate risks and to monitor environmental sustainability risks through the risk function. However, the unique features of environmental sustainability risks require a strategic approach which is developing in parallel at different banks.

6 The traditional sociological theory of agency considers 'the thoughts and actions taken by people that express their individual power'. See Emirbayer, M. & Mische, A., 1998. What is Agency. *The American Journal of Sociology*, 103(4), pp. 962-102, 3. They develop a concept of agency which they called 'human agency', which is defined as 'the temporally constructed engagement by actors of different structural environments – the temporal–relational contexts of action – which, through the interplay of habit, imagination, and judgment, both reproduces and transforms those structures in interactive response to the problems posed by changing historical situations'.

7 For the theoretical foundation of human agency theory, see Alberto Bandura, 2000, 'Exercise of human agency through collective efficacy. *Current Directions in Psychological Science*', 9(3), pp. 75-78; see also Bandura, 2006, 'Toward a psychology of human agency. *Perspectives on Psychological Science*', 1(2), pp. 164-180; Bandura, 2009, 'Agency', in D. S. Carr, ed. *Encyclopedia of the life course and human development*. Detroit: Macmillan Reference USA.

8 See Bank of England (2018), *Transition in thinking: The impact of climate change on the UK banking sector*. See also Prudential Regulation Authority (2018), *Enhancing banks' and insurers' approaches to managing the financial risks from climate change*, consultation paper 23/18. Available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2018/cp2318.pdf?la=en&hash=8663D2D47A725C395F71FD5688E5667399C48E08>

The question arises whether bank regulatory authorities should manage and seek to influence corporate governance frameworks as a key instrument to influence banks in developing a strategic response to sustainability risks.<sup>9</sup> International good practices on corporate governance are comprehensive enough to address environmental sustainability challenges. Typically, boards have ultimate responsibility for the bank's business strategy and financial soundness, corporate culture, governance structure and practices, and risk management and compliance obligations. Accordingly, banks' boards are thus being called upon to understand and assess the financial risks caused by environmental and social sustainability challenges with a forward-looking approach that integrates them into bank risk management frameworks. Boards are also expected to factor these risks into the design of the bank's business model, strategy, and objectives, and to conduct effective oversight of the financial risks associated with climate change.<sup>10</sup>

International policymakers are considering the role of bank and financial institution governance as a medium-term policy response to support enhanced financial sustainability business practices.<sup>11</sup> Indeed, bank governance mechanisms have proved necessary to reduce the incentives for bank management to take on excessive short-term financial risks more generally, as well as those financial risks linked to environmentally unsustainable activity. Therefore, an effective prudential regulatory framework is necessary to oversee bank risk governance and this should also address environmental sustainability risks.

The main elements for designing bank governance frameworks that promote environmental sustainability are intrinsic to good corporate governance on two levels: First, good corporate governance calls on the use of ethical judgment of what is acceptable and what is not. Second, corporate governance has an important role in overseeing and ensuring effective risk management for the bank and ensuring sustainable returns for owners and shareholders. Recent studies suggest that there is a strong correlation between good bank corporate governance and effective environmental and social risk management.<sup>12</sup>

Bank governance is also affected by stewardship codes and both formal and informal concepts of fiduciary duty. There have been legal opinions issued in both Australia for all firms and the UK for pension funds which conclude that boards, and others with fiduciary duties, must consider whether climate related risks are financially material and that failing to do so is a failure of fiduciary duty which could pave the way for legal challenge.<sup>13,14</sup>

The concept of stewardship has also been informed by the efforts of institutional investors to harmonise a global understanding of fiduciary duty. For example, the corporate governance codes of most G20 countries require the board of directors of joint stock companies to assess the financial and nonfinancial risks that relate to environmental risks, as well as social, ethical, operational and other risks, and to establish tolerable levels of risk in these areas.<sup>15</sup> And the EU is proposing further clarification of governance requirements to ensure that sustainability is explicit, not just implicit, in the requirements and capabilities of boards.

9 World Economic Forum, *Measuring Stakeholder Capitalism, Towards Common Metrics and Consistent Reporting of Sustainable Value Creation*, Sept. 2020, *Pillar: Principles of Governance*.

10 See Basel Committee on Banking Supervision, *Principles of Supervisory Review for Climate Change Risks* (June, 2022). See also European Central Bank's *Final Guidance on Climate-related and environmental risks* and the European Banking Authority's report on the management of ESG risks. Similar supervisory statements are in various regulatory instruments of a different legal nature adopted by supervisors in EU member states, such as France and Germany, as well as Australia and Hong Kong, Singapore, Vietnam and the United Kingdom.

11 See Directorate General, *Financial Stability, Financial Services and Capital Markets Union (FISMA)*, 'Commission legislative proposals on sustainable finance' (2018).

12 See Center for Sustainability Studies, *Federacao Brasileira de Bancos (Febraban)*, 'The Brazilian Financial System and the Green Economy: Alignment with Sustainable Development', Sao Paulo, 2014, 34-35.

13 N Hutley SC and S Hartford Davies 'Climate Change and Directors' Duties'. Memorandum of Opinion published by The Centre for Policy Development and the Future Business Council via Minter Ellison, Solicitors, Melbourne, October 2016 3ff.

14 K Bryant QC and J Rickards, 'The legal duties of pension fund trustees in relation to climate change'. Opinion commissioned and published by ClientEarth, London, 2016.

15 See Kern Alexander and Paul Fisher, *Alexander K and Fisher P (2018)*, 'Banking Regulation and Sustainability'. SSRN Working Paper. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3299351](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299351).



The EU Corporate Social Reporting Directive<sup>16</sup> can play a role in improving bank governance by improving transparency for investors – by making clear its involvement in unsustainable economic activity. Institutional investors are already beginning to ask banks about their efforts to mainstream sustainability challenges into their business models and their strategies to mobilize capital for sustainable economic activity. Most countries do not yet require banks to incorporate environmental sustainability risks into the bank’s risk governance and management strategy, but some countries have begun to do so. Both China and Brazil regulate bank corporate governance regarding environmental risks. China adopted ‘Green Credit Guidelines’ in 2012 that require banks to adopt green governance strategies. Brazil has incorporated green governance into its Basel III pillar 2 supervisory review assessments. Specifically, Brazil has adopted the principle of proportionality for individual banks to decide – based on the bank’s particular risk exposures – to what extent environmental sustainability risks should be incorporated into the bank’s governance and risk strategy.

Indeed, environmental sustainability poses a major challenge for banks in assessing how such risks will affect the banking business. Risk management practises are probably the key mechanism through which firms protect themselves from these risks. Because of that, oversight of risk management (also known as ‘risk governance’) by supervisors is a natural way to ensure that best practice prevails.

### 2.3 Bank Risk Culture and Sustainability – Where Should the Focus Be?

#### A. The role of the board in risk culture

Risk culture influences the decisions on risk that management and employees take during day-to-day activities. Accordingly, it is the board’s task to set a ‘tone at the top’ that promotes an effective risk culture. Supervisors are not called on to run banks, but they should liaise with the board, its risk and audit committees, to verify whether or not the institution has adequate risk governance mechanisms and effective risk culture (BCBS, 2014).

16 Proposal for a Directive of the European Parliament and of the Council, amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM/2021/189 final.

Furthermore, the Financial Stability Board (FSB) set out clear guidance to help regulators and supervisors assess risk culture in financial institutions. In its 2014 ‘Guidance on supervisory interaction with financial institutions on risk culture’, the FSB stated that: «a sound risk culture bolsters effective risk management, promotes sound risk-taking, and ensures that emerging risks or risk-taking activities beyond the institution’s risk appetite are recognised, assessed, escalated and addressed in a timely manner.»<sup>17</sup>

The G30, in its 2015 Banking Conduct and Culture study, also drew a line between the roles of the board/management of firms and the supervisory authorities in relation to culture and risk culture.<sup>18</sup> The former has responsibility for a firm’s cultural focus and the latter cannot determine culture. Supervisors should, instead, monitor the effectiveness of a firm’s own culture to deter, among other things, inappropriate behaviour in violation of regulatory norms and standards. (G30, 2015). It is worth noting that the issue of risk culture from the regulatory perspective has a broader scope than a typical firm’s vision. In essence, while firms address risk culture from an internal perspective, supervisors should address risk culture into the context of potential systemic implications for markets and the financial system. This is particularly so when addressing issues of sustainability. The link between firm culture and prudential regulation was not strong before the financial crisis, but recent financial scandals have changed that. Proven misconduct – such as the rigging of the London Inter-Bank Offered Rate (LIBOR) and the mis-selling of many types of financial products (ie., payment protection insurance in the UK) in many European countries prompted regulators to discuss risk culture in the context of «misselling» or «misconduct risk». The European Systemic Risk Board (ESRB) recognised the scale of the problem and made recommendations that banks address weaknesses in risk culture by adapting behaviours, practices and governance mechanisms to reduce misconduct risk.<sup>19</sup>

17 Financial Stability Board (2014), 1. Supervisors are recommended to conduct periodic reviews of an institution’s culture, issue findings and review the extent to which culture is the underlying cause of the identified problems.

18 G30 (2015), Banking conduct and culture: a call for sustained and comprehensive reform. Available at: [//group30.org/images/uploads/publications/G30\\_BankingConductandCulture.pdf](http://group30.org/images/uploads/publications/G30_BankingConductandCulture.pdf)

19 European Systemic Risk Board (2015), Report on misconduct risk in the banking sector. Available at: [www.esrb.europa.eu/pub/pdf/other/150625\\_report\\_misconduct\\_risk.en.pdf](http://www.esrb.europa.eu/pub/pdf/other/150625_report_misconduct_risk.en.pdf)

This means that understanding culture – what one does «when nobody is watching» – and ethics – the line between acceptable and unacceptable decisions – can help us to recognise, and even predict, some behaviour.<sup>20</sup> To illustrate this, the following section discusses the UK's regulatory initiatives in supervising bank risk culture.

## B. Managing the risks and strategy

Consequently, banks are doing more to address the economic and financial risks associated with sustainability challenges by incorporating, or mainstreaming, sustainability factors and guidelines into their risk management models and business strategies. And bank boards are also responding by beginning to incorporate sustainability into the overall organisational cultural ethos.

Nevertheless, market structures must evolve to meet environmental sustainability needs and banks face steep challenges in managing the risks associated with that transition. Potentially, these could include price volatility and increased credit risk in assets and sectors considered environmentally unsustainable. Where such transition risks are material, they may pose systemic risks to the banking sector – and this is the source of increasing regulatory attention. To adequately address these risks, bank risk culture should fully incorporate sustainability criteria and values into risk management, remuneration incentives, and strategic business objectives. Where there are institutional or market barriers, policy intervention may be necessary.

Despite progress in these areas, in calculating sustainability values into mainstream bank business practices demands a more concerted focus on bank risk culture. In particular, that means a longer-term, and wider, appreciation of risks to the firm, not just of the narrow risks to a particular transaction or portfolio. Bank risk culture should address the following factors that relate to environmental sustainability:

20 S Ashby, T Palermo, M Power (2014), 'Risk culture: definitions, change practices and challenge for chief risk officers. In: Jackson P (ed), Risk Culture Effective Risk Governance, 25–46.

## 2.4 Taking account of the importance of reputation

As the financial crisis and countless other episodes have shown, reputation is essential for any successful business to be sustained: lose it and one's business model can follow very quickly. Pressure to maintain a good reputation can be exerted by investors – bank debt or equity holders – or by clients. However, in the past, the way in which banks offered very substantial remuneration for short-term performance could lead to staff ignoring long-term reputational risks to their firms – and that needs permanent change.

Sustainability is quickly becoming a reputational issue, thanks to pressure from governments and the public alike. As appreciation of sustainability issues rises, what was defensible at one point in time can become indefensible. We have seen this in Australia, for example, in relation to financing a new coal project.<sup>21</sup> Public attitudes can also change rapidly as they did in Western Europe in 2018 when there was a sudden consumer and retailer shift away from single-use plastics on account of concerns about pollution of the oceans, a movement which has since gone global.<sup>22</sup> Obviously, any company specializing in such products has had their business model severely challenged.

## 2.5 Taking account of longer-term and broader risks

In the past, banks viewed sustainability risks as a social/political/ethical issue to be managed by their corporate social responsibility departments. This has led to some good work being done, at the margin, but has not been transformative. The cultural change required is two-fold: First, large banks in particular need to appreciate that sustainability risks are existential and systemic. If economic growth is not sustainable, then banks' business models are likely to come under pressure and quite possibly collapse. That means that the risk culture needs to be much longer-term and to be focused on broader macroeconomic factors. For example, banks must examine not just the short-term risks of an individual loan, but the future risks underlying the whole portfolio and their potential impact on the banking sector.

21 J Robertson J (2017), 'Big four banks distance themselves from Adani coalmine as Westpac rules out loan'. The Guardian, 28 April.

22 S Buranyi (2018) (2018), 'The plastic backlash: what's behind our sudden rage – and will it make a difference?'. The Guardian, 13 November.

Second, the sustainability agenda should be recognised as a great business opportunity as well as a financial risk. Picking up on sustainability trends could be highly profitable by going with the grain of economic transformation and political direction. Both changes could be classed as internalising risks that have hitherto been regarded as externalities.

### 3. The role of regulation

In the past few years, regulators have started to identify the material financial risks that the potential for stranded assets and, in particular, market volatility related to climate risk represent. However, such risks are still seen by many as being long-term and therefore beyond the scope of risk management processes. They are, though, not just long-term:

- Climate events can be precipitous – there is a significant financial stability risk arising from London flooding for example, which could happen at any time.
- Technical developments are on the brink of potentially causing huge and sudden disruptions to sectors such as energy, transport (eg electric vehicles) and construction. That could result in very significant risks to banks exposed to those sectors crystallizing within, say, the next 3–5 years.
- On top of that, government policies globally are starting to implement the Paris 2015 agreement, which could result in a lot of unanticipated policy and regulatory risks emerging.

Given these challenges, bank boards need to ensure that they are not blind-sided by the sudden materialisation of sustainability risks. Such risks are not all so-called ‘black swans’. A lot of sustainability risks are predictable in nature – just not in timing or scale. As the regulators turn up the volume and tighten the rules, banks need to understand the systemic risks to financial services that come with tackling sustainability if they are to avoid being continually caught out by new regulations.

### 4. Conclusion

The article discusses the importance for bank boards and senior management to design more effective governance approaches to address sustainability risks. The article argues that an important aspect of this is influencing the development of a risk culture that takes account of sustainability risks and challenges to the banking business. The post-crisis regulatory environment has brought bank culture to the fore of improving bank governance and risk management practices, particularly regarding sustainable finance. The scope of regulation in shaping and developing risk culture with the specific aim of a more sustainable outcome remains uncertain.

The article addresses some of the major challenges that bank boards face in incorporating sustainability criteria into their governance and risk management practices. Bank regulators are now supervising closely the governance and business practices of banks in addressing sustainability challenges and the associated financial risks. This change of regulatory focus does not only bear down on how they manage and control financial sector risks, but increasingly includes how banks themselves are impacting broader sustainability objectives in the economy and society. The article sheds light on some areas where banks can adjust their governance practices and risk culture so that the banking business can be more directly aligned with the goals and values of a sustainable economy.

The financial system has a big role to play in delivering a more sustainable economy and banks have a special part within that. But there needs to be raised awareness: improving risk culture is crucial if banks are to both manage their own financial risks and realise business opportunities while supporting the development of the sustainable economy that is an existential necessity for their business model.

# Reward the talk – Pay for Performance includes Performance on ESG



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## 1. Summary

The regulatory requirements and pressure by stakeholders as regards sustainability has continuously increased in the past years. The efforts made by companies are constantly growing and translating into the expanding use of ESG metrics also in executive compensation. Nevertheless, challenges emerge both globally and domestically, in Switzerland, as the implementation and reaching of these goals raises questions regarding the use of metrics in variable compensation plans and how to address misalignment between financial and non-financial metrics.

## 2. Say-on-Sustainability puts pressure on companies

Stakeholders increasingly demand higher commitment from companies to make meaningful progress on sustainability. At the same time, regulatory pressure rises globally as well as in Switzerland. For example, as of financial year 2023, Swiss listed companies as well as banks are obliged to publish a sustainability report on their sustainability performance and initiatives which is subject to shareholders' vote at the AGM 2024 for the first time. While some companies are still starting to act, stakeholders including investors and proxy advisors have already expressed dissent over corporate ambition levels, for example on Board's gender diversity, as also reflected in specific voting results during the last proxy seasons.

## 3. Embedding ESG in compensation: a growing trend

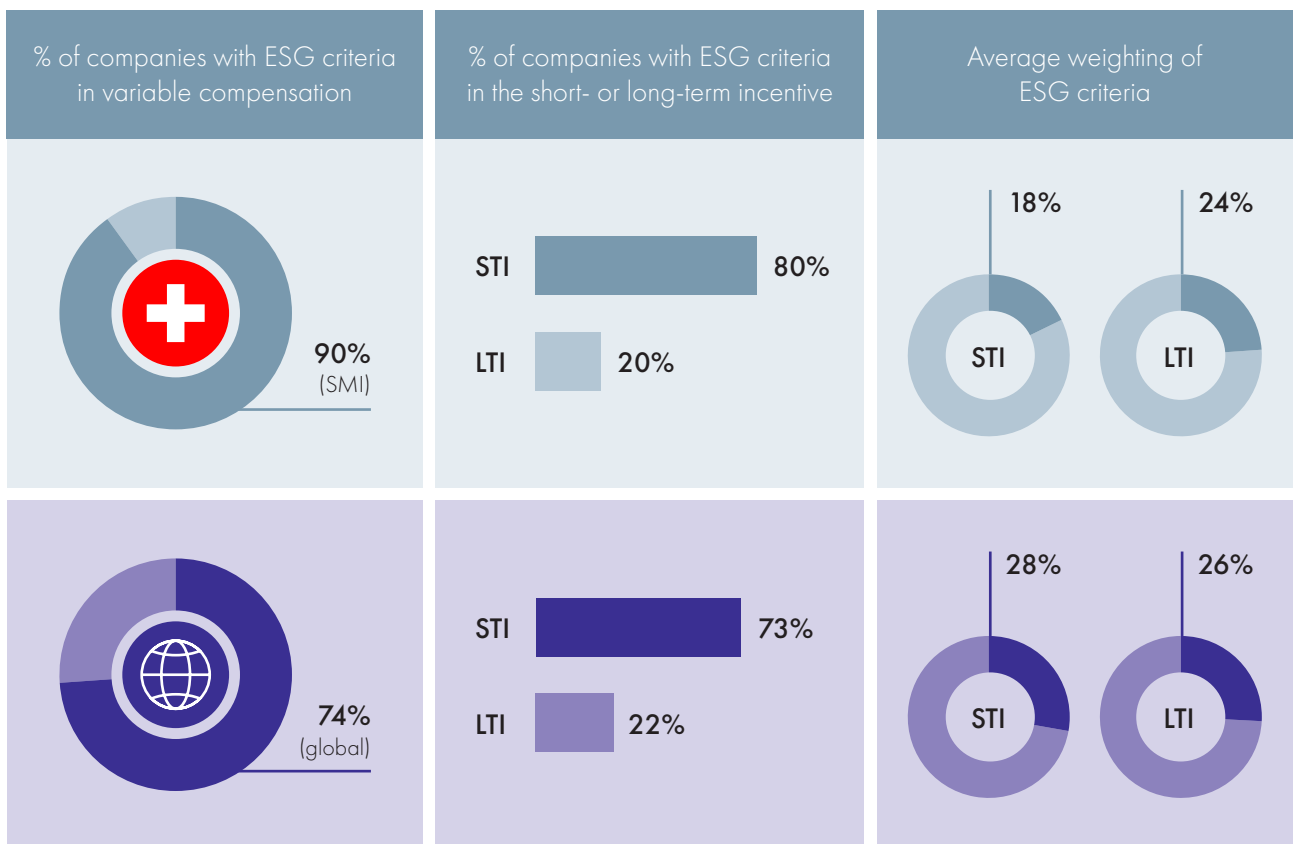
Until recently, variable compensation was typically linked to financial as well as individual performance. However, proxy advisors and investors set rising expectations to include non-financial performance, including sustainability. One way to show commitment to internal and external stakeholders and avoid criticism regarding «greenwashing» and low credibility is to reflect environmental, social, and governance (ESG) performance in executive pay decisions.

In fact, more and more companies are integrating ESG topics in short-term incentive plans (STI). A 2022 study conducted by the HCM presided Global Governance and Executive Compensation Group (GECN) found that among over 500 international companies, 73% use ESG in their STI (2021: 71%). In comparison, listed companies in Switzerland are still lagging with only 34% of the companies in the Swiss Performance Index (SPI) reflecting ESG in pay decisions. Our studies show that companies with larger market capitalization are more likely to employ such metrics, which also applies for Switzerland (90% of companies in the Swiss Market Index (SMI)).

The average weighting of these criteria within the respective STI plans makes up for 28% on a global level, 16% for SPI and 18% for SMI companies. Again, larger companies tend to put a slightly higher weight on ESG criteria within their compensation decisions. Notably, companies with non-financial incentive metrics show a higher historical total shareholder return (TSR) performance compared to market.

However, the prevalence of integrating ESG in variable compensation plans can vary significantly by industry. For example, some industries with already high prevalence of ESG metrics continue to see growth such as the utilities and materials sectors and reach approximately 95% of companies, while the energy sector is stable at around 85%. All other industries, with the exceptions of the financial and information technology sectors, see significant annual growth (up to 15 percentage points).

Given the different ESG focuses and challenges of companies and respective industries, the nature of ESG metrics varies quite significantly. Globally, among the most common topics used are social criteria (72%) such as diversity & inclusion or employee engagement, environmental criteria (50%) such as GHG Emissions and renewable / non-renewable energy, and customer focused criteria (37%) such as customer satisfaction or product quality and safety. Especially the E-dimension has significantly increased compared to last year, indicating that companies are taking environmental responsibility.



#### 4. ESG in LTI to anchor the sustainability strategy

While the integration of ESG in STI frameworks has almost become a «must» for modern compensation designs, the integration in long-term incentive plans (LTI) is still less common. Having said this, leaders are increasingly realizing that sustainability is a long-term commitment. To align with long-term strategic plans, more and more companies are therefore considering ways to reflect ESG performance in LTI plans. Currently, on a global scale 22% (2021: 16%) of companies do so with an average weighting of 26%. While in Switzerland only 10 SPI companies reflected ESG in their LTI plans during the 2021 cycle, the increase by 6 companies from previous year is significant.

For example, Holcim was one of the first Swiss listed companies to not only integrate ESG in their STI but also in their three-year performance share plan. Within their LTI, environmental criteria are weighted at 33%. Specifically, targets regarding CO<sub>2</sub> emissions, the quantity of recycled waste, and freshwater withdrawal are included. All three are aligned with Holcim's sustainability strategy and its commitment to build a net-zero future by taking a rigorous science-driven approach, with its industry's first net-zero 2030 and 2050 targets, validated by the Science Based Targets initiative (SBTi).

In Europe, more companies have included ESG in their LTI programmes. For example, one third of the LTI grant at Deutsche Bank in 2021 was based on their ESG factor, comprising seven weighted metrics in the E (e.g. sustainable finance and investments), S (e.g. gender diversity) and G (e.g. anti-money laundering remediation) dimensions, making up for 20% of the total variable compensation of the executives.

Since the majority of ESG topics seem to be rather long-term ambitions that are not solved within the one-year cycle that STI plans typically have, it might seem surprising that companies are still hesitant to include such measures in their LTIs. However, companies are struggling with several challenges when aiming at considering such topics in long-term compensation.

Firstly, traditional LTI plans are typically driven by purely financial metrics such profit-related KPIs or TSR, while non-financial, strategic topics have historically been less considered – and less accepted by investors – in such plans. Secondly, many companies are still on a «learning journey» towards a more sustainable business model. This implies that ESG-related metrics might not yet be readily available and a robust internal or external measurement over a longer time horizon is often tricky – especially when the results thereof are ultimately linked to compensation outcomes which requires a high degree of tangibility and comprehensiveness. This also relates to the third challenge, namely the setting of relevant, long-term ambitions for ESG topics. While companies have decades of experience in setting relevant financial goals, in the non-financial area, target-setting is still difficult, especially in the current volatile market environment.

#### 5. ESG in incentives: How to deal with trade-offs?

Including ESG in pay decisions can entail trade-offs because certain ESG and financial objectives are sometimes diametrically opposed – at least in the short term. For example, additional costs for a production plant with lower CO<sub>2</sub> emissions reduce profits in the medium term. Also, trade-offs can exist within specific ESG initiatives, for example between building electricity consumption (E) and employee satisfaction (S), when thinking about the current energy saving initiatives. Such trade-offs require prioritization, aligned with the overall ESG strategy.

While several approaches exist to cope with such trade-offs, two alternatives come closest to solving the challenge.

1. **Qualitative assessment:** In this approach, ESG factors are incorporated into the compensation model in the form of an overall assessment. To this end, strategically relevant ESG topics are defined, which are underpinned by concrete criteria. These should be measurable but are not subject to a weighting and mathematical formula. Rather, an overall assessment of ESG performance is made by the Board. In Switzerland, listed companies are increasingly adopting this approach, as it reduces the pressure on the discussion about «true» performance and better accounts for trade-offs.
2. **Framework conditions:** Here, ESG criteria are defined as a minimum requirement or threshold. For example, a CO<sub>2</sub> reduction of x% or a safety improvement of y% per year would need to be fulfilled. This increases the robustness of the compensation model and shifts the discussion about trade-offs between ESG and financial performance to the strategic level – or rather to the periodic discussion about how ambitious these thresholds should be set.

Based on our experience, those two approaches can solve the questions around potential trade-offs most adequately. In addition, they allow for a comprehensive reflection of the perceived performance by investors, Board members and managers. With this, integrating ESG in compensation can help companies to address stakeholders' concerns, ensure credibility and improve reputation and ultimately make significant progress on their ESG strategies also in the long-term.

# Business Dynasties: An Evolutionary Perspective



## Dr. Matthias Ch. Würsten

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1 Würsten, Matthias Christian: Three Essays on Owner Control in Private Firms: Dynasties, Employee Empowerment and Entrepreneur Faith. Thesis, 2022.

2 The research project on business dynasties was carried out by the three researchers: Prof. PhD Josh Wei-Jun Hsueh, Dr. Matthias Ch. Würsten, and Prof. Dr. Thomas Zellweger.

## 1. Business Dynasties: Where Family meets Business meets History

Families that accumulate significant wealth via the transgenerational control of companies, called business dynasties, are often tainted with an aura of mystery and nostalgia in the public eye.<sup>3,4</sup> As business dynasties are an ecosystem of family and business, they are a fertile soil for the rise and fall of businesses, families, and individuals. The variety of challenges that stem from the symbiotic relationship between family and business are why studies typically assume that dynastic control over firms is inefficient, particularly in developed economies.<sup>5,6</sup> Yet, while being a prominent phenomenon in emerging countries, business dynasties are also found in developed Western economies – to name only a few examples: Agnelli family in Italy, Hermes family in France, Quandt family in Germany.<sup>7</sup>

Another prominent and vivid case depicting the ride of emotions which can make business dynasties so compelling for both the press and academia is the Gucci family. After its foundation in 1921, the Gucci family had successfully guided its company specialized in leather ware through various socioeconomic developments including a world war. However, heavy disputes and intrigues within the 3rd generation led to the sale of the company in 1993 and the assassination of Maurizio Gucci, once considered a potential successor, in 1995. Besides the various challenges business dynasties face in the family domain, such as the selection of a suitable successor, the erosion of family unity, and the appearance of family conflicts, their survival is tested in the business domain as well. Changes in the socioeconomic environment pose a potential threat to the prosperity of a company and thus to the survival of the business dynasty, time after time.

3 Carney, M., & Nason, R. S. (2018). Family business and the 1%. *Business & Society*, 57(6), 1191-1215.

4 Economist, T. (2008, May 10). Business: Dynasty calls; Face value. *The Economist*, 387(8579).

5 Caselli, F., & Gennaioli, N. (2013). Dynastic management. *Economic Inquiry*, 51(1), 971-996.

6 Casson, M. (1999). The economics of the family firm. *Scandinavian Economic History Review*, 47(1), 10-23.

7 Iacobucci, D., & Rosa, P. (2010). The growth of business groups by habitual entrepreneurs: The role of entrepreneurial teams. *Entrepreneurship Theory and Practice*, 34(2), 351-377.



In light of all these hurdles that business dynasties face in both the family- and business-domain, one may wonder how various business dynasties have thrived over generations. The secret for their formation and continued success lies in the effective co-evolution of family dynamics and business activities – both following an evolutionary process. The next chapter clarifies how the formation of business dynasties can be explained through the lens of evolutionary theory.

## 2. Formation of Business Dynasties: An Evolutionary Process

As an umbrella theory, evolutionary theory is typically used to explain change and progression of systems, organization, groups, and individuals.<sup>8,9</sup> To assess the core dynamics and tensions in the multi-layered contexts of business dynasties, adopting an evolutionary perspective – more specifically, a Darwinian perspective – proved to be appropriate, if not innovative.<sup>10</sup> As business dynasties are a construct of two domains (family, business), distinct evolutionary processes are typically adopted by families, as opposed to firms.

On the one hand, dynamics in the family domain tend to follow a pre-configured sequence of birth, marriage, and death. On the other hand, change processes on the firm-level evolve in less pre-configured ways, but strongly resemble the cycle of variation, selection, and retention as depicted in Darwinism. Subsequently, an explanation is provided on how the parallel, yet asynchronous co-evolution of both family- and business domains drive the formation of business dynasties.

- 8 Aldrich, H. E. (1979). *Organizations and environments*. Englewood Cliffs, NJ: Prentice-Hall.
- 9 Hannan, M. T., & Freeman, J. (1977). The population ecology of organizations. *American Journal of Sociology*, 82(5), 929-964.
- 10 Darwinism is the idea of passive selection based on a constant cycle of variation, selection, and retention. Variation indicates that there are no two identical organisms. Selection means that organisms need to be well adapted to the environment. Certain variation that does not fit the environment loses the fight over scarce resources and is eliminated. Finally, retention denotes that organisms preserve and pass their variation to the next generation. (Aldrich, H. E., & Ruef, M. (2006). *Organizations evolving* (2nd ed.). London: Sage Publications Ltd.; Van de Ven, A. H., & Poole, M. S. (1995). Explaining development and change in organizations. *Academy of Management Review*, 20(3), 510-540.)

### 2.1 Variation: Effects of Births and Marriages

Variation in a business dynasty either stems from within the family, caused by a) the birth of a new family member, or from outside the family, caused by b) the expansion of the family through marriage.

- a) The arrival of an own child marks an important turning point for a leader of a business dynasty. Motivated by the prospect of continued family control over the business, dynasty leaders begin to gradually engage in additional, selected business activities (e.g., acquisition of a new firm, diversification of business portfolio) with the intent to eventually pass it down to the next generation.<sup>11</sup> In contrast, the birth of a grandchild (e.g., 3rd generation) appears to make senior-generation leaders (e.g., 1st generation) aware of the professional maturity of their own children as potential successors.<sup>12</sup> Thus, as the arrival of a grandchild marks a milestone in the inevitable cycle of life, business dynasty leaders begin to push the succession process with their children.
- b) Data shows that variation through marriage has been a double-edged sword for business dynasties. On the positive side, they can profit from a successful infusion and integration of new members («in-laws») into the business dynasty.<sup>13</sup> For example, Emile Hermes was inspired by his wife, Julie Hollande, who complained about the designs of existing handbags at the time. He went on designing his own handbag collection, which is a success story until today. Later, his son-in-law and perfumer, Jean Guerrand, facilitated the diversification of Hermes into the perfume industry. On the negative side, if in-laws are not welcomed by the family, it decimated the chance for their spouses to be eligible for a future leadership role. For example, when Maurizio Gucci married Patrizia Reggiani in 1972, he was excluded from the company by his father.
- 11 Diaz-Moriana, V., Clinton, E., Kammerlander, N., Lumpkin, G., & Craig, J. B. (2020). Innovation motives in family firms: A transgenerational view. *Entrepreneurship Theory and Practice*, 44(2), 256-287.
- 12 Gersick, C. J. (1994). Pacing strategic change: The case of a new venture. *Academy of Management Journal*, 37(1), 9-45.
- 13 Le Breton-Miller, I., & Miller, D. (2018). Beyond the firm: Business families as entrepreneurs. *Entrepreneurship Theory and Practice*, 42(4), 527-536.

## 2.2 Selection: Effects of Successor Selection Process

Selection processes in business dynasties occur either a) before power is passed from one generation to the next or b) right after a new leader is in power.

- a) One of the most critical and disruptive family events for the continuity of a business dynasty marks the death of a family business leader. Oftentimes, a looming power void within the business dynasty triggers the start of a successor selection process and marks the beginning of intensive competition and infighting among potential successor candidates. As an example, after Giovanni Agnelli passed away in 2003, his grandson John Elkann was drawn into legal fights with his aunt, Margherita Agnelli, over his grandfather's inheritance and leadership position. Similarly, William Henry Vanderbilt was at cross with his siblings for two years after his father died, before eventually taking over the leadership role in 1879. Thus, if a family is unable to agree on a clear successor before the death of the business leader, the business dynasty runs the risk of dissolution. To prevent such conflicts, some leaders appointed their successors before their own passing. The Sainsbury dynasty, for example, followed the same path of leadership succession for five generations: the successors entered the firm in their early 20s, gradually became executive-level managers in their 50s, retired, and transferred their chairperson positions to the next successor before their deaths.
- b) After a clear next generation leader is selected, business dynasty leaders tend to implement punctuated changes in the business domain<sup>14</sup> to accommodate their firms according to their vision. Such changes surrounding their firms typically involve acquisitions of and mergers with other companies, divestments of businesses, and diversification into new sectors and industries. In addition, it appears that new business dynasty leaders initiate changes in the family domain by striving for a rearrangement of their relationships with non-successors.

14 Tushman, M. L., & Romanelli, E. (1985). Organizational evolution: A metamorphosis model of convergence and reorientation. In B. M. Staw & L. L. Cummings (Eds.), *Research in Organizational Behavior* (Vol. 7, pp. 171-222). Greenwich, CT: JAI Presse.

It turns out that a decisive factor for the continued success of a business dynasty relates to the stance a non-successor takes towards the business dynasty because or despite having lost the «race for the leadership position». In the following section, four different retention paths for non-successors are drawn ranging from highly cooperative to highly confrontational.

## 2.3 Retention: Accommodation of Non-Successors

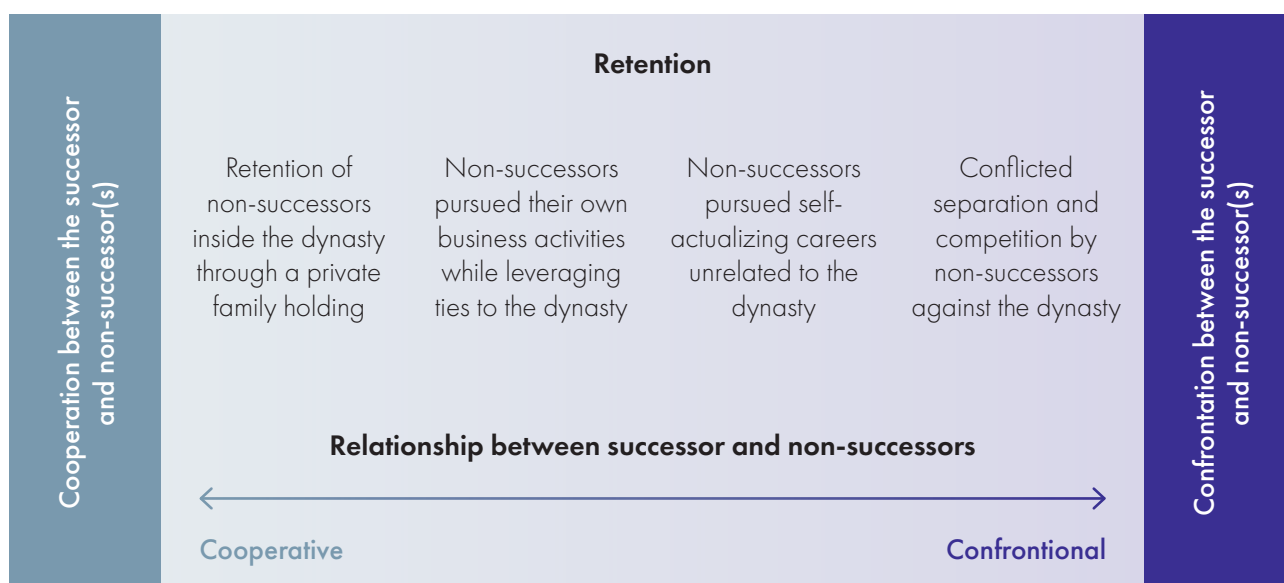
It is a key finding that the dynamics between new business dynasty leaders and non-successors substantially affect the co-evolution of the family- and business domain and, ultimately, the formation of family dynasties. It is beneficial to business dynasties, if non-successors maintain cooperative relationships towards the business dynasty and its leader. The four retention paths identified involve non-successors a) being involved in private family holding companies, b) keeping ties with the business dynasty as business partners, c) pursuing careers outside and unrelated to the business dynasty, and d) conducting a conflicted separation from the business dynasty.

- a) One way to cooperatively involve non-successors in the business activities of the dynasty is to assign them a role of a shareholder and/or board member in a coordination entity, such as a private family holding company. Such a move comes with several beneficial impacts as i) a costly payout of family shareholders can be avoided, ii) a potential sale of shares to non-family members can be prevented, iii) non-successors are limited in their ability to interfere in business operations, and iv) opportunities for non-successors to be supportive of their family and business are provided.<sup>15</sup> In this way, coordination entities such as holding companies can consolidate control in both the family and the business domain and act as an instrument to ensure unity within the business dynasty.

15 Jaskiewicz, P., Combs, J. G., & Rau, S. B. (2015). Entrepreneurial legacy: Toward a theory of how some family firms nurture transgenerational entrepreneurship. *Journal of Business Venturing*, 30(1), 29-49.

- b) In a different attempt, some non-successors may decide to pursue their careers outside the core business but still related to the business dynasty while keeping cooperative ties with the family and newly appointed business dynasty leader. For example, Andrea Agnelli – nephew of the third-generation leader, Giovanni Agnelli – did not turn out to be the next business dynasty leader of the Agnelli dynasty. However, he assumed position as president of the family-owned football club, Juventus F.C., a career path outside the dynasty’s automobile business, but still related to the business dynasty.
- c) Other non-successors aim to pursue their professional careers outside of and unrelated to the business dynasty while still maintaining cooperative ties to the family. Individuals who follow this path oftentimes strive for careers in fields with high publicity and social status such as politics, arts, or social engagement. It is not ruled out that such career paths are beneficial to the business dynasty as they can indirectly contribute to its reputational and political capital.<sup>16</sup>
- d) The worst outcome for all parties involved is when non-successors decide to remain hostile and spiteful towards the business dynasty leader as a result from the disappointment of not becoming the next business dynasty leader. In some cases, hostile non-successors drag the business leader into tedious legal fights or use insider knowledge to start their own business and compete against the dynasty’s business.

Below figure shows the four retention paths for non-successors:<sup>17</sup>



16 Le Breton-Miller, I., & Miller, D. (2018). Beyond the firm: Business families as entrepreneurs. *Entrepreneurship Theory and Practice*, 42(4), 527-536.

17 Würsten, Matthias Christian: Three Essays on Owner Control in Private Firms: Dynasties, Employee Empowerment and Entrepreneur Faith. Thesis, 2022.

### 3. Conclusion and Relevance for Members of Board of Directors

The article above can be understood as a call to change perspective from a company-centric to a family-centric view, at least from time to time. Traditionally, the job profile of a BoD member consists of many topics allocated to the business domain (e.g., definition of organizational structure, providing strategic guideline, review and approval of budget, etc.). Given the findings above, BoD members of family business might want to include developments in the family domain into their considerations as well. It is specifically the life-cycle developments in the family domain, such as birth, marriage, and death which may directly imply and/or trigger changes in the business domain. A possible way to interlink the family- with the business domain in family businesses is to ensure the effectiveness of governance mechanisms. As laid out by Zellweger (2017), there are (potentially) four types of governance to be applied and coordinated in family firms: corporate governance, family governance, ownership governance, and wealth governance.<sup>18</sup>

Below are summarized the four key implications for members of a board of directors of a family firm:

- The extension of the family has implications for the business. The arrival of the next generation triggers changes on the business domain. The birth of a leader's child leads to gradual changes on the business level (diversification, acquisitions). The birth of a leader's grandchild marks the starting point for the materialization of the succession process. Marriage, as a form of family extension, can be a double-edged sword for a business dynasty. The prevention of conflicts with and the accommodation of in-laws are decisive for the success of generational transitions of dynasties.
- The transparent and timely appointment of a clear successor can smoothen the generational transition. The transparent appointment of a clear successor before the death of the business dynasty leader prevents a looming power void within the business dynasty and ensures a smooth transition from one to another generation. In case the family has not assigned or is unable to agree on a clear successor, the passing of the business dynasty leader poses a threat to the survival of the whole business dynasty.
- The completion of a succession process is followed by changes in the business and in the family domain. After taking over the lead, successors implement punctuated changes in the business domain (M&A, divestments, diversification) and seek to rearrange their relationships with non-successors.
- A key aspect for the continued success of a business dynasty is whether a business dynasty leader manages to keep non-successors on board. Four distinct non-successor retention paths vary in the extent to which the ties between successor and non-successor remain cooperative or confrontational. Spiteful non-successors can lead to the ultimate demise of a business dynasty. Coordination entities, such as holding companies, can consolidate control in both the family- and business domain and ensure unity within a business dynasty.

18 Zellweger, T. (2017). Managing the family business: Theory and practice. Edward Elgar Publishing.



# The Effective Corporate Tax Rate («ETR»): Quo Vadis?



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## 1. Introduction

The Effective Tax Rate («ETR») is a figure presented in consolidated financial statements of annual reports. It is calculated as Total Tax Expense (i.e. current and deferred) divided by Earnings Before Tax («EBT»). ETR shows the overall (global, blended) income tax burden of a Multinational Enterprise («MNE») in the reporting period. Often, Boards' audit committees want to benchmark their own ETR against its peers operating in the same business and understand both positive and negative factors influencing its height. This article explains, which aspects should be considered, when determining the targeted ETR. The following figure presents the way ETR is calculated.<sup>1</sup>

$$\text{ETR} = \frac{\text{Tax expense (current + deferred)}}{\text{Earnings Before Tax (EBT)}}$$

Figure 1: ETR ratio

## 2. The macro perspective: shareholder vs. stakeholder interests

### 2.1 Shareholder interests<sup>2</sup>

The key determinant of shareholder value according to the current prevalent reporting standards is earnings per share («EPS») ratio, which is usually defined as net profit (i.e. profit after corporate income tax) divided by the count of outstanding shares.<sup>3</sup> Therefore, the effect of having an ETR of 20% means that operating profit is reduced by 20% corporate income tax before it is (at least partly) distributed between shareholders. As a result, due to ETR of 20% any shareholder obtains by 20% less EPS usually in the form of a dividend. Because of the way EPS is calculated, the shareholder value rises with decreasing ETR. Assuming that all other basic conditions remain the same, decreasing ETR should lead to the increase of share price as well. By applying the shareholder theory, ETR should be the Key Performance Indicator («KPI») of any MNE's tax function.

1 IAS 12.86.

2 DATTA, Y.: «Friedman Doctrine: Maximizing Profits Is Neither Good for Society Nor Even for the Shareholders.», Journal of economics and public finance 7.3 (2021): p. 153 et seq.

3 IAS 33.

In other words, from a shareholder perspective the main goal of any MNE's tax department should be the ETR reduction to the lowest possible level with tax planning schemes and other measures discussed in Section 3: Other Aspects.

## 2.2 Stakeholder interests<sup>4</sup>

At the same time, the ETR of a MNE and its minimum required level have been extensively discussed by a broad variety of stakeholders for more than a decade. In the late 2000s, the daily press articles about ETRs below 10% caused by allegedly aggressive tax planning schemes resulted in public protests and boycotts followed by reputational damage of Amazon, Google, Starbucks and Co.<sup>5</sup> As a reaction to the growing stakeholder (e.g., non-governmental organizations («NGOs»), investors, tax authorities, the OECD and G20) demand for more transparency regarding tax payments and overall tax strategy, the first Environmental Social Governance («ESG») standard for tax matters was announced by the Global Reporting Initiative («GRI») on 5 December 2019. With this non-financial reporting regulatory development, tax became part of the ESG strategy. Due to the reporting standard GRI 207, Tax, information about overall tax burden (per country) should be disclosed in ESG reports. Consequently, notably low values of overall tax burden might result in negative publicity and reputational damage.

The following figure depicts the two rival approaches. The shareholder interests are to present as low values as possible, whereas a broad variety of stakeholders expect a «reasonable» level of ETR.

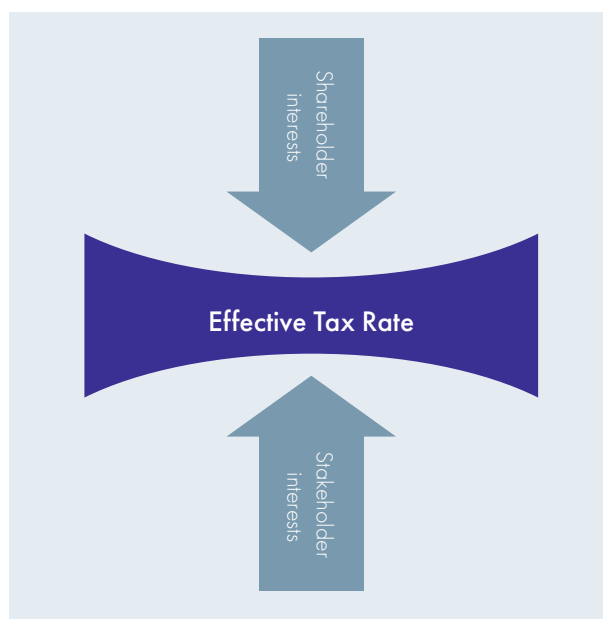


Figure 2: Macro perspective – Shareholder interests vs. stakeholder interests<sup>6</sup>

## 3. The micro perspective: other aspects

It is important to note that, beside the (strategic) macro perspective, there are several operational aspects to be considered – from the micro perspective – too, namely:

### 3.1 EBT

As EBT is the denominator in the ETR ratio, there is a negative correlation between ETR and EBT. In other words, should EBT decrease, for example due to economic recession or impairments and write-offs of assets, ETR will – due to remaining tax obligations based on assessments from last years – rise.

### 3.2 Global blending of EBT

As ETR is calculated as weighted average of tax rates with EBT per country as weights, the global allocation of earnings before tax plays an instrumental role. To make an example, MNEs generating majority of its profits from Germany (with tax rate of ~30%) will report on average higher ETR than MNEs with majority of its profits coming from Singapore (with tax rate of ~17%).

4 PARMAR, B. R. / FREEMAN, E. R. / HARRISON, J. S. / WICKS, A. C. / DE COLE, S. / PURNELL, L.: «The Stakeholder Theory the State of the Art», The Academy of Management Annals, June 2010, p. 3. Available: [https://www.researchgate.net/publication/235458104\\_Stakeholder\\_Theory\\_The\\_State\\_of\\_the\\_Art/citation/download](https://www.researchgate.net/publication/235458104_Stakeholder_Theory_The_State_of_the_Art/citation/download), last access on 30 October 2021.

5 BARFORD, V. / HOLT, G.: The rise of «tax shaming», 21 May 2013, BBC News Magazine, Available at: <https://www.bbc.com/news/magazine-20560359>, last entry on 29 October 2022.

6 Own creation.

### 3.3 Business model

The global blending of EBT can be positively influenced by the selection of a suitable business model. A good example of a tax efficient operating model, which changes the international allocation of profits, is the principal structure accumulating EBT in a low tax country or sales via digital platforms.

### 3.4 Tax accounting rules

Beyond the tax expert circles, it is less known that an important driver of ETR is the deferred tax expense. In contrast to the current tax, this component of tax expense is cash flow irrelevant. It arises due to the different valuation approaches between the international reporting standards (e.g., IFRS or US GAAP) and statutory accounting (e.g., OR in Switzerland or HGB in Germany) for all balance sheet positions. The creation of Deferred Tax Assets reduces the ETR, whereas new Deferred Tax Liabilities increases it.

### 3.5 Tax reporting quality

ETR is determined in the year-end closing reporting process, during which individual legal entities fill out and submit their reporting packages to the central consolidation and tax reporting teams. The reporting packages usually take the form of predefined schedules, in which data on current and deferred tax expenses and EBT are inserted. In order to achieve the targeted level ETR, personnel responsible for tax reporting in individual legal entities in all MNE's locations has to stay up-to-date as regards tax reporting standards (e.g., IAS 12) as well as other tax initiatives (e.g., the recent UK Tax reform or the OECD Pillar Two). In addition, a robust and reliable reporting system for financial reporting is indispensable.

### 3.6 OECD pillar two / Minimum taxation

Finally, the widely discussed OECD pillar two reform, which will introduce the minimum taxation of 15% in each jurisdiction, will adversely affect ETR of MNEs with global revenues exceeding EUR 750m.<sup>7</sup> It can be assumed that this reform will not enter in force before 2024.

<sup>7</sup> BERNDT, T. et al., Umsetzung der globalen Mindeststeuer (Pillar 2) in der Schweiz, IFF-HSG Working Paper No.2022-13.

The following figure depicts other (operational) factors influencing ETR.

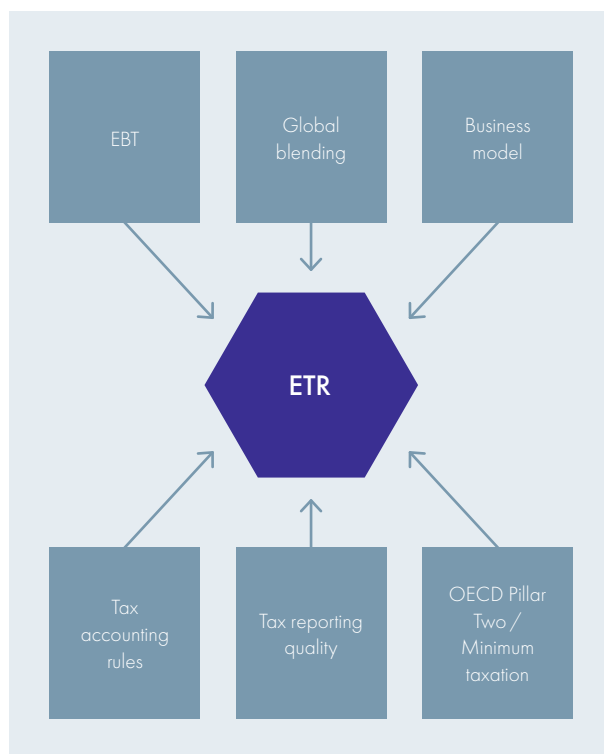


Figure 3: Micro perspective – Other (operational) factors<sup>8</sup>

## 4. Conclusion

Frequently, ETR and its desired level is a topic discussed between the audit committee and the Head of Group Tax or CFO in board meetings. In practice, reported ETRs are benchmarked against competitors and peers for e.g., WACC calculation purposes. Before any decisions are made, attention should be paid to the drivers of ETR and what is realistic to achieve. From a strategic point of view, the interaction between the shareholder interest and ESG goals (e.g., desired ratings) plays an important role. Finally, there are several other (operational) factors influencing ETR, such as: EBT, Global blending, Business model, Tax accounting rules, Tax reporting quality and OECD Pillar Two / Minimum taxation.

<sup>8</sup> Own creation.





# Cloud Governance



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## 1. Introduction

During the past years we have continued to see stable growth in cloud services adoption across the industry. With greatly expanding portfolios of cloud service offerings tailored to address the customer needs in the areas of data analytics, machine learning, and microservices, the reliance on cloud infrastructure for many enterprises has gone way beyond traditional conservative usage. During the challenging times of COVID-19 pandemic in 2020-2021, we observed many organizations take strategic decisions for complete migrations of their IT infrastructures into the cloud. On the other side of the scale, many successful businesses were leveraging the cloud for their operating model from the very beginning.

Effective governance mechanisms and C-level commitment are crucial for accelerating the digital business transformation as well as achieving the benefits offered by a cloud journey, such as accelerated growth, rapid innovation, global reach, and optimized IT costs.

Running an IT environment which is largely defined by the cloud-native capabilities and workflows requires drastic evolution of the governance model to be supportive of such operations. The organizations are facing a significant challenge of ramping up and maintaining required skillset, fostering agile working culture and DevOps environments, as well as establishing corresponding roles and responsibilities for the involved teams.

Ability to leverage cloud services effectively is underpinned by a set of foundational capabilities within the organization. These capabilities span across multiple functional domains and must be backed by well-established interaction models between different functions, enabling decentralized decision making while staying within clearly defined regulatory and risk boundaries.

From the business perspective, the executives should focus on ensuring that cloud investments accelerate the pace of digital transformation and the desired business outcomes. Common stakeholders that determine and steer the success of cloud adoption include the Board Members, CEO, CFO, COO, CIO, and CTO. As innovation and digital transformation of the business is a continuous journey, it requires considerable adjustment of the business and IT strategy to enable benefits realization at various stages and maturity levels of the cloud adoption.

Some good practices for effective cloud governance that fall in with the area of C-level responsibilities are:

- Fostering ongoing partnership between the business functions and teams. For effective cloud value realization, organizational alignment serves as a bridge between technology and the business, so that technology changes are leveraged by the business units producing business outcomes.
- Establishing dedicated cloud adoption program and the corresponding teams who are responsible for the overarching technology and architectural aspects of using the cloud, facilitating the right skills and knowledge across the organization.
- Reliance of the business and IT strategy on deliverables that cloud adoption program is committed to, executive sponsorship and involvement of the business stakeholders into the steering committees for major initiatives of the cloud adoption program such as large-scale application and infrastructure migrations.
- Adjustment of the HR strategy, creation of dedicated job profiles, and skills development plans to support cloud adoption program needs. Fostering agile business culture based on continuous innovation and enablement of the product teams for quick and autonomous decision making.
- Risk management, security and compliance functions applying controls frameworks that are designed for use with the cloud technologies, thus allowing continuous extension of risk management and governance processes into all domains of the operated cloud environment.

The proven approach to accelerating initial phases of the cloud journey for many organizations is establishing a Center of Excellence team for the cloud. This dedicated cross-functional team serves as an overarching enablement mechanism for the cloud adoption. It is typically responsible for supporting involvement and incorporation of the business strategy into the capabilities delivered out of the cloud, shaping the operating model for the cloud usage, and facilitating the right degree of interaction between development and operation teams.

The Center of Excellence is also responsible for engaging resources required for building up shared infrastructure and services as well as maintaining centralized view of the entire cloud-based environment.

Risk management, security and compliance procedures are extended into the cloud operations by means of centralized guardrails that define safe boundaries for decentralized product development and operations while maintaining the right degree of autonomy for technical decision making within DevOps teams.

## 2. State of the Art Cloud Governance in Switzerland

Swiss ICT market is leaning towards ever increased adoption of cloud services for many modern product portfolios.

Financial organizations in Switzerland being bound by utmost strict regulatory requirements around data protection have taken a challenge to redefine and adapt their service delivery models so that the usage of global service providers has become viable for many business cases.

Establishment of strong governance models with clear separation of roles and responsibilities as well as re-definition of contractual and control frameworks made it possible to demonstrate compliance with strict regulatory landscape for increasing volumes of cloud-based data processing by the Swiss companies.<sup>1</sup>

## 3. AWS Cloud Governance

Amazon Web Services (AWS) is the world's most comprehensive and broadly adopted cloud platform, offering over 200 fully featured services from data centers globally.

As the number of AWS customers in Switzerland has grown, so has the size of AWS's presence in the country. More than ten thousand customers in Switzerland now use AWS each month to build their businesses and expand their geographic reach. Many large and medium-sized businesses across Switzerland such as Homegate, Novartis, and Swiss Post are moving their mission-critical workloads to AWS.

1 Public Cloud for Public Services <https://www.lauxlawyers.ch/en/public-cloud-for-public-services/>.

Leveraging on the vast experience of various customer organizations worldwide migrating and running their IT in the cloud, AWS has come up with a proven set of best practices and governance principles for their customers to support their cloud journey. Structural alignment of the governance mechanisms with multiple organizational perspectives as well as clear allocation of roles and responsibilities are at the core of the best practices facilitated by AWS. The below section outlines key perspectives encompassed by the suggested framework.

#### 4. Responsibilities and Roles

The AWS Cloud Adoption Framework (AWS CAF) leverages AWS experience and best practices to help the organizations digitally transform and accelerate their business outcomes through innovative use of AWS.

The figure below provides an outline of the main delivery capabilities comprising the best practices described in the AWS CAF framework.

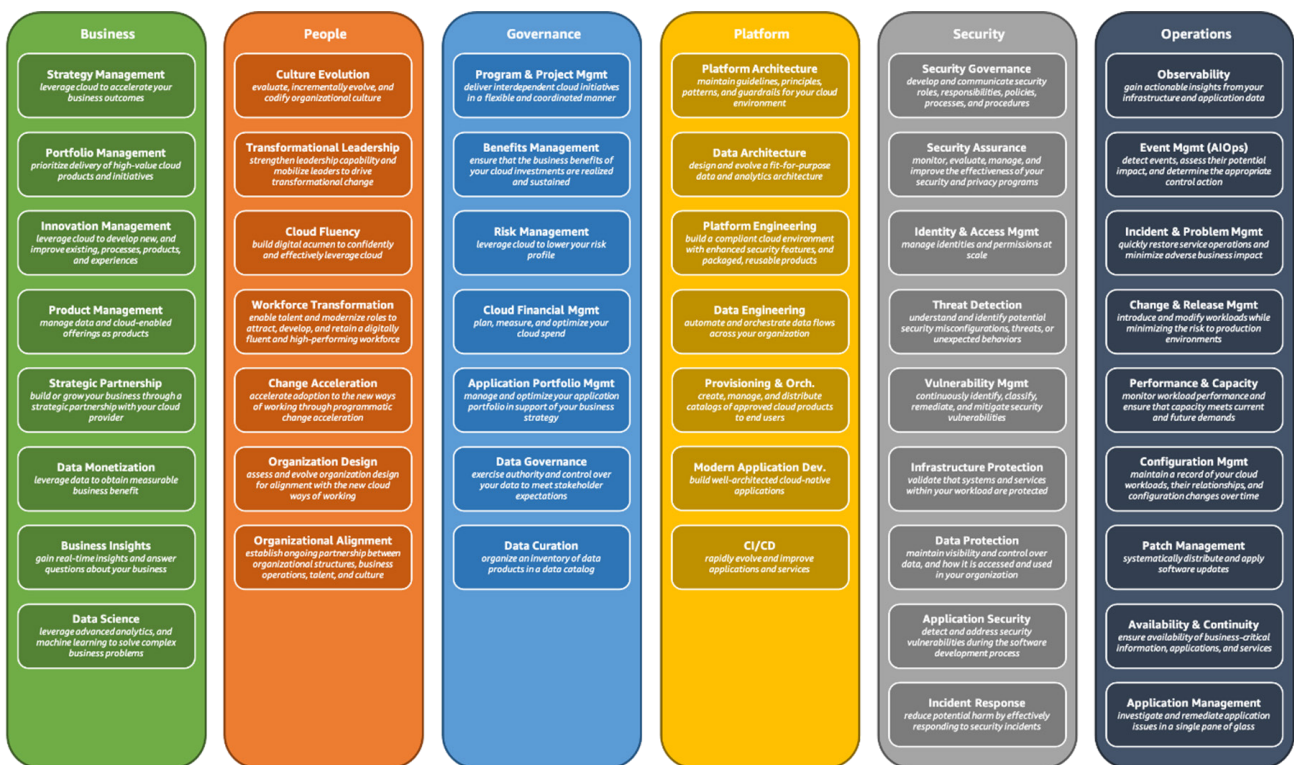


Figure 1 AWS Cloud Adoption Framework (CAF) capabilities<sup>2</sup>

From the Governance Perspective of the AWS CAF framework, to define a solid foundation for the cloud adoption journey the organizations should establish the corresponding management functions and roles:<sup>2</sup>

- Program and project management. Delivering interdependent cloud initiatives in a flexible and coordinated manner. Complex cross-functional cloud transformation initiatives require careful coordination, especially in more traditionally structured organizations.

Program management is especially critical since many of these interdependencies only become obvious during delivery phase. Managing interdependencies by alignment of multiple initiatives for optimized or integrated costs, schedule, effort, and benefits.

- Benefits management. Ensuring that business benefits associated with the cloud investments are realized and sustained. Success of the transformation is determined by the resulting business benefits. Clear identification of the desired benefits upfront allows for prioritization of the cloud investments and tracking the transformation progress over time.

<sup>2</sup> AWS Cloud Adoption Framework (CAF) / Governance Perspective <https://docs.aws.amazon.com/whitepapers/latest/overview-aws-cloud-adoption-framework/governance-perspective.html>

- Risk management. Leveraging the cloud to lower the risk profile. Identifying and quantifying operational risks related to infrastructure availability, reliability, performance, and security, and business risks related to reputation, business continuity, and organization's ability to quickly respond to changing market conditions.
- Cloud financial management. Planning, measuring, and optimizing the cloud costs. Combining the ease of resource provisioning and agility benefits provided by the cloud with financial accountability and fine-grained cost allocation to individual teams or units.
- Application portfolio management. Managing and optimizing the application portfolio in support of the business strategy. Applications underpin the business capabilities and link them to the associated resources.
- Data governance. Exercising authority and control over the data assets to meet stakeholder expectations. Business processes and analytics capabilities depend on accurate, complete, timely, and relevant data. The organizations should define and assign key data governance roles, including data owners, stewards, and custodians.
- Data curation. Collecting, organizing, leveraging, and enriching metadata to establish inventory of data products in a Data Catalog. A Data Catalog facilitates data monetization and self-service analytics by helping data consumers quickly locate relevant data products as well as understand their context, such as provenance and quality.

Roles and responsibilities described above are foundational to a governance framework which is capable of sustaining long term success of the cloud adoption journey. They are closely collaborative with the Center of Excellence and define a branch of technology and business resources with a focus on leading the organization on its cloud adoption journey that maps to the most important needs of the business.

## 5. Required Skills

Effective cloud governance model needs to account for the skills required to operate in the cloud as well as the long-term cultural shift in the organization. To be successful in digital transformation, the organizations should leverage their core values while facilitating new behaviors and mindsets that would help in attracting and retaining people with the right skills and aspiration for continuous improvement and innovation at ever increasing pace.

Leadership skills required for driving the cloud adoption initiatives must support and enable self-organized cross-functional product teams. Such teams should be empowered for autonomous decision making aimed at delivering outcome-oriented transformational changes to their products.

To help in driving the innovation and digital vision of the organization, affinity to technology and cloud fluency should be extended to all leadership profiles including the C-suite, with senior leaders being well-versed with, and excited about the chances brought by the modern technology trends.<sup>3</sup>

## 6. Summary

Expanding the business operations into the cloud is a considerable strategic challenge for every organization. It requires close collaboration and effective feedback loop between the business and IT as well as establishment of a foundational governance framework supportive of evolving cultural and product delivery aspects. These disciplines should be governed by a dedicated Center of Excellence enabling scalable and accelerated cloud adoption.

Clearly defined business objectives and performance expectations are essential to long term success and value proposition of a cloud adoption program. It ensures C-level sponsorship and reliance of the business strategy on the capabilities and products delivered by the cloud.

Effective cost optimization and continuous risk management spanning throughout the cloud infrastructure domain are essential to continuous increase in maturity and consolidation of cloud-based capabilities.

3 Building a Cloud Operating Model <https://docs.aws.amazon.com/whitepapers/latest/building-cloud-operating-model/building-cloud-operating-model.html>

## Talk the Walk: Nachhaltigkeit richtig kommunizieren



### Prof. Dr. Johanna Gollnhofer

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Viele Unternehmen haben ihre Hausaufgaben bezüglich Nachhaltigkeit schon gemacht. Wie kann man sicherstellen, dass diese Bemühungen und Erfolge bei KundInnen und MitarbeiterInnen ankommen und verstanden werden?

In einer PwC Studie aus dem Jahre 2019 gaben 56% der Board-MitgliederInnen an, dass zu viel Zeit auf Nachhaltigkeitsthemen verwendet wurde.<sup>1</sup> Diese Perspektive hat sich über die letzten Jahre rasant gewandelt, da der Erfolg von Nachhaltigkeit quantifiziert werden konnte: So zeigt eine Studie von Accenture auf, dass Unternehmen mit höheren ESG (Environmental, Social & Governance)-Ratings auch bessere finanzielle Ergebnisse erzielen.<sup>2</sup>

Diese positiven Auswirkungen von Nachhaltigkeit haben in führenden Unternehmen im Top-Management und im Verwaltungsrat Anerkennung gefunden. Besonders der Verwaltungsrat kann hier eine langfristige, generationsübergreifende Perspektive einnehmen.<sup>3</sup> Nachhaltigkeit ist ein Querschnittsthema, welches sich über die verschiedenen Aufgabenbereiche im Verwaltungsrat zieht, wie zum Beispiel über die strategische, finanzielle und kommunikative Ebene.

Über die letzten Jahre wurden vermehrt Nachhaltigkeitsstrategien entwickelt, implementiert und überprüft. Manchmal werden die Bemühungen auch von einem CSO (Chief Sustainable Officer)- oder einem ESG-Officer begleitet.<sup>4</sup> Ausgiebige Nachhaltigkeits-Reports – im Jahre 2022 hatten 35% der Nachhaltigkeitsreports über 151 Seiten, wohingegen im Jahr 2019 nur 18% der Reports mehr als 151 Seiten hatten – belegen die Bemühungen und Erfolge der Unternehmen.<sup>5</sup>

- 1 PwC (2019): Annual Corporate Directors Survey: The collegiality conundrum: Finding the balance in the boardroom.
- 2 The Forum of Young Global Leader (2020): Responsible leadership for a sustainable and equitable world.
- 3 Eccles R. G., Johnstone-Louis M., Mayer C. and J. C. Strohle (2020): The board's role in sustainability, Harvard Business Review, <https://hbr.org/2020/09/the-boards-role-in-sustainability>.
- 4 Langen R. and M. Menz (2022): Does your company need a chief ESG Officer?, Harvard Business Review, <https://hbr.org/2022/02/does-your-company-need-a-chief-esg-officer>.
- 5 WBCSD (2022): Reporting matters, <https://www.wbcsd.org/Programs/Redefining-Value/Reporting-matters/Resources/RM2022>.

Kommen diese nachhaltigen Bemühungen und Erfolge aber auch wirklich bei den KundInnen, MitarbeiterInnen und anderen Stakeholdern an? Hier drei Indikatoren, dass dies in Unternehmen nicht der Fall ist.

### 1. Indikator 1: MitarbeiterInnen haben kein einheitliches Verständnis von Nachhaltigkeit

Nur weil ein Nachhaltigkeitsreport vorhanden ist, heisst das nicht, dass das Konzept Nachhaltigkeit im jeweiligen Unternehmen auch gelebt wird. Wahrscheinlich werden die meisten MitarbeiterInnen bestätigen, dass Nachhaltigkeit wichtig ist. Der Weg, wie man zu dieser Nachhaltigkeit kommt, kann in den Köpfen der MitarbeiterInnen jedoch sehr unterschiedlich aussehen: Für die einen besteht Nachhaltigkeit darin, die Wertschöpfungskette CO<sub>2</sub>-neutral auszugestalten, für die anderen geht es um Tierschutz oder wiederverwertbare Verpackungen. Nachhaltigkeit ist also ein sehr breites Wort – und ähnlich wie in Diskussionen zu Digitalisierung, wird dieses Wort oftmals unterschiedlich verstanden und definiert.<sup>6</sup>

Für den Verwaltungsrat heisst das: Welches Nachhaltigkeitsverständnis gilt in dem Unternehmen? Was sind die konkreten nachhaltigen Ziele, die verfolgt werden? Wie kann man sich mit diesen Zielen auch sinnvoll von den jeweiligen Mitwettbewerbsern differenzieren? Dies sind strategische und kulturelle Fragestellungen, welche teilweise in der Verantwortung des Verwaltungsrats liegen.<sup>7</sup>

### 2. Indikator 2: MitarbeiterInnen wissen nicht mit Trade-Offs umzugehen

Nachhaltigkeitsziele sind löblich und erwünscht, jedoch kommen sie in der Regel mit Trade-Offs:

Erstens stehen nachhaltige Ziele oftmals in einem Trade-Off zu finanziellen Zielen. Soll jetzt beispielsweise der Einkauf die billigere Variante wählen, oder doch die nachhaltige, welche sich oftmals erst in einer langfristigen Betrachtung auszahlt?<sup>8</sup> Wie sollen hier in der alltäglichen Unternehmenspraxis Entscheidungen getroffen werden?

Zweitens stehen nachhaltige Ziele auch oftmals in Konflikt miteinander. Dies kann man sich an einem alltäglichen Beispiel verdeutlichen: Ist eine in Plastik verpackte Gurke nachhaltiger, oder eine Gurke, welche nicht in Plastik verpackt ist? Die erste Intuition ist oftmals die Gurke in Plastik als weniger nachhaltig zu bezeichnen. Jedoch bedenkt man hier nicht, dass eine in Plastik verpackte Gurke länger haltbar ist. Welches nachhaltige Ziel wiegt hier mehr: Geht es um die Reduktion von Plastik? Oder geht es um die Vermeidung von Lebensmittelabfällen?

Für den Verwaltungsrat heisst das: Wie wird mit Trade-Offs zwischen kurzfristigen und langfristigen Zielen umgegangen? Wie wird mit Trade-Offs zwischen nachhaltigen und finanziellen Zielen umgegangen? Es handelt sich hier um strategische Trade-Offs. Die Aufgabe des Verwaltungsrats ist es, potenzielle Zielkonflikte zu erkennen und vorrausschauend mit ihnen umzugehen. Auch wenn das Management i. d. R. für die Kommunikation mit den Mitarbeitenden zuständig ist, ist es Aufgabe des Verwaltungsrates, die Kommunikationsstrategie für die nachhaltigen Ziele mitzudenken – mit dem Ziel, dass diese Ziele bei den MitarbeiterInnen ankommen, verstanden und gelebt werden.

6 Tödtmann C. (2018): Wie wär`s mal mit der Entmystifizierung der Digitalisierung?, <https://blog.wiwo.de/management/2018/01/26/wie-waere-es-mal-mit-entmystifizierung-der-digitalisierung/>.

7 Eccles R. G., Johnstone-Louis M., Mayer C. and J. C. Strohle (2020): The board`s role in sustainability, Harvard Business Review, <https://hbr.org/2020/09/the-boards-role-in-sustainability>.

8 Gruzauskas V., Baskutius S. and V. Navickas (2018): Minimizing the trade-off between sustainability and cost effective performance by using autonomous vehicles, Journal of Cleaner Production, Volume 184, 709-717.

### 3. Indikator 3: KundInnen zweifeln an den nachhaltigen Absichten

Immerwieder stellen KundInnen oder andere Stakeholder das nachhaltige Handeln von Unternehmen in Frage. Hier befindet man sich im Bereich des Greenwashings.<sup>9</sup> Grob kann man zwei Formen unterscheiden:

a) **Das faktische Greenwashing** – hier behauptet ein Unternehmen etwas im Bereich der Supply Chain oder der Diversität zu tun, was es faktisch nicht tut. Ähnliche Techniken sind Verschleierung oder Betonung von Punkten, welche eigentlich nicht wirklich relevant sind (zum Beispiel die Aufschrift «FCKW-frei», obwohl dies in gewissen Ländern schon länger untersagt ist).

b) **Das unterstellte Greenwashing** – Unternehmen verhalten sich nachhaltig. KundInnen und Stakeholder zweifeln jedoch an, dass die Unternehmen es ernst meinen. Hier fehlt es an Glaubwürdigkeit für das Unternehmen. Ein Beispiel hierfür konnte kürzlich auf dem sozialen Netzwerk LinkedIn beobachtet werden: So hat im November 2022 der deutsche Handelsriese REWE die Kooperation mit dem DFB (Deutscher Fußball-Bund) aufgelöst, da der DFB auf Druck der FIFA auf die One-Love-Binde bei den Weltmeisterschaften in Katar verzichtet hat. Laut dem REWE CEO ist dies nicht vereinbar mit der Diversitäts-Auffassung von REWE. Brisantes Detail: Der Partnerschaftsvertrag wäre auch ohne das Zutun der FIFA in ein paar Monaten ausgelaufen – REWE hatte bereits im Oktober 2022 verkündet, diesen nicht weiterzuführen. Die Reaktionen auf die Entscheidung von REWE fielen auf den sozialen Medien hierfür oftmals kritisch aus: REWE sah sich dem Vorwurf der Scheinheiligkeit und des PR-Stunts ausgesetzt.<sup>10</sup> Offensichtlich stufen die KritikerInnen die Handlung von REWE nicht als glaubwürdig ein. Diese Gefahr der fehlenden Glaubwürdigkeit treibt manche Unternehmen so weit, dass sie Abstand davon nehmen, ihre nachhaltigen Anstrengungen und Erfolge zu kommunizieren – auch Greenhushing genannt.<sup>11</sup>

Für den Verwaltungsrat heisst das: Was sind nachhaltige Handlungen und Ziele, welche das Unternehmen glaubhaft vertreten kann? Wie sieht eine glaubwürdige Kommunikation aus?

Diese Fragestellungen liegen an der Schnittstelle zwischen Strategie und Markenführung.

### 4. Fazit

Nachhaltigkeit sollte nicht nur als eine Implementierungs- und Monitorings-Aufgabe verstanden werden. Um die Früchte der nachhaltigen Bemühungen vollumfänglich zu ernten, geht es auch darum, die Bemühungen und Erfolge richtig und effektiv zu kommunizieren.

9 Tuerff K. (2008): Claim greenness at your own risk, Harvard Business Review, <https://hbr.org/2008/07/claim-greenness-at-your-own-ri>.

10 Auszug von LinkedIn Kommentaren (2022): <https://www.linkedin.com/feed/update/urn:li:activity:7002187238381862912/>.

11 Speed M. (2022): Green Hushing on the rise as companies keep climate plans from scrutiny, Financial Times, <https://www.ft.com/content/5fd513c3-e23f-4daa-817e-aa32cf6d18d4>.





# Die digitale Aktie – Evolution – Governance



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## 1. Einleitung

Mit der rasch voranschreitenden Digitalisierung wächst auch das Bedürfnis, immer mehr Rechtsgeschäfte digital abzubilden. Auch das Aktienrecht bleibt hiervon nicht unberührt und Prozesse wie der Erwerb, das Halten und die Veräusserung von Aktientiteln werden zunehmend digitalisiert. Im Zuge der Entmaterialisierung der ursprünglich als Wertpapiere ausgestalteten Aktien können diese heute als digitale «Werteinheiten» oder sog. Token<sup>1</sup> ausgegeben und über Distributed-Ledger-Technologie (DLT bzw. Blockchain Technologie basierte Infrastrukturen) gehalten und übertragen werden. Im vorliegenden Artikel wird zum einen auf die Entwicklung der «Papieraktie» zum «Aktien-Token», und zum anderen auf die sich hieraus ergebenden Vorteile im Bereich Aktienbuchführung, Aktionärsmanagement und Governance eingegangen.

## 2. Vom Wertpapier zum Registerwertrecht

### 2.1 Die Aktie als Wertpapier i.S.v. OR 965

Gemäss Art. 965 des Schweizerischen Obligationenrechts («OR») ist ein Wertpapier jede Urkunde, mit der ein Recht derart verknüpft ist, dass es ohne die Urkunde weder geltend gemacht noch auf andere übertragen werden kann. Klassisches Beispiel für ein Wertpapier ist die Aktie. Dem Wertpapier oder dem Aktienzertifikat kommt eine Legitimations-, Transport- und Verkehrsschutzfunktion zu. Die Legitimationsfunktion einer Namenaktie schützt die Gesellschaft, die sich bei Vorlage des Aktienzertifikats darauf verlassen darf, dass der Inhaber des (allenfalls indossierten) Zertifikates auch tatsächlich dessen rechtmässiger Eigentümer ist. Der Inhaber seinerseits kann sich gegenüber der Gesellschaft oder einem Dritten durch Präsentation des Wertpapiers als rechtmässiger Eigentümer der Aktie legitimieren. Mit der Übertragung der (indossierten) Namenaktie geht auch das Eigentum an der Aktie auf den Erwerber über (Transportfunktion). Gestützt auf den Verkehrsschutz ist ein gutgläubiger Erwerber einer verbrieften Aktie geschützt.

<sup>1</sup> Ein Token ist eine digital auf einem Blockchain-Ledger dezentral gespeicherte Informationseinheit, die unterschiedlichste Eigenschaften, Funktionalitäten oder Rechte darstellen bzw. abbilden kann.

Kleinere und mittlere Unternehmen haben zunehmend auf die Ausstellung von physischen Aktienzertifikaten verzichtet (sog. aufgeschobener Titeldruck), was zwar faktisch einem ersten Schritt zur Entmaterialisierung der Aktien gleichkommt, nicht aber mit Art. 965 OR im Einklang steht, wonach die in einem Wertpapier abgebildeten Rechte durch eine physische Urkunde verkörpert werden müssen. Solchen faktischen Wertrechten fehlte es demnach lange an einer gesetzlichen Grundlage.

## 2.2 Vom Wertpapier über das Wertrecht zum Aktien-Token

Mit der Einführung des Bucheffektengesetzes («BEG») wurde zeitgleich per 1. Januar 2010 Art. 973c OR eingeführt und somit eine materielle Grundlage für die Schaffung von sog. Wertrechten als weiterer Entwicklungsschritt im Entmaterialisierungsprozess geschaffen. Wertrechte im Sinne von Art. 973c OR stellen entmaterialisierte, unverbriefte Wertpapiere dar, denen es an jeglicher Körperlichkeit fehlt. Einer Aktiengesellschaft steht es grundsätzlich frei, ihre Aktien in verbrieft oder unverbrieft Form auszugeben, wobei es für Letzteres, d.h. die Ausgabe von Wertrechten, einer statutarischen Grundlage bedarf.

Für die rechtsgültige Übertragung von verbrieften Aktien bedarf es der Übergabe des (indossierten) Zertifikates. Wertrechte hingegen werden durch eine Zession übertragen, die zu ihrer Gültigkeit eine handschriftliche Unterschrift des Übertragenden benötigt. Neben der handschriftlichen Unterschrift kann das Schriftformerfordernis alternativ durch eine qualifizierte elektronische Signatur («QES») ersetzt werden.

Mit der raschen Verbreitung der DLT-Technologie kamen zunehmend auch sog. Anlage- oder Asset-Token auf, die im Gegensatz zu den reinen Zahlungstoken wie Bitcoin oder Ether Forderungs- und / oder Mitgliedschaftsrechte verkörpern können. Ein Aktien-Token wird als Anlage-Token qualifiziert, da er dem/r Token Holder/in als Aktionär/in sowohl Vermögensrechte (wie z.B. Anspruch auf Dividendenzahlungen oder Liquidationserlös) als auch Mitgliedschaftsrechte an einer Gesellschaft vermittelt. Durch die Tokenisierung, d.h. durch die Verknüpfung von rechtlichen Informationen mit technischen Daten, wird die Aktionärsstellung derart mit dem Token verbunden, dass diese nur noch mit dem Token übertragen werden kann.<sup>2</sup>

2 Hans Caspar von der Crone, Fleur Baumgartner; Digitalisierung des Aktienrechts - die Ausgabe von Registerwertrechten; SZW / RSDA 4/2020, S. 353.

Vor dem Inkrafttreten des Bundesgesetzes zur Anpassung des Bundesrechts an Entwicklungen der Technik verteilter elektronischer Register («DLT-Gesetz») am 1. Februar 2021 konnten solche Aktien-Token nur als (einfache) Wertrechte im Sinne von Art. 973c OR ausgegeben werden. Dies mit dem Nachteil, dass eine rechtsgültige Übertragung des Aktien-Tokens nur mittels schriftlicher Zession erfolgen konnte, was nicht im Einklang mit der angestrebten Digitalisierung stehen kann. Erst mit der Einführung des Registerwertrechts i.S.v. Art. 973d OR wurde dieses Schriftlichkeitserfordernis schliesslich überwunden.

## 2.3 Das Registerwertrecht

Mit dem am 1. Februar 2021 in Kraft getretenen ersten Teil des DLT-Gesetzes wurde auch eine neue Kategorie von Wertrechten mit der Bezeichnung Registerwertrechte eingeführt (Art. 973d OR). Gleichzeitig wurde das oben beschriebene Wertrecht nach Art. 973c OR neu als einfaches Wertrecht bezeichnet. Die konstitutive Schaffung eines Registerwertrechts entsteht mit dessen Eintragung in ein sogenanntes Wertrechtereister und kann nur über dieses geltend gemacht und rechtsgültig übertragen werden. Als Registerwertrechte können alle Rechte ausgestaltet werden, die auch in Wertpapieren verbrieft werden können.<sup>3</sup> Darunter fallen auch die Mitgliedschaftsrechte bei der Aktiengesellschaft, sprich die Aktie. Durch die Registrierungsvereinbarung erfolgt die konstitutive Verknüpfung von Recht und Urkunde. Gemäss Art. 973e OR kommen dem als Registerwertrecht ausgestalteten Aktien-Token dieselben Funktionen zu, welche traditionellerweise von Wertpapieren erfüllt werden:<sup>4</sup>

- **Legitimationsfunktion:** Berechtig ist, wer im Register als Berechtigter ausgewiesen wird. Parteien dürfen sich ohne Weiteres (d.h. ohne Nachforschungen treffen zu müssen) auf den Registereintrag verlassen.
- **Transportfunktion:** Ein Registerwertrecht kann nur über das Register rechtsgültig übertragen werden.
- **Verkehrsschutzfunktion:** Es gilt der Gutgläubenschutz, wonach sich Parteien auf einen Registereintrag verlassen dürfen.

3 Von der Crone S. 354.

4 Botschaft, BBl 2020 S. 259.

Gestützt auf Art. 622 Abs. 1 OR bedarf es für die Ausgabe von Aktien als Registerwertrechte einer statutarischen Grundlage, wobei dieser keine konstitutive Wirkung zukommt. Viel mehr dient die Statutenbestimmung der Schaffung der nötigen Transparenz und stellt sicher, dass die Registerwertrechte nicht gegen den Willen der Aktionär/innen geschaffen werden können. Oft sind solche Statutenbestimmungen so ausgestaltet, dass diese dem Verwaltungsrat die Kompetenz zuweisen, Aktien in der Form von Registerwertrechten auszugeben. Neben dieser statutarischen Grundlage bedarf es einer Registrierungsvereinbarung und eines den gesetzlichen Anforderungen genügenden Wertrechtregisters.

Ein elektronisches Register muss folgende technische Voraussetzungen erfüllen, um als Wertrechtregister im Sinne von Art. 973d Abs. 2 OR zu qualifizieren:

- es vermittelt den Gläubigern, nicht aber dem Schuldner, mittels technischer Verfahren die ausschliessliche Verfügungsmacht über ihre Rechte;
- die Integrität des Registers ist geschützt, indem es durch angemessene technische und organisatorische Massnahmen, wie die gemeinsame Verwaltung durch mehrere voneinander unabhängige Beteiligte, gegen unbefugte Veränderungen geschützt ist (Manipulationsresistenz);
- der Inhalt der Rechte, die Funktionsweise des Registers und die Registrierungsvereinbarung sind im Register oder in damit verknüpften Begleitdaten festgehalten (Publizität);
- die Gläubiger können die sie betreffenden Informationen und Registereinträge einsehen sowie die Integrität des sie betreffenden Registerinhalts ohne Zutun Dritter prüfen.

Zwar sind die neuen Gesetzesbestimmungen technologieneutral formuliert, doch zeichnet sich klar ab, dass heute die DLT die am besten geeignete Technologie darstellt, um die vorgenannten Voraussetzungen zu erfüllen.

Nebst dem Wertrechtregister bedarf es auch einer Registrierungsvereinbarung. Mit einer solchen Registrierungsvereinbarung wird ein Recht derart mit dem Register eintrag verbunden, sodass es nur über das Register geltend gemacht und übertragen werden kann und es somit der registerrechtlichen Übertragungs- und Legitimationsordnung (doppelseitige Präsentationsklausel bzw. einfache Wertpapierklausel) unterworfen wird. Die im Falle des Wertpapiers ausgestellte Urkunde als Informationsträger wird durch ein Wertrechtregister ersetzt, wodurch das Register als Äquivalent zur klassischen Urkunde qualifiziert wird. Neben einem eigentlichen Begebungsvertrag kann eine Vereinbarung zur elektronischen Registrierung auch über Ausgabebedingungen, Anleihebedingungen oder Allgemeine Geschäftsbedingungen erfolgen, welche mit Erwerb des Rechtes oder der Mitgliedschaft akzeptiert werden.<sup>5</sup> Bei letzterem sind die Voraussetzungen zur Gültigkeit von Bestimmungen in den AGBs zu beachten.

### 3. Vorteile bei der Ausgabe von digitalen Aktien aus Sicht der Governance

Gestützt auf die obigen Ausführungen ist offenkundig, dass die Aktie bestens für die Ausgabe in der Form eines Registerwertrechts geeignet ist. Hierbei können bestehende Aktien gestützt auf eine statutarische Grundlage von Wertpapieren in Registerwertrechte umgewandelt oder neu geschaffene Aktien als Registerwertrechte ausgegeben werden. Als Grundlage hierzu dienen die Registrierungsvereinbarung oder die Ausgabebedingungen.

Die Tokenisierung von Aktien findet oft über eine Konfiguration von sogenannten Smart Contracts<sup>6</sup> statt, womit auch Governance-Rechte wie Stimmrechte, Ernennungsrechte, Informationsrechte etc. festgelegt werden können.

5 Botschaft, BBl 2020, S. 276.

6 Smart Contracts sind Software-Programme, die in einer Blockchain gespeichert sind und ausgeführt werden, wenn bestimmte Bedingungen erfüllt sind. Sie werden in der Regel verwendet, um die rechtsgültige Ausfertigung eines Vertrags zu automatisieren, so dass alle Beteiligten sofort Gewissheit über das Ergebnis haben, ohne dass ein Vermittler eingeschaltet werden muss oder Zeit verloren geht.

Die Tokenisierung von Aktien bringt in Bezug auf das Aktionärsmanagement und die Governance viele Vorteile mit sich:

**3.1 Unternehmensinformationen:** Gestützt auf die Konfiguration des Smart Contracts hat jede/r Aktionär/in zu jeder Zeit Zugang zu den aktuellen Informationen der Gesellschaft. Dazu gehören diejenigen Informationen, welche im Handelsregister ersichtlich sind wie bspw. die Höhe und Zusammensetzung des Kapitals, Sitz und Domizil, Vertretungsbefugte etc., sowie auch all jene Informationen, die den/die Aktionär/in selbst betreffen, insb. Anzahl und Art der von ihm/ihr gehaltenen Beteiligungen.

**3.2 Schnelle, einfache und sichere Übertragung:** Ein/e Aktionär/in kann seine/ihre Aktien-Token in seinem/ihrer eigenen Wallet halten und diese ohne Zwischenschaltung eines Intermediärs digital über das Register an eine/n Dritte/n übertragen.

**3.3 Automatische Nachführung des Aktienbuches:** Jede Übertragung über das Register wird fälschungssicher und unabänderbar auf der DLT abgespeichert und führt automatisch und ohne Zutun von Dritten zur Anpassung des Aktienbuches; damit ist gewährleistet, dass jederzeit und in Bezug auf jede einzelne Aktie eine lückenlose Eigentümerkette nachgewiesen werden kann. Dies ist heute bei vielen SMIs, die ihre Aktien als Wertpapiere führen, nicht der Fall.

**3.4 Einfaches Management der Aktionär/innen:** Dadurch, dass das Aktienbuch stets aktuell ist, wird die Kommunikation via digitalen Medien mit den Aktionär/innen vereinfacht; Zustellung von Unterlagen wie Jahresberichte, Jahresrechnungen, Einladungen zu ordentlichen oder ausserordentlichen Generalversammlungen erfolgt automatisiert an die Halter/innen der Aktien-Token.

**3.5 Durchführung von virtuellen Generalversammlungen:** Gestützt auf die COVID-19-Verordnung 3 und neu ab dem 1. Januar 2023 gemäss Art. 701 d nOR können Generalversammlungen teilweise oder neu vollständig digital durchgeführt werden. Dies birgt insbesondere im Zusammenhang mit der Feststellung der Präsenz von Aktionär/innen, die noch als Wertpapiere ausgegebene Aktien halten, einige Unsicherheiten mit sich. Sind Aktien hingegen als Registerwertrechte ausgegeben worden, kann mittels Konfiguration des Smart Contracts auch eine Stimmrechtsausweis- und Stimmabgabefunktion (sog. Stimmrechts-Token) integriert werden, welche sicherstellt, dass nur der/die im Aktienbuch eingetragene Berechtigte als Stimmberechtigte/r gilt. Die eigentliche Durchführung einer Generalversammlung kann über spezialisierte Plattformen erfolgen, über die einerseits Stimmrechts-Token an die Aktionär/innen versandt und andererseits deren Stimmabgabe erfasst und protokolliert und so das Abstimmungsergebnis sowie jede Stimmabgabe fälschungssicher und unabänderbar auf der DLT abgespeichert werden. Eine solche Plattform ist beispielsweise daura.

#### 4. Die daura Plattform als praktisches Anwendungsbeispiel

Die daura ag wurde 2018 gegründet und ist ein Gemeinschaftsunternehmen der innovativen Schweizer Partner Swisscom, SIX, Sygnum, BEKB, BDO, Luka Müller (MME) und Christian Wenger (Wenger & Vieli).

Als schweizweite Marktführerin im Bereich der Aktientokenisierung bietet daura ihren Kunden/innen eine digitale Plattform an, über welche nicht-kotierte Schweizer Aktiengesellschaften Unternehmensanteile digital ausgeben und ihre Aktienbücher elektronisch verwalten können. Aktionär/innen müssen sich dafür einmalig auf der Plattform onboarden und erhalten nach erfolgreicher Registrierung ihre Unternehmensanteile in digitaler Form zugeteilt. Darüber hinaus bieten die digitalen Lösungen der daura Plattform erhebliche Vereinfachungen des Aktionärsmanagements. So haben beispielsweise viele Gesellschaften während der Covid-19 Pandemie ihre Generalversammlungen virtuell über das entsprechende Tool der daura durchgeführt und dabei von der Möglichkeit der digitalen Stimmabgabe bei gleichzeitiger Echtzeit-Interaktion mit den Aktionär/innen Gebrauch gemacht.

daura bietet technische Lösungen für die Ausgabe von Aktien und Partizipationsscheinen als Eigenkapitalinstrumente und jüngst auch für Wandelanleihen als Fremdkapitalinstrument an. Den Unternehmen steht es dabei frei, die Beteiligungen als einfache Wertrechte i.S.v. Art. 973c OR oder als Registerwertrechte gemäss Art. 973d OR auszugeben. Unabdingbar ist indes, dass eine entsprechende statutarische Ermächtigung in den Gesellschaftsstatuten vorhanden ist. Um die Unternehmen in dieser Hinsicht zu unterstützen und rechtliche Klarheit zu schaffen, bietet daura über einen externen Partner einen kostenlosen Statutencheck für interessierte Unternehmen an.

Viele Unternehmen nutzen die daura Plattform für die vereinfachte und effizienzsteigernde Abwicklung von Kapitalerhöhungen. Den Gesellschaften steht es dabei offen, ein Angebot zur Zeichnung von Aktien oder Partizipationsscheinen im Stile eines «Crowdfundings» öffentlich einsehbar oder aber als «Private Placement» über die Plattform zu platzieren. daura ist als Anbieterin einer technischen Infrastruktur, d.h. als Software Providerin, nie in ein solches Angebot involviert und bewirbt auch keine Kapitalerhöhungen. Eine Aktiengesellschaft sollte sich demnach bewusst sein, dass sie auch im Falle eines Crowdfundings eine geeignete Marketingstrategie entwickeln muss, um so einen möglichst breiten Investorenkreis anzugehen.

Unternehmen, die über die daura Plattform digitale Aktien ausgeben, können diese über das organisierte Handelssystem der Berner Kantonalbank (BEKB), die SME|X, zum Handel zulassen. Die auf dem Handelsplatz zugelassenen Aktien-Token werden dabei mit Einbringung in die SME|X-Umgebung als Bucheffekten geschaffen (d.h. im Hauptregister der BEKB als Verwahrungsstelle eingetragen und im Effektenkonto gutgeschrieben). Damit eröffnet sich gleichzeitig die Möglichkeit, die digitalen Unternehmensanteile in der sicheren Bankenumgebung im Wertschriftendepot der BEKB aufzubewahren.

Erst im letzten Monat hat sich daura überdies mit der SDX und der BEKB zur Verfolgung eines gemeinsamen Ziels zusammengeschlossen: der Etablierung eines Schweizer digitalen Ökosystems im Finanzwesen für die Ausgabe, den Handel und die Verwahrung von tokenisierten Aktien für kleine und mittlere Unternehmen (KMU). Der Anschluss an die SDX als weltweit erste vollregulierte digitale Wertpapierplattform, welche die Emission, Kotierung, Handel, Abwicklung, Service und Verwahrung von digitalen Wertpapieren anbietet, bedeutet damit für daura Kunden einen wahrhaften Meilenstein.

## 5. Schlusswort

Zusammenfassend kann festgestellt werden, dass mit der Einführung des Registerwertrechts eine weitere, wesentliche Grundlage geschaffen wurde, um den Digitalisierungsprozess der Aktie weiter voranzutreiben. Neu können Aktionäre ihre Aktien digital auf einen Rechtsnachfolger übertragen, ohne dass ein Intermediär dazwischengeschaltet werden muss (peer-to-peer). Damit werden Übertragungen schneller, kostengünstiger und insbesondere auch sicherer. Aufgrund der automatischen Verbuchung der auf einer DLT gespeicherten Transaktionsdaten ist das Aktienbuch der Gesellschaft stets auf dem aktuellsten Stand und der Nachweis einer lückenlosen Eigentümerkette von als Registerwertrechten ausgegebenen Aktien kann jederzeit erbracht werden.

Es etablieren sich immer mehr Technologie-Anbieter wie zum Beispiel daura, über deren Plattform Gesellschaften ihre Aktien tokenisieren können. Ebenso entstehen Handelsplattformen wie die SME|X oder SDX, über welche Aktien-Token gehandelt werden können. Bis sich das Registerwertrecht bei den Aktien auf breiter Ebene durchsetzen wird, bedarf es sicherlich noch etwas Zeit; die Zukunft der Aktie wird aber digital sein.



# Regulierung von ESG-Ratings bzw. ESG-Ratingagenturen – Bedeutung, Mängel und Handlungsoptionen

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## 1. Vorwort

ESG-Ratings bzw. ESG-Ratingagenturen sind im Kontext des breiten Themenkomplexes des nachhaltigen Finanzwesens (Sustainable Finance) zu sehen. Bei diesem steht die Frage im Vordergrund, wie der Finanzmarkt zur Erreichung von Nachhaltigkeitszielen beitragen kann. Bei ESG-Ratings geht es um die Einordnung eines Unternehmens oder eines Unternehmenstitels anhand von ESG-Kriterien auf einer Skala. ESG-Ratings sind heute weit verbreitet, auch auf dem Schweizer Finanzplatz. Börsennotierte Unternehmen, Banken, Fondsleitungen, Vermögensverwalter, Versicherer sowie Retail-Anlegerinnen treffen unvermeidbar auf ESG-Ratings. Nicht zuletzt betreffen deren Implikationen aber auch Unternehmen aus der Realwirtschaft und damit deren Oberleitungsorgane. So kann eine Herabstufung des Ratings einen negativen Einfluss auf die Kapitalisierungskosten und die Aktienrendite haben. Aufgrund der steigenden Bedeutung von ESG-Ratings im Finanzmarkt und der mit den ESG-Ratings zusammenhängenden Probleme sowie nicht zuletzt auch wegen den regulatorischen Bemühungen in der EU drängt sich auch in der Schweiz die Frage nach dem Regulierungsbedarf und den regulatorischen Handlungsoptionen auf.

In einem ersten Schritt soll vorliegend die Bedeutung und der Entstehungsprozess von ESG-Ratings beleuchtet werden, wonach auf virulente Problemfelder und den Regulierungsbedarf einzugehen sein wird. In einem weiteren Schritt werden die regulatorischen Handlungsoptionen diskutiert und schliesslich werden die Erkenntnisse in einem letzten Teil zusammengefasst.



## 2. Bedeutung und Entstehungsprozess von ESG-Ratings

### 2.1 Bedeutung von ESG-Ratings

Unbestrittenermassen haben ESG-Ratings in den vergangenen Jahren in den Finanzmärkten eine gigantische Bedeutung erlangt. Quantitativ lässt sich deren Bedeutung unschwer erkennen. Insgesamt betrug das Schweizer Investitionsvolumen im Bereich Sustainable Investments im Jahr 2020 CHF 1'520 Mrd., was einem Wachstum von 31% gegenüber dem Vorjahr entspricht.<sup>1</sup>

Während die Bedeutung von ESG-Ratings in den Finanzmärkten durch diese Zahlen verdeutlicht wird, ist deren Bedeutung auch in der Realwirtschaft nicht unerheblich. So haben ESG-Ratings bspw. auch eine Auswirkung auf die Kapitalbeschaffungskosten und damit auf den Kapitalzugang börsenkotierter Unternehmen.<sup>2</sup> So zeigten Studien, dass ein Downgrade eines ESG-Ratings der Agentur MSCI zu einer statistisch signifikanten Negativentwicklung der Aktienrendite bei US-kotierten Unternehmen führt.<sup>3</sup>

### 2.2 Entstehungsprozess von ESG-Ratings

Es gibt eine breite Produktpalette im Bereich von ESG-Ratings, wobei das Angebot inhaltlich und terminologisch je nach Anbieterin variiert.<sup>4</sup> Obwohl der Entstehungsprozess von ESG-Ratings, ESG-Scorings oder ESG-Rankings keineswegs einheitlich ist, kann er dennoch in drei grobe Phasen gegliedert werden:<sup>5</sup>

**Datenbeschaffung:** ESG-Ratingagenturen verwenden hauptsächlich Daten, welche von Unternehmen selbst (freiwillig oder aufgrund einer Berichterstattungspflicht) offengelegt werden, aber auch unstrukturierte Daten, wie z.B. Daten von Medien oder NGOs.<sup>6</sup> Von den Unternehmen freiwillig offengelegte Daten werden zum Teil mittels Fragebögen durch die ESG-Ratingagenturen erhoben.<sup>7</sup> Teilweise wird auf Daten von Drittanbietern abgestellt, welche diese Daten auf ähnliche Weise erheben.<sup>8</sup> Es existiert hier keine trennscharfe Abgrenzung.<sup>9</sup>

**Auswertung / Bewertung:** Die ESG-Ratingagentur definiert zunächst Indikatoren und ordnet diesen Indikatoren Daten zu. Qualitative Daten werden quantifiziert. Danach werden die quantifizierten Daten anhand einer Peer-Group von Konkurrenzunternehmen bewertet und zum Gesamtrating zusammengefügt.<sup>10</sup>

**(Vor-)Publikation:** Schliesslich kommt es zur Publikation des ESG-Ratings. Selten wird davor noch eine Vorpublikation durchgeführt, bei der die ESG-Ratingagentur das Unternehmen über das Ergebnis informiert und die Gelegenheit einräumt, zusätzliche Informationen zu teilen, welche das Ergebnis beeinflussen könnten.<sup>11</sup>

1 SSF/CSP: Swiss Sustainable Investment Market Study 2021 (7. Juni 2021), <[https://marketstudy2021.sustainablefinance.ch/downloads/SSF\\_2021\\_MS\\_full\\_144dpi.pdf](https://marketstudy2021.sustainablefinance.ch/downloads/SSF_2021_MS_full_144dpi.pdf)> (besucht am 27.03.2022), 4.

2 METAXAS JOANNA: Ratings et rankings sociétaux des sociétés, EF 6-7/2016, 504 ff., 507.

3 SHANAEV SAVVA/GHIMIRE BINAM: When ESG meets AAA: The effect of ESG rating changes on stock returns, Finance Research Letters (10. Juli 2021), <<https://doi.org/10.1016/j.frl.2021.102302>> (besucht am 28.03.2022), 2; DIESELBEN, 5; vgl. auch METAXAS (Fn. 2), 507, wonach ESG-Ratings den Aktienkurs börsenkotierter Unternehmen beeinflussen.

4 EC: Study on Sustainability-Related Ratings, Data and Research (6. Januar 2021), <<https://op.europa.eu/en/publication-detail/-/publication/d7d85036-509c-11eb-b59f-01aa75ed71a1>> (besucht am 28.03.2022), 31 f.

5 Vgl. IOSCO: Environmental, Social, Governance (ESG) Ratings and Data Products Providers, Final Report (November 2021), <<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD690.pdf>> (besucht am 27.03.2022), 28 ff.

6 EC (Fn. 4), 80 ff.; METAXAS (Fn. 2), 507.

7 IOSCO (Fn. 5), 28 f.; EC (Fn. 4), 83 f.; METAXAS (Fn. 2), 507.

8 EC (Fn. 4), 85 f.; vgl. z.B. MSCI: MSCI ESG Ratings, Providing institutional investors with a more robust ESG integration tool designed to support ESG risk mitigation and long term value creations, <<https://www.msci.com/documents/1296102/21901542/MSCI+ESG+Ratings+Brochure-cbr-en.pdf>> (besucht am 03.04.2022), 1 ff.

9 ABHAYAWANSA SUBHASH/TYAGI SHAILESH: Sustainable Investing – The Black Box of Environmental, Social, and Governance (ESG) Ratings, The Journal of Wealth Management 2021, 52.

10 Zum Ganzen EC (Fn. 4), 93.

11 IOSCO (Fn. 5), 28.

### 3. Problemfelder und Regulierungsbedarf

#### 3.1 Qualitativer Gehalt von ESG-Ratings

##### 1. Aussage von ESG-Ratings

Eines der grundlegenden Probleme von ESG-Ratings ist auf der Definitions- bzw. Interpretationsebene anzusiedeln. Während sich ein Investor von einer ESG-Anlage einen positiven Einfluss auf die Umwelt-, Sozial- und Governance-Ebene – sprich einen Nachhaltigkeitsbeitrag (impact) – versprechen mag, sagen die meisten ESG-Ratings nicht viel über die effektive Nachhaltigkeit der Anlage aus, sondern viel eher darüber, welche finanziellen Risiken einem Unternehmen aus dem Bereich ESG widerfahren.<sup>12</sup> Dasselbe wird auch von den führenden ESG-Ratingagenturen dargelegt. So lautet etwa die Erklärung von MSCI wie folgt:

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«Some think MSCI ESG ratings are like credit ratings. Others think they should be focused on climate or rejuvenating the planet. Both interpretations misconstrue their true purpose. MSCI's ESG ratings are designed for one purpose: to measure a company's resilience to financially material environmental, societal and governance risks. Our ESG ratings provide a window into one facet of risk to financial performance. They are not a general measure of corporate 'goodness,' a barometer on any single issue or a synonym for sustainable investing.»<sup>13</sup>

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Dennoch können seitens der Kundinnen Erwartungen resp. Interpretationen von ESG-Ratings dahingehend bestehen, dass diese eine Aussage über die eigentliche Nachhaltigkeit des Unternehmens machen. Man spricht in diesem Fall von sog. doppelter Materialität, d.h., bei einer Anlage sollen nicht nur ESG-Risiken berücksichtigt werden, sondern auch die Wirkung der Anlage (impact).<sup>14</sup>

Aufgrund dieser eben dargelegten Erwartungs- oder Interpretationslücke von ESG-Ratings sind diese im Anlageberatungs- und Vermögensverwaltungsgeschäft grundsätzlich geeignet, Kundeninteressen zu gefährden. Auf mögliche Ansatzpunkte bezüglich des Aspekts des Kundenschutzes wird daher zurückzukommen sein.

##### 2. Divergierende Ratings

Ein weiteres grundlegendes Problem von ESG-Ratings ist deren frappante Divergenz.<sup>15</sup> Eine grossangelegte Studie der ESG-Ratings von 1'049 Unternehmen hat eine Übereinstimmung von gerade einmal 19-28% gezeigt.<sup>16</sup>

Ein Grund für die Divergenz dürfte nicht zuletzt die Abwesenheit eines einheitlichen Standards sein, was den ESG-Ratingagenturen in Bezug auf die Evaluation der Unternehmen grösstenteils freie Hand lässt. Als weitere Gründe für die Divergenz werden die Heterogenität der zugrundeliegenden Daten und deren Erhebungsmethoden genannt sowie auch die unterschiedliche Granularität der ESG-Ratings und verschiedene Biases.<sup>17</sup> Ein Folgeproblem der Divergenz ist die Verwendung von ESG-Ratings für ESG-Indizes.<sup>18</sup>

12 Bericht «Wie kann die Schweiz die Finanzmittelflüsse klimaverträglich ausrichten?» des Bundesrates vom 17. November 2021 in Erfüllung des Postulates 19.3966 der Kommission für Umwelt, Raumplanung und Energie des Ständerats UREK-S vom 16. August 2019, <<https://www.bafu.admin.ch/bafu/de/home/themen/klima/mitteilungen.msg-id-85933.html>>, 6.

13 So die Erklärung auf der Webseite von MSCI im zweiten und dritten Absatz des Abschnitts «What MSCI's ESG Ratings are and are not» <<https://www.msci.com/our-solutions/esg-investing/esg-ratings/what-esg-ratings-are-and-are-not>> (besucht am 06.04.2022).

14 Vgl. für die Unterscheidung von Risiko und Wirkung Bericht BR (Fn. 12), 6.

15 BILLIO MONICA/COSTOLA MICHELE/HRISTOVA IVA/LATINO CARMELO/PELIZZON LORIANA: Inside the ESG ratings: (Dis)agreement and performance, Corporate Social Responsibility and Environmental Management 28/2021, 1426 ff., 1432.

16 BILLIO et al. (Fn. 15), 1432.

17 WINDOLPH SARAH ELENA: Assessing Corporate Sustainability Through Ratings: Challenges and Their Causes, Journal of Environmental Sustainability 1/2011, 1 ff., 42.

18 BILLIO et al. (Fn. 15), 1432.

Unmittelbare Folge der starken Divergenz der ESG-Ratings ist die mangelnde Vergleichbarkeit zwischen den einzelnen ESG-Ratings. Doch auch innerhalb eines ESG-Ratings derselben ESG-Ratingagentur herrscht mangelnde Vergleichbarkeit, weil gewisse ESG-Ratingagenturen ihre Methodik ohne vorgängige Information ändern.<sup>19</sup>

### 3. Messbarkeit und Skala

ESG-Ratings umfassen zahlreiche Aspekte, welche nicht quantitativ erfasst werden können und somit stark von einer Interpretation abhängig sind.<sup>20</sup> Mehrere ESG-Ratingagenturen verweisen ausdrücklich auf die Verwendung von qualitativen Beurteilungen, insbesondere durch die Lektüre von Unternehmens-, Branchen- und NGO-Berichten über Entwicklungen in der Branche, um zu entscheiden, was in der jeweiligen Branche wesentlich ist. Dieses Urteil scheint auch für die Gewichtung der Indikatoren relevant zu sein.<sup>21</sup> Diese qualitativen Beurteilungen beeinflussen somit die Wesentlichkeitsschwelle diverser Faktoren, was bei inkohärenter Anwendung wiederum zu stark divergierenden ESG-Ratings führt.

Ein damit in Verbindung stehendes Problem bezieht sich sodann auf die angewandte Skala. Obwohl die zugrundeliegenden Daten bisweilen (auch) qualitativer Natur sind oder die ESG-Ratings an sich in wesentlicher Weise qualitative Beurteilungen inkorporieren, werden die Ergebnisse oftmals auf einer Skala ausgewiesen, die den Investorinnen von Kreditratings bekannt vorkommt – MSCI verwendet eine Skala von AAA bis CCC, Inrate von A-D – nur beruhen Kreditratings auf auditierten Jahresrechnungen der Unternehmen. Passend erscheint eine ähnliche Skala wie bei den Kreditratings immerhin deshalb, weil ESG-Ratings eine Aussage über ein finanzielles Risiko machen wollen.

19 IOSCO (Fn. 5), 29.

20 Vgl. SCHNECK OTTMAR: Regulierung von Ratingagenturen, ST 5/2014, 455 ff., 455, wonach Ratings, Scorings und Bonitätsprüfungen «Elemente des menschlichen Suchens nach vergleich- und beurteilbaren Urteilen aufgrund vermeintlich messbarer Sachverhalte» sind.

21 OECD: ESG Investing: Practices, Progress and Challenges (2020), <<https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf>> (besucht am 03.04.2022), 31.

## 3.2 Renaissance bekannter Probleme

### 1. Marktkonsolidierung von ESG-Ratingagenturen

Der Markt für ESG-Ratings ist jung und dynamisch. Wie es in solchen Märkten üblich ist, kommt es allmählich zu einer Marktkonsolidierung der Anbieter und damit zu einer Konzentration der globalen ESG-Ratingagenturen bei gleichzeitigem Verbleib von regionalen spezialisierten ESG-Ratingagenturen.<sup>22</sup>

Im Jahr 2020 wurde die Anzahl von ESG-Ratingagenturen auf weltweit 150 geschätzt,<sup>23</sup> während man von 30-40 Agenturen in der EU ausging.<sup>24</sup> Global durchgesetzt zu haben scheinen sich die ESG-Ratingagenturen MSCI (USA), Sustainalytics (Morningstar, USA), Moody's ESG Solutions (USA), S&P Global Ratings (USA) und ISS ESG (USA/DE).<sup>25</sup> Die genannten ESG-Ratingagenturen sind bereits aus dem Markt für Kreditratings bekannt und sind im Bereich ESG-Ratings durch Akquisitionen von regionalen ESG-Ratingagenturen gewachsen,<sup>26</sup> wobei auch diverse Schweizer ESG-Ratingagenturen akquiriert wurden.<sup>27</sup>

Regional ist für die Schweiz Inrate relevant.<sup>28</sup> International zeichnet sich somit allmählich ein Oligopol ab.

22 Zum Ganzen IOSCO (Fn. 5), 6 f.; EC (Fn. 4), 166; WEBER ANNETTE/REUTTER THOMAS U.: CSR und Kapitalmarkt, in: Reutter Thomas U./Werlen Thomas (Hrsg.), Kapitalmarkt – Recht und Transaktionen XV (Zürich 2020) 87 ff., 97; KÖLBEL JULIAN: The ESG Ratings Jungle, EF 12/2020, 994 ff., 994; vgl. aber auch METAXAS (Fn. 2), 505, wonach der Markt der ESG-Ratingagenturen immerhin weniger konzentriert ist als der Markt der Kreditratingagenturen.

23 KPMG: Sustainable investing: fast-forwarding its evolution (Februar 2020), <<https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/02/sustainable-investing.pdf>> (besucht am 28.03.2022), 45.

24 EC (Fn. 4), 50.

25 IOSCO (Fn. 5), 7; WEBER/REUTTER (Fn. 22), 97; KÖLBEL (Fn. 22), 994.

26 IOSCO (Fn. 5), 7; EC (Fn. 4), 7 f.

27 Vgl. KÖLBEL (Fn. 22), 994, wonach die Schweiz vor dem Beginn der Marktkonsolidierung eine Pionierstellung bezüglich ESG-Ratingagenturen innehatte.

28 KÖLBEL (Fn. 22), 994.

Das Problem von oligopolistischen Ratingmärkten gab es bereits bei den Kreditratingagenturen.<sup>29</sup> Die Oligopolstruktur in Ratingmärkten kann zu verschiedenen Problemen führen. So kann der Anreiz für qualitativ hochwertige Ratings fehlen oder ein Anreiz zur Preisdiskriminierung bei den Ratinggebühren bestehen.<sup>30,31</sup> Bei der Behandlung dieser Probleme mittels aufsichtsrechtlicher Regulierung ist zu beachten, dass regulatorische Anforderungen kontraproduktiv sein können, soweit dadurch der Markteintritt erschwert und die Oligopolstruktur verstärkt wird.<sup>32</sup> Dies ist bei einer allfälligen Regulierung von ESG-Ratings bzw. ESG-Ratingagenturen zu berücksichtigen.

## 2. Interessenskonflikte

Der Entstehungsprozess von ESG-Ratings birgt verschiedene Gefahren für Interessenskonflikte. Hervorzuheben ist etwa, dass ESG-Ratingunternehmen oft weitere Dienstleistungen anbieten, welche direkt mit dem erstellten ESG-Rating des Unternehmens zusammenhängen. Solche Dienstleistungen umfassen u.a. die Beratung bei der Corporate ESG-Strategy, die Unterstützung bei der nicht-finanziellen Berichterstattung, welche in die ESG-Ratings miteinfliesst oder die Beratung zur Verbesserung des ESG-Ratings.<sup>33</sup>

Ein weiterer Interessenskonflikt lässt sich beim Vergütungsmodell identifizieren. Unterschieden werden die beiden Modelle Issuer pays und Subscriber pays. Bei ersterem bezahlt das Unternehmen eine Gebühr für die Erstellung des Ratings,<sup>34</sup> während bei letzterem die Investorinnen über die Abonnementsgebühren die Ratings finanzieren.<sup>35</sup>

Derzeit ist im ESG-Bereich das Modell Subscriber pays am verbreitetsten.<sup>36</sup> Bei diesem besteht die Gefahr, dass die ESG-Ratingagentur ihren Fokus auf Quantität statt Qualität bei ESG-Ratings setzt.<sup>37</sup> Hingegen besteht beim Modell Issuer pays aufgrund der finanziellen Abhängigkeit die Gefahr, dass ein zu positives Rating abgegeben wird.<sup>38</sup>

Diese Interessenskonflikte tauchten in gleicher Form bereits bei Kreditratingagenturen auf. Sowohl in den USA als auch in der EU (und auch in der Schweiz) wurde diesen Interessenskonflikten mittels aufsichtsrechtlicher Regulierung der Kreditratingagenturen begegnet.<sup>39</sup>

## 3. Transparenz

Verschiedentlich wird eine fehlende Transparenz im Markt für ESG-Ratings festgestellt. Auf internationaler Ebene wird insbesondere die Intransparenz in Bezug auf die verwendeten Daten, die dem ESG-Rating zugrundeliegenden Definitionen, die Frequenz der Aktualisierung der ESG-Ratings sowie die angewendete Methode bei der Entstehung des ESG-Ratings kritisiert.<sup>40</sup> Bezüglich der Methodik werden regelmässig die Schlüsselnachhaltigkeitsthemen sowie die Scoring Methode offengelegt, nicht aber die dem ESG-Rating unterliegenden Indikatoren sowie deren Gewichtung.<sup>41</sup> Trotz zunehmender Bemühungen von ESG-Ratingagenturen, Aspekte ihrer Methodik offenzulegen, bleibt die effektive Datenverarbeitungs- und Evaluierungsmethode eine Black-Box.<sup>42</sup> Dies führt dazu, dass ESG-Ratings schwer verständlich und kaum interpretierbar sind.<sup>43</sup>

29 NOBEL PETER: Schweizerisches Finanzmarktrecht (4.A. Bern 2019), § 14 Rz. 282; VASELLA DAVID: Die Haftung von Ratingagenturen, Ein Beitrag zur Expertenhaftung, Zürich 2011 (= Diss. Univ. Zürich 2011 = ZStP 236), Rz. 2; MÖLLERS THOMAS M. J.: Regulierung von Ratingagenturen, JZ 18/2009, 861 ff., 863; EMMENEGGER SUSAN: Die Regulierung von Rating-Agenturen, SZW 2006, 32 ff., 33.

30 MÖLLERS (Fn. 29), 870; EMMENEGGER (Fn. 29), 35.

31 EMMENEGGER (Fn. 29), 35.

32 EMMENEGGER (Fn. 29), 39 f.

33 Zum Ganzen IOSCO (Fn. 5), 31; EC (Fn. 4), 68 ff.

34 VASELLA (Fn. 29), Rz. 174; vgl. FRICK JÜRIG/JOST HANNA: Haftung von Ratingagenturen, in: Reutter Thomas U./Werlen Thomas (Hrsg.), Kapitalmarkt – Recht und Transaktionen XI (Zürich 2017) 131 ff., 137 f., wonach hierfür auch der Begriff «Auftragsrating» verwendet wird.

35 VASELLA (Fn. 29), Rz. 174.

36 IOSCO (Fn. 5), 18; ESMA Call for Evidence, On Market Characteristics for ESG Rating Providers in the EU vom 3. Februar 2022, 7.

37 IOSCO (Fn. 5), 18.

38 VASELLA (Fn. 29), Rz. 176; MÖLLERS (Fn. 29), 863.

39 Zum Ganzen NOBEL (Fn. 29), § 14 Rz. 283; SCHNECK (Fn. 20), 460; MEIER HEINZ: Regulierung von Ratingagenturen – Auswirkungen auf die Schweiz, ST 12/2009, 945 ff., 945; MÖLLERS (Fn. 29), 864 ff.; EMMENEGGER (Fn. 29), 35 f.; DIESELBE, 40 f.; vgl. für die Schweiz FINMA-Rundschreiben 2012/1 vom 29. Juni 2011 Ratingagenturen, Anerkennung von Instituten zur Bonitätsbeurteilung, Rz. 32 ff.

40 IOSCO (Fn. 5), 26; ESMA letter to EC on ESG ratings vom 28. Januar 2021, 2.

41 EC (Fn. 4), 107; METAXAS (Fn. 2), 508.

42 IOSCO (Fn. 5), 29; vgl. EC (Fn. 4), 167, wonach MSCI ein neues Kommunikationsportal errichtet hat, sowie die Dokumente zur Offenlegung der Methodik aktualisiert hat, aber dennoch nicht die vollständige Methodik preisgibt.

43 IOSCO (Fn. 5), 33; BERG FLORIAN/KÖLBEL JULIAN F./RIGOBON ROBERTO: Aggregate Confusion: The Divergence of ESG Ratings (14.01.2022), <<http://dx.doi.org/10.2139/ssrn.3438533>> (besucht am 29.03.2022), 25; vgl. auch METAXAS (Fn. 2), 505 ff., wonach die ESG-Ratingagenturen ein Interesse daran haben, dass ihre «magische Formeln» nicht öffentlich bekannt wird und dass die einzelnen Indikatoren in jeder Branche verschieden sind.

Bereits bei den Kreditratingagenturen stellte die fehlende Transparenz bezüglich der Ratingmethodik ein Problem dar. Im Zuge der Regulierung der Kreditratingagenturen wurde dem Transparenzproblem mit einer Offenlegungspflicht für die Methoden, Modelle und Annahmen Rechnung getragen.<sup>44</sup>

#### 4. Qualität der ESG-Ratings

Die Qualität eines ESG-Ratings hängt stark von der Verfügbarkeit verlässlicher Daten ab.<sup>45</sup> Die zunehmenden Pflichten im Bereich der nachhaltigen/nicht-finanziellen Berichterstattung haben möglicherweise einen positiven Effekt auf die Datenqualität und damit auf das ESG-Rating.<sup>46,47</sup> Andererseits zeigt eine Studie, dass die Zunahme offengelegter Informationen von Unternehmen zu einer stärkeren Divergenz zwischen den ESG-Ratings der verschiedenen ESG-Ratingagenturen führt.<sup>48</sup> Schliesslich sind die Verfügbarkeit, Konsistenz und das Format der Daten je nach Region und Unternehmen unterschiedlich, was die Vergleichbarkeit und Verlässlichkeit des ESG-Ratings und damit dessen Qualität in Frage stellt.<sup>49</sup>

Auch bei Kreditratings stellte sich bereits die Frage nach deren Qualität. Mit der Regulierung von Kreditratings bzw. Kreditratingagenturen wurden daher qualitative Anforderungen an die Mitarbeitenden sowie den Ratingprozess gestellt, um die Qualität der Kreditratings zu verbessern.<sup>50</sup>

#### 4. Regulatorische Handlungsoptionen

ESG-Ratings und ESG-Ratingagenturen sind derzeit grösstenteils unreguliert. Den obenerwähnten Problemfeldern könnte aber auf mehrere Arten begegnet werden.

Zunächst besteht die Option, auf die staatliche Regulierung von ESG-Ratings bzw. ESG-Ratingagenturen zu verzichten und die Regulierung stattdessen dem Prozess der Selbstregulierung zu überlassen. Der staatliche Regulator beschränkt sich hierbei darauf, ESG-Ratingagenturen zu motivieren, freiwillige Industriestandards oder Codes of Conduct zu entwickeln und diese zu unterstützen.<sup>51</sup> Eine Unterstützung durch die FINMA kann darin bestehen, breit abgestützten Standesregeln eine höhere Bedeutung zu verleihen, indem sie sie als Mindeststandard anerkennt.<sup>52</sup> Sollten die angesprochenen Problemfelder im Bereich der ESG-Ratings bzw. ESG-Ratingagenturen mittels eines Selbstregulierungsansatzes angegangen werden, läge ein Tätigwerden der IOSCO wohl am nächsten.

Eine weitere Option ist eine Bewilligungspflicht sowie eine laufende Aufsicht über ESG-Ratingagenturen. Einen Orientierungsrahmen hierfür bieten die Empfehlungen der IOSCO, welche den Regulator sowie die Aufsichtsbehörden bei der Entwicklung einer Regulierung von ESG-Ratings bzw. ESG-Ratingagenturen unterstützen sollen.<sup>53</sup> Sobald eine Bewilligungspflicht und eine Aufsicht über ESG-Ratingagenturen besteht, können die oben angesprochenen Problemfelder folgendermassen angegangen werden: Pflicht zur Offenlegung und Vermeidung von Interessenskonflikten, Transparenzpflichten bezüglich der Ratingmethode sowie der verwendeten Daten, Pflicht zur Sicherstellung von qualitativ hochwertigen ESG-Ratings, Pflicht zur Definition der Aussagekraft von ESG-Ratings sowie eine Pflicht zur Verwendung einer bestimmten Skala.<sup>54</sup>

44 Zum Ganzen NOBEL (Fn. 29), § 14 Rz. 283; MÖLLERS (Fn. 29), 866; vgl. für die Schweiz FINMA (Fn. 39), Rz. 40.

45 IOSCO (Fn. 5), 16; DIESELBE, 32.

46 Vgl. für eine Übersicht über die legislativen Entwicklungen im Bereich der nachhaltigen/nicht-finanziellen Berichterstattung BÜHLER CHRISTOPH B.: Nichtfinanzielle Berichterstattung nach dem Gegenvorschlag zur Konzernverantwortungsinitiative und ihre Bedeutung für den Finanzsektor, SZW 2021, 716 ff. (für die EU und die Schweiz) sowie WEBER DANIEL S./LIENHARD STEPHANIE: Gegenschlag zur KVI – Compliance mit den neuen nichtfinanziellen Berichterstattungs- und Sorgfaltspflichten, RR-COMP 3/2021, 2 ff. (für die Schweiz).

47 IOSCO (Fn. 5), 32.

48 CHRISTENSEN DANE/SERAPEIM GEORGE/SIKOCHI ANYWHERE: Why is Corporate Virtue in the Eye of The Beholder? The Case of ESG Ratings, *The Accounting Review* 97/2022, 147 ff., 169.

49 IOSCO (Fn. 5), 17.

50 Zum Ganzen NOBEL (Fn. 29), § 14 Rz. 283; SCHNECK (Fn. 20), 461; MÖLLERS (Fn. 29), 868; vgl. für die Schweiz FINMA (Fn. 39), Rz. 2; DASSELBE, Rz. 28; DASSELBE, Rz. 48.

51 IOSCO (Fn. 5), 35; ferner EC (Fn. 4), 173 f.

52 Vgl. Art. 7 Abs. 3 FINMAG i.V.m. Art. 12 Abs. 1 Verordnung zum Finanzmarktaufsichtsgesetz vom 13. Dezember 2019 (SR 956.11). Zu beachten ist jedoch, dass eine Anerkennung nur im Rahmen der Aufsichtstätigkeit der FINMA stattfindet.

53 IOSCO (Fn. 5), 34.

54 Vgl. zum Ganzen IOSCO (Fn. 5), 35.

Die radikalste Option stellt sodann ein Verbot von ESG-Ratings dar. Vor dem Hintergrund, dass die Schweiz über einen international renommierten Finanzplatz verfügt, dürfte ein Verbot von ESG-Ratings hingegen ein negatives Licht auf die Schweiz werfen.<sup>55</sup> Schliesslich ist auch nicht erkennbar, wie ein Verbot von ESG-Ratings juristisch vernünftig begründet werden könnte. Da die Nachteile in einem Missverhältnis zu den Vorteilen stehen dürften, erscheint ein Verbot von ESG-Ratings zum aktuellen Zeitpunkt realitätsfern.

Schliesslich kann den oben erläuterten Missständen unter geltendem Recht zumindest vorübergehend dadurch begegnet werden, dass der Umgang mit Nachhaltigkeitsratings am Point of Sale – also im Vermögensverwaltungs- und Anlageberatungsgeschäft von Finanzdienstleistern – konkretisiert wird. Es wäre denkbar, dass die Finanzdienstleister für Transparenz sorgen und die Kundin über die (Grenzen der) Aussagekraft von ESG-Ratings aufklären (müssen). Entsprechende Bestrebungen in diese Richtung finden sich bereits in den Richtlinien und Leitsätzen der SBVg und der AMAS.<sup>56</sup> Die FINMA liess aber verlauten, dass spezifische nachhaltigkeitsbezogene Transparenzpflichten sowie wirksame aufsichtsrechtliche Grundlagen für ein Vorgehen am Point of Sale derzeit noch fehlen.<sup>57</sup> Wesentliche Vorteile dieses Vorgehens bestehen darin, dass die bestehenden aufsichtsrechtlichen Strukturen nicht ausgebaut und andererseits keine neuen Subjekte der direkten Aufsicht unterstellt werden müssten.

55 Statt vieler NOBEL (Fn. 29), § 2 Rz. 1.

56 Vgl. AMAS: Position zu Greenwashing, <[https://www.am-schweiz.ch/assets/content/files/Artikel/Position-Greenwashing\\_V2.pdf](https://www.am-schweiz.ch/assets/content/files/Artikel/Position-Greenwashing_V2.pdf)> (besucht am 03.04.2022), 1 ff., wo die AMAS das Greenwashing-Risiko am Point of Sale diskutiert, jedoch nicht spezifisch auf die Problematik von ESG-Ratings eingeht. Vgl. auch SBVg: Leitfaden für den Einbezug von ESG-Kriterien in den Beratungsprozess für Privatkunden (Juni 2020), <[https://www.swissbanking.ch/\\_Resources/Persistent/1/8/1/c/181c804ca4ca251ce7e1da9d167f4c824e7815f/SBVg\\_Leitfaden\\_Einbezug\\_ESG\\_Kriterien\\_in\\_Beratungsprozess\\_f%C3%BCr\\_Privatkunden\\_DE.pdf](https://www.swissbanking.ch/_Resources/Persistent/1/8/1/c/181c804ca4ca251ce7e1da9d167f4c824e7815f/SBVg_Leitfaden_Einbezug_ESG_Kriterien_in_Beratungsprozess_f%C3%BCr_Privatkunden_DE.pdf)> (besucht am 26.03.2022), 9, wo diese Problematik nicht explizit thematisiert wird, aber dennoch die Finanzdienstleister dazu angehalten werden, ihre Kundenberater so zu schulen, dass diese in der Lage sind, die Kundin darüber aufzuklären, inwiefern eine Beziehung zwischen der Anlage in ein Finanzinstrument und den mit dem Klimawandel verbundenen Herausforderungen besteht.

57 FINMA Risikomonitor 2021 vom 11. November 2020, <<https://www.finma.ch/de/dokumentation/finma-publikationen/berichte/risikomonitor/>>, 20.

## 5. Zusammenfassung

Die Bedeutung von ESG-Ratings im Finanzmarkt nimmt stetig zu. ESG-Ratings entstehen üblicherweise, indem Daten beschafft, Indikatoren zugeordnet und schliesslich ausgewertet werden. International zeichnet sich bezüglich ESG-Ratings bzw. ESG-Ratingagenturen eine Regulierungslücke ab. So empfiehlt die IOSCO den Aufsichtsbehörden, einen stärkeren Fokus auf die Regulierung von ESG-Ratings bzw. ESG-Ratingagenturen zu werfen.

Es zeigt sich, dass verschiedene Problemfelder rund um ESG-Ratings bzw. ESG-Ratingagenturen bestehen. Einerseits kann der Gehalt von ESG-Ratings falsch aufgefasst werden, indem eine Aussage über die Nachhaltigkeit erwartet wird. Zudem weisen ESG-Ratings eine starke Divergenz auf und es stellt sich die Frage, wie gut die zugrundeliegenden Sachverhalte messbar sind. Sodann zeigt sich, dass eine Marktkonsolidierung bei den ESG-Ratingagenturen eingesetzt hat sowie Transparenz- und Qualitätsprobleme bestehen. Auch sind verschiedene Interessenskonflikte auszumachen. Viele dieser Probleme sind bereits von Kreditratingagenturen bekannt.

Mögliche Regulierungsoptionen sind ein umfassendes Verwendungsverbot von ESG-Ratings, eine Anerkennung der Regulierung im Ausland oder eine Selbstregulierung der ESG-Ratingagenturen. Angesichts der Vor- und Nachteilsanalyse zeigt sich, dass die Anerkennung der Regulierung von ESG-Ratings bzw. ESG-Ratingagenturen im Ausland wohl die geeignetste Massnahme für die Schweiz wäre. Doch auch unter geltendem Recht gibt es Handlungsoptionen. So können den Kundenschutzbedenken anhand einer Regulierung mit den bestehenden Mechanismen am Point of Sale begegnet werden.





## **NICG Annual Conference on Board Dynamics** Governance Dynamism - The New Normal

### **Conference Report**

November 28th, 2022

Swiss Re Centre for Global Dialogue,  
Rüschlikon / Zürich









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## Governance Dynamism: The New Normal

In today's chaotic socio-economic situation, one must not forget that chaos is not always negative, reminded Prof. Dr. Michèle Sutter-Rüdissler, Academic Director NIGG and independent Board Member, to the participants of the annual NIGG conference. In board governance, questioning the status quo will lead to essential innovation. If «the impossible» is not brought up, there will be no growth towards new possibilities. How one ends up in a chaotic situation depends on internal and external factors. There can be a forced entry, similar to how board meetings were forced to take place online during the Covid-19 pandemic. The entry could be subconscious, similar to having no choice but to enter specific industries due to the current world situation. Or the entry into a chaotic environment was a conscious choice to take a leap and discover the opportunities in a new environment full of threats. Overall, the more conscious actors are of their environment, the more they must lose. Entering chaotic environments and following disruptive behaviour is necessary to make new advancements.

The purpose of the annual NIGG conference, held at the Swiss Re Centre for Global Dialogue in Rüslikon, is to contribute to academic and practice in corporate governance, in the light of emerging and important topics. As research and practice are not always perfectly aligned, an interconnection must be built. The conference follows three central aspects. First, it is intergenerational, with participants from different generations and backgrounds, from executive board members to students. Second, it is curious and open to the public, with the possibility to join the discussions freely online. Lastly, participation is free spirit and non-profit, and the speakers are fully independent, with interdisciplinary backgrounds, not biased nor limited in their ability to speak for themselves.

## Sustainability and the board, the perspective of an insurer

Dr. Felix Horber, Group Company Secretary at Swiss Re, started the conference with an overview of Swiss Re and its sustainable position. The insurer's core business relies on reinsurance, corporate solutions, InsurTechs such as its iptiQ, and its over-150-year risk knowledge and market positioning. Swiss Re also has a long track of sustainability, publishing its first sustainability report in 1979. This reporting continued over the years and

was formalised in 2007 when the company signed its adherence to the PRI. Additionally, Swiss Re announced its commitment to net-zero emissions by 2050 on its A&L side and by 2030 on its operational side. This will be achieved by reducing commitment to oil and gas companies.

The board of directors handles the sustainability strategy, whereas an advisory committee on management level is responsible for aligning sustainability activities. Additionally, sustainability was introduced as an additional quantitative positioning of the group.

## The ethics of climate change, the perspective of philosophers

Prof. Dr. Martin Hartmann, Chair for Practical Philosophy at the University of Luzern, started his presentation with an analogy of his mother's neighbour laying concrete slabs on her lawn, killing the grass beneath it. He questioned whether this small behaviour of a single person would have an impact on the larger picture. Do these individual actions make a difference regarding the massive problem of climate change? Similarly, when another neighbour goes on a late-night ride, to go «joy guzzling», does this individual behaviour significantly impact climate change?

This question can be tackled from a moral perspective. If the activity is morally wrong, it can be criticised and actively worked against by others, and a moral obligation could be raised. But driving one's car today is not the only activity that harms the environment. Taking a flight, driving large vehicles and generally travelling long distances have disastrous consequences for the environment if done on a large scale. This has led to a new normal, where the new harms are everyday activities that will harm distant people in several different ways.

Avoiding causing harm is generally expected in society, no matter its form. Actions that cause harm to distant people should thus lead to a moral obligation to refrain from these actions. However, today's «new harms» have so far too few ethical restrictions, as their impacts are hard to visualise for the actors causing them. When the harms are difficult to notice and visualise, it becomes morally tricky to understand them. This has led to a new challenge for modern philosophy.

The average American is responsible for one two-billionth of current and near-term emissions. Consequently, the life of one American will cause the severe suffering and/or deaths of two future people through emissions. To get a moral obligation to reduce this impact, the consequences of the emissions must become more visible, as they are currently primarily indirect. On the one hand, one can directly assimilate carbon emissions with rises in the September Sea level but measuring the exact harmful impact per action is impossible. People can thus avoid moral responsibility through ignorance, blaming society, or claiming that their impacts are negligible on the global scale. Instead, the combination of all actions is harmful; thus, one individual should not be blamed, but society as a whole. But this punishment scheme is also not wholly appropriate, as not all people are related to one another. Additionally, although it is a collective action, it is not a group of people intentionally and purposively causing harm.

As global warming is a global challenge, it should be collectively solved, not on an individual basis. Instead of banning «joy-guzzling», people have a moral obligation to put pressure on the government and the regulators to engage them tackle emissions. As climate change is a chaotic system, small individual efforts can increase the prospects of something occurring, positively or negatively. Without individual or collective action for change, there will be no significant change.

Lastly, Dr. Hartmann discussed the responsibility of the government. He judges that «the alternative between individual and systemic responsibility is wrong.» There must be a bridge between individual and systemic responsibility, as the focus cannot solely lie on an individual, a government or a company. If individuals are not concerned, the government will not be either, nor will companies. Citizen and moral responsibilities must mutually engage each other to create an overall positive effect.

After his presentation, Prof. Dr. Hartmann was asked whether individuals, companies and the government are doing enough to avoid severe climate change, as the consequences might not be felt yet. Prof. Hartmann responded that the effects of climate change are already present with extreme heat waves and rising sea levels. It is known that there is a price to pay to continue with our current lifestyles. But it is tough to cause global behavioural change across society. Additionally, Prof. Hartmann was asked whether it is possible to be

innocent in this society. He answered that especially people born in third-world countries and the youngest generations are innocent of the emissions caused by Western populations and the previous generations that emitted without consideration.

### **Panel I: Walk the Talk – Actions in ESG and Digital Transformation**

Prof. Dr. Johanna Gollnhofer, Director of IMC-HSG, was invited to present the challenges that arise when communicating sustainability efforts. Today, sustainability is no longer only an optimisation challenge, it is a communication challenge. Many companies talk the talk by saying that sustainability is essential, but not all walk the talk by implementing, monitoring and communicating their sustainability efforts.

In research by PwC from 2019, it was found that 56% of board members found that too much time was spent on sustainability, which should instead be spent on operative profit margins. In 2022, this view has drastically changed, with most companies aiming to move to climate-neutral production in a short period. But how can a company effectively communicate its efforts?

The perception of the company and its efforts by external stakeholders is one of the most significant challenges to tackle climate change. Companies must communicate their efforts in a clear way for consumers to understand without misinterpretation and with the correct credibility. A recent example showed that REWE, a German supermarket chain, wanted to communicate its support of diversity by ending the sponsorship deal with the German Football Association DFB in reaction to OneLove armband spat, but it lacked the credibility to communicate and was accused of greenwashing.

The fear of misinterpretation is growing with companies, leading to the new phenomenon of green hushing, where organisations prefer not to report anything for fear of not being believed or not being credible enough. This puts into question the benefit of communicating sustainability efforts and what the best communication channels are.

Communication with internal stakeholders is essential. While most people feel that they talk about the same things, most people have different perceptions of sustainability and how to tackle climate challenges. Prof. Gollnhofer gave the example of a cucumber production company. Plastic allows for the longer preservation of products, preventing food waste. However, while plastic reduces food waste, it increases the amount of plastic waste. From a company perspective, it is vital to have adequate communication to convey the right message in such a situation, so that the consumer understands the differences in practice.

### **Focus on ESG in governance**

Switzerland is the 16th highest emitter of carbon per capita in the World, reminded Dr. Hannah Hummel, Partner at HCM International. Swiss residents emit 14 tons of carbon per person per year, while the maximum allowed emissions to fight climate change effectively lie at 0.6 tons per year. While individuals can make behavioural changes to create a positive impact, there is a significant effort to be made by corporations, especially by banks. The Swiss banking industry is responsible for the same emissions as the airline industry. This is mainly due to the heating of offices and much travel, but most notably due to lending activities. While some companies have banned lending to some industries, banks continue to allow large polluters to grow even further. However, from a risk management perspective, climate risk is one of the most short-term with a high probability. Apart from posing financial risks, it also leads to reputational risks. But these risks also allow for new opportunities, through the development of new business models, digital transformation and newly developed goods and services. This change is also driven by increased regulation and transparency, soon the reporting of sustainability will be mandatory in the Swiss market.

So how should companies walk the talk? First, from a governance perspective, firms should continue discussing gender diversity. In the United States, these discussions are more prevalent than in Europe, with stock markets such as the NASDAQ having mandatory disclosure of gender diversity of board members. Regulators and proxies have different views, where a quota of 30% of board members must be female, proxy advisory firms such as Glass Lewis report that companies that do not meet the quota must only give an explanation but have no further consequences.

Second, the correlation between ESG targets and board compensation is still perceived as insufficient. But it has also been proven that there is a strong positive correlation between executive pay and a focus on ESG goals, which is believed to improve a company's performance. Research has shown that 74% of companies use ESG metrics in their executive compensation. Still, when it is included, it is compensated through 71% of short-term incentives (STI) and 16% long-term incentives (LTI). Compensating primarily on a short-term basis takes away incentives to realistically tackle long-term climate challenges. Looking at Switzerland, 42% of all companies implement ESG metrics in compensation, and on the SMI, 75% employ them. The social and governmental impacts are primarily in focus, with the environmental aspect being integrated into the fewest companies.

Companies must currently face trade-offs from switching to more sustainable business practices. While production plants with low emissions will have lower profit margins, it will have a long-term positive impact. These trade-offs must thus be accepted and can be priced into the site's value. There are different ways to implement this change. Companies can reach societal expectations through trade-offs weighted through balanced scorecards, taking a cost approach, an assessment approach or a gateway approach.

### **Limited time for boards: How to walk the talk**

Nina Spielmann, Director of Practice Management at McKinsey, continued with how to walk the talk. Change is inevitable and necessary for the development of a company. The question lies in how and who can adapt to change. Especially over the past 15 years, the board of directors have seen a significant shift in how they operate and handle a changing environment. This has come with increased stakeholder expectations, higher business complexity and intense market forces that pressure board members to create positive change and integrate sustainability into their firms' strategy.

There are three dimensions of how a board can be pushed to create more positive impacts. First, the board of directors must be very engaged. It was optional to have a very active board in the past, but this has changed over the years due to several controversies. After the fall of Enron, it was decided that the board of directors must be compliant and that fiduciary duties must be taken seriously.

Additionally, the average time spent per board mandate has increased and continues to rise today. As a result, many more companies rate their board as «very effective». On the topical level, boards still discuss the same matters, but involvement levels have increased, and board members are becoming more proactive.

Secondly, board interactions change. The nature of the collaboration between the board of directors and the executive board is changing, with communication between the two levels increasing over time. Although communication has increased, some actions that increase board effectiveness are not present enough in many companies. These actions are sufficient induction training for new board members, dedicated time for team building, establishing a culture of trust and respect, creating a 3-to-5-year succession plan for the board, and regularly engaging in self- or team-evaluation. Were these small actions to be implemented across most companies, boards would become more effective over time. Using this communication to integrate a serious ESG strategy into the company, the challenge should be present on board meeting agendas and deeply embedded into the company's strategy. Thirdly, there must be serious individual contributions by each board member. From preparing well for each board meeting to interacting with other board members, there must be intrinsic motivation to push forward. Once this motivation is present, there is the capability to discuss change and positive impacts with the board.

### **Panel I: Plenary Discussion**

After their presentations, Prof. Johanna Gollnhofer, Dr. Hannah Hummel and Nina Spielmann were invited to hold a plenary discussion in which all participants could participate.

Prof. Gollnhofer was asked whether differentiating between internal and external sustainability communication can be dangerous if there are discrepancies in the content. She confirmed that it is essential that both communications convey the same message. Additionally, companies must also ensure that communication is consistent over time. There is currently a change in how sustainability is communicated, shifting from «we are sustainable» to «we are on our way to sustainability». Clearly communicating past, present, and future efforts to the consumer will reduce misunderstandings and inform stakeholders of the company's commitment.

Nina Spielmann was asked how conflicts of interest can be avoided when the board of directors and executive board collaborate very closely, when their roles are very distinct. She answered that the boards should work on their own, that the board's role should be redefined yearly, and that there must be a common understanding of the tasks and responsibilities of each board member. However, while the boards are independent, the board of directors should guide the management board and act as a sparring partner. The next question tackled digital literacy with board members. As data and digital tools are often used to make decisions, this competency must be acquired by the board of directors. Nina Spielmann answered that the board should be expanded with an additional expert or committee, but rather that these capabilities and understandings must be considered when searching for an adequate board member. To broaden the knowledge of the existing board, digital experts, external actors or advisory boards can be brought in to help implement digital tools into the company's strategy.

Dr. Hannah Hummel was asked why ESG metrics are not as present in LTIs, when climate risk is a long-term challenge. She answered that historically LTIs were hardwired financially linked plans, with little to no integrated non-financial metrics. But today, European companies are increasingly using non-financial data and accept the fact that not everything is measurable but rather that everything is assessable. Until now, this assessment has been complicated, as it requires a history and targets, but progress is being made.

A discussion about the role of and communication with the board ensued. Firstly, the communication between the executive board and the board of directors should be formal and structured. This can happen in a pre-planned and regular fashion, but it should not be daily. Ultimately, transparent communication between the two bodies is the most effective. When the board of directors takes the role of a sparring partner, the board should act as one and have one voice. This means that if only one member is approached, there must be a process of collaboration and mentoring for the board to effectively work as a good collaborator. Additionally, collaboration outside the boardroom can be allowed, when the two actors are experts in their field. Still, this communication must be disclosed transparently to avoid surprises for the other board members.

Lastly, the plenary discussion tackled the topic of ESG on the board level and whether there are already good examples of solid commitment to the new strategies. Especially in Nordic countries, boards are trying to implement their sustainable strategy. An example given was from one company where site visits were conducted by using a minivan as a mode of transport, and board members eating their lunch with the employees in the same cantina. But for the board to effectively implement ESG into their company's strategy, the members must have sufficient knowledge about the topic. Adequate opportunities for collaboration, frequent meetings and board training are thus necessary for this development. Additionally, when it comes to the communication of this development, the board must communicate as one body rather than an individual member bearing this responsibility.

## **Panel II: Non-Financial Reporting Requirements – Trends & Implications**

Prof. Dr. Thomas Berndt, Director IFF-HSG, started his presentation with a reminder that climate change threatens not only our existence but also current business models and the economy. Sustainability and ESG reporting and targets are thus strongly related to companies' risk management, which is necessary to maintain existing business models.

In the near future, financial reporting and sustainability reporting will become equivalent. This will lead to two different types of currencies, monetary ones on the one hand and GHG emissions on the other. Sustainability reports take on various names, like ESG report, CSR report, integrated report or sustainability report. This heterogeneity makes the communication of efforts more difficult, especially when companies are following different standards, such as the GRI, SASB, TCFD, or a combination of them. In the European Union, sustainability reporting has been integrated into the financial reports of the largest companies, but the data it relies on is still unaudited.

Prof. Berndt proceeded to propose six theses on the challenges arising from sustainability reporting.

First, with an unmanageable variety of participants on the playing field of ESG reporting, switching from a shareholder to a stakeholder approach is necessary to continue creating value.

Secondly, with high complexity and high regulatory speed, all financial reports must be consolidated so that there can be a strong link between financial and non-financial data. Auditing this data should be mandatory too. In Switzerland, the Task Force on Climate-related Financial Disclosures (TCFD) is now required for sustainability reporting in the country. Corporate Sustainable Due Diligence (CSDD) is also present, forcing large entities to conduct sustainability due diligence on their business partners.

Thirdly, the preparation process and maturity level of ESG reporting are not yet on the same level as financial reporting. While environmental and governance reporting is well on its way, there is still a lack of social impact reporting in financial reports.

Fourthly, there is a great need to increase data quality and digitisation of ESG reporting processes. 33% of companies declare that the data for sustainability reports is incomplete, making auditing this data difficult.

Fifthly, ESG assurance is key for improving the quality of ESG reporting. Due to the efforts made by corporations, the expectations gap is being reduced, and the risk of greenwashing diminishes accordingly. Lastly, non-financial reporting and financial reporting must be integrated into each other. Sustainability reporting is mostly storytelling but should be presented through numbers instead.

In conclusion, for the transformation to occur, the economy needs capital markets, which require financial data that can be presented in financial and sustainability reports. With a continuous input loop, there are not only sustainability risks, but opportunities also present themselves.

## **How to deal with sustainability and non-financial reporting**

David Chase Lopes, Managing Director EMEA at D.F. King, continued with trends in current sustainability reporting. Before the Covid-19 pandemic, the ESG movement started, and shareholders needed stewardship to understand the undertakings of their companies. In 2020, companies were primarily focused on financial risks and the pandemic. Still, since the end of 2021, the systematic risks have evolved, and companies were forced to focus on inflation, international conflicts, climate, societal and pandemic risks.



With these systematic risks that directly threaten the business's profitability, it becomes harder for firms to focus on non-financial reporting. A solution must thus be found to integrate non-financial focus into a profitable strategy.

While the first half of 2022 was very fruitful for most companies, this has shifted with the arrival of high interest rates, high energy prices and an international conflict close by. Board members should reflect on the profitable half of the year to convince them of the quality of the board, as the focus of shareholders shifts when times become difficult. This became even more challenging, as the market showed a strong pushback on ESG reporting standards and how to handle sustainability risks. Does it make sense, for example, for an executive of an automotive company to receive a high bonus for high sales numbers, when the products increase climate risks?

Regarding the international sustainability reporting standards, there is a straightforward battle for soft power about which model will become the global standard. In the European Union prescriptive models are more prevalent, while in the United States dictating models are preferred. It is thus in the interest of concerned companies to invest in the standard most beneficial to them, as the impact of the reporting method can be significant.

Lastly, the board must understand what investors expect as returns from the company and the sustainability reports. Additionally, the board must show that it is effective, something that is assessed yearly during the (re-)election of the board of directors. If an activist investor steps in, the sustainability and governance reports must be ready, and the board must be prepared to back them. If it is not ready to do so, the activist investor can gain the support of other shareholders and the board will not be re-elected.

### **Non-financial reporting standards**

Dr. Daniel Lucien Bühr, Partner at LALIVE, continued with the real drivers of ESG reporting. While one might answer investors and other stakeholders, which are broadly defined, it is mainly demanded by employees and clients. Especially the youngest generation of customers, which is very aware of the present climate challenges, asks the most from an ESG perspective. But ESG is very broad and not only restricted to environmental challenges. The UN Sustainable Development Goals (UN SDGs) define 17 societal challenges, which companies can tackle and integrate into their ESG strategy. While environmental

challenges are most focused on, social challenges are rarely on the minds of board members.

On the global scene, some standards already govern the governance of organisations. ISO 37000:2021, for example, is the only internationally applicable treaty for sustainability reporting, signed by 77 countries worldwide. The standard questions the role of the board and executive management and defines internal control systems. Then there are reporting initiatives such as the GRI, EU Taxonomy and the Swiss TCFD. As pioneers in sustainable reporting, these standards are currently most referenced to and thus significantly impact how the reporting is handled. New reporting standards are also being developed, with EFRAG being published in 2023, CSRD planned to receive a regulatory tightening, and the CSDD draft shows what the European Union expects in the medium term.

In Switzerland, the revision of the Code of Obligations (CO) will bring new regulations, for example prohibiting the utilisation of child labour and obliging gender diversity in companies. Additionally, article 716a revCO states that at board and executive levels, conflicts of interest must immediately be disclosed. The field of application of the revised articles of the CO has also expanded to include all listed companies, bond issuers and FINMA-regulated firms. It is expected that some of these companies have yet to realise that they must incorporate these new reporting standards in 2024. This is especially problematic, as false reporting will be considered a criminal offence committed by the board members. As a public offence and a criminal act, criminal complaints can be filed worldwide, increasing the pressure on board members.

This pressure will bring new challenges. First, one must analyse the adverse impacts in the field of non-financial reporting. Second, diligence must be applied to every action. Third, material risks must be immediately disclosed, including the threats they pose. As this will be a requirement in 2024, these material risks must be reported on and solved immediately to avoid future threats. The strict revision of the CO will tighten the responsibility of corporations. In the case of due diligence on conflict minerals and child labour, firms have a supply chain due diligence duty. If not applied correctly, the repercussions can be very severe. Risk management, KPIs and transparency are thus of utmost importance.

## Panel II: Plenary Discussion

The three presentations by Prof. Thomas Berndt, David Chase Lopes and Dr. Daniel Bühr had three common themes. Firstly, non-financial and ESG reporting are highly complex and require a lot of additional resources and skills. Individual companies, but also accounting and law firms, must broaden their expertise to tackle these new regulations. Secondly, stricter reporting standards pose a profitability threat, as they require additional people, work and due diligence. Companies must integrate these additional expenses while remaining profitable and appealing to young talent. Thirdly, the role and power of regulators and reporting standards must be considered for future developments. In the European Union, for example, the definition of being «green» has changed a lot over recent years, impacting the behaviour of the gas and nuclear industries.

With all these additional challenges, pressures and individual responsibilities, is a board mandate still attractive for experts in their field? Especially when the reported data is incomplete, how can board members ensure that their actions are based on adequately measured data and dependent on the data provided by third parties?

After their presentations, Prof. Thomas Berndt, David Chase Lopes and Dr. Daniel Bühr were invited to hold a plenary discussion with the conference participants. The first question asked whether ESG will lead to the end of economic activity as it has been known until now. While for some businesses it will be the end, for others, sustainability creates the opportunity to redefine their assets and resources, becoming more profitable. Public Interest Entities (PIEs) must reorganise themselves, avoiding silo thinking and will decide what SMEs will be part of their value chains.

Boards of directors will decide whether to focus on ESG or remain profitable with the old business model and face the resulting conflicts. The most important aspect of this decision-making will be to stay transparent and explain to shareholders how value will continue to be created. Incentive plans are an effective way for this transition to happen in the best interest of all stakeholders. The most considerable difficulty of this communication arises from the fact that sustainability information is incomplete. It is thus essential to explain to stakeholders and investors how decisions are made. Additionally, there are more effective ways to tackle ESG challenges from a company

perspective than focussing on all 17 SDGs. Firms should thus select a few that their business can act on, analyse appropriate metrics and consequences, and create a realistic approach to create a positive impact.

From a board perspective, the fiduciary duty to create value for shareholders and representing their interests will remain. Investors should thus continue to question whether the current business model and operations are profitable and fit for the future. For board members, the focus is ensuring that the business strategy is suitable for this new economy, and reporting on the operations is of secondary importance. Therefore, instead of focusing on compliance and the reason for the reporting will be of minor importance to the board. Consequently, it will continue to rethink the core business and adapt it to the current ESG challenges.

Lastly, the trio was asked whether Switzerland will be at a disadvantage from an ESG perspective due to the personal liability of board members in the case of inappropriate reporting. Rather than solely being a disadvantage, this liability will create more focus on the topic. Due to the challenge becoming so complex, a lot of backbone and independent thinking will be necessary from all stakeholders. Additionally, Swiss companies are forerunners in many aspects of sustainable development. Thus, the threat of criminal liability remains small in the country.

### Chairperson Succession in Swiss Quoted Companies

Dr. des. Cornel Germann, Research Fellow at IFF-HSG, began by tackling the central question of board governance: «how to find a world-class chairperson?» The search for an adequate chairperson should follow a thorough and fair strategic process. Additionally to applying to the search for a new chairperson, it is also essential to have a succession strategy that covers the firm's short- and long-term vision. Overall, as a study by Fernandez-Araoz et al. (2021) showed, proper management and succession planning could add 1% of additional gains, so this effort can also add value to a company if done systematically. Based on a survey with 80 SPI chairpersons and head nomination committees and with a focus on the board chair, Dr. des. Cornel Germann's board governance research focussed on three dimensions: Competence, Moderators and Voluntary Disclosure.

First, what are the competences of a chairperson? Personal and group leadership are of most importance. Integrity, low ego and strong values are good to have to hold serious discussions. A certain stamina is also required, as a chairperson should not only nod but also critically question and intervene during meetings. Additionally, technical competences are also necessary. The top three rated functional skills are HR, audit & finance, and ESG knowledge. Compared to board members, the chairperson must have a broad skill base, as they are the last line of defence. They must act as a gatekeeper when dealing with many stakeholders. Regarding competence definitions, companies will usually over profile, but must downsize the requirements after some time, due to a limited pool of potential candidates available. While economic performance criteria are still at the core, social and interpersonal skills will add value to the chairperson's profile.

Previous experience as a chairperson is usually not pre-required due to the limited candidate pool. Leadership experience also sees a downward demand trend, as this restricts the candidate pool through diversity and origin challenges. Most importantly, the chairperson should be able to challenge the members of the organisation.

Second, what are influential moderators in chairperson succession? Basically, there are four key dimensions to recognize: Firstly, independence is of utmost importance. There should be no bias in decision-making, and board members shouldn't be financially dependent on their mandate. Secondly, there must be either a search for a candidate with a «cultural fit» or a «cultural add» and it is essential for the incoming and outgoing chairperson to have a seamless change of power. Thirdly, using the network for reference checking is key. As a result, having a broad network is seen rather as a resource than a power game, as connections make it easier to know if a person is a fit for the job.

Third, what are the principles of voluntary disclosure in chairperson succession? In disclosing information about the succession (planning) of boards, most companies are reluctant as consequences are uncertain. In addition, they also rely on their own benchmarks and do not compare their reporting scheme directly to others. As a matter of fact, this leads to the result that, when a controversy arises, companies will preferably disclose the information of an individual person rather than of the organisation itself. As it is easier to replace

a single person, these will usually receive the blame, and the company will move on – without the need for transforming their current processes in place.

As a key take away, in board chair succession there are specific implications to be considered. The (head of the) nomination committee should lead the succession process because this task is delegated to him/her/them and because actors should be independent. This yet shall not mean to fully exclude the former chairperson; he/she knows the position and forthcoming expectations best and thus can provide helpful insights when it comes to election procedures. The company secretary takes on a passive role, ensuring the processes are systematically followed. The CEO should be involved at the planning level, ensuring that the correct person fills the position and that the CEO and chair positions are not exchanged simultaneously. He/she yet should have no deciding power.

When board advisory services are employed, the parties should act as gatekeepers, ensuring the processes are professional, transparent and fair. Lastly, shareholders are only to a minor extent involved. If involved, they should be allowed to state their expectation and opinion. To conclude, Dr. des. Cornel Germann highlighted that most important and overall, the chosen chairperson must be the one that adds most value to the company and the board of directors.

After his presentation, Dr. des. Cornel Germann was asked whether technological competence is truly required for board members, as most of the data presented is financial data. He answered that the required skillset for board members is very dynamic and has changed over time, but the company fit will ultimately decide on the right person. Contrary to ordinary board member elections, the departing chairperson should not participate actively in the nomination of the following chairperson, in the sense of steering the process. Additionally to being sometimes nominated and elected by the AGM, financial services are required to consult with regulators before a person is eligible to be selected chairperson of the board. In practice, however, this does not considerably hinder the process, as in the majority of the cases the proposed person is accepted.

## Dynamics in Healthcare

Dr. Anna-Sophia Beese, Scientific Project Lead at Careum Center for Health Literacy, gave an overview of the Swiss healthcare system. Today, 2.2 million people in Switzerland live with a chronic disease. 20% of people over 50 years old have multimorbidity, or have two or more chronic illnesses. This population-wide situation impacts society in many ways and leads to additional spending for the healthcare sector. One solution to ease the additional expenses and create a healthier community is developing an integrated healthcare system.

The current system is geared towards treating acute needs, not the prevention of diseases or special needs. Companies operate in silos, depending on the customer demands and only focus on the most profitable practices. In an integrated healthcare system, however, value creation is population oriented, focused on the quadruple demand for health. These systems also reduce the overall costs of healthcare. The theoretical foundation of an integrated system relies on bringing fragmented aspects together and is designed to create a unified delivery from the system. In a system with three or more entities, the cooperation can be very dynamic and fluctuating depending on the needs. Therefore, most network research is focused on network governance and the interplay between members.

There are three perspectives in network governance research. Firstly, governance as a structure explains the social behaviour between participants. Secondly, governance as a process focuses on the agency and activities of individual actors. Thirdly, governance as a practice focuses on practices to explain phenomena, instead of patterns or individual actors.

Through 33 semi-structured interviews, 153 documents, 37 non-participating observations and six reflection workshops, Dr. Anna-Sophia Beese researched how the identity of a network evolves over time. The research mainly focussed on the Integrated Care Network, founded in 2009 by 11 members to align healthcare services in Zurich. It was initiated by the municipal health department and still growing currently counting 35 members. Over the years, the self-description and the network itself have changed significantly. It was found that network identity is essential, as it can add value when it provides appropriate guidance and orientation to its members. Throughout the change, the network has found that specific actions can be taken

to increase effectiveness. Firstly, direct network building should answer what the purpose of the collaboration is. Secondly, social locales should be established to understand the members' expectations of cooperation. Thirdly, while many members will be passive at the beginning, active participation is quintessential. Lastly, a certain commitment of the members should be created, to involve participants and effectively run the network. Active participation of members was found to be the most crucial aspect of the network. Two years after the creation of the network, members came together for the first time to define expectations and set a strategy for collaboration. Additionally, communication channels, rooms for discussion and meetings between network members proved to create the most value. With this communication, the network was set up as a process model. There was a clear orientation, the actions of the members were in line with the goal of the network and value creation processes were aligned. However, over time this co-creation diminished, bringing the network to the brink of breaking up. In these dire times, network identity was discussed, leading to restructuring and re-strengthening the collaborative effort.

To conclude, network identity building sees increasing perception shifts, ultimately driving the collaboration towards becoming an integrated platform. Through these discussion platforms, players with different languages but common vocabularies could work together to reduce the silo mentality and ultimately create additional value for the healthcare system.

After her presentation, Dr. Anna-Sophia Beese was asked how companies in a vast healthcare system with many different regulations can find common ground and collaborate and create additional value. She answered that the Swiss FOPH is trying to develop solutions for integrated healthcare by introducing new regulations, but not all stakeholders support this. Additionally, in an integrated network, costs are strongly reduced, which should incentivise companies to create such a system. The network's funding has so far come from membership fees, which in return gives members access to the opportunities of the integrated system, namely reduced costs and additional value creation opportunities. While the research was primarily focused on the value creation for the integrated network members, these systems can also create additional value for consumers.

## Business Dynasties' Succession Planning

To conclude the conference, Dr. Matthias Ch. Würsten, Strategic Planner at Baumann Springs, presented the challenges arising from succession planning in dynasties. Business dynasties are a combination of a family and a business that faces various challenges. Thinking about a family business, it is often observed that the company goes first and that the family has some kind of «weird attachment». In his research, Dr. Christian Ch. Würsten looked at the case of succession in business dynasties and how the business contributes to the process.

In modern business dynasties, a new vision has appeared, where the family and succession are in the centre and the business is considered the «weird attachment». The company acts in a socio-economic environment and must continuously change to it. Simultaneously, the family members face a more stable environment and must deal with successions, family unions and conflicts. Research has shown that this interplay of environments and family constructs is inefficient. However, against all odds, some family dynasties have been very successful over time. To answer how companies such as Hermes, BMW or Fiat survived over so many years, evolutionary theory might provide an answer. Instead of following a simple cycle of being born, living and dying, business cycles are different, going through variation, selection and retention. To complicate matters, no two firms are identical, thus by merging evolutionary theory with business evolution, different aspects emerge.

Firstly, two events can occur to create variation in a business dynasty. A new birth within the family will set the current leader's mentality to prepare the business for an inevitable succession to an inheritor. The second possibility is the entrance of a new member from outside the family. If successfully integrated, available resources for the company are expanded. In other situations, the chairperson is unhappy with a marriage, leading to the barring from the succession plan.

Secondly, the selection of the successor of the business dynasty leader can occur either before or after the current leader steps down. When selection occurs before power is handed over, competition between candidates can occur. Some dynasties successfully set up structures to avoid these fights, for example, by following growth structures throughout the company. If selection occurs after the leader steps down, conflicts can occur, and nomination committees can take over the task.

Thirdly, the retention of family members not elected as leaders of the company is essential to keep the balance between the two entities. In case of cooperation between successors and non-successors, new positions can be created for non-elected members to honour them within the dynasty. Alternatively, they can pursue their own business activities while leveraging ties to the dynasty to create value for themselves. In case of confrontation between successors and non-successors, non-elected members can either pursue self-actualizing careers unrelated to the dynasty or take on full confrontation with the newest leaders.

Overall, several crucial points should be taken into consideration in dynasty succession. An eye should be kept on the business. As a member of the firm, look out for family members, marriages and conflicts. For leaders, the succession's success depends on transparency and making decisions well ahead of time, including accommodating the non-successors.

After his presentation, Dr. Matthias Ch. Würsten was asked whether these points differ between private and public companies. He answered that the ownership structure does not matter. Instead, whether the family runs the company and not only owns it will create a familiar impact on the business. Some families built immense holding structures to keep ownership of the shares, ensuring the continuation of the dynasty.

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