



NICG Network for Innovative
Corporate Governance

Board Dynamics

Rethinking ESG and Diversity

we are curious, free spirits,
and non-profit

Innovative Corporate Governance

Curiosity. Courage. Empathy.

«I have never tried that before, so I think I should definitely be able to do that.»

Pippi Longstocking by Astrid Lindgren

Sometimes it takes a great deal of curiosity, courage, and empathy to achieve desired goals.

For many companies, the interplay between the proven, the emerging, and the constantly evolving is more complex than ever: starting with the annual general meeting (AGM), continuing with the board of directors, and (not) ending with the CEO. A company needs to develop a systematic approach and clever coordination with everyone pulling in the same direction in order to create added value and embed the organisation in a fruitful environment.

Boards are no longer responsible for just the classic «good of the company» but also for the good of the environment (E), society (S), and governance (G) combined. Fully achieving these objectives has become even harder because it is easy to get lost in the impenetrable jungle of planning, integrating, and communicating ESG initiatives. So where should a company set its focus? It requires effort to approach ESG in a transformative way. But if we succeed in creating added value during the process, we will also succeed in connecting today with tomorrow. Maybe we can manage to approach the unknown with as much self-confidence as Pippi Longstocking – namely, with curiosity, courage, and empathy.

The 2022/1 edition of our Board Dynamics demonstrates once again how strong corporate governance works at the interface of law and economics. As a curious, non-profit, academic network full of free spirits, the NICG relies on both senior experts and young, talented researchers to contribute articles. When providing insights on key stakeholders within an organisation – from the AGM to the chairperson to the CEO – we always try to feel the pulse of times. Does this appeal to you as well? If so, please get in touch with us. We are looking forward to exchanging innovative ideas with you!

Kind regards



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Is Tax Behavior a Flawed Sustainability / ESG Metric?



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1. Sustainability Metrics – an Overview

It is evident that ESG ratings are important for investors as well as for enterprises. However, it is also well-known that these ESG ratings are to a certain extent opaque and also not fully persuasive depending on the underlying benchmark. The benchmark could, on the one hand, be the sustainable development of the value of the enterprise (**business development rationale**). On the other hand, it could also be the fulfillment of the Sustainable Development Goals (SDGs) as approved by the UN General Assembly in 2015 (**comprehensive development rationale**).¹ In the current methodologies towards ESG ratings both approaches are mingled.

Having this in mind, the goal of this article is not to challenge ESG ratings per se as they can indeed incentivize enterprises to act in a more sustainable manner. However, as it will be outlined, these ratings can also have a detrimental impact as some of the metrics may be misused to offset bad ratings in one area with exceptionally good ratings in another area. One example are tax metrics used for ESG ratings.

2. Example to Start

To give a rather extreme example to demonstrate the validity of the argument, assume that a Russian multinational in the oil business which is close to the government has in the past years followed the available sustainability standards to a large extent. Due to this reason, its tax transparency policy has led to a result in which its «Global and Home Market Percentile Rank» by one rating agency is 100th (Best in Class). This means that the agency puts the company in the 100th percentile to its global and domestic industry competitors, inter alia, on an evaluation of possible tax controversies involved and the tax gap calculated between the estimated corporate income tax rate and the targeted effective tax rate.

¹ We further outline the meaning of these terms in the following paper Peter Hongler, Florian Regli & Thomas Berndt, Tax Reporting and Sustainability, IFF-HSG Working Papers No. 2021-6, p. 1 et seq.

However, it is far from clear whether its tax behavior has done any good in the world for obvious reasons. Nevertheless, its approach towards tax behavior might have helped such a company to increase its ESG rating and even offset parts of its negative factors within the ESG rating. Therefore, if the benchmark is a comprehensive development rationale it is far from clear whether such Russian company has acted in a sustainable manner although its tax rating was presumably very good. Of course, this is a rather extreme example but it shows the underlying risks of current approaches towards ESG ratings.

3. Is Tax an Important ESG Metric?

It is evident that ESG ratings are important for investors. These ratings partly use tax behavior in its widest form as part of the overall ESG metric. Depending on the rating agency, tax might amount to up to 5% of the overall ESG rating of an MNE.² In addition, certain tax behaviors (such as the use of tax havens) can lead to a downgrading of the ESG rating or even an exclusion of companies from capital providers' investment decisions. It is, therefore, not a surprise that the tax section in sustainability reports has gained importance over the past years, just like the ESG rating in general.

4. What Are the Challenges in Incorporating Taxation Considerations into ESG Metrics?

Although tax seems to play an important role as an ESG metric, there are several challenges triggered by linking ESG tax metrics and development policy goals.

First, it is not at all clear how exactly tax is used as a metric for calculating the overall ESG rating of an MNE as it is unclear which assessment criteria play a crucial role for rating agencies. Their metrics used are only partly published. Moreover, there are a variety of recommendations published by different organizations (Global Reporting Initiative [GRI], Principles for Responsible Investment [PRI], World Economic Forum [WEF], OECD, etc.) in tax matters and these recommendations are a source of inspiration for the rating agencies as well. A first analysis shows that there are up to 90 different recommendations in tax matters.

For instance, to name three, it is suggested that MNEs shall draft a tax strategy, that they should not bribe tax authorities but also that they should publish their approach concerning the engagement with tax authorities in general. Therefore, tax metrics used are not only hard facts such as how much taxes an enterprise pays (maybe compared to competitors) but also a variety of soft criteria to assess the overall tax behavior.

Nevertheless, the underlying narrative of tax metrics used is that higher tax payments or less tax planning is in general considered to be a good tax behavior.

This brings us to the second and most important challenge. Besides these technical challenges in defining persuasive metrics, a more fundamental issue arises as tax behavior does not necessarily have a direct effect on the SDGs (e.g. compared to prohibition of child labor or the reduction of CO2 emissions within the supply chain). This is the case as the assumption that tax payments are always good for development depends on how states invest tax revenue. Governmental investment into military forces might obviously not have the same effect as investments into health care. This is undeniable and an obvious concern. Some recommendations such as the prohibition of tax bribery, nevertheless, seem to have an unconditional positive direct impact on the development of a state.

² However, based on our own exchanges with rating agencies, tax might on average amount to 1-3% of the overall rating.

5. Is There a Way Out?

ESG metrics are a great opportunity to achieve development policy goals through incentivizing the private sector to act in a certain manner. This is also true with respect to tax as an ESG metric.

However, badly designed ESG metrics can also be detrimental as they enable window dressing in the sense that positive tax behavior might offset a negative assessment in other areas such as environment. Badly designed and opaque ESG ratings seduce companies to do ratings management (comparable to doing earnings management) just to fulfill certain expectations without any link to real effects on the SDGs. Therefore, from a development policy perspective it is absolutely decisive that these tax metrics are well-designed. In this regard, we need a new debate about the intersection between tax behavior and sustainable development. It is key to have independent bodies judging which, if any, tax behaviors are a solid ESG metric.

From an MNE's perspective, the topic is frustrating as compliance requirements have significantly increased over the past years and it does not necessarily lead to a sustainable development of the world. Current approaches seem to mainly improve the «G» in ESG as the current recommendations such as GRI 207 tend to focus on governance factors, i.e. that tax risks are mitigated.

Of course, this is a valid approach if the goal is to assess the sustainable development of the value of the company but such recommendations can hardly be linked to the SDGs. It also means that it needs to be clarified and clearly communicated what the goal of these ratings is.

The underlying even more fundamental issues is that the more factors are included in a sustainability rating the less its informative value is regarding some of the most important and undisputed impact factors such as CO2 emissions. Of course, there are new approaches at the horizon (incl. disclosing all taxes paid by an MNE) but even if such metric is used, it is questionable whether the payment of a tax (even of carbon taxes) is per se an effective way of achieving the SDGs.



Sustainability in relation to variable compensation



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The concept of «Sustainability» is not new: the Swiss Federal Constitution of 1874 already covers sustainability in relation to agriculture and combines this with production that is market oriented. This concept has evolved over decades to cover Environmental, Social and Governance («ESG») topics. In the 1990s and early 2000s, those topics tended to be covered under the umbrella of «Corporate Social Responsibility», typically outside the core business. More recently, companies, investors, proxy advisors and regulators alike have recognised that topics commonly covered under ESG are essential to sustainable value creation for shareholders, employees and society. Employees, especially the younger generation, expect real progress towards a more sustainable future.

In view of this, it is becoming standard practice to integrate ESG aspects as part of core business operations. For an increasing number of companies, this also includes an integration in variable compensation schemes such as annual and/or multi-year bonuses.

This article discusses key practical aspects which Boards of Directors and their Compensation Committees may need to assess when considering the integration of ESG in variable compensation schemes. It also elaborates on how Swiss Re has integrated ESG in its variable compensation scheme.

1. The pros and cons of integrating ESG in variable compensation schemes

With ESG being so prominent on investors' proxy advisors' and the general public's agenda in recent years, integrating ESG in variable compensation may seem like an obvious move. Conceptually, however, one might argue that ESG is «the right thing to do», i.e. an absolute baseline of doing business similar to ethical conduct and compliance with applicable laws and regulations, which should not be rewarded separately.

Certain studies have suggested that companies that do well on ESG, show more sustainable long-term financial performance!¹

¹ See for example Tarmuji, Indarawati, Ruhanita Maelah, and Nor Habibah Tarmuji. «The impact of environmental, social and governance practices (ESG) on economic performance: Evidence from ESG score.» *International Journal of Trade, Economics and Finance* 7, no. 3 (2016): 67 or Giese, Guido, Linda-Eling Lee, Dimitris Melas, Zoltán Nagy, and Laura Nishikawa. «Foundations of ESG investing: How ESG affects equity valuation, risk, and performance.» *The Journal of Portfolio Management* 45, no. 5 (2019): 69-83.

If ESG drives sustainable long-term financial performance, rewarding for both ESG and financial performance could come close to 'double rewarding' for one and the same effort.

Finally, investors and proxy advisors agonise over companies' use of vague and poorly measurable qualitative ESG metrics, which make it difficult to assess whether there is real progress.

On the other hand, if ESG metrics are tangible, measurable and explainable, these can be a strong factor to substantiate a company's commitment to ESG, both internally and externally, and drive employee commitment and engagement.

2. Options for integrating variable compensation in the compensation framework

Companies deciding to integrate ESG metrics in variable compensation will face a number of practical considerations, namely i) which metric(s) to consider, ii) which weighting and upside/downside potential to use,

and iii) – for companies that have more than one variable compensation scheme – which scheme to use (i.e. short- and/or long-term variable compensation scheme).

3. Metrics

Much has already been published on measuring progress on ESG and the most suitable measurement approach will depend heavily on a company's industry, business model and strategy. We therefore briefly touch upon the choice between internal and external metrics and provide some commonly used metrics.

We consider as internal metrics those designed and developed by the company internally, while external metrics are those used by third-party institutions, such as the Dow Jones Sustainability Index (DJSI) or MSCI Index (indices which independently evaluate the sustainability performance of companies in a consistent way so that their performance can be compared). Both present some key practical advantages and disadvantages, as shown in the table below:

	Internal metrics	External metrics
Advantages	<ul style="list-style-type: none"> ■ Tailorable to company's exact business model, operations and ESG challenges. ■ Reporting can be aligned to the company's (financial or other) reporting timelines as needed or required by regulations. 	<ul style="list-style-type: none"> ■ Element of credibility thanks to third-party validation. ■ Comparability amongst participating companies. ■ Public recognition/marketing of results.
Disadvantages	<ul style="list-style-type: none"> ■ Business confidentiality may hinder/prohibit external reporting, which, however, is critical to substantiate ESG commitments. ■ Does not allow stakeholders to easily compare between companies. 	<ul style="list-style-type: none"> ■ Depending on metric(s) chosen, significant internal resources can be required to complete the reporting to the third-party institution. ■ Metrics may not be well tailored to a company's business model. ■ Potential lack of available data for some of the data points requested by the third-party institution. ■ Dependence on the third-party institution's (perceived) standing, (changing) method, number of participating companies and timeline to receive results.

To offset some of the challenges of using either internal or external metrics, companies may consider the use of a combination of both to leverage the third-party validation element of external metrics and the flexibility offered by internal metrics. In this context, it is important to keep the total number of metrics at a manageable level to avoid a potpourri of metrics diluting focus in the variable compensation scheme.

Examples of commonly used ESG metrics are as follows:

Environment	Social	Governance
Air quality/ pollution	Customer satisfaction	Audit strategy
Carbon emissions	Diversity and inclusion	Board capabilities
Climate change strategy	Employee education	Board independence
Energy usage	Employee engagement	Business ethics
Plastic usage	Equal pay	Compliance (with law & regulations)
Soil quality/ pollution	Health & safety	Risk management
Sustainable investment	Human rights	Sanctions/ legal settlements
Water usage/ pollution	Labour rights	Stakeholder engagement
Waste management	Value chain management	Tax strategy

The list of potential targets seems endless, and it may be difficult to prioritise e.g. carbon emissions over customer satisfaction, or labour rights over risk management. To define which metrics will make a difference to the company, a clear company strategy is key. After the metrics have been chosen, tangible and measurable target levels (eventually with a threshold and maximum) will need to be defined to show sufficient stretch to investors and proxy advisors.

4. Weighting and upside versus downside potential

With weighting, we mean the relative weight of ESG metrics in comparison to other (most commonly financial) metrics used in determining variable compensation outcomes. Market practice varies widely across companies and industries, which shows that there is no «one size fits all» approach. Though, we would argue that the more tangible, measurable and disclosable the chosen ESG metrics are, the higher the weighting can be, especially if the company publishes concrete targets and achievements. On the other hand, intangible, catch-all metrics along the lines of «Making [non-quantified] progress on...» risk being challenged by investors as a potential means to offset poor financial performance. That being said, for companies that are at the beginning of their ESG journey, there can still be value in using such metrics (with a relatively small weighting) to underline ESG commitments both internally and externally.

Another option to mitigate the risk of challenge by investors is the use of ESG metrics only for potential downside, but not for upside in the variable compensation scheme. With this, poor performance on ESG would have consequences by way of lower variable compensation payouts, while performance at or above expectations will not result in higher variable compensation payouts. On the flipside, the incentivising factor for employees and management to make extra efforts on ESG may be limited in this set-up.

5. Short-term versus long-term variable compensation schemes

Companies with more than one variable compensation element will most commonly have a short-term (typically an annual bonus, rewarding performance over one financial year) and a long-term variable compensation scheme (typically a cash- or share-based incentive, rewarding performance over a three- to five-year period and paid out at the end of that period).

The short-term variable compensation scheme generally touches a larger portion of the workforce. Due to the short line of sight, employees below senior management likely feel more committed as their behaviour directly contributes to achieving ESG targets. This may drive change faster. As an example, a metric to reduce CO₂ emissions triggers employees to consider alternatives to business travel by plane.

The long-term variable compensation scheme may seem a more obvious choice considering the long-term nature of many ESG issues; after all, progress on issues such as human rights may not be visible in a one-year timeframe. Long-term variable compensation is oftentimes limited to the more senior employees in the workforce. As a result – and this can be intentional depending on the company's compensation philosophy – ESG metrics may not impact compensation for the majority of the workforce if the path of long-term variable compensation is chosen. However, even to senior management, the long line of sight may be perceived as less motivational, and progress may not be (directly) reflected in typical long-term performance indicators such as the company's share price.

Short-term variable compensation schemes allow for a higher degree of flexibility as the metrics and targets considered can be changed on an annual basis if needed. On the other hand, for the long-term variable compensation schemes, these metrics and targets are locked in for the three- to five-year performance period as so called «in-flight» changes to metrics and targets during that period tend to be perceived negatively by external stakeholders (the general presumption being that targets are changed to make them more easily achievable and hence to generate higher payouts at the end of the performance period).

Regardless of the option chosen, it is key for metrics to be tangible and – depending on the desired level of transparency – suitable for internal and external communication. Companies may therefore go through a number of maturity levels, starting with qualitative targets and moving to more quantifiable targets as their ESG strategy and measurement approach matures.

6. Assessment process

Assessment of achievements against ESG targets, especially when these are qualitative, can be difficult. Credibility of outcomes can especially be problematic when the performance on ESG is better than the financial results. Simple and clear measures as well as a robust assessment process agreed at the start of the year are essential. A specific body carrying out the assessment and eventually an independent audit of the results may be helpful to convince internal and external stakeholders.

7. Swiss Re

At Swiss Re, we consider «Sustainability» a strategic, long-term value driver. Our Sustainability approach is embedded throughout our re/insurance value chain: from the liability to the asset side of our balance sheet, our own operations and dialogue with our stakeholders.

As an example, climate clearly plays a role in natural catastrophe losses, over half of which were caused by secondary perils such as floods, drought, wildfires or winter storms. As our business is impacted by climate change, we play an important role in tackling it: we provide natural catastrophe re/insurance to help governments, corporates and individuals on the ground with reconstruction efforts in the wake of a natural disaster, we help combat climate change by providing risk transfer solutions that help mitigate the associated risks and advance the energy transition and we decarbonise our underwriting business. This contributes to environmental, social and economic sustainability.

But mitigating risks of climate change is not the only challenge for society: fighting inequities is another. Swiss Re focuses on improving access, affordability and availability of life and health insurance products to populations that have traditionally been underserved by our industry, such as women, immigrant communities, ethnic minorities and informal workers.

Swiss Re believes that lasting progress comes from striking the right balance between building upon past sustainability achievements and taking decisive action. To focus the workforce's energies on the topics that are deemed most important in a certain year, Swiss Re defines clear KPIs – tangible to the extent possible – for the Group as a whole and for each Business Unit and Group Function at the start of the year.

Our sustainability-related KPIs are aligned to Swiss Re's Group Sustainability Strategy and take into account our sustainability ambitions. Swiss Re uses a combination of external and internal metrics as disclosed in the Climate-related financial disclosure section of our Financial Report and in our Sustainability Report.

Select sustainability-related KPIs are linked to Swiss Re's short-term variable compensation scheme to focus on the right priorities in a certain year. At the end of each year, the Group, Business Units and Group Functions report on their performance, whereby Swiss Re's Sustainability Council reviews the outcome of specific group-wide sustainability-related KPIs. As a result, sustainability-related KPIs impact variable compensation for all employees, including members of the Group Executive Committee.

Examples of external metrics Swiss Re used in the 2021 short-term variable compensation scheme were the company's leading role on ESG as recognised externally by leading Sustainability indices as the DJSI and MSCI, but also Swiss Re's profile as an active voice in public discussions on sustainability and climate. As internal metrics Swiss Re focused on the share of sustainable business, reducing the carbon footprint of our operations, investments and insurance activities as well as topics like representation of women in leadership, customer focus (Net Promotor Score) and risk & control behaviour.

We continue monitoring developments on Sustainability/ESG and regularly review and adapt our approach in line with our business strategy.



Board Duties and the Application of the IFRS – The Legal Perspective¹



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With a listing at the SIX Swiss Exchange («SIX»), companies must apply a financial reporting standard providing a true and fair view of the financial situation of the company. Listed entities mainly have the choice between the application of the IFRS, the US GAAP, and the Swiss GAAP FER.

The choice of the financial reporting standard lies within the competence of the board of directors and impacts the board members' work on various levels. As the IFRS are the most applied reporting standard at the SIX this article focuses on the application of the IFRS.² Nevertheless, some considerations might be applicable to companies preparing their reports according to US GAAP or Swiss GAAP FER as well. The application of the IFRS has a significant effect on corporate governance and contrary to what one might expect, the application of the IFRS per se will not lead to a better corporate governance. To the contrary, only good corporate governance will mitigate risks arising from the application of the IFRS. This article therefore offers a legal perspective on the impacts of the application of the IFRS on board duties for the overall financial management of the company. The focus lies on the question whether the board of directors, being responsible for the overall financial management of the company, may base its decisions on an IFRS-report.

¹ This contribution is based on the author's publication and dissertation published in 2021: Daniele Simoniello, *The Influence of the IFRS on the Financial Management Duties of the Board of Directors under Swiss Law*, SSHW 349, Zürich 2021. The author thanks Marisa Hunkeler, MLaw and Mirella Janett, MLaw for their valuable inputs and critical review of this article.

² <<https://www.six-group.com/de/products-services/the-swiss-stock-exchange/market-data/shares/companies.html>> (accessed on 29.03.2022).

1. Overall Financial Management: Duty to organize Accounting, Financial Control and Financial Planning

Based on the duty stipulated in Art. 716a para 1 Swiss Code of Obligations («CO»), the board of directors is required to prepare the financial report and to organise the entire accounting, financial control, and financial planning systems for the purpose of managing the company.

The duty of overall financial management is closely connected with the duty of overall strategic management. Members of the board must include in their overall strategy, which shall ultimately lead to the creation of shareholder value, long-term value management, the specification of financial goals and liquidity coordination, the capital structure policy, and how to maintain financial flexibility. To that end, the board of directors must set out a risk management framework, determine the basic risk orientation of the company and align the risk orientation with its capital structure policy.³

The primary guideline of overall financial management is to ensure the good financial performance of the company and the transformation of this performance into shareholder value, e.g. dividends or an increase in share value. A constant orientation towards creating shareholder value also helps to improve corporate governance.⁴

Financial reporting provides data that allows shareholders, tax authorities, and creditors to assess the financial situation of the company. However, financial reporting, but also accounting, financial control, and financial planning systems may serve internally to members of the board and the senior management. It is recognised amongst legal scholars that financial accounting and reporting should serve a board of directors as a management tool and only in the case in which financial reporting depicts the financial situation of the company as close to the reality as possible can board members make adequate decisions.⁵

To manage the company, a board of directors should receive (at least) monthly updates on costs, earnings, cash in- and outflows, as well as liquidity. Furthermore, financial indicators like the EBITDA, EBIT, ROA, or ROS might be required for the assessment of the financial situation of the company and to take adequate decisions.⁶ Modern financial reporting standards, such as the IFRS, do, contrary to financial reports according to the CO, already offer a true and fair view, and they could therefore already offer to the members of the board of directors a basis on which they may rely their decisions without a separate management accounting system.⁷

The next paragraphs will present the positive and negative aspects of using the IFRS for decision making of the board, whether members of the board of directors may rely on an IFRS report and what considerations from a corporate governance perspective must be made by the board of directors. The analysis is based on international literature, mainly from Germany, where the context was similar as in Switzerland: German financial reporting was prudence driven and therefore unable to provide the board of directors and executive management with figures for decision making. Therefore, members of the board of directors and senior management had to rely on a second set of figures (controlling or management accounting). Several studies and contribution have shown the positive and negative aspects of the implementation of a convergent financial reporting system, meaning that the board of directors and the executive management may rely on a financial report according to the IFRS.⁸

3 Müller Roland/Lipp Lorenz/Plüss Adrian, *Der Verwaltungsrat*, 5th edn, Zürich 2021, p 192 et seq; Simoniello (fn 1), para 139 et seq.

4 Böckli Peter, *Schweizer Aktienrecht*, 4th edn, Zürich 2009, § 14 para 36; cf the discussion in Bühler Christoph B., *Regulierung im Bereich der Corporate Governance*, Zürich 2009, para 343 et seq; Simoniello (fn 1) para 135.

5 Böckli (fn 4) § 13 para 344; Müller/Lipp/Plüss (fn 3) p 200 et seq.

6 Bühler Christoph B., In: Handschin Lukas (Ed), *Zürcher Kommentar Obligationenrecht, Art 698-726 und 731 b OR, Die Aktiengesellschaft Generalversammlung und Verwaltungsrat Mängel in der Organisation*, 3th edn, Zürich 2018 (ZK-Bühler), Art 716a CO para 61; Müller/Lipp/Plüss (fn 3), p 196.

7 However, it is to be noted that in Switzerland, companies are still required to present their statutory financial reports in accordance with the CO for tax purposes and dividend payments and it still serves as basis for the assessment of a company in financial crisis and e.g. the determination of over-indebtedness and the therewith relating duties of the board to notify the competent court. See Simoniello (fn 1) para 696 et seq.

8 Brandau Michael/Endenich Christoph/Luther Robert/Trapp Rouven, *Separation - integration - and now...? A historical perspective on the relationship between German management accounting and financial accounting*, *Accounting History* 22 (2017), p 67 et seq. See also Simoniello (fn 1) para 333 et seq.

2. Use of IFRS for Decision Making of the Board – Positive Aspects

2.1 Shareholder Value Orientation

From a shareholders' perspective what counts is in the financial report. The core communication medium for financial information of a company is therefore the external financial report.⁹ Communication between a company and the capital market improves if the same financial data is used internally as well as externally, because internal and external communication are aligned. Generally, if internal communication improves in quality so does external communication. At the same time, there is an alignment of aims of shareholders, board of directors and management, and the managers will aim to maximize the figures of the IFRS-report, which ultimately benefits the shareholders.¹⁰

2.2 Reduction of Divergences in the Financial Results

When using two separate financial accounts, externally and internally, it is possible that the board of directors receives divergent financial results, which obviously raises the question of which result the board of directors and managers should trust.¹¹ Therefore, when the board of directors bases its decisions on the report communicated externally there will be no unexplainable divergences, which helps the board of directors, to make the right decisions.¹²

A further advantage is that if a company decides to make decisions based on external results, the objectivity of the internal management system is enhanced. Managers must act within the regulations set by the standard setting body. Furthermore, the external financial report is audited in contrast to a separate internal report, leaving a minimal margin for managers to cover up any failures with extensive use of subjective estimates. Finally, audited reports improve the internal credibility of an accounting and reporting system.¹³

2.3 Improvement of International Clarity and Transparency of Accounting

Especially in an international context, the use of the IFRS allows for a clear and transparent understanding of accounting for managers all over the world, as in an international group there might be different views and understandings of financial accounting and controlling within the group. Different accounting standards, reconciliation accounts, and further internal reports are additional sources of error, which can be reduced by using a single set of figures.¹⁴

2.4 Effectiveness and Efficiency

Several scholars have also pointed out the improved effectiveness and efficiency when using one set of figures mainly due to the waiving of imputed costs, and the therefore obsolete reconciliation accounts between internal and external accounting, which are particularly time-consuming. Consequently, it is possible to obtain a financial report faster («fast close») and controllers have more time to look after their core competences and act as business partners with senior management.¹⁵

9 Trapp Rouven, Konvergenz des Rechnungswesens: Eine Inhaltsanalyse der Diskussion um eine Annäherung des internen und externen Rechnungswesens in deutschsprachigen Fachzeitschriften, Diss Dortmund 2011, Wiesbaden 2012, p 175 et seq; Weissenberger Barbara E., IFRS für Controller, 2nd edn, Freiburg 2011, p 206.

10 Engelen Christian/Pelger Christoph, Determinanten der Integration von externer und interner Unternehmensrechnung – Eine empirische Analyse anhand der Segmentberichterstattung nach IFRS 8, in: zfbf 66 (2014), p 178 et seq, p 186; Trapp (fn 9) p 176 et seq; Weissenberger (fn 9) p 206 et seq. See Simoniello (fn 1) para 333 et seq.

11 Trapp (fn 9) p 143 et seq; Weissenberger (fn 9) p 206.

12 Cf Angelkort Hendrik, Integration des Rechnungswesens als Erfolgsfaktor für die Controllerarbeit, Diss Giessen/ Frankfurt am Main 2010, pp 1, 28.

13 Engelen/Pelger (fn 10) p 186; Trapp (fn 9) p 179 et seq.

14 Beissel Jörg/Steinke Karl-Heinz, Integriertes Reporting unter IFRS bei der Lufthansa, in: ZfCM 2/2004, p 63 et seq, p 65.

15 Beissel/Steinke (fn 14) p 65; Belohuby Richard, Kundenwertcontrolling und IFRS Rechnungslegung, Wiesbaden 2014, p 20 et seq; Trapp (fn 9) p 171 et seq, 175.

3. Use of IFRS for Decision Making of the Board – Negative Aspects

3.1 Dependence on International Standard-Setters

One disadvantage when using a single set of figures pointed out by several scholars is the dependency on international standard-setters.¹⁶ Instruments of decision making and management accounting should be implemented because of their benefit for its purpose and not because of other, possibly political, reasons. Furthermore, the decision making system cannot be personalised to suit a company's unique needs, and new standards that are introduced over the years can hinder the aim of comparability across years.¹⁷

3.2 Inferior Fulfilment of Controlling Requirements

It has also been argued that the IFRS are not entirely appropriate for controlling requirements. In particular, because the IFRS are designed to meet the requirements of aiding the decision-making of external investors, which does not necessarily meet the internal requirements of for incentive setting. Furthermore, fair value measurement might impede the correct valuation of performance because financial results become more volatile if they are dependent on, for example, discount rates. Finally, the earnings management policy for external reporting automatically and directly influences internal reporting, which leads to a loss of accuracy in the management reporting system.¹⁸

4. A Partially Integrated Reporting System as State of the Art

Because of certain negative aspects of using the IFRS for decision making, a partially integrated reporting system might be more suitable for a company applying the IFRS. Partially integrated means that for the purpose of managing the entity, senior management as well as the board of directors rely on the figures of financial reporting, possibly with some adjustments. However, for operational management (for example, for «make or buy» decisions), management accounting figures are used, including e.g. opportunity costs, on lower management levels.¹⁹

Therefore, for the purpose of performance measurement in a company reporting according to the IFRS, the following should be considered:

- At the highest levels of the management hierarchy, internal and external financial reporting must be fully converged. The highest levels of the hierarchy include the management of group and segment levels.
- The IFRS standards, which are not appropriate for performance measurement, should be eliminated or adjusted when necessary. However, these bridging positions should always be comprehensible and transparent.
- At an operational level, and for the purpose of process management, it must be possible to rely on internal figures, which might be adjusted for cost calculations.²⁰

16 Beissel/Steinke (fn 14) p 70; Dais Martin/Watterott Richard, Umstellung des externen und internen Rechnungswesens der Bosch-Gruppe auf IFRS, in: Controlling 8/9 2006, p 465 et seq, p 472 et seq; Weissenberger (fn 9) p 212.

17 Cf Angelkort (fn 12) p 30; cf Belohuby (fn 15) p 42.

18 Beissel/Steinke (fn 14) p 70; Belohuby (fn 15) p 43; Weissenberger (fn 9) p 212; Dais/Watterott (fn 16) p 472 et seq; Trapp (fn 9) p 184 et seq.

19 Weissenberger (fn 9) p 212 et seq

20 Weissenberger Barbara E., Ergebnisrechnung nach IFRS und interne Performancemessung, in: Wagenhofer Alfred (Ed), Controlling und IFRS Rechnungslegung, Berlin 2006, p 49 et seq, p 72; cf also Angelkort (fn 12) p 31 et seq.

The main advantage of such system is that at the senior management and board level, it is possible for the entity to benefit from improved communication possibilities with capital markets. Internal and external goals can be compared, even if some adjustments for the reasons set out above are made.²¹ On the other hand, management at the profit-centre level can still work with internal calculations, which do not need to be compared with the figures communicated to external investors. Many German companies have adapted the system of partial integration, and it is therefore considered as state of the art among scholars and practitioners.²² Therefore, in the opinion of the author, from a legal perspective, a board of directors may rely on an IFRS report, possibly with some adjustments. However, it must ensure good corporate governance and mitigate certain risks, some of which are outlined in the following paragraphs.

5. Impact of IFRS on Corporate Governance and the Board's Duties

5.1 Determine Effects of Fair Value Measurement

According to IFRS 13, a fair value is the price that market participants would pay in an orderly transaction to transfer an asset or liability. The price is therefore an exit price under current market conditions. At initial recognition, a fair value is usually the purchase price. For subsequent valuations, the preparer of the financial report might use valuations methods such as the DCF method. However, IFRS 13 sets forth three different levels of inputs to assess the fair value of an asset. Fair values according to level 1 inputs are assessed by means of quoted prices in an active market. With level 2 inputs, prices can be observed directly or indirectly, however, no active market exists. For level 3 inputs in the fair value hierarchy, no prices are observable for the asset or liability.

Fair value measurement, therefore, leaves a great deal of discretion to managers. To decide which inputs should be used for valuation, managers must assess whether an active market exists. In the case in which no active market exists and inputs categorised in level 3 are unobservable, managers need to use inputs that reflect assumptions and considerations that a market participant would use when pricing an asset or liability. These assumptions include risk rates.²³

The board of directors must therefore ensure that discretion is applied fairly and not in such a way that managers are unduly benefitted. One way of doing so is ensuring that the board of directors itself is composed in such a way that it ensures control over senior management. One author found that a strong board is able to mitigate the risks arising from level 3 fair values. He determined that a strong board is independent, small with respect to the size of the company, and gender diverse.²⁴

A board of directors could enhance internal control by introducing an independent valuation committee outside of the board of directors. The valuation committee should be independent from the board of directors, the treasury, and senior management. Furthermore, members of that committee should not receive any variable remuneration based on financial figures.²⁵

A strong audit can further enhance corporate governance in general, specifically in that fair values are applied correctly. Auditors should use their own programs and parameters to determine fair values and control the end results with the results of the company. Fair values are considered to be applied correctly, if the difference in valuation is within a threshold determined by the auditor in advance.²⁶

21 Weissenberger (fn 20) p 72 et seq.

22 Brandau/Endenich/Luther/Trapp (fn 8) p 80 et seq; cf also for convergence in general Prochazka David, The Development of Financial and Management Accounting after the IFRS adoption: A Case from the Czech Republic, May 2010, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660122> (accessed on 29.03.2022), p 19.

23 For an overview see Simoniello (fn 1) para 441 et seq.

24 Siekkinen Jimi, Board characteristics and the value relevance of fair values, in: J Manag Gov 21 (2017), p 435 et seq.

25 See, the example of Leonteq, Annual Report 2021, p 208, available at: <<https://ch.leonteq.com/investor-relations/fyr-2021/leonteq+ag-full+year+report-2021-en.pdf>> (accessed on 29.03.2022).

26 See, the example of Leonteq, Annual Report 2017, p 146, available at: <<https://ch.leonteq.com/investor-relations/fyr-2021/leonteq+ag-full+year+report-2021-en.pdf>> (accessed on 29.03.2022).

Finally, the board of directors might decide to restrict the application of fair values by opting for the cost model where possible (for example, IAS 16 for property, plant, and equipment). A study showed that most companies use the cost model for plant and equipment as well as for intangible assets. Fair values are mostly used for property and investment property, especially where it enhances performance measurement and the asset is part of the primary activities of the company.²⁷

5.2 Determine Effects on Incentive Setting and Executive Pay

A board of directors is required to decide on compensation plans for senior management since it has the non-transferable duty to appoint and supervise senior management according to Art. 716a para 1 CO. Appointing managers involves determining the terms of their employment and compensation.²⁸

Executive compensation plans are an important aspect of corporate governance because incentives must be set in such a way that the company and shareholders benefit and that principal-agent problems are mitigated. However, compensation plans based only on financial figures might lead to results that are contrary to the overall strategic targets.²⁹ This is especially true since financial reporting according to the IFRS is complex and results are difficult to foresee, which is why boards of directors must determine adverse effects that might arise with incentive plans based on IFRS results.

Furthermore, the board should address whether fair values should be included in compensation plans. Fair values might be included when the asset that is valued based on fair values is a primary activity, e.g. financial instruments for banks. In all other cases, results should be adjusted by fair values because they include external effects, like interest rate changes, in the results. Thus, it is not possible to measure the performance of the managers in a reliable manner.³⁰

27 Christensen Hans B./Nikolaev Valeri V., Does Fair Value Accounting for Non-Financial Assets Pass the Market Test?, November 2012, available at: <<https://ssrn.com/abstract=1269515>> (accessed on 29.03.2022), p 4 et seq.

28 ZK-Bühler (fn 6) vor Art 707-726 CO para 172.

29 Bühler (fn 4) paras 380 et seq, 511 et seq.

30 Trapp (fn 9) p 282. See also Simoniello (fn 1) para 674 et seq.

Nevertheless, these problems might be eliminated by a value-oriented management system (e.g., by using the CVA method) and further adjustments.³¹ Furthermore, members of the board might come to the conclusion that relative performance evaluation with foreign peers is an adequate solution for incentivising managers because accounting earnings are more cross-country comparable with IFRS-based reports than with reports according to local GAAP.³²

Finally, because of the complexity and profound differences between the different sectors, boards of directors are required to establish a compensation committee within the board and seek external advice. The compensation committee must consider that senior management compensation must be understandable from a shareholder's perspective and, therefore, be transparent.³³

5.3 Maintain an Internal Control System

The internal control system is an important tool for ensuring the efficient management of the company, its assets, and its corporate governance as well as to ensure a trustworthy and complete accounting system. The understanding of the internal control system is derived from the concept of the COSO.³⁴

5.4 Prepare a Reporting Handbook

To ensure the uniform application of the IFRS in the whole company, the board of directors should (in close collaboration with finance and accounting departments) establish a financial reporting handbook.³⁵

31 Cf the examples in: Dais/Watterott (fn 16) pp 466, 568, 472.

32 Ozkan Neslihan/Singer Zvi/You Haifeng, Mandatory IFRS Adoption and the Contractual Usefulness of Accounting Information in Executive Compensation, February 2012, available at: <<https://ssrn.com/abstract=1999898>> (accessed on 29.03.2022), p 4.

33 Swiss Code of Best Practice for Corporate Governance, Economiesuisse, February 2016, available at: <https://www.economiesuisse.ch/sites/default/files/publications/economiesuisse_swisscode_e_web_2.pdf> (accessed on 29.03.2022), appendix 1.

34 Böckli (fn 4) § 15 para 248; Müller/Lipp/Plüss (fn 3) p 277 et seq.

35 Dais/Watterott (fn 16) p 467; Engelbrechtsmüller Christian, Bilanzpolitik und IFRS-Umstellung im Zuge eines Unternehmenserwerbes, in: Engelbrechtsmüller Christian, Losbichler Heimo (Ed), CFO-Schlüssel-Know-how unter IFRS, Wien 2010, p 163 et seq. See also Simoniello (fn 1) para 672.

A manager might not violate any reporting duties when using the great margin of financial reporting regulations. However, it is possible that such managers could violate internal corporate governance norms, and therefore be liable to the company.

5.5 Establish Board Committees

This contribution demonstrates that the work of a board of directors can be very complex and demanding. It is therefore uncontested that a board of directors must split different tasks and delegate them to specialised committees within the board. In the context of the present contribution the focus lies on the audit committee and compensation committee.

5.5.1 Audit Committee

The tasks of the audit committee can be summarised into three areas of responsibility: dealing with the external audit, the internal control system, and financial reporting. The requirement for an audit committee is primarily targeted at listed companies. However, depending on a company's size and the complexity of its situation, an audit committee might be recommended even for non-listed companies.³⁶

Some of the IFRS standards give managers and boards of directors a substantial margin of discretion and therefore need close control. Furthermore, decisions concerning impairment (e.g. regarding goodwill) or decisions regarding provisions can have a major influence on the financial results of a company.³⁷ In the opinion of the author, it is therefore inevitable that companies applying the IFRS establish an audit committee within the board of directors. The complexity of the IFRS and the required collaboration of the board of directors with internal controllers, and external auditors often exceed the expertise of most board members, and it would also require too much time for the entire board to handle this task.³⁸

The audit committee should be composed of a minimum of three members, all of which are required to be independent board members, since even non-executive members that are not independent can have a considerable influence in a small committee. Furthermore, members of the audit committee should be financially literate and be able to understand a report and raise important questions about it.³⁹ The audit committee should represent a counterbalance to the managers and executive members of the board of directors, which will usually have more insights and greater knowledge than independent board members.⁴⁰

5.5.2 Compensation Committee

The compensation committee is responsible for the entire compensation policy of the company, especially the compensation of senior management. The committee submits the proposal for the compensation policy to the entire board of directors for final approval.⁴¹ As the salary of senior management could be controversial among shareholders as well as stakeholders, it should be supported by the entire board of directors.

The compensation committee should be composed of non-executive and independent members of the board of directors.⁴² If remuneration is based on IFRS-based figures, it is important that the compensation committee understands the potential impacts of incentives. Incentive setting using IFRS-based figures can become highly complex, which should be considered when nominating members of the compensation committee. It might be helpful if a member of the audit committee is at the same time part of the compensation committee.⁴³

36 Böckli Peter, *Audit Committee*, Zürich 2005, para 7, 146 et seq; Simoniello (fn 1) para 685.

37 Regarding goodwill impairment, Kabir Humayun/Rahman Asheq, *The role of corporate governance in accounting discretion under IFRS: goodwill impairment in Australia*, in: *Journal of Contemporary Accounting & Economics* 12 (2016), p 290 et seq.

38 Cf Böckli (fn 4) § 13 para 391; Böckli (fn 36) para 35.

39 Böckli (fn 4) § 13 para 391; Böckli (fn 36) para 26 et seq; Böckli Peter, *Einführung in die IFRS/IAS*, 2nd edn, Zürich 2005, para 6 et seq; Simoniello (fn 1) para 685 et seq.

40 According to Kabir and Rahman, the audit committee's expertise has a direct influence on corporate governance, which was assessed by analysing the association between economic indicators and impairment decisions of the company. Kabir/Rahman (fn 37) p 291.

41 Müller/Lipp/Plüss (fn 3) p 74.

42 Müller/Lipp/Plüss (fn 3) p 74.

43 Simoniello (fn 1) para 692 et seq.

6. Conclusion

This article has shown that the application of the IFRS impacts the members of the board on many levels. Even though members of the board of directors may rely on a report according to the IFRS for their decision making process they have to ensure good corporate governance, as the application of the IFRS itself does not lead to a better corporate governance of a company.

To do so the board of directors must ensure that valuations are executed fairly and in the interest of the company, determine the effects of the IFRS and especially of fair values in general and on incentive setting and executive pay.

Additionally, the board of directors must implement an appropriate internal control system and consider implementing an independent valuation committee outside of the board of directors that is responsible for fair values, which could reduce the risk that managers use fair values in an opportunistic manner. A strong audit further enhances corporate governance and the correct application of the IFRS.

Furthermore, the board of directors should establish an audit and a compensation committee within the board of directors, and, if necessary, seek expert advice externally.

However, if a company has a strong corporate governance and the board of directors takes into account the impact of the IFRS on issues as e.g. incentive setting, the IFRS report can serve the board of directors as an important management tool. Particularly, will the IFRS report provide the board of directors with valuable financial information, which will enable the board to take adequate decisions, ultimately supporting the board of directors to fulfill its financial management duties according to the Swiss Code of Obligations.



ESG Regulation for Financial Services Companies in the European Union



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1. Introduction

By 2050, Europe aims to become the world's first climate-neutral continent. To pave the path to meet this aspiration in the fight against climate change, the European Commission (EC) released the 'Fit for 55' package, which contains ambitious climate targets. These targets set out a clear ambition for a green (and digital) transition in the EU as a whole and in individual EU member states by 2030:

- minimum 55 percent cuts in greenhouse gas (GHG) emissions by 2030, compared to 1990 levels
- above 32 percent share of renewable energy
- at least 32.5 percent improvement in energy efficiency.

The European Green Deal was always intended to be a green game changer, and on 14 July 2021, the 'Fit for 55' plan further articulated the strategy and gave traction to these transformative efforts. The 'Fit for 55' leads the way for a green transition via the use of regulations, new initiatives, amendments to key legislation and key non-legislative communications.

One of the goals is to steer private capital into sustainable business models and products. Here Financial Services Companies like banks, insurers and asset managers play an important role as investors and providers of products.

New regulations are introduced by the

- European Union (EU) > Taxonomy and Disclosure Regulation
- European Commission (EC) > Corporate Sustainability Reporting Directive (CSRD).

In addition, new standards for sustainability reporting are currently issued by

- European Financial Reporting Advisory Group (EFRAG) > EU Sustainability Reporting Standards (ESRS)
- International Sustainability Standards Board (ISSB) > IFRS Sustainability Disclosure Standards

The regulations and the standards will not only have an impact on the business of the companies itself, but also on the governance – (supervisory) boards and management boards – and auditors.

Both customers and investors have an increased demand on receiving sustainability reporting information.

2. New Regulation

2.1 European Union

Through regulation 2020/852 (Taxonomy Regulation (TR)), the EU aims to boost sustainable investments and prohibit greenwashing. The TR establishes an EU-wide classification system defining which activities are “environmentally sustainable” and how related information must be disclosed.

The TR defines six environmentally sustainable objectives: a) climate change mitigation b) climate change adaptation c) sustainable use and protection of water and marine resources d) transition to a circular economy e) pollution prevention and control f) protection and restoration of biodiversity and ecosystems

For an activity to be considered environmentally sustainable, it must simultaneously

- Provide a substantial contribution to one of the six objectives by complying with technical screening criteria
- Not significantly harm any of the other objectives
- Respect internationally recognized minimum safeguards

The objective of the Taxonomy is to provide a framework for corporates to disclose to investors and customers the level of their engagement in environmentally sustainable activities and products.

The TR foresees certain disclosures both on entity/issuer level as well as at the financial product level. On an entity level, for all financial undertakings subject to NFRD (until 2023) and subject to CSRD (starting 2024) taxonomy-eligible and taxonomy eligible and aligned exposures need to be disclosed. For financial services companies specific KPI's were identified, which better fit their business. This includes percentage of eligible risk positions of total risk positions, like green asset ratio for banks.

On product level, all financial market participants offering products in the EU need to disclose taxonomy aligned exposures and qualitative information regarding sustainable investment objectives. The companies must explain, how and to what extent investments qualify as environmentally sustainable, name the environmental objectives targeted by relevant investments and compute the proportion of the portfolio's Taxonomy alignment.

Through regulation 2019/2088 (Disclosure Regulation (DR)), the EU aims to booster the disclosure of environmental related strategies, investments and products. DR and TR are interlinked.

Companies have to disclose their strategies for the inclusion of sustainable risks in their investment decisions or for the investment and product advice for customers. On the product level companies must present the percentage of non sustainable products, products with sustainable or social offerings and products including sustainable investments.

The information must be shown on the internet, in the product prospects and in regular reports.

2.2 European Commission

On April 21st, 2021 the EC published the draft of the Corporate Sustainability Reporting Directive (CSRD). This initiative has as well to be seen in context with the European Green Deal. It is one of the central instruments, to shift capital flows from companies towards sustainable investments via enhanced disclosure. It is the next step of the legislative, which was introduced by the taxonomy and disclosure regulation mentioned above and will supersede the current Non-Financial Reporting Directive. The implementation date is planned for 2024 but might be postponed to 2025.

The CSRD will have a huge impact on the strategy, the internal control systems, duties of supervisory and management boards and the incentivization.

Companies will have to issue a so-called sustainability declaration. In addition to the above-mentioned TR and DR further information about environmental, social and employee aspects including the impact on governance needs to be disclosed. This comprises the resilience of the business model and the strategy of the company towards sustainability risks, the compatibility of the company planning vis-à-vis the Paris climate goals. It has to be reported to what extent stakeholder interests and sustainability aspects are reflected in the business model and the strategy, the goals and goal achievement in relation to sustainability and measures for the prevention or improvements of negative consequences of the business conduct. The disclosure has to take place retrospective as well as prospective and both qualitative and quantitative.

An important part is the so called "double materiality". Companies have to report about aspects, which are necessary to understand their business and aspects, which are necessary to understand the impact of their business on sustainability requirements.

Companies will have to use a standard for sustainability reporting – see below. The information has to be shown in a specific section of the MD&A and must be published in digital form.

In order to improve the quality of sustainability reporting, it will have to be audited with so called "limited assurance" either by the external auditor or another auditor. Also, the supervisory board will have to monitor the reporting process and review the information like it has to do already for financial reporting.

3. (New) Standard Setters

3.1 European Financial Reporting Advisory Group (EFRAG)

EFRAG is a private association established in 2001 with the encouragement of the European Commission to serve the public interest. EFRAG extended its mission in 2022 following the new role assigned to EFRAG in the proposal for a CSRD of 21 April 2021, providing Technical Advice to the European Commission in the form of fully prepared draft EU Sustainability Reporting Standards and/or draft amendments to these Standards.

One of the proposals in the CSRD is to introduce the requirement for companies to report sustainability information based on European Sustainability Reporting Standards (ESRSs). ESRSs are to be developed by the European Financial Reporting Advisory Group (EFRAG) and adopted by the European Commission.

The CSRD, if adopted as proposed, requires EFRAG to draft, and the European Commission to finalize, an initial set of ESRSs by 31 October 2022 and further sector-specific standards by 31 October 2023.

In response, EFRAG set up various working groups to do the groundwork on the draft standards. These have now been issued formally by the newly created EFRAG Sustainability Reporting Board as exposure drafts for public consultation.

The 13 proposed ERSs cover:

- one standard on general principles for sustainability reporting;
- one standard on overarching disclosure requirements; and
- specific disclosure requirements focused on eleven ESG topics in the area of environmental, social and governance matters.

Under the proposals, companies would have to publish separate sustainability statements as part of their management reports containing sector-agnostic, sector-specific and company-specific disclosures.

By adopting double materiality principles, the proposed ERSs consider a wider range of stakeholders than IFRS® Sustainability Disclosure Standards (see below)

3.2 International Sustainability Standards Board (ISSB)

The IFRS Foundation is aiming to put sustainability reporting on the same footing as financial reporting by establishing a sister body to the International Accounting Standards Board (the IASB® Board). The goal is to drive globally consistent, comparable and reliable sustainability reporting using a building blocks approach. This approach will allow national and regional jurisdictions to build on that global baseline to set supplemental standards that serve their specific jurisdictional needs.

The new International Sustainability Standards Board (ISSB) will aim to develop sustainability disclosure standards that are focused on enterprise value.

New proposals on the first IFRS® Sustainability Disclosure Standards (the proposals) mark the next step towards equal prominence for sustainability and financial reporting. They are based on existing frameworks and standards, including TCFD and SASB. Their aim is to create a global baseline for investor-focused sustainability reporting that local jurisdictions can build on.

Companies would report on all relevant sustainability topics (not just on climate) under a consistent global framework and focus on how these topics impact enterprise value. Reporting would be connected to the financial statements. Therefore, companies will need processes and controls in place so that they can provide sustainability information of the same quality, and at the same time, as their financial information.

In preparation for the new board, the Foundation formed a Technical Readiness Working Group (TRWG) to create prototypes to give the new board a running start in developing its first two exposure drafts. These prototypes covered:

- General requirements for disclosure.
- Climate-related disclosures, building on the TCFD recommendations and SASB industry-based standards; and

The general requirements proposal sets the foundation

- General features of reporting, including on materiality.
- A content structure across the four areas of governance, strategy, risk management and, metrics and targets.
- Practical guidance, including on presentation of information.

The climate proposal provides additional detail

- It builds on the four content areas with additional guidance, particularly in relation to:
- disclosure of risks, climate transition plans and scenario analysis; and
- general and industry-specific metrics.

The ISSB has just released its first two exposure drafts for public comment, which build on these prototypes. There are no requirements, where the disclosure needs to take place or whether it needs to be audited.

It is the International Sustainability Standards Board's (ISSB) aim to create a global baseline for sustainability reporting standards that allows local standard setters to add additional requirements (building blocks), rather than face a coexistence of multiple separate frameworks.

EFRAG has published a comparison against the ISSB Board's proposals and committed to join an ISSB Board working group to drive global alignment. However, in the short term, companies and investors may potentially have to deal with three sets of sustainability reporting standards in setting up their reporting processes, controls and governance.

Key differences

- The proposed ESRs list detailed disclosure requirements for all ESG topics. The proposed IFRS Sustainability Disclosure Standards would also require disclosure in relation to all relevant ESG topics, but the ISSB Board has to date only prepared a detailed exposure draft on climate, asking preparers to consider general requirements and other sources of information to report on other sustainability topics. The SEC focused on climate in its recent proposal.
- The proposed ESRs are more prescriptive, and the number of disclosure requirements significantly exceeds those in the proposed IFRS Sustainability Disclosure Standards.
- While the proposed IFRS Sustainability Disclosure Standards are intended to focus on the information needs of capital markets, ESRs also aim to address policy objectives of the EU by addressing wider stakeholder needs.

4. Impact on Governance

Reliance from the receivers of sustainability information on the correctness of the information is seen by the European Commission as an important requirement for achieving the sustainability goals. Therefore the content of the sustainability reporting has to be audited. The requirements for the review and monitoring of the board have been strengthened and national enforcement procedures shall incorporate sustainability reporting.

4.1 Boards

The enhanced sustainability reporting by the CSRD will have to be reviewed and monitored by the supervisory board, respectively by the audit committee. The monitoring requirements are not only limited to the content of the sustainability reporting, but also include the corporate governance systems. These comprise the underlying internal control, risk management, internal audit and compliance management systems. The supervisory board shall also monitor the process of digitalization of sustainability reporting. The board can use the work of the external auditor, but still keeps its own responsibility for the monitoring.

4.2 Auditors

According to CSRD the content of sustainability reporting has to be audited with "limited assurance" either by the external auditor or another independent assurance services provider. Scope of the audit is the adherence to respective European rules including an assessment on the processes and controls for the reporting process. The EU Commission is considering, moving to a "reasonable assurance" in the future.





Gender Diversity on Corporate Boards in the MENA: Multiple Layers of Challenges and Conditions

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Abiding by conventional societal norms, countries in the Middle East and North Africa (MENA) adopt a more conservative view about women roles in society and their involvement in business activities. Given the region's institutional heterogeneity, firms are nevertheless likely to differ in terms of their flexibility and progressiveness regarding such institutional pressures. Improving gender diversity is essential in order to boost the MENA's economic growth and competitiveness. Various studies in this regard have evidenced the positive impact of gender-balanced leadership as it provides diversity in thinking, enhances decision-making, contributes to better conflict resolution, mitigates risks and governance-related controversies¹, improves employee retention and company reputation, effectively utilizes the firm's talent pool², and overall, enhances the firm's financial performance and organizational effectiveness.³

1. Challenges in Attaining Gender Balance on Corporate Boards in the MENA

The MENA region continues to undergo a series of transformations characterized by economic diversification and governance reforms aimed towards an inclusive society with social and economic opportunities for all and achieving gender balance in corporate leadership.⁴ Closing the gender diversity gap in corporate roles remains another critical challenge in the region. The MENA's legal system, social and cultural norms, and family codes significantly limit the appointment of women to top-level executive positions. Nevertheless, substantial progress has been noticeable in the region, especially in the past few years, although to varying degrees depending on the countries.⁵

- 1 Lee, L. E., Marshall, R., Rallis, D., & Moscardi, M. (2015). Women on boards: Global trends in gender diversity on corporate boards. Morgan Stanley Capital International ESG Research, New York.
- 2 Thwing-Eastman, M. T., Rallis, D., & Mazzucchelli, G. (2016). The tipping point: Women on boards and financial performance. Morgan Stanley Capital International (MSCI) ESG Research, New York.
- 3 Catalyst. (2017). 2016 Catalyst Census: Women and men board directors. <https://www.catalyst.org/research/2016-catalyst-census-women-and-men-board-directors>.
- 4 Hunt, V., Layton, D., & Prince, S. (2015). Diversity matters. McKinsey & Company, 1(1), 15-29.
- 5 PwC. (2019). «Women in Work» Insights from Middle East and North Africa. <https://www.pwc.com/m1/en/publications/women-in-work-index.html>.
- 6 OECD. (2019). Corporate governance in MENA: Building a framework for competitiveness and growth, corporate governance. OECD Publishing, Paris.
- 7 World Economic Forum. (2019). Five ways to increase gender parity in the MENA region. <https://www.weforum.org/agenda/2019/04/five-ways-increase-gender-parity-mena-middle-east/>

Despite this progress, women's appointment to corporate boards remains modest as the region faces key challenges to increasing women's representation in corporate leadership due to several factors, leading to progress being slower than in other regions. First, customary laws continue to exist in parallel with statutory laws in the region, discouraging gender equality and women's empowerment, where women are expected to take on domestic responsibilities primarily instead of working.⁶ The region's restrictive legal framework, combined with conservative social and cultural norms, notably family codes and traditions, play a vital role in driving the gender gap in the labor market and in limiting women's activities. Thus, their appointment to corporate boards remains minimal as no constitutional measures on non-discrimination against women in the MENA have been implemented in company practices. Second, corporate governance codes in the MENA rarely and only broadly endorse gender diversity.⁷ The region generally lacks targeted measures and quotas to encourage women's participation in corporate leadership. Moreover, company and security laws neither acknowledge the benefits of gender diversity nor mandate disclosure of gender information about board members and senior management. Third, women in the region are not granted enough support from colleagues, have limited interaction with firms' senior managers, and lack female role models, networking opportunities, and targeted leadership programs.⁸ Conscious and unconscious biases against women in leadership are hence evident across the region. And lastly, the lack of reliable data and limited disclosure and transparency hinder the possibility of accurately assessing women's participation in corporate leadership.

6 OECD. (2017). Women's economic empowerment in selected MENA countries: The impact of legal frameworks in Algeria, Egypt, Jordan, Libya, Morocco and Tunisia, competitiveness and private sector development. OECD Publishing, Paris.

7 Inferences drawn after reviewing national corporate governance codes in the MENA region.

8 McKinsey. (2014). GCC women in leadership – from the first to the norm. McKinsey & Company, New York.

2. Multiple Layers of Conditions for Female's Appointment to Corporate Boards

Diversity is increasingly becoming an essential aspect of corporate board structure as it entails a greater variety of talents and resources that enhance the overall quality of firms' decision-making processes.⁹ The inclusion of women on corporate boards amends the premises of major theories that define the antecedents and performance implications of board diversity for two main reasons. First, women's perceptions of themselves influence their career choices and aspirations and determine the extent and quality of female candidates for board nominations.¹⁰ Second, cultural and social norms affect the public's perceptions of women differently than their perceptions of men, and thus, stimulate different reactions to their presence on corporate boards.¹¹ These aspects impact the appointment of women to corporate boards as well as their impact on firm performance. As such, the same conditions and characteristics that influence the appointment of females to corporate boards can likewise affect females' actual roles on these boards. Both perceptions, however, are shaped by the institutional environment in which they take place. It is hence crucial to make distinctions among the types of levers within the overall institutional context that impacts female board participation and their performance consequences, and to delineate the various ways board gender diversity is affected by different institutional layers.¹²

9 Hillman, A. J., Cannella Jr, A. A., & Harris, I. C. (2002). Women and racial minorities in the boardroom: How do directors differ? *Journal of Management*, 28(6), 747-763.

Zhu, D. H., Shen, W., & Hillman, A. J. (2014). Recategorization into the in-group: The appointment of demographically different new directors and their subsequent positions on corporate boards. *Administrative Science Quarterly*, 59(2), 240-270.

10 Barbulescu, R., & Bidwell, M. (2013). Do women choose different jobs from men? Mechanisms of application segregation in the market for managerial workers. *Organization Science*, 24(3), 737-756.

11 Lee, P. M., & James, E. H. (2007). She'-E-Os: Gender effects and investor reactions to the announcements of top executive appointments. *Strategic Management Journal*, 28(3), 227-241.
Ryan, M. K., & Haslam, S. A. (2007). The glass cliff: Exploring the dynamics surrounding the appointment of women to precarious leadership positions. *Academy of Management Review*, 32(2), 549-572.

12 Grosvold, J. 2011. Where are all the women? Institutional context and the prevalence of women on the corporate board of directors. *Business & Society*, 50(3), 531-555.

Grosvold, J., Rayton, B., & Brammer, S. 2016. Women on corporate boards: A comparative institutional analysis. *Business & Society*, 55(8), 1157-1196.

The MENA's legal frameworks, social and cultural norms, and religious beliefs greatly restrict women's participation in economic and political activities and encourage familial duties over career goals.¹³ The recent efforts in closing gender gaps underlines the paradoxical setting of the region as females' access to education advances but their prevalence in corporate careers remains limited.¹⁴ The MENA's institutional configurations differ significantly not only from developed economies but also from developing nations, hold a conservative view about women's role in society, and thus offer an interesting opportunity to investigate the impact of multiple layers of conditions that affect female's appointment to corporate boards as well as their roles on these boards and their consequent impact on firm performance. This article elaborates on the predictors of female board assignment at the firm, industry, and country level, as well as the impact of female directors on accounting and market performance measures.

3. The Antecedents of Female Directors in the MENA

Firm Size. Relying on the institutional logic and legitimacy concerns in assessing the predictors of female directorship, larger firms are considered to be more visible, experience higher public scrutiny, and need to abide by social norms in order to maintain their organizational legitimacy.¹⁵ Larger firms are more likely to conform to societal expectations and are hence less likely to assign females to their corporate boards than smaller firms. Larger firms particularly in the MENA may be negatively impacted by the social stigma of female director appointments.

State and Family Ownership. The MENA region is characterized by a high degree of state-owned enterprises (SOEs) and family-held businesses. State- and family-owned firms are more likely to have female directors on their boards, as state-owned firms are further encouraged to abide by good corporate governance practices and family firms prioritize the retention of control. The institutional configurations in the MENA have predominantly led women to prefer employment in state-owned organizations over the private sector. The more stable job prospects and socially acceptable work hours and conditions lead more women to prefer state-owned firms.¹⁶ For similar reasons, public sector firms not just in developing economies but also developing ones are more likely to have more gender balanced boards than private sector ones.¹⁷ It is therefore socially acceptable for women to participate in the workforce through SOEs, resulting in a greater prevalence of female directors on their boards.

Family firms, on the other hand, prioritize the retention of control and typically do so through the appointment of family members to the board. In some cases, family firms may have no option but to appoint women directors if no male family members are available.¹⁸ The weak legal and regulatory frameworks and corporate governance structures in the MENA suggest that family shareholders are more likely to run the company themselves rather than delegate the management to outsiders.¹⁹ In addition, family firms are less sensitive to external pressures imposed by debt and equity markets as they primarily rely on their familial funding to finance their activities. This implies that they are likely to view any reduction in their legitimacy from the appointment of female directors as less consequential.

13 Hayo, B., & Caris, T. (2013). Female labour force participation in the MENA region: The role of identity. *Review of Middle East Economics and Finance*, 9(3), 271-292.

14 World Economic Forum. 2019. Five ways to increase gender parity in the MENA region. <https://www.weforum.org/agenda/2019/04/five-ways-increase-gender-parity-mena-middle-east/>.

15 Assenova, V. A., & Sorenson, O. 2017. Legitimacy and the benefits of firm formalization. *Organization Science*, 28(5), 804-818.

16 OECD. (2019). *Corporate governance in MENA: Building a framework for competitiveness and growth*, corporate governance. OECD Publishing, Paris.

17 Saeed, A., Belghitar, Y., & Yousaf, A. 2016. Firm-level determinants of gender diversity in the boardrooms: Evidence from some emerging markets. *International Business Review*, 25(5), 1076-1088.

18 Shareholders Rights. 2016. *Women Representation on Boards of Directors on Mena Exchanges*. Gender diversity research and policy paper, Beirut.

19 Peng, M. W., & Jiang, Y. 2010. Institutions behind family ownership and control in large firms. *Journal of Management Studies*, 47(2), 253-273.

Foreign Shareholders. Foreign investors are relatively less compelled by the MENA region's social and cultural norms and would rather follow their home countries' approach to this matter. Foreign shareholders from more developed economies are subject to more advanced institutional frameworks that also shape the strategies of the firms they invest in.²⁰ Home country institutions are thus likely to influence foreign shareholders' investment strategies in MENA countries with institutional configurations that do not necessarily consider female representation to be a priority in board assignments. Following a home-bias in their institutional logic, foreign investors are thus more likely to invest in firms with female directors or promote higher female representation on the boards of the firms in which they invest.

Industry Female Representation. Although female participation in the labor force is limited in the MENA, certain industries, such as education and health care, have higher female representation.²¹ As such, some industries may be viewed as more fit to employ women and appoint them to leadership positions.²² This is reinforced by institutional normative forces because for firms operating in industries in which females represent larger portions of the employment base, the appointment of female directors is less likely to be perceived as a serious deviation in norms among stakeholders.²³ Stakeholders also regard female directors as qualified insiders in industries with higher female representation. Therefore, women's appointments to board seats are socially more acceptable in industries with a higher representation of women.

Gender Parity. Gender parity refers to a society where women enjoy equal access to higher education levels, health care, employment and appointment to top executive positions, and political empowerment. On the one hand, women in countries with greater gender parity are more likely to possess the types of human capital suitable for board positions. On the other hand, firms operating in countries with greater gender parity are more likely to leverage the knowledge, experience, and values that female directors bring to decision-making. Higher gender parity, therefore, not only promotes the overall legitimacy of females in economic activities, but also limits the questionability of female board appointments.²⁴ While MENA countries primarily promote women's education, gender parity in its various aspects is advancing in the region, although the extent of these progressions varies from one country to the other.²⁵

4. Female Directors and Firm Performance in the MENA: Between the Upper Echelon View and the Institutional View

The impact of female directors on firm performance is shaped by cultural and social views of women in the labor force. Female directors in the MENA region contribute to firm value but their appointment constitutes a serious deviation from established norms with respect to the perceived role and ability of women in society. Specifically, MENA firms that have female directors are likely to be perceived as violating deeply-rooted institutional norms that view men as more capable organizational leaders. It is thus crucial to distinguish between firm performance in terms of accounting measures and firm performance in terms of market measures.

20 Meyer, K. E., & Thein, H. H. 2014. Business under adverse home country institutions: The case of international sanctions against Myanmar. *Journal of World Business*, 49(1), 156-171.

Morck, R., Yeung, B., & Zhao, M. 2008. Perspectives on China's outward foreign direct investment. *Journal of International Business Studies*, 39(3), 337-350.

21 OECD. 2019. Corporate governance in MENA: Building a framework for competitiveness and growth, corporate governance. OECD Publishing, Paris.

22 Adams, R., & Ferreira, D. 2009. Women in the boardroom and their impact on governance and performance. *Journal of Financial Economics*, 94, 291-309.

23 Hillman, A. J., Shropshire, C., & Cannella Jr, A. A. 2007. Organizational predictors of women on corporate boards. *Academy of Management Journal*, 50(4), 941-952.

24 Post, C., & Byron, K. 2015. Women on boards and firm financial performance: A meta-analysis. *Academy of Management Journal*, 58(5), 1546-1571.

25 World Economic Forum. (2019). Five ways to increase gender parity in the MENA region. <https://www.weforum.org/agenda/2019/04/five-ways-increase-gender-parity-mena-middle-east/>.

Based on the upper echelons view that the impact of gender diversity usually stems from the different qualities, cognitive skills, and experience women directors offer, a positive relationship between female directors and firm performance in terms of accounting measures is expected.²⁶ The region's traditional and conservative views on female participation in the workforce, however, cannot be overlooked. It is hence vital to consider institutions that alter societal attitudes regarding female workforce participation and succession into higher level roles in the corporate world.²⁷ As such, a negative relationship between female directors and firm performance in terms of market measures is expected, reflecting the MENA's socio-cultural views of women in leadership roles.

5. Conclusion

Enhancing women's participation in corporate leadership is crucial for the comprehensive economic growth needed to improve the MENA's competitiveness and global integration. Gender diversity on corporate boards has been proven to benefit both firms and economies. Failing to implement policies and undertake measures ensuring a sustainable gender-balanced leadership in the region would be a missed opportunity.

The MENA's institutional configurations and conservative social and cultural norms, the lack of adequate corporate governance structures, the absence of academic research and empirical evidence in the region in this regard, and the reforms and progress that the MENA continues to undergo in order to decrease gender gaps reinforce the necessity for and the timeliness of such research. The aim of this article is to underscore the importance of comprehensively examining multiple layers of conditions at the micro and macro levels that impact female board directorship. This article additionally highlights that while female directors' various skills and qualities are appreciated by the firm, they are subject to a biased evaluation in the market, which oftentimes impairs their actual performance.

26 Hambrick, D. C. 2007. Upper echelons theory: An update. *Academy of Management Review*, 32: 334-343.

27 Haveman, H. A., & Beresford, L. S. 2012. If you're so smart, why aren't you the boss? Explaining the persistent vertical gender gap in management. *The ANNALS of the American Academy of Political and Social Science*, 639(1), 114-130.



Frauen an Bord – es ist Zeit für Pionierarbeit



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Geld regiert die Welt, und die Frauen regieren noch nicht mit. Die Finanzströme sind einer der wichtigsten Hebel, um die Welt zu verändern. Zu lange waren Frauen jedoch vom globalen Handel, von der Wirtschaft und der Mitbestimmung weitgehend ausgeschlossen. Erst wenn die grossen Geldflüsse zu Unternehmen gelangen, die nicht nur umwelt-, sondern auch frauen- und menschenfreundlich sind, wird sich etwas ändern. Lesen Sie, wie Sie Pionierarbeit leisten können, um Frauen an Bord zu holen – und zu behalten.

ESG boomt. Nachhaltige Finanzprodukte sind gefragt wie nie. Mit einem Wachstum von beinahe 50 Prozent allein im Jahr 2020 übertrifft ihr Marktvolumen heute erstmals dasjenige von kollektiven Kapitalanlagen ohne Nachhaltigkeitsbezug.¹ ESG unterteilt unternehmerische Verantwortung in drei Bereiche: Environmental, Social und Governance – übersetzt Umwelt, Soziales und Unternehmensführung. Während die Umweltstandards, das E von ESG, angesichts der Klimaerwärmung mittlerweile zu Recht ein dominierendes Thema sind – besonders im Finanzsektor –, segeln S und G noch immer (zu) leicht unter dem Radar der öffentlichen Aufmerksamkeit – und leider damit auch der Verwaltungsrät:innen. Dabei wäre es wichtig, die Geldflüsse auch nach den Kriterien von S und G zu lenken.

Die Unternehmen sind stattdessen mit ihren Es beschäftigt, indem sie den CO₂-Ausstoss ihrer Wertschöpfungsketten auf Netto-Null reduzieren: sei es dank privaten Initiativen wie den Science-Based Targets, sei es im staatlichen Rahmen des europäischen Green Deals. Teil des Green Deals ist die EU-Taxonomie, die neu weitgehende Regeln bestimmt, um das E zu normieren. Bisher war nicht immer klar, was wirklich nachhaltig oder bloss Greenwashing ist.

Die neuen Regeln führen dazu, dass in der EU tätige Finanzdienstleister seit diesem Jahr das E von ESG offiziell als nachhaltig ausloben dürfen, wenn sie sich an die EU-Taxonomie halten. Wie streng diese Vorgaben sind und wie zielführend, ist eine andere Frage. In der Schweiz gibt es jedenfalls bis jetzt weder gesetzliche Definitionen noch regulatorische Vorgaben zur Verwendung von einschlägigen Begriffen im Bereich Nachhaltigkeit, wie «nachhaltig», «ESG» oder «grün».²

1 Swiss Sustainable Investment Market Study 2021, Swiss Sustainable Finance (SSF) / Center for Sustainable Finance & Private Wealth, Universität Zürich.

2 FINMA-Aufsichtsmitteilung 05/202, Prävention und Bekämpfung von Greenwashing.

Der Bundesrat hat jedoch Ende März 2022 über eine Verordnung zur Klimaberichterstattung von grossen Unternehmen eine Vernehmlassung eröffnet, die noch bis Anfang Juli dauert.³

1. ESG besteht aus mehr als E

Und was ist mit S und G – Social und Governance? Sie bleiben zumindest bis jetzt teilweise noch unreguliert bzw. es bestehen noch keine einheitlichen Messgrössen, an die man sich halten könnte, auch in der EU nicht. Soziale Standards und eine nachhaltige Unternehmensführung sind jedem Unternehmen mehr oder weniger selbst überlassen. Verbindliche Ansätze oder Vorgaben, wie diese zu messen, umzusetzen und auszuweisen wären, bestehen noch nicht. Doch auch das dürfte eine Frage der Zeit sein. Ausnahmen bilden hier allenfalls die Frauenquoten in Vorständen in Nachbarländern und die schweizerischen «Richtlinien» gemäss Aktiengesetz. Während immerhin Schritte erkennbar sind, die Geldflüsse in Richtung ökologische Nachhaltigkeit zu lenken, bleibt bei S und G noch Etlisches zu tun. Denn auch sie gehören zur nachhaltigen Wirtschaft.

Zu S und G gehören beispielsweise auch Diversität, Gleichstellung und Inklusion – drei weitere Gebote der Stunde. Grössen, die sich zwar messen liessen, die aber im Unterschied zum E die Indizes und Ratings von börsenkotierten Unternehmen nur teilweise beeinflussen. Wer heute diese Themen im Unternehmen jedoch ernst nimmt, sich Ziele setzt und diese wirklich umsetzt, ist ähnlich pionierhaft unterwegs wie Verwaltungsrät:innen, die bereits in den 1990er-Jahren mit Überzeugung für ihre Unternehmen Nachhaltigkeitsziele setzten – und heute von Kapitalzufluss profitieren.

2. Vorbereitung ist alles

Doch wie lassen sich Diversität, Gleichstellung und Inklusion konkret in einem Unternehmen umsetzen? Muss sich jedes Unternehmen der Herausforderung stellen? Und was hat der Verwaltungsrat damit zu tun? Vorab: sehr viel. Sind die Boards nicht entsprechend besetzt, werden in der Unternehmenskultur wenig Impulse bestehen, Diversität, Gleichstellung und Inklusion tatsächlich auch zu leben.

Unternehmen, die heute umdenken, haben die grosse Chance, noch vor der Pensionierungswelle der Babyboomers ihre Strukturen so anzupassen, dass Frauen, Menschen mit Beeinträchtigungen und unterschiedlichen sozio-kulturellen Hintergründen Anschluss an die Wirtschaftswelt bekommen. Damit könnten sie nicht nur den voraussehbaren einschneidenden Fachkräftemangel auffangen, sondern auch die Unternehmenskultur auf einen grossen gesellschaftlichen Wandel vorbereiten, der mit Sicherheit eintreffen wird. Die Frage ist, ob man vorbereitet ist – oder eben nicht.

Noch immer ist die Erwerbsarbeit primär auf ein klassisches gesellschaftliches Modell ausgerichtet: das des männlichen Alleinernährers bzw. der kinderlosen Karrierefrau. Die Teams, die Geschäftsleitungen, die Sitzungsrhythmen, die Arbeitszeiten, die öffentliche Präsenz an Podien, ja die Beteiligung an der Lokal- und Bundespolitik funktionieren für Menschen, die keine Haushaltsarbeit verrichten, die keine kleinen Kinder betreuen oder Alte pflegen, die auf zwei Beinen laufen und nicht wissen, was strukturelle Diskriminierung ist.

Blinde Flecken drohen dann, wenn Unternehmen Produkte anbieten, die die eigene Workforce bedienen. Einem Unternehmen, das beim eigenen Personal keinen Wert auf Diversität legt, kann so viel Umsatz entgehen: Frauen treffen nach wie vor die meisten Konsumententscheidungen, werden aber nicht als Zielgruppe anerkannt.

Kein Wunder, fühlen sich Frauen, queere und trans Menschen wie auch Ausländer:innen – kurz zusammengefasst FINTA-Menschen – weder von Banken und Versicherungen verstanden noch von anderen Branchen gekannt angesprochen.⁴ Sie sind daher noch immer ein «verlorenes Segment».

3. Was ist nun mit den Frauen?

Nicht nur bei der Produktentwicklung ergibt Diversität Sinn: Schon lange ist bekannt, dass gemischte Teams besser performen. Verschiedene Untersuchungen in den letzten Jahren deuten darauf hin, dass Vielfalt in der Geschäftsleitung nicht nur mit besseren aktuellen Finanzergebnissen verbunden ist, sondern auch ein Indikator für zu erwartende Gewinne eines Unternehmens sein kann.⁵

3 Medienmitteilung des Bundesrats zur Verordnung über die Berichterstattung über Klimabelange: <https://www.sif.admin.ch/sif/de/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-87790.html>

4 85 % der Frauen fühlen sich vom Angebot von Finanzdienstleistern nicht angesprochen, Blackrock: People and Money, 2020.

5 Diversity: A competitive advantage? | AXA IM Corporate, besucht am 27.3.22.

Unternehmen mit einer überdurchschnittlichen Geschlechtervielfalt generieren gegenüber denjenigen mit einer unterdurchschnittlichen ein Alpha von 200 Basispunkten. Auch die ESG-Ratings sind höher. Umgekehrt und nicht überraschend: Unternehmen mit der besten Performance weisen eine höhere Vielfalt im Verwaltungsrat und in der Unternehmensführung auf.⁶ Die Investmentbank Goldman Sachs kündigte vor zwei Jahren gar an, nicht mehr an Börsengängen von Unternehmen zu arbeiten, die nicht mindestens eine Frau oder Person of Color in ihren Verwaltungsräten haben.⁷ Die Gründe liegen auf der Hand.

Beim Thema Diversität ist die Frauenfrage noch immer dringend. Nicht, dass die Bedürfnisse von gesellschaftlich zu wenig beachteten Minderheiten nicht ebenso wichtig wären, das soll hier explizit gesagt sein. Doch bei den Frauen handelt es sich nicht um eine Minderheit, sondern um die Hälfte der Bevölkerung. Equality oder Gleichstellung zwischen den Geschlechtern ist noch immer nicht erreicht, weder politisch oder gesellschaftlich noch bei den Unternehmen. Wie viele Schweizer CEO von SMI-Unternehmen sind weiblich? Die Antwort lautet: 0 %.

Immer wieder sagen Unternehmen, sie seien motiviert, das zu ändern, und die meisten Verwaltungsräte und Geschäftsleitungen wissen, dass gemischte Teams besser funktionieren und bessere Entscheidungen treffen. Doch was führt zu mehr Equality, zu einer Arbeitswelt, die auch den Bedürfnissen von Frauen entgegenkommen würde?⁸

4. So geht «Female Corporate Diversity»

Es folgen sieben Vorschläge, wie eine «Female Corporate Diversity» aussehen könnte, damit Frauen an Bord kommen und bleiben. Es sind konkrete Handlungsvorschläge für frauen-, menschen- und familienfreundliche Strukturen, die mehr Menschen eine kontinuierliche Teilnahme am Arbeitsmarkt ermöglichen. Und das Beste daran: Sie lassen sich sofort umsetzen.

6 CS Gender 3000 «CS Gender 3000»-Bericht: Ein Viertel der Verwaltungsratspositionen weltweit ist mit Frauen besetzt, besucht am 27.3.22

7 Goldman Sachs' Commitment to Board Diversity, besucht am 27.3.22

8 Wegweisend sind Initiativen wie Equileap oder Edge Certification, die gewissen Unternehmen verbindliche Vorgaben machen, sie messen und zertifizieren.

1. **Gleicher Lohn für gleiche Arbeit:** Ein Grundsatz, der seit 1995 in der Bundesverfassung steht, bis heute aber nicht verwirklicht ist. Wenn Frauen weniger verdienen als Männer, werden sie eher die Erwerbstätigkeit aufgeben, wenn ein Kind geboren wird oder ein Mensch in der Familie gepflegt werden muss. Führen Sie klare Lohnpläne ein und kommunizieren Sie die Lohnbänder. Der Rest kommt von alleine. Und: Bieten Sie Weiterbildungen an für alle, damit die Mitarbeiter:innen ihr Potenzial entfalten können.
2. **50/50 – eine freiwillige Quote:** Bei Einstellungsgesprächen und in der ersten Beförderungsrunde freiwillige Quoten einhalten. Die Quote muss auch für das Rekrutierungsteam gelten, das die Interviews durchführt. So wird sichergestellt, dass im Pool der nachwachsenden Talente genügend Frauen die Chance haben, ihre Leistungen unter Beweis zu stellen und ins Kader aufzusteigen. In kleinen und mittelgrossen Unternehmen ist dies schwieriger umzusetzen; ein offenes und nicht männlich dominiertes Betriebsklima und bewusst divers und gendersensibel formulierte Stellenausschreibungen können jedoch viel bewirken. Machen Sie Ihr Unternehmen attraktiv! Wer es wirklich ernst meint, kann gemischte Teams für das Management zudem für bonusrelevant erklären. Wirkt Wunder.
3. **Einführung von New Work:** Die Coronapandemie hat bewiesen, dass Homeoffice funktioniert. Man kann Mitarbeiter:innen vertrauen, auch wenn sie nicht im Büro sind. «Work from anywhere» lässt sich im Dienstleistungssektor gut umsetzen. Fixe wöchentliche Meetings im Büro können immer noch dazugehören, sie fördern auch den Teamgeist. Definitiv passé sind dagegen Chef:innen, die Mitarbeiter:innen ihre Stunden am PC absitzen lassen. Die Devise sollte sein: Die Leistung wird am Output und der Effizienz gemessen, nicht an der Präsenzzeit am Bildschirm. Zudem sollten Sitzungen in der Regel nicht vor 9 und nicht nach 17 Uhr stattfinden, und die Arbeitszeiten sollten nach Bedarf frei einteilbar sein, solange es sich betrieblich organisieren lässt.

4. **Teilzeit für alle, nicht nur für die Frauen:** Gegenwärtig wird Care- und Haushaltsarbeit zum überwiegenden Teil von Frauen geleistet – und zwar unbezahlt. Allein in der Schweiz beträgt der Wert dieser Arbeit jährlich 242 Milliarden Franken. Teilzeitarbeit auch für Männer hilft massgeblich, diese Last gerechter aufzuteilen. Auch vorübergehende tiefere Teilzeitpensen sollten vermehrt möglich sein, gerade in der Rush Hour des Lebens zwischen 30 und 40 Jahren. Das verhindert, dass gut ausgebildete Arbeitnehmer:innen kurz nach der Familiengründung komplett aus der Arbeitswelt aussteigen. Es braucht nur wenige Jahre Teilzeitarbeit, bis diese Arbeitskräfte wieder voll an Bord sind. Top Sharing in Führungsrollen sowie Jobsharing sollten selbstverständlich sein.
5. **Gleichberechtigte Elternzeit:** Der Schweizer Mutterschaftsurlaub ist mit 14 Wochen einer der kürzesten in ganz Europa. Zudem überträgt der Staat damit das Risiko, wegen der Geburt eines Kindes am Arbeitsplatz auszufallen, einseitig den Frauen. Eine paritätische Lösung, die Männer und Frauen gleichermaßen verpflichtet, Elternzeit zu nehmen, würde endlich echte Gleichberechtigung bringen. Die Elternzeit müsste nicht gleichzeitig bezogen werden, sondern würde idealerweise aufgeteilt bzw. hintereinander bezogen. Je mehr Unternehmen sich dazu bekennen, desto stärker würde die Politik unter Zugzwang gesetzt, die staatliche Abfederung auch für kleine und mittlere Unternehmen bereitzustellen. So war es damals beim Mutterschaftsurlaub. Garantiert würde die Elternzeit die Arbeitsbelastung unter Paaren gerechter aufteilen, Rollenbilder auflösen und die Chancen auf eine kurzfristigen Rückkehr einer Mitarbeiterin an den Arbeitsplatz steigern. Dabei darf die Elternzeit nicht als Leave-time für die Lohnkalkulation gelten.
6. **Pensionskassenpläne überarbeiten, sodass sie zeitgemässer werden:** Die freiwillige Streichung oder massive Reduktion des Koordinationsabzugs würde mit einem Federstrich Hunderttausende von Frauen mit Teilzeitpensen in der Pensionskasse versichern und damit die Altersarmut lindern. Der Gender-Pension-Gap beträgt in der Schweiz bei den Pensionskassen 60 Prozent. Männer bekommen mehr als doppelt so viel PK-Geld ausbezahlt wie Frauen. Viele Pensionskassen zeigen sich zudem gegenüber der steigenden Zahl der Konkubinatspaare wenig kulant, was beim Ableben des Partners jedoch existenziell werden kann. Hier gilt es, bessere Regeln mit den Kassen auszuhandeln.
7. **Unterstützung bei der Finanzierung der familienexternen Betreuung:** Die Kinderbetreuung in der Schweiz gehört zu den teuersten weltweit. Der Staat beteiligt sich mit 0,4 % des BIP kaum daran, sogar Kühe erhalten mehr Subventionen als Kinderkrippenplätze. Nach Abzug von Steuern und Kita-Kosten bleibt einer Familie mit einem tiefen Lohn am Ende des Monats teilweise weniger übrig, als wenn ein Elternteil gleich zu Hause bleibt. Nutzen Sie das als Chance: Unternehmen, die sich an diesen Kosten beteiligen, binden wertvolle Mitarbeiter:innen an sich und reduzieren das Risiko, dass Frauen aussteigen, weil sich die bezahlte Arbeit «nicht lohnt».

5. Fazit

Alle sprechen über ESG, doch eigentlich ist damit bisher nur das E wie Environmental gemeint. Um Greenwashing zu vermeiden, wird das E nun reguliert, die Menschen wollen nachhaltig investieren. Es ist eine Frage der Zeit, bis Soziales und Unternehmensführung, das S und G, ebenso reguliert und gemessen werden. Wer Pionier:in sein will, investiert jetzt schon in Diversität, Gleichstellung und Inklusion im Unternehmen: Sie bilden unter anderem S und G. Gerade Frauen machen die Hälfte der Bevölkerung aus und werden wichtig sein, um den Fachkräftemangel abzufedern. Damit Frauen im Erwerbsleben ankommen und dort bleiben, müssen sich jedoch die Arbeitswelt und die Unternehmenskulturen ändern. Diesen Wandel einzuleiten, ist eine wichtige Aufgabe von Verwaltungsrät:innen und Unternehmungen.

Gedanken zur Generalversammlung der Zukunft



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Die Erfahrungen mit den Generalversammlungen während der Pandemie legen es nahe, sich über das künftige Format dieser Veranstaltung Gedanken zu machen.

1. Traditionelle Generalversammlung

Die traditionelle Generalversammlung der grösseren Publikumsgesellschaft orientiert sich immer noch am Modell der «Landsgemeinde», das heisst einer physischen Versammlung der Aktionäre, welche hier einmal im Jahre ihre Mitgliedschaftsrechte ausüben. An dieser Illusion wird festgehalten, auch wenn häufig nur noch etwa 2% der Aktionäre im Raum sind und die grosse Mehrheit der Aktionäre bereits im Vorfeld ihre Stimmen abgegeben hat. Gerade wenn eine Gesellschaft seit Jahren die Aktionäre enttäuscht, führt das zu berechtigten Frustrationen.

Auch auf Seiten der Gesellschaft ist das heutige Modell unbefriedigend. Viele Gesellschaften pflegen heute einen intensiven Dialog mit ihren Aktionären ausserhalb der Generalversammlung und brauchen diese Veranstaltung dafür nicht. Vielmehr wird diese mehr und mehr zu einem jährlichen «Show-down» mit einer kleinen lauten Minderheit von Aktionären und Aktivisten, welche niemanden wirklich befriedigt. Trotz teuren Sicherheitsvorkehrungen bleiben immer auch unkontrollierbare Restrisiken.

2. COVID Generalversammlung

Nach entsprechenden Anregungen aus der Praxis (Felix Horber/David Frick, NZZ vom 5. März 2020, S. 10) hat der Gesetzgeber die Gesellschaften befristet ermächtigt, die Generalversammlung ohne die persönliche Teilnahme der Aktionäre durchzuführen. Dies bedarf jeweils eines entsprechenden Beschlusses des Verwaltungsrates. Die Aktionäre können ihre Stimmen dann ausschliesslich über schriftliche Instruktionen an den Unabhängigen Stimmrechtsvertreter ausüben.

Einige Gesellschaften haben diese Gelegenheit benutzt, um ihrer Generalversammlung ein digitales Element hinzu zu fügen. Fragen der Aktionäre wurden in der Regel ausserhalb der Generalversammlung beantwortet, aber gegebenenfalls in den Reden von Chairman und CEO adressiert, welche online übertragen wurden. Treffen mit institutionellen Aktionären aus verschiedenen Regionen der Welt wurden virtuell geführt. Einzelne Gesellschaften «webcasten» auch die ganze Versammlung oder stellten spezielle Plattformen für Fragen zur Verfügung.

Trotz dieser Bemühungen ist aber festzuhalten, dass die Schweizer «COVID Generalversammlungen» gerade keine hybride oder virtuelle Veranstaltungen sind, wie sie teilweise im Ausland bereits stattfinden, wo die Aktionärsvoten in Bild und Ton übertragen werden.

3. Die Generalversammlung der Zukunft

Es wäre eine vertane Chance, wenn man nach der Pandemie einfach wieder unbesehen zum traditionellen Modell zurückkehrte. Vielmehr drängt es sich auf, ein hybrides oder gar virtuelles Modell zu finden, das auch eine digitale Präsenz ermöglicht.

Das neue Aktienrecht will eine solche «elektronische» GV ermöglichen. Seine rudimentäre Regelung im neuen Aktienrecht (Art. 701c-f im neuen Obligationenrecht/nOR) genügt aber alleine nicht, um den Gesellschaften die nötige Planungs- und Rechtssicherheit zu geben.

Namentlich folgende Probleme müssen gelöst werden:

a.) **Plattform:** Eine Generalversammlung ist keine öffentliche Veranstaltung. Deshalb kann diese nicht über Zoom oder ähnliche Plattformen durchgeführt werden. Vielmehr braucht es zuverlässiger technischer Plattformen, wo die Teilnahme ausschliesslich der Aktionäre sichergestellt werden kann. Dabei könnte in einem ersten Schritt die passive Teilnahme («Uebertragung» der Versammlung) ermöglicht werden, und gegebenenfalls in einem zweiten Schritt auch die aktive Teilnahme («live» Uebertragung der Fragen der Aktionäre). Solche Plattformen sind im Ausland bereits im Einsatz und in der Schweiz in Entwicklung.

b.) **Technische Probleme:** Auch bei der besten Plattform lässt sich nicht ausschliessen, dass es technische Probleme gibt. Das neue Recht (Art. 701f nOR) sieht dazu lapidar vor, dass die GV wiederholt werden muss, wenn sie nicht ordnungsgemäss durchgeführt werden kann. Immerhin wird in der Botschaft des Bundesrates 2016 (S. 560) festgehalten, dass Schwierigkeiten der Aktionäre mit ihrer eigenen Hard- und Software nicht von der Gesellschaft zu verantworten sind - es sei denn, wenn es beispielsweise ein flächendeckendes Problem eines bedeutenden Telekommunikationsunternehmens gab. Die Streitigkeiten scheinen hier vorgezeichnet, und die Gerichte werden vernünftige Abgrenzungen finden müssen. Beschlüsse, welche die GV vor dem Auftreten der technischen Probleme gefasst hat, bleiben aber in jedem Fall gültig (Art. 701f nOR).

Durch die digitale Teilnahmemöglichkeit erhöht sich wohl auch nochmals der Reiz, eine Versammlung zu stören oder zu «hacken», und sie für aktivistische Anliegen zu missbrauchen. Deshalb braucht es zuverlässige technische Plattformen.

c.) **Identitätskontrolle:** Gemäss heutigem Verständnis hat der Verwaltungsrat die Pflicht, die Teilnahme nur der Aktionäre (in Bild und Ton) sicherzustellen. Nach neuem Recht stellt er sicher, dass die Identität der Teilnehmer feststeht (Art. 701e nOR).

Bei grossen Gesellschaften soll es zulässig sein, sachliche Kriterien zu finden, um die elektronische Teilnahme auf eine limitierte Anzahl von Aktionären zu beschränken, während die anderen physisch oder über einen Stellvertreter teilnehmen (so Peter Forstmoser/Marcel Küchler, Schweizerisches Aktienrecht 2020, S.379f). Sicher braucht es auch die Registrierung der elektronischen Teilnehmer vor der Generalversammlung. Dennoch kann die Gesellschaft letztlich nicht kontrollieren, wer aktionärsseitig am Bildschirm sitzt bzw. dazu eingeladen wird. Eine solche unbefugte Teilnahme weiterer Personen wird der betreffende Aktionär verantworten müssen. Auch hier ist die Rechtsprechung gefordert, vernünftige Massstäbe zu setzen.

d.) **Fragenkataloge:** Eine elektronische Teilnahme macht es theoretisch möglich, eine Versammlung durch repetitive Fragen lahmzulegen, ohne auch nur anreisen zu müssen. Im Schweizer Rechtsverständnis hat grundsätzlich jeder Aktionär einen Anspruch darauf, dass seine Frage an der Generalversammlung beantwortet und sein Antrag (soweit innerhalb der Traktanden) zur Abstimmung gebracht wird. Ausländische Praxen, wonach der Chairman nur gerade die Fragen beantwortet, die ihm relevant erscheinen, wären in der Schweiz mit hohen juristischen Risiken verbunden. Im schlimmsten Fall drohte gar die gerichtlich angeordnete Wiederholung der Versammlung. Hier gilt es, einen vernünftigen Umgang mit einer möglichen Fragenflut zu finden, etwa mit Hilfe des Rechtsmissbrauchsverbotes.

4. Schlussfolgerungen

Auch für die Generalversammlung zeigten die Erfahrungen der Pandemie Chancen auf, das traditionelle Modell zu digitalisieren. Um die elektronische Generalversammlung der Zukunft auch bei grossen Publikumsgesellschaften wirklich zu ermöglichen, bedarf es aber zuverlässiger Plattformen und eines neuen Grundverständnisses zu einem vernünftigen Umgang mit den Aktionärsrechten.

Der neue Swiss Code of Best Practice for Corporate Governance, welcher derzeit revidiert wird, kann möglicherweise einen Beitrag dazu leisten, vernünftige Erwartungen zu etablieren. Die wirkliche Rechtssicherheit wird allerdings von den Gerichten hergestellt werden müssen.

Einstweilen sind jedenfalls die grossen Publikumsgesellschaften gut beraten, ihren (digitalen) Dialog mit den Aktionären vor allem ausserhalb der Generalversammlung zu pflegen. Digitale Elemente können aber auch helfen, Format und Ablauf der Generalversammlung zu entschlacken und eine Anreise der Aktionäre überflüssig zu machen. Die Versammlung selber kann sich dann auf das juristisch Notwendige fokussieren.

Verschiedene Gesellschaften sind bereits auf diesem Weg. Sie haben mit bilateralen Treffen, «Chairman's Roundtables» und CEO Meetings mit institutionellen Investoren, aber auch mit Retail-Aktionären, Aktionärsforen geschaffen, um den Dialog mit ihren Aktionären zu pflegen. Anders als im 2014 vom Bundesrat vorgeschlagenen Modell des elektronischen Aktionärsforums (zur «Diskussion von Traktanden und Anträgen»), sollten diese derzeit von der Generalversammlung getrennt werden, um die juristischen Risiken zu minimieren. Richtigerweise fokussiert sich der Dialog dann auf die Governance und die längerfristige strategische Entwicklung des Unternehmens.

Wenn es gelingt, die erwähnten Fragen zu lösen, steht der digitalen Generalversammlung der Zukunft nichts mehr entgegen. Dann kann sie einen wichtigen Beitrag leisten, den Dialog mit den Aktionären auf die Schaffung von langfristigem, nachhaltigem Mehrwert zu fokussieren.



T-Modell als Zauberformel im Rollenspiel

Verwaltungsrat und Geschäftsleitung



Dr. Monika Krüsi

Dr. Monika Krüsi (Dr. inform., lic.oec. publ.) ist Verwaltungsratspräsidentin der Repower AG und Oskar Ruegg AG und Mitglied der Verwaltungsräte Burckhardt Compression AG, Energie 360° und RUAG Holding/BGRB. Zudem ist sie Partnerin der Unternehmensberatung MKP Consulting und External Examiner bei der Middlesex University, London. Davor war sie u.a. bei McKinsey tätig.

Die Aufgaben eines Verwaltungsrates sind im Obligationenrecht geregelt. Einige Aufgaben wie zum Beispiel die Oberleitung der Gesellschaft und die Ernennung und Abberufung der mit der Geschäftsführung betrauten Personen sind unübertragbare und unentziehbare Aufgaben (OR 716a). Der Verwaltungsrat als Gremium muss in seiner Zusammensetzung zudem die notwendigen Qualifikationen und Kompetenzen sowie eine angemessene Vielfalt sicherstellen. In seiner Zusammensetzung ist ein Gleichgewicht von Management Erfahrung und Wissen aus verschiedenen Fachbereichen unabdingbar, um die Erfüllung der Aufsichtsfunktion sowie eine unabhängige Entscheidungsfindung zu gewährleisten. Wie kann ein Verwaltungsrat seine Vielfalt des Wissens und Erfahrung am besten der Geschäftsleitung zur Verfügung stellen, um Wert für das Unternehmen zu generieren?

Aus den Erfahrungen als Mitglied und Präsidentin diverser Verwaltungsräte von Start-ups, KMU und börsenkotierten Unternehmen habe ich mich im Laufe der Jahre vertieft mit den unterschiedlichen Rollen, die ein Verwaltungsrat einnimmt, auseinandergesetzt. Meine Erkenntnisse aus dieser Betrachtung haben mich inspiriert, mein eigenes Modell, das T-Modell, zu entwickeln, auf das ich in diesem Beitrag eingehe.

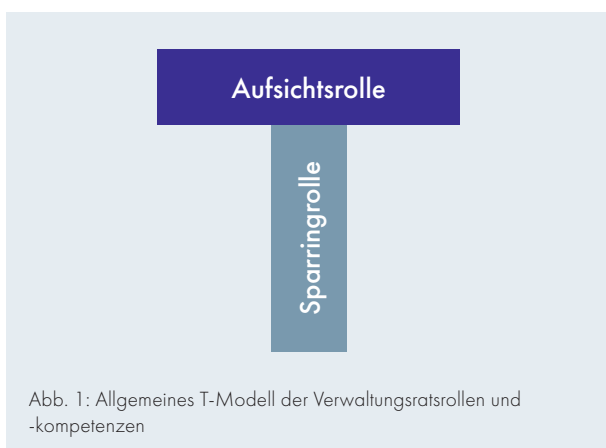
1. Das T-Modell mit unterschiedlichen Rollen und Kompetenzen eines Verwaltungsrates

Für das einzelne Verwaltungsratsmitglied leiten sich aus den beiden Anforderungen «Aufsichtsfunktion» und «Managementwissen beziehungsweise Fachwissen aus verschiedenen Fachgebieten der Unternehmung zur Verfügung zu stellen» die folgenden zwei, unterschiedlichen Rollen ab.

1.1 Die Aufsichtsfunktion des Verwaltungsrates: Jedes Mitglied des Verwaltungsrates muss als Teil des Aufsichtsorgans die Geschäftsführung überwachen. Dies bedeutet u.a. das Entwickeln von strategischen Zielen und das Festlegen der für die Zielerreichung notwendigen Mitteln.

Zudem ist er für die Einrichtung eines angemessenen Kontrollsystems, für die Sicherstellung der internen und externen Compliance sowie für die Beantragung einer regelmässigen Berichterstattung durch die Geschäftsleitung zuständig. Nur so kann die Zielerreichung überprüft werden.

1.2 Die Sparringrolle des Verwaltungsrates: Es wäre unangebracht, wenn sich der Verwaltungsrat einzig auf seine Aufsichtsrolle beschränken würde. Verwaltungsräte verfügen in der Regel über ein profundes Wissen und weitreichende Erfahrung (Spikes), die sie der Geschäftsleitung und damit dem Unternehmen zur Verfügung stellen sollten.



Den Verwaltungsratsmitgliedern müssen diese zwei unterschiedlichen Rollen, die sie einnehmen, immer bewusst sein, sich in ihrer Arbeit klar manifestieren und für die Geschäftsleitung unmissverständlich als solche erkennbar sein. Das T-Modell kann die Definition dieser Rollen unterstützen und das Verhalten der Verwaltungsratsmitglieder konsequent darauf ausrichten, sodass Missverständnisse zwischen den beiden Kompetenzsphären Verwaltungsrat und Unternehmensleitung gar nicht erst entstehen.

2. Gefässe für die Einbringung der verschiedenen Kompetenzen und Rollen des Verwaltungsrates

In Verwaltungsrats- und Ausschusssitzungen sind die Verwaltungsratsmitglieder primär in ihrer Aufsichtsrolle gefordert: So beispielsweise in der Sicherstellung des regelmässigen Reportings wichtiger Kennzahlen und Geschäftsvorfällen, bei der Bewertung von Anträgen oder bei der Vorbereitung und Ausführung von Beschlüssen.

Im Gegensatz dazu sind für ihre Rolle als Sparringpartner keine rechtlichen oder sonst standardisierten Gefässe definiert. Diese müssen vom Verwaltungsrat selbst geschaffen und aktiv geführt werden. Folgenden Gefässe haben sich in der Praxis bewährt:

- Meetings mit Arbeits- und/oder Projektgruppen, z. B. bei strategischen IT-Projekten oder bei grossen Investitionsvorhaben.
- Meetings mit Divisionsleitungsteams wie Sales-, Produktion-, Supply Chain- oder Geschäftsleitungsteams einer Region.
- Bilaterale Meetings mit einem Konzernleitungsmitglied: Etabliert sind solche beispielsweise zwischen Leiter:in des Audit Committee und CFO oder Leiter:in Compensation Committee und Human Resource Verantwortlichen (CHRO). Diese Meetings dienen in der Regel nicht nur der Vorbereitung von Ausschusssitzungen, sondern drehen sich oft um Sparringthemen.
- Weniger häufig – da auch governancemässig schwierig zu führen – finden bilaterale Meetings zwischen Verwaltungsratsmitgliedern und einzelnen Mitgliedern des Kaders statt.

An diesen Sparringmeetings werden keine fachlichen Entscheide gefällt. Es geht vielmehr darum, die Erfahrung der Verwaltungsratsmitglieder in vergleichbaren Situationen abzuholen, Einschätzungen zu einer Fragestellung zu erhalten oder allenfalls auf ihre beruflichen Kontakte und Netzwerke zurückgreifen zu können.

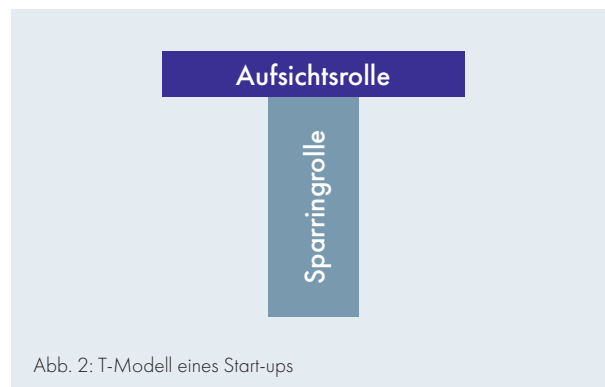
In der Regel ist an diesen Sparringmeetings ein Konzernleitungsmitglied, allerdings nicht zwingend der CEO, anwesend. Wichtig ist, dass die jeweiligen Gefässe und die dabei geltenden Spielregeln klar definiert sind. Der Sparringprozess muss dabei möglichst transparent sein und über einen strukturierten Feedbackprozess verfügen, damit alle Verwaltungsratsmitglieder und der CEO stufengerecht informiert werden. Nur so kann der CEO die gesamte operative und funktionale Konzernleitung verantworten. Aus diesem Grund wäre es empfehlenswert, die Eckpunkte des Sparringprozesses im Organisationsreglement, welches die Leitungs- und Aufsichtsfunktion des Verwaltungsrates beschreibt, darzulegen.

3. Je nach Art des Unternehmens unterschiedliche Ausprägung des T-Modells

Das T-Modell weist je nach Wachstumsphase und Art des Unternehmens unterschiedliche Ausprägungen auf: Einige typische Beispiele:

- Bei **Start-ups** ist die Ressourcenknappheit oft die grösste Herausforderung. Die Geschäftsleitung setzt sich hauptsächlich aus den Gründer:innen zusammen und verfügt entsprechend – bezogen auf die Anzahl Mitglieder und folglich auch auf die vorhandenen Kompetenzen und Erfahrungen – nicht über das gesamte Spektrum einer gängigen Geschäftsleitung. Auf das Know-how und die Erfahrungen eines Verwaltungsrates Zugang zu haben, ist deshalb umso mehr gefragt und wird von der Geschäftsleitung von Start-ups geschätzt. Die Sparringrolle des Verwaltungsrates wird in solchen Fällen meist viel umfassender wahrgenommen und weist einen grösseren inhaltlichen Tiefgang auf. Es kann durchaus vorkommen, dass ein Verwaltungsrat beispielsweise bei der Vorbereitung einer Finanzierungsrunde – formal betrachtet – CFO-Aufgaben übernimmt oder bei der Erarbeitung eines Patentantrages mitredigiert. Wichtig ist allerdings, dass seine Rolle klar definiert und zeitlich beschränkt ist, um den CEO und/oder die Geschäftsleitung nicht zu übergehen. Bei Start-ups ist der Sparringbalken des T-Modells deshalb oft breiter und tiefer dargestellt.
- Bei einem **börsenkotierten, internationalen Konzern** sind die gesetzlichen Vorschriften, die es zu beachten gilt, umfangreich und verbindlich. Der Konzern wird von sorgfältig ausgewählten Konzernleitungsmitgliedern geführt, verfügt über diverse fachkompetente Stabstellen sowie über klar dokumentierte Geschäftsprozesse und Kompetenzordnungen, die von Spezialist:innen und Manager:innen aufgesetzt, gepflegt, geschult, begleitet und rapportiert werden. Die einzelnen Konzernbereiche verfügen wiederum über ein erfahrenes Führungsteam und die dazugehörigen Stabstellen. Die Rolle des Verwaltungsrates als Sparringpartner ist in einem solchen Setting in der Regel nur punktuell gefragt.

Seine Aufsichtsrolle hingegen gewinnt deutlich an Bedeutung: Diese kann bei Bedarf durch eine Vertreter-Rolle erweitert werden, wenn ein Verwaltungsratsmitglied beispielsweise in Branchenverbänden aktiv ist und/oder mit Interessensgruppen wie Regierungsbehörden etc. in Verbindung steht. Bei börsenkotierten, internationalen Unternehmen ist der Aufsichtsbalken des T-Modells breiter, der Sparringbalken tritt etwas in den Hintergrund.



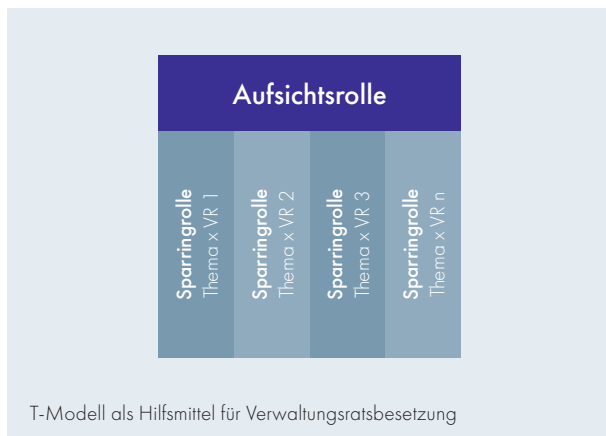
- **Mittelständische Familienunternehmen** mit teilweise externen Verwaltungsratsmitgliedern weisen generell eine ausgewogene Gewichtung derer Aufsichts- und Sparringrolle auf. Die externen Verwaltungsratsmitglieder werden in der Regel aufgrund ihrer Unabhängigkeit und ihres Branchenwissens in den Verwaltungsrat berufen. Das wie in Abbildung 1 dargestellte allgemeine T-Modell mit einer ausgewogenen Aufsichts- und Sparringrolle spiegelt die Aufgaben des Verwaltungsrates in mittelständischen Familienunternehmen passend wider.

4. T-Modell des Gesamtverwaltungsrates

Idealerweise setzt sich ein Verwaltungsrat aus Mitgliedern zusammen, die je mindestens in einem der wichtigen, für das Unternehmen strategisch relevanten Themen über profundes Know-how (Spikes) und Erfahrung verfügen. So ist einerseits sichergestellt, dass die einzelnen Verwaltungsratsmitglieder ihre Aufsichts- und Sparringrolle – für die unterschiedliche Unternehmensschwerpunkte – wahrnehmen können, andererseits werden durch eine solche Zusammensetzung die notwendigen Qualifikationen und Kompetenzen bereitgestellt und eine angemessene Diversität gewährleistet.

Der Verwaltungsrat seinerseits kann von einer solchen Zusammensetzung mit klar definierten Aufsichts- und Sparringrollen ebenfalls profitieren, seine Aufgaben noch effektiver wahrnehmen und gegebenenfalls einen kompetitiven Vorteil für das Unternehmen schaffen.

Das T-Modell eines idealen Verwaltungsrates sieht wie ein Würfel aus, der sich aus der Summe aller T je Verwaltungsratsmitglied zusammensetzt, mehr noch, sich zu einem Würfel ergänzt.



Das T-Modell hilft somit nicht nur bei der Klärung der Rollen innerhalb des Verwaltungsrates, sondern kann bei der Besetzung des Verwaltungsrates zur Identifikation von Erfahrungs- und Wissenslücken angewendet werden.

5. T-Modell für die Rollenklärung und Wissensnutzung

Damit ein Verwaltungsrat für ein Unternehmen maximalen Nutzen generieren kann, muss er sowohl unterschiedliche Aufgaben annehmen als auch unterschiedliche Rollen wahrnehmen können. Damit das gelingt, sind entsprechende Strukturen und Gefässe mit Spielregeln und strukturiertem Informationsaustausch notwendig. Diese sind teilweise von Gesetzes wegen vorgegeben, teilweise fällt es in den Zuständigkeitsbereich des Verwaltungsrates selbst, wobei seine Rollen je nach Art und Wachstumsstand des Unternehmens unterschiedlich ausgeprägt sind.

Das auf Basis meiner Erfahrungen entwickelte T-Modell hilft, diese Rollen zu klären, sie zu schärfen, Lücken zu erkennen und Missverständnisse und daraus möglicherweise resultierende Konflikte der beiden Kompetenzsphären Verwaltungsrat und Geschäftsleitung zu vermeiden. Die Vielfalt des Wissens und der Erfahrung des Verwaltungsrates kann somit am besten genutzt werden.

The Resurfacing of Board Discretion in Variable Pay

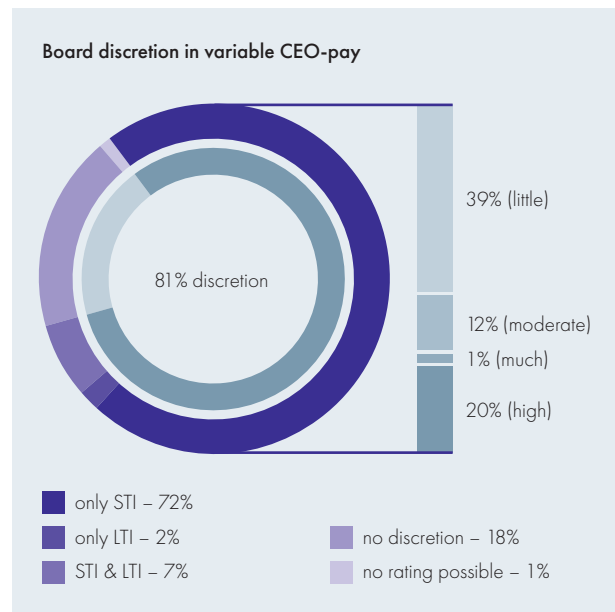


Loris Pedron

Recent graduate from the University of St. Gallen in Business Management. Master thesis focus on discretion in variable CEO compensation of the largest Swiss listed companies. Now working as Consultant at HCM International Ltd.

Recent evidence suggests that boards of directors are increasingly applying or at least reserving the right to use discretion in executive variable compensation decisions. For example, among the largest Swiss listed companies, 81% of the boards used or had the option to use some degree of discretion on variable compensation.¹ For these purposes, discretion can be defined as having the option to use own judgment with regard to a pay outcome. This is in contrast to having pay outcomes be based solely on a formula.

However, the use of discretion can differ depending on the pay instrument in question. The figure below shows that significantly more discretion is being applied in the short-term incentive (STI) (72%) than in the long-term incentive (LTI) (2%). Twenty percent of companies showed «high» use of discretion on variable pay. This is noteworthy even though the majority (51%) only permit «little» to «moderate» use of discretion.



¹ This article bases on the master thesis «Vergüten nach Ermessen – Eine Strukturierung und Beurteilung der Ermessensspielräume in der variable CEO-Vergütung auf Basis der grössten Schweizer börsennotierten Firmen» (Pedron, 2021) that examined the companies of the UBS 100 Index, which represent the largest listed companies in Switzerland in terms of market capitalization, for the existence of discretion in variable CEO compensation in 2019. For this purpose, publicly available information was analyzed (e.g., annual (compensation) reports). The result was an overall ranking of all companies analyzed with regard to their level of discretion in variable CEO compensation.

Applying discretion is by no means new. As early as 1978, researchers addressed the evaluation of performance for variable compensation contracts through the use of discretion or so-called «judgment» due to imperfect monitoring and agency issues.² The differentiation of discretion increased over time due to the growing complexity of compensation designs. However, the same challenges in dealing with discretion remain at the core today, such as discretionary decisions in some cases being based on private information and therefore not being verifiable by third parties, nor being able to be judicially enforced.^{3,4}

To remedy the challenges and ensure that stakeholders' interests are protected, the market is increasingly demanding «rules» to provide a framework for dealing with discretion in variable compensation. Boards of directors are gradually confronted with increased regulatory requirements, critical investors, and related changes in their (voting) advisors (so-called proxy advisors) guidelines.

This article aims to define guiding principles for dealing with discretion and is structured as follows:

- A** Decision structure for variable compensation
- B** Four types of discretion
- C** Pros and cons of the use of discretion
- D** Limitations and guiding principles for applying discretion
- E** Concluding remarks

A Decision structure for variable compensation
Variable compensation typically entails three decisions:



The definition of the intended STI/LTI amount. Since this decision typically is made at the beginning of the performance year or at the time of signing the contract, only the following two decisions are relevant in the context of discretionary decision-making towards the final payout of the STI/LTI.

In general, the difference between variable and base compensation lies in the fact that variable compensation is performance- or success-based. Therefore, success or performance must be defined and measured. This is achieved by means of so-called key performance indicators (KPIs), which are measured individually and then combined to form an overall performance.

Ultimately, a decision must be made as to how much variable compensation will be paid out (subsequently referred to as «result» or «outcome») based on the intended amount and the performance assessment.

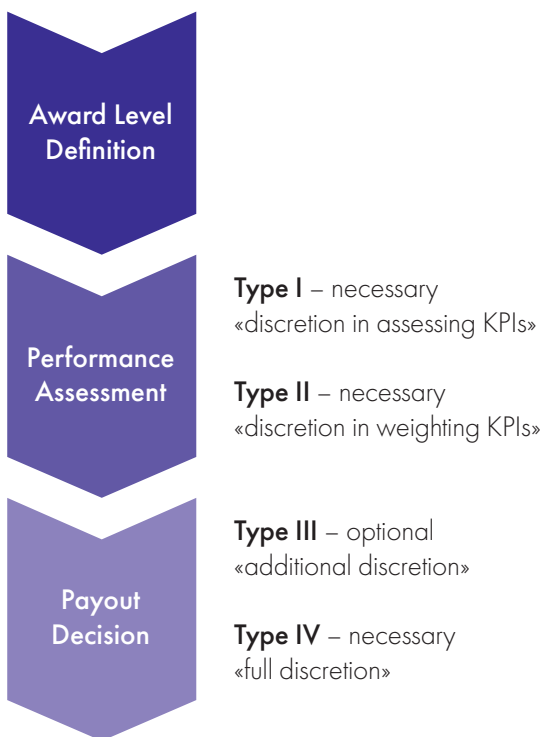
2 Cf. Harris, M., & Raviv, A. (1979). Optimal incentive contracts with imperfect information. *Journal of Economic Theory*, 20(2), p. 233; Holmström, B. (1979). Moral Hazard and Observability. *The Bell Journal of Economics*, 10(1), p. 89.

3 Cf. Baker, G. P., Gibbons, R., & Murphy, K. J. (1994). Subjective Performance Measures in Optimal Incentive Contracts. *The Quarterly Journal of Economics*, 109(4), pp. 1125-1156., or Ederhof, M., Rajan, M. V., & Reichelstein, S. (2011). Discretion in Managerial Bonus Pools. *Foundations and Trends® in Accounting*, 5(4), pp. 243–316.

4 Murphy, K. J., & Oyer, P. (2001). Discretion in executive incentive contracts: Theory and evidence, p. 1&30.

B Four types of discretion

The figure below summarizes four types of board discretion - three of them are considered necessary, one is optional:



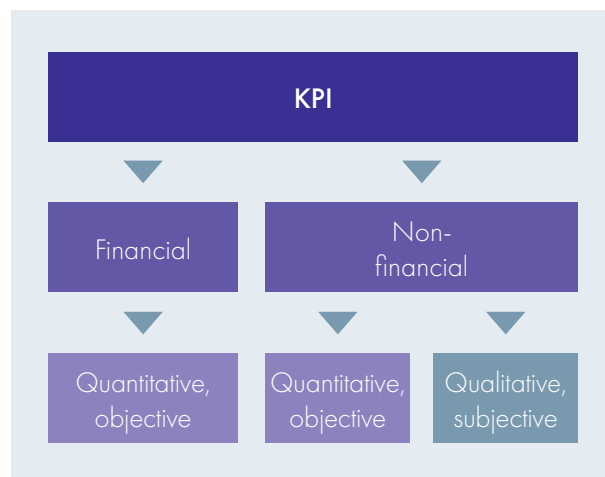
Type I – necessary «discretion in assessing KPIs»

KPIs are used to measure performance. These can be either financial or non-financial. A further distinction can be made between quantitative and qualitative KPIs. Financial KPIs are always quantitative. Non-financial KPIs can be qualitative or quantitative.⁵

Quantitative KPIs are objectively observable measures that third parties can verify. They include, for example, audited accounting figures (such as profit, sales, or assets), share prices, or quantifiable measures (e.g., Net Promoter Score). The measurement of qualitative KPIs is based on private information and a subjective assessment (discretion) of the appraiser (e.g., the board), which leads to the fact that it cannot be verified / checked by third parties.⁶ Since qualitative KPIs cannot be measured without a subjective assessment, their use in the performance review context constitutes a necessary (inalienable) discretion.

Accordingly, assessing non-financial, qualitative KPIs is the first (necessary) type of discretion. The following figure provides an overview of the KPIs and the first type of discretion (green).

Although approximately 65% of the largest Swiss listed companies applied discretion type I in their variable CEO compensation, 95% of the companies used predominantly quantitative, objectively measurable KPIs.



5 Ittner, C. D., Larcker, D. F., & Rajan, M. V. (1997). The Choice of Performance Measures in Annual Bonus Contracts. *The Accounting Review*, 72(2), p. 231f. & 251; Murphy, K.J. (1999). Chapter 38 Executive compensation. In *Handbook of Labor Economics* (Vol. 3, pp. 2485–2563). Elsevier, p. 10f; Murphy, K.J., & Oyer, P. (2001). Discretion in executive incentive contracts: Theory and evidence, p. 30; Schiehl, E. (2008). Private performance information in CEO incentive compensation. In (Vol. 18, pp. 323–356): Emerald Group Publishing limited, p. 326.

6 Ederhof, M., Rajan, M. V., & Reichelstein, S. (2011). Discretion in Managerial Bonus Pools. *Foundations and Trends in Accounting*, 5(4), 243–316, p. 247f.

Type II – necessary «discretion in weighting KPIs»

To determine the overall performance (or a target achievement level), a combination of the KPIs used (if multiple) is required. The combination of KPIs is performed by weighting each KPI, whereby the weighting can be determined ex-ante or be decided ex-post (at the discretion of, e.g., the board). A closer link between pay and performance can be achieved by including ex-post information such as a changing market environment.⁷

Where the weighting of KPIs is decided ex-post, a necessary (inalienable) discretion is assumed since no overall performance assessment can be made without such weighting. Accordingly, the ex-post weighting of the KPIs used for the performance assessment constitutes the second (necessary) type of discretion.

In contrast to discretion type I, used by a majority of the companies analyzed, discretion type II in variable CEO compensation was only used by approximately 11% of the companies. Particularly in the LTI, discretion type II was not observed. However, it should be emphasized that only 4% of the companies that had an LTI instrument requiring a performance assessment applied discretion.

Type III – optional «additional discretion»

In addition to the performance assessment, there may be discretion that complements the explicit contract or exceeds the formula so that ex-post adjustments become possible.⁸ Special circumstances are taken into account that, according to the subjective opinion of the board of directors, are of importance in the decision-making process for variable compensation and are not or only insufficiently covered by the performance assessment.

Examples of such circumstances include outperformers and underperformers, external factors, reorganization and the impact of new business units on performance, unrealistic budgets, or the perpetuation of internal equity.⁹ These circumstances are considered optional discretion that can be applied if needed. Optional discretion is allocated to the payout decision. The performance assessment is adjusted from an ex-post perspective to strengthen the link between pay and performance.¹⁰

In general, optional discretion can be quantified because, according to the explicit contract or formula, without the ex-post adjustment of the board, a lower (if positive discretion is applied) or higher (if negative discretion is applied) payment would have been made. Cases in which the performance assessment itself is amended from an ex-post perspective belong to this type of discretion but cannot at all times be quantified. In summary, the ex-post modification of the performance assessment outcome to improve the link between pay and performance in the payout phase constitutes the third type of discretion. In contrast to the first two types, the use of this discretion type is optional.

In 24 (ca. one-fourth) of the companies surveyed, the board had the option for additional discretion in determining the final STI payout. Of these, one company used positive discretion (upwards correction), two companies used negative discretion (downwards correction), and two companies used no discretion. 18 companies did not indicate whether the option of discretion type III was exercised. Only 9% of the boards whose variable CEO compensation included LTIs had the option for additional discretion.

7 Höpfe, F., & Moers, F. (2011). The Choice of Different Types of Subjectivity in CEO Annual Bonus Contracts. *The Accounting Review*, 86(6), p. 2041.

8 Ederhof, M. (2010). Discretion in Bonus Plans. p. 1929; Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. *The Accounting Review*, 79(2), p. 412.

9 Murphy, K. J., & Oyer, P. (2001). Discretion in executive incentive contracts: Theory and evidence, p. 22.

10 Höpfe, F., & Moers, F. (2011). The Choice of Different Types of Subjectivity in CEO Annual Bonus Contracts. *The Accounting Review*, 86(6), p. 2041.

Type IV – necessary «full discretion»

It may be that the payout amount is not triggered by a formula nor by a supplemental or overriding decision, but rather a decision by the board that is detached from the explicit contract. In other words, there may be no formula-based or contractually specified causal link between the performance assessment and the payout. This form of discretion is called «full» discretion.

This does not mean that no performance assessment is required or that no link between pay and performance must be made. «Full» discretion can be applied by including the performance assessment in the basis for the decision. However, not being decisive for the absolute amount of the payout. Accordingly, «full» discretion is again necessary since a payout, without a formula-based contract, is dependent on the assessment and decision of, e.g., the board regarding a potential payout and its level. Thus, (necessary) «full» discretion in determining the result is the fourth and last type of discretion.

This type of discretion was used significantly more often than expected. 21% of the companies let their board decide the amount of the CEO's STI at its «full» (or sole) discretion. In the LTI, this type of discretion was not observed.

C Pros and cons of the use of discretion

There are numerous reasons why discretion in variable compensation can be advantageous or disadvantageous for companies (or their owners, boards, or executives from the appraiser's perspective) and their employees (from an appraisee's perspective). The following figure summarizes the reasons for and against discretion.

Reasons for discretion	Reasons against discretion
<ol style="list-style-type: none"> 1. Consideration of individual performance 2. Inclusion of new information becoming available during the performance management year 3. Reduction of compensation-related risks 4. Increase in fairness and satisfaction with compensation 5. Reduction of «gaming» 6. Future-oriented perspective 	<ol style="list-style-type: none"> 1. Risk of inaccurate, unfair, untruthful assessment, mainly due to cognitive limitations of the appraiser Subsequent problems: <ul style="list-style-type: none"> – Loss of incentive effect of variable compensation – Loss of causal link between pay and performance – Decrease in morale of the appraisee 2. Manipulation risks of the appraisee 3. Lack of verifiability, auditability, and legal enforceability of discretionary contracts

Reasons for the use of discretion

1. Consideration of individual performance

One of the main reasons for discretion in variable compensation is the possibility of including individual performance more easily and comprehensively in performance assessments. Quantitative or objectively measurable KPIs are imperfect and too broad. The reason is that they usually refer to company performance and do not (fully) encompass the performance of an individual.¹¹

¹¹ Murphy, K. J., & Oyer, P. (2001). Discretion in executive incentive contracts: Theory and evidence, pp. 1&30&32; Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. The Accounting Review, 79(2), p. 411.

This can be addressed by including qualitative KPIs so that an improvement in contract design can be achieved through an overall performance assessment.¹² The inclusion of individual performance in the overall assessment thus can solve the multiple task problem, in which tasks of the appraisee cannot be adequately translated into success criteria.¹³

2. Inclusion of new information becoming available during the performance management year

Another reason for discretion in variable compensation for companies and employees is the possibility of including relevant information or circumstances that only become available during the contract period. This refers to the inclusion of unforeseen events and the correction of error-prone metrics.¹⁴ Research indicates that discretionary adjustments are made, particularly when the results of quantitative KPIs are either high or low but not in the middle range.¹⁵

3. Reduction of compensation-related risks

By filtering out uncontrollable factors with subsequent discretionary adjustments, compensation risks for employees can be reduced, and better alignment of incentives can be achieved from the company's perspective. Uncontrollable factors are circumstances or events that affect the company's performance but over which the employee has little influence, referred to as «noise».¹⁶

4. Increase in fairness and satisfaction with compensation

By using subjectively assessed, qualitative KPIs, companies can include performance dimensions that otherwise might be hard or impossible to include in explicit compensation contracts. Using such discretion raises opportunities to restore the perceived fairness of variable pay or increase satisfaction with the outcome from an employee's perspective.¹⁷

5. Reduction of «gaming»

Quantitative KPIs are susceptible to manipulation given that the employee has a (temporal) information advantage over the appraiser (e.g., especially over the board) and can use it to his or her advantage regarding the performance assessment, so-called «gaming».¹⁸ Using discretion, the company can reduce such manipulation risks, as part of the assessment is made ex-post. This reduces the incentive and the employee's ability to manipulate KPIs in his or her favor.¹⁹

6. Future-oriented perspective

Another reason for discretion from a company's perspective is the mitigation of the excessively short-term or past focus of quantitative KPIs. Accordingly, qualitative KPIs, which are discretionary and only visible to contracting parties, can reward future expected performance.²⁰

12 E.g., Holmström, B. (1979). Moral Hazard and Observability. *The Bell Journal of Economics*, 10(1), 74–91, p. 89;

Hayes, R. M., & Schaefer, S. (2000). Implicit Contracts and the Explanatory Power of Top Executive Compensation for Future Performance. *The RAND Journal of Economics*, 31(2), p. 292.

13 Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. *The Accounting Review*, 79(2), p. 411.

14 Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. *The Accounting Review*, 79(2), p. 410&411; Bol, J. C. (2008). Subjectivity in Compensation Contracting. 27, 1–32, p. 8.

15 Rajan, M. V., & Reichelstein, S. (2009). Objective versus Subjective Indicators of Managerial Performance. *The Accounting Review*, 84(1), p. 227;

Ederhof, M. (2010). Discretion in Bonus Plans. Vol. 85, pp. 1922f. & 1941.

16 E.g., Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. *The Accounting Review*, 79(2), p. 410&412;

Oyer, P. (2004). Why Do Firms Use Incentives That Have No Incentive Effects? *The Journal of Finance* (New York), 59(4), p. 1645;

Rajgopal, S., Shevlin, T., & Zamora, V. (2006). CEOs' Outside Employment Opportunities and the Lack of Relative Performance Evaluation in Compensation Contracts. *The Journal of Finance*, 61(4), p. 1842.

17 Rajan, M. V., & Reichelstein, S. (2009). Objective versus Subjective Indicators of Managerial Performance. *The Accounting Review*, 84(1), p. 210;

Bol, J. C. (2008). Subjectivity in Compensation Contracting. 27, p. 12.

18 E.g., Baker, G. P. (1992). Incentive Contracts and Performance Measurement. *The Journal of political economy*, 100(3), p. 612; Ittner, C. D., Larcker, D. F., & Meyer, M. W. (2003). Subjectivity and the Weighting of Performance Measures: Evidence from a Balanced Scorecard. *The Accounting Review*, 78(3), p. 754.

19 Bol, J. C. (2008). Subjectivity in Compensation Contracting. 27, p. 11; Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. *The Accounting Review*, 79(2), p. 412.

20 Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. *The Accounting Review*, 79(2), p. 412;

Hayes, R. M., & Schaefer, S. (2000). Implicit Contracts and the Explanatory Power of Top Executive Compensation for Future Performance. *The RAND Journal of Economics*, 31(2), p. 292; Ederhof, M. (2010). Discretion in Bonus Plans. p. 1941.

Reasons against the use of discretion

- a. Risk of inaccurate, unfair, untruthful assessment, mainly due to cognitive limitations of the appraiser

The most significant risk of discretion in variable compensation revolves around any potential abuse of it, such as assessing the employee inaccurately, unfairly, or even untruthfully. When discretion is applied, it is always assumed that the judgment is made truthfully and to the best of one's knowledge and belief, partly due to the duty of care and loyalty under 717 para. 1 CO. Nevertheless, a discretionary assessment makes it impossible for a court to examine the accuracy of the contract so that promises can be breached by the company (or the appraiser, e.g., the board), and the perceived transparency may be lost.²¹

A primary factor for biased assessments is the cognitive limitations of humans. For example, known features are used to infer unknown characteristics of an employee, the so-called «halo effect». Further, a more or less randomly memorized performance behavior serves as the basis for personal assessment. Personal preferences of the appraiser lead to some dimensions being considered more important than others in the assessment.²²

In addition, appraisers may tend to evaluate employees too leniently («leniency bias») or too well («severity bias»), regardless of their actual performance.

Reasons for this are, for example, interpersonal relationships such as a friendship between the appraiser and the appraisee, negative feelings towards the appraisee, or the avoidance of confrontation.²³

According to empirical research, appraisees are assessed inaccurately when the appraiser pursues self-interest.²⁴ Another factor for distorted performance appraisals is information asymmetries of the appraiser (especially the board) concerning an employee's (actual) performance. These are reinforced by general trends, such as home office, or special events, such as the Corona pandemic, which accelerate the trends. Ultimately, significant time and monitoring costs for performance assessments combined with time pressure can lead to inaccurate assessments.²⁵

Inaccurate, unfair, or untruthful performance assessments can result in subsequent risks for companies. For example, compensation contracts may lose their incentive effect, the causal link between pay and performance may be lost, or employee morale may decline. Lower motivation can lead to lower performance or, in the worst case, fluctuation.²⁶

21 Bol, J. C. (2008). Subjectivity in Compensation Contracting. 27, p. 14; Fulk, J., Brief, A. P., & Barr, S. H. (1985). Trust-in-supervisor and perceived fairness and accuracy of performance evaluations. *Journal of business research*, 13(4), p. 307; Prendergast, C., & Topel, R. (1993). Discretion and bias in performance evaluation. *European Economic Review*, 37(2), p. 363; Baker, G. P., Gibbons, R., & Murphy, K. J. (1994). Subjective Performance Measures in Optimal Incentive Contracts. *The Quarterly Journal of Economics*, 109(4), p. 1227.

22 Thorndike, E. L. (1920). A constant error in psychological ratings. *Journal of applied psychology*, 4(1), p. 25; Becker, F. G. (2003). Grundlagen betrieblicher Leistungsbeurteilungen, Leistungsverständnis und -prinzip, Beurteilungsproblematik und Verfahrensprobleme (4., aktualis. Aufl. ed.). Schäffer-Poeschel, p. 224ff.; Bailey, W. J., Hecht, G., & Towry, K. L. (2006). Dividing the Pie: Do Managers Fully Incorporate Non-Contracted Information into Full and Partial Discretionary Bonus Allocations? In G. Hecht (Ed.): *AAA 2007 Management Accounting Section (MAS) Meeting Paper*, p. 25.

23 Feldman, J. M. (1981). Beyond attribution theory: Cognitive processes in performance appraisal. *Journal of applied psychology*, 66(2), 127-148, p. 140; Bol, J. C., Hecht, G., & Smith, S. D. (2015). Managers' Discretionary Adjustments: The Influence of Uncontrollable Events and Compensation Interdependence. *Contemporary Accounting Research*, 32(1), p. 157; Cardy, R. L., & Dobbins, G. H. (1986). Affect and Appraisal Accuracy: Liking as an Integral Dimension in Evaluating Performance. *Journal of applied psychology*, 71(4), p. 673; Klimoski, R., & Inks, L. (1990). Accountability forces in performance appraisal. *Organizational behavior and human decision processes*, 45(2), p. 202; Baker, G. P., Jensen, M. C., & Murphy, K. J. (1988). Compensation and Incentives: Practice vs. Theory. *The Journal of Finance*, 43(3), p. 598.

24 Bol, J. C. (2008). Subjectivity in Compensation Contracting. 27, p. 14.

25 Murphy, K. J., & Oyer, P. (2001). Discretion in executive incentive contracts: Theory and evidence, p. 31; Boyon, N. (21. Juli, 2021). Workers want more flexibility from their employers after COVID. Ipsos. <https://www.ipsos.com/en/return-to-the-workplace-global-survey>

26 Bol, J. C. (2008). Subjectivity in Compensation Contracting. 27, p. 14; Gibbs, M., Merchant, K. A., Van der Stede, W. A., & Vargus, M. E. (2003). Determinants and Effects of Subjectivity in Incentives. *The Accounting Review*, 79(2), p. 433; Baker, G. P., Gibbons, R., & Murphy, K. J. (1994). Subjective Performance Measures in Optimal Incentive Contracts. *The Quarterly Journal of Economics*, 109(4), p. 598f.

b. Manipulation risks of the appraisee

Another risk of discretion in variable compensation is the appraisee’s activities and efforts to inappropriately influence the appraiser. Once the appraisee knows which activities are of particular importance to the appraiser, he or she will distort the effort to win the appraiser’s favor.²⁷ Subsequently, the risk of manipulation («gaming») of quantitative KPIs described above is transferred to influencing the appraiser using discretion. Accordingly, manipulation risks are a problem for assessments in general.

c. Lack of verifiability, auditability, and legal enforceability of discretionary contracts

Ultimately, discretionary decisions and contracts based on private information cannot be reviewed or verified by third parties or legally enforced in court.^{28, 29}

D Limitations and guiding principles for applying discretion

When applying discretion in variable compensation, framework conditions for Swiss listed companies mainly arise from a regulatory, proxy advisor, and large investor perspective (also representing small investors).

The main framework conditions for the use of discretion from a regulatory perspective derive from:

- the Transparency Act (Ordinance against Excessive Compensation in Listed Companies; VegüV)
- the Swiss Code of Best Practice for Corporate Governance (Swiss Code)
- the Directive on Information Relating to Corporate Governance (RCLG) of SIX Swiss Exchange AG
- the Circular on Remuneration Schemes of FINMA (particularly for its subordinated banks and insurance companies)
- the labor law, in particular Art. 319 para. 1 CO (salary), Art. 322d CO (gratuity) and the Business Judgment Rule (BJR)

27 Bol, J. C. (2008). Subjectivity in Compensation Contracting. 27, p. 21; Milgrom, P. R. (1988). Employment Contracts, Influence Activities, and Efficient. The Journal of political economy, 96(1), p. 58; Prendergast, C. (1993). A Theory of «Yes Men». The American economic review, 83(4), p. 769.

28 Ederhof, M. (2010). Discretion in Bonus Plans. p. 1923f.; Rajan, M. V., & Reichelstein, S. (2009). Objective versus Subjective Indicators of Managerial Performance. The Accounting Review, 84(1), p. 210.

29 Murphy, K. J., & Oyer, P. (2001). Discretion in executive incentive contracts: Theory and evidence, p. 1&30.

The primary proxy advisors defining framework conditions for the use of discretion are:

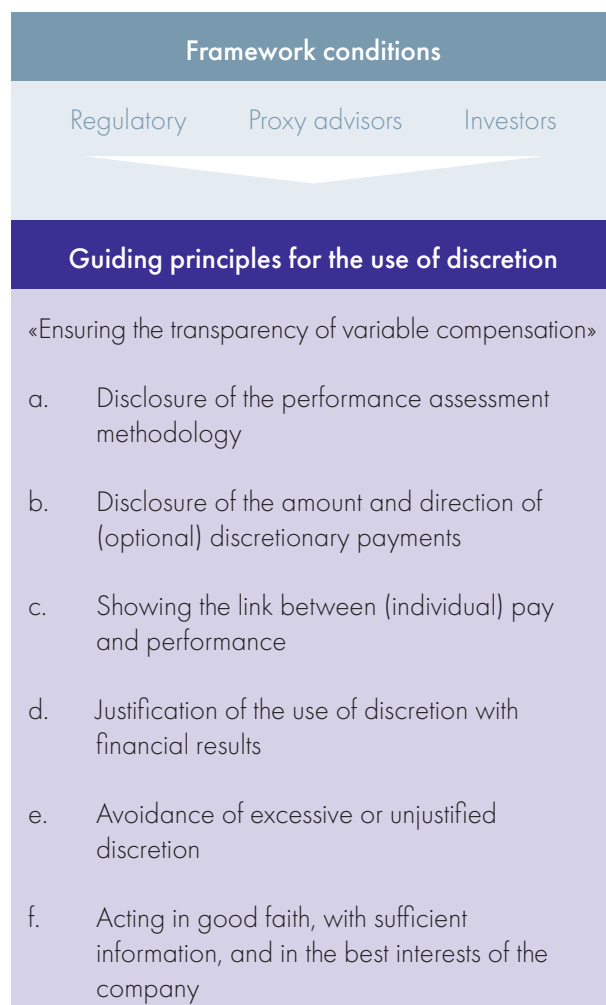
- ISS
- Glass Lewis
- Ethos

The key investors defining framework conditions for the use of discretion, among others, are:

- BlackRock
- Fidelity
- UBS Funds Management AG

What guiding principles can be derived from the framework conditions?

The framework conditions mentioned above result in the following guiding principles, which ought to be followed or are recommended when dealing with the above-defined discretion types:



«The top priority is to preserve the transparency of variable compensation!»

a. Disclosure of the performance assessment methodology

The KPIs used should be described to understand whether they are quantitative or qualitative (discretion type I). Furthermore, their selection should be justified. Finally, the weighting of the KPIs must be disclosed (if ex-post, discretion type II) to understand the performance assessment better.

b. Disclosure of the amount and direction of (optional) discretionary payments

If the option of additional discretion is applied (discretion type III), it should be stated to what extent (quantified amount) the actual result, determined by the explicit contract or formula without additional discretion, has been changed. Likewise, a clear indication should be given as to whether the change has increased or decreased the outcome.

c. Showing the link between (individual) pay and performance

When using «full» discretion (discretion type IV), particular caution is required. It is recommended to make use of qualitative KPIs for individual performance assessments. Ultimately, the option of additional discretion can increase the link between pay and performance, which may not be sufficiently evident from the explicit contract or formula.

d. Justification of the use of discretion with financial results

When applying any type of discretion, it is crucial to ensure that financial performance is measured in the performance assessment. Accordingly, a performance assessment of purely qualitative (discretionary) KPIs is not feasible. To conclude, discretion should not be in strong contrast to financial performance.

e. Avoidance of excessive or unjustified discretion

Although no definition is given as to how much discretion is «excessive», it can be guessed that «full» discretion, in particular, is critical. This does not mean that its use is prohibited. As a rule, however, a higher degree of discretion is accompanied by a higher requirement for transparency in its use.

f. Acting in good faith, with sufficient information, and in the best interests of the company

According to most legal systems, including in Switzerland, boards of directors and executives are bound to standards of good faith, due care, and acting in the best interest of the company and its shareholders. Hence the company's board and management are duty-bound to also observe these principles when applying discretion on compensation.

What are the potential consequences of non-compliance with the guiding principles?

Possible consequences directly alleged in the context of compensation can be identified, particularly in the voting results of the Annual General Meeting. In this regard, possible consequences are, among others:

- rejection of the compensation report;
- rejection of members of the compensation committee;
- rejection of the amount of the variable compensation of the management;
- rejection of the amount of the total compensation of the management.

Moreover, legal consequences may arise from non-compliance, e.g., with the duty of care and loyalty, or not adhering to regulatory rules or guidelines, such as from SIX or FINMA.

E Concluding remarks

A glance at the Swiss market shows that discretion in variable compensation is becoming standard market practice at listed companies, particularly for STIs.

The analysis of the 97 largest Swiss listed companies reveals that a large majority of the companies (77) have at least one type of discretion in the STI of their CEO. In the LTI, only nine companies show discretion. Seven companies have «little» discretion in the payout decision, and two companies have «moderate» discretion in both the performance assessment and the decision on the final payout amount of the LTI.

Board's discretion in variable compensation can be divided into four different types, of which three are considered necessary and one optional. Discretion in (I) the assessment and (II) weighting of KPIs are «necessary» types of discretion. (III) Discretion to adjust the performance assessment result upwards or downwards is an «optional» discretion type. Lastly, (IV) discretion to determine the result solely at the boards' judgment taking into account the performance assessment but not relying on a formula-based or contractually specified causal link between the performance assessment and the payout. The most frequently used discretion type, with 65% of the companies surveyed, is discretion type I (discretion in assessing KPIs).

Next in line are discretion type III (additional discretion) and discretion type IV (full discretion) with 25% and 21%, respectively. Discretion type II (discretion in weighting KPIs) is only used in the STI, if at all (11%).

A juxtaposition of the advantages and disadvantages shows that the use of discretion may well be justifiable. For example, by including discretion in variable compensation, individual performance or performance that is difficult to assess can be considered, information that becomes available during the performance management year can be included, and compensation risk can be limited. Additionally, the use of discretion in variable compensation can lead to higher satisfaction by the employee with the outcome, can support a future-oriented perspective, and can reduce manipulative behavior on quantitative KPIs.

The principal risks of discretion revolve around any potential abuse of it, such as if the assessment is inaccurate, unfair, or untruthful. This can be due to cognitive limitations of the appraiser or manipulation by the appraisee. Framework conditions can partially mitigate these risks, as they allow discretion in principle but require a high degree of transparency in its use. The fact that discretion cannot be easily verified or reviewed by third parties or that it can face enforcement challenges legally underlines the importance of transparent disclosure of discretion.

Beziehung zwischen Chairperson und CEO: Zentral für den Unternehmenserfolg



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Im Kontext der Dialektik zwischen Verwaltungsrat und Management kommt der Beziehung zwischen Chairperson und CEO ein zentraler Stellenwert zu. Zusammen bilden sie die Spitzen der Unternehmensführung, Steuerung und Überwachung und fungieren mitunter als die wichtigsten Repräsentierenden des Unternehmens. Ihre Rollen sind zwar unterschiedlich, weisen aber Berührungsflächen auf. Lässt sich die Beziehung zwischen Chairperson und CEO so gestalten, dass sich mögliche Konfliktsituationen frühzeitig vermeiden lassen?

1. Dynamik der Verwaltungsratssitzung

Der formalisierte Informationsaustausch zwischen Chairperson und CEO findet primär in den Sitzungen des Verwaltungsrates statt. Der Chairperson steht das Sitzungsmanagement zu, sie leitet und orchestriert die Diskussionen und stellt sicher, dass der Verwaltungsrat die erforderlichen Beschlüsse fasst. Die CEO hingegen ist Antragstellerin und Berichterstatterin. Sie ist Überbringerin der Botschaften und liefert den Sachverhalt, über den der Verwaltungsrat letztlich zu befinden hat. Dadurch, dass der Chairperson die Leitungsfunktion zukommt, kann sie grundsätzlich besser den Ausgang der Diskussionen steuern als die CEO. Als hierarchisch höher gestellte Person verfügt die Chairperson entsprechend über längere Spiesse. Wird diese einflussreiche Position mit einer geschickten Sitzungsleitung kombiniert, sind dies gute Voraussetzungen für einen effizienten Sitzungsverlauf. Zum Sitzungsmanagement gehört auch ein feines Sensorium für die Empfindlichkeiten im Entscheidungsprozess. Die Tonalität der Argumentation prägt die Sitzungsatmosphäre. Eine faire und von gegenseitigem Respekt geprägte Diskussionskultur erleichtert einen konstruktiven und reflektierenden Dialog im Sitzungsraum; mitunter lässt die Chairperson Raum für divergierende Meinungen, kritische Stimmen und Querdenker. In einem solchen Arbeitsklima wird erfahrungsgemäss die Bereitschaft erhöht, sich frühzeitig und aktiv im Meinungsbildungsprozess zu engagieren, was sich vorteilhaft auf das Sitzungsergebnis auswirken kann. Ein ausgewogenes Sitzungsmanagement der Chairperson ist mithin ein entscheidender Faktor für eine erfolgreiche Entscheidungskultur im Verwaltungsrat.

2. Bilaterale Meetings

Die Interaktionen zwischen Chairperson und CEO finden vor allem auch zwischen den Verwaltungsratssitzungen statt. Bilaterale Treffen werden im Nachgang oder im Vorfeld einer Verwaltungsratssitzung oder losgelöst vom Sitzungskalender angesetzt. Diese Meetings verfolgen den Zweck, die unterschiedlichen Positionen, welche Chairperson und CEO im Unternehmen erfüllen, aufeinander abzustimmen und die Arbeiten gegenseitig zu koordinieren. Im Gegensatz zur Situation während einer formellen Verwaltungsratssitzung stehen sich Chairperson und CEO in den «Bilaterals» gewissermassen als Sparringpartner gegenüber. Auch können diese Treffen formlos, ohne Traktandenliste und Protokoll, stattfinden. Um Informationsasymmetrien zu vermeiden, ist es ratsam, diese bilateralen Meetings über das ganze Jahr hindurch aufzusetzen und sie auch im Sitzungskalender als Sitzungsdaten zu markieren. Sie werden damit Teil des korporativen Entscheidungsprozesses und institutionalisieren die Beziehung zwischen Chairperson und CEO. Auch im Organisationsreglement kann kurz auf die bilateralen Meetings referenziert werden. Dies unterstreicht die Relevanz des Dialogs zwischen den Unternehmensspitzen.

3. Leadership und Management

Durch die Delegation der Geschäftsführung ans Management resultiert beim Verwaltungsrat ein Kompetenzabbau, während die Geschäftsleitung komplementär mit Kompetenzen betraut wird. Es stehen sich demnach zwei Kompetenzsphären gegenüber, die aufeinander abzustimmen sind. Der Verwaltungsrat hat trotz rechtsgültiger Delegation eine Restverantwortung für die delegierten Sachbereiche, die sich in der dreifachen Sorgfaltspflicht für Auswahl, Instruktion und Überwachung erschöpft. Dies führt zwangsläufig dazu, dass der Verwaltungsrat das Management und somit auch die CEO zu überwachen hat. Damit die Aufsichtsfunktion des Verwaltungsrates nicht mit der operationellen Verantwortung des Managements kollidiert, empfiehlt sich, im Organisationsreglement darzulegen, wie der Verwaltungsrat seine Oberaufsicht wahrnehmen will und wie das Management seine Berichterstattungspflichten zu erfüllen hat.

Das schafft die Voraussetzung dazu, dass Verwaltungsrat und Management sich in ihren Zuständigkeitsbereichen gegenseitig respektieren und positive und negative Kompetenzkonflikte vermieden werden können. Die Chairperson und CEO haben somit im Unternehmen ein gemeinsames Verständnis über die Grenzziehung zwischen Leadership und Management zu entwickeln, was sich begünstigend auf das Rollenspiel im korporativen Machtzentrum auswirkt.

4. Zielsetzungen des Verwaltungsrates

Um die Wichtigkeit der Beziehung zur CEO zu untermauern, kann es hilfreich sein, wenn die Chairperson und der Verwaltungsrat den regelmässigen Kontakt und die Begleitung der CEO bei ihrer Aufgabenerfüllung in die jährliche Zielsetzung aufnehmen. Im Selbstevaluierungsprozess am Ende des Jahres kann der Verwaltungsrat beurteilen, ob diese Zielsetzung erfüllt wurde. Konkret ist zu fragen, ob die bilateralen Meetings und deren Sitzungsrhythmus sich bewährt haben und wie sich das Sitzungsmanagement der Chairperson auf die Qualität der Zusammenarbeit mit der CEO ausgewirkt hat. Wird dieses Assessment gründlich durchgeführt, können daraus Massnahmen resultieren, die das Beziehungsfeld zur CEO nachhaltig stärken. Sollten trotz formalisierter Prozesse und Bemühungen zwischenmenschliche Konflikte auftreten, können eine Mediation oder ein Coaching mithelfen, solchen Differenzen entgegenzuwirken.



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Kind regards,

Prof. Dr. oec. Michèle F. Sutter-Rüdisser

Academic Director NICG
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